

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 3, 2013

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal filed by Yvonne Tomlinson, with respect to *Water Act* Licence No. 00311837-00-00 issued to the Evergreen Regional Waste Management Services Commission by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal No. 12-033-ID1 (A.E.A.B.).

BEFORE:

Ms. A.J. Fox, Board Member.

SUBMISSIONS BY:

Appellant:

Ms. Yvonne Tomlinson.

Approval Holder:

Evergreen Regional Waste Management Services Commission, represented by Mr. William Barclay, Reynolds Mirth Richards & Farmer LLP.

Director:

Mr. Patrick Marriott, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Michelle Williamson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development issued a Licence to the Evergreen Regional Waste Management Services Commission, authorizing the operation of works and the diversion of water from an aquifer for municipal purposes (washrooms and equipment washing). Evergreen Regional Landfill is a Class II landfill, where more than 10,000 tonnes per year of non-hazardous waste is disposed of in the County of St. Paul.

The Board received an appeal from Ms. Yvonne Tomlinson. The Board received motions to dismiss the appeal on the ground that she was not directly affected.

The Board determined Ms. Tomlinson is directly affected by the Director's decision given her use of properties adjacent to the landfill. If there is an impact on the groundwater or surface water regimes, there may be an impact on the water that she relies on at the properties.

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I. BACKGROUND

[1] On August 20, 2012, the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), acting under the *Water Act*, R.S.A. 2000, c. W-3, issued Licence No. 00311837-00-00 (the “Licence”) to the Evergreen Regional Waste Management Services Commission (the “Licence Holder”) authorizing the operation of a works and to divert up to 1,500 cubic metres of water annually for municipal purposes (washrooms and equipment washing) at the Evergreen Regional Landfill (Class II), (“Landfill”) in the County of St. Paul.

[2] On October 16, 2012, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Ms. Yvonne Tomlinson (the “Appellant”).

[3] On October 17, 2012, the Board wrote to the Appellant, the Licence Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and the Director of the appeal. The Board also requested that the Director provide the Board with a copy of the records relating to the appeal.

[4] On October 26, 2012, the Director requested the Board dismiss the appeal on the basis the Appellant is not directly affected and the matter had been adequately dealt with in the Board’s previous decision in relation to the Licence Holder’s facility, *Tomlinson and Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.) (“*Tomlinson and Shapka*”).

[5] The Board received submissions on the motion to dismiss the appeal between November 22, 2012 and January 11, 2013.

II. SUBMISSIONS

A. Appellant

[6] The Appellant stated she is knowledgeable about the area and has a genuine interest on the effects the Landfill will have on the environment including the surface and ground water in the area.

[7] The Appellant stated she leases Dr. Amil Shapka's lands, and her agricultural operation involves organic farming on three quarters.

[8] The Appellant explained the scale house well location at SW 21-56-10-W4M is north of the Landfill and adjacent to crown land that is leased to the St. Paul Grazing Reserve. The Appellant stated she has had cattle in the association, and the land is a grazing option for her and her neighbours. The Appellant stated the Landfill well is adjacent to a source of water for the cattle, and she questioned whether the cattle water comes from the same aquifer. The Appellant noted the Landfill well is monitored and sampled by the Licence Holder.

[9] The Appellant stated the Licence Holder has been diverting water without a licence, and she questioned whether Alberta Environment and Sustainable Resource Development ("AESRD") has taken action against the Licence Holder.

B. Licence Holder

[10] The Licence Holder referred to *Tomlinson and Shapka*. The Licence Holder noted the Board dismissed the Appellant's appeal in *Tomlinson and Shapka* because she had not filed a Statement of Concern, and her husband, Mr. Robert Tomlinson, had his appeal dismissed because he was not directly affected. The Licence Holder stated the Appellant lives over eight kilometers from the Landfill.

[11] The Licence Holder explained the Licence allows the diversion of water to a maximum of 1,500 cubic metres of water annually from two production wells located at SW 21-56-10-W4M and SW 16-56-10-W4M.

[12] The Licence Holder submitted the facts related to the Tomlinsons' residence in *Tomlinson and Shapka* remain the same. The Licence Holder referred to the Board's decision in *Tomlinson and Shapka*, noting the Board determined: (1) eight kilometres was a significant distance when assessing impacts on surface and ground water regimes; (2) no evidence was provided to demonstrate a connection between the Landfill and the Tomlinsons' property; and (3) the Tomlinsons live up-gradient to the flow of water from the Landfill, so their groundwater and surface water could not be contaminated by the Landfill. The Licence Holder noted the Board dismissed Mr. Tomlinson's appeal in *Tomlinson and Shapka*.

[13] The Licence Holder submitted the Appellant is in exactly the same position in regard to this appeal. The Licence Holder argued the Appellant has not met her onus of demonstrating there is a reasonable probability that she will be harmed by the issuance of the Licence.

[14] The Licence Holder noted the Appellant has no interest in the St. Paul Grazing Reserve.

C. Director

[15] The Director explained the application for the Licence was not publicized, as it was waived by the Director. Notice of the decision was sent to the County of St. Paul office and posted on the AESRD approval viewer website.

[16] The Director argued the Appellant is not directly affected, and the being appealed issue was previously determined in *Tomlinson and Shapka*. The Director noted the Appellant is married to Mr. Robert Tomlinson, one of the appellants in *Tomlinson and Shapka*. The Director stated the Tomlinsons live eight kilometers from the Landfill. The Director said that, based on the evidence provided in *Tomlinson and Shapka*, the Board determined that Mr. Tomlinson lives up-gradient to the flow of water from the Landfill and, therefore, groundwater and surface water on his property could not be contaminated by Landfill operations. The Director argued the facts determining Mr. Tomlinson was not directly affected are the same for the Appellant. The Director submitted the appeal should be dismissed.

[17] The Director stated the Appellant is not a member of the St. Paul Grazing Reserve.

[18] The Director said there is no leasehold interest registered on the certificate of title of Dr. Shapka's property.

[19] The Director argued there is no evidence to explain how the Appellant is directly affected.

D. Rebuttal Submission

[20] The Appellant noted the Director waived the requirement that the application for the Licence be advertised, so it was only posted in the County of St. Paul office. The Appellant argued not publicizing the application potentially extinguishes a person's right to water without their knowledge.

[21] The Appellant explained the St. Paul Grazing Reserve has a number of wells around the Landfill. She stated grazing options are assessed depending on herd numbers and availability of pasture.

[22] The Appellant stated she farms within a five kilometre radius of the Landfill. She explained she is the leaseholder of Dr. Shapka's lands and has contracts with Labreque Ranching. She explained the properties have many creeks, springs, wetlands, and marshes where her cattle forage and drink water. The Appellant stated she had an agreement for the past three years with Dr. Shapka to lease lands owned by Dr. Shapka on the SW 27-56-10-W4M, NW 22-56-10-W4M, SE 28-56-10-W4M, and SE 27-56-10-W4M.

[23] The Appellant explained she relies on forage produced on the leased lands as a winter supply of feed for her cattle. She noted the monitoring wells at the Landfill show contamination, and given alfalfa is a deep rooted plant, it needs a safe uncontaminated water supply. The Appellant stated she has public health concerns, because the monitoring well at the compliance well has reported increased levels of Landfill gas.

[24] The Appellant noted a licence issued to the Licence Holder requires it to notify all water users within a distance specified by the Director of contact names and numbers. She

submitted the Licence Holder should have contacted Dr. Shapka and asked him if the Appellant leased his lands.

[25] The Appellant stated she lives on the land and wants to ensure her water wells and the environmental integrity of the area is not compromised.

III. Legal Basis

[26] The Board has discussed the issue of directly affected in numerous prior decisions. The Board received guidance on the matter of directly affected from the Court of Queen's Bench in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) ("*Court*").

[27] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is 'extremely significant' is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a

project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he 'preponderance of evidence' standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a 'potential' or 'reasonable probability' for harm. The Board believes that the Department's submission to the [A]EUB, together with Mr. Bildson's own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”¹

Justice McIntyre concluded by stating:

¹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted...”²

[28] What the Board looks at when assessing the directly affected status of an appellant is how the appellant will be individually and personally affected. The more ways in which the appellant is affected, the greater the likelihood of finding that person directly affected. The Board also looks at how the person uses the area, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected.³

[29] The Court of Queen’s Bench in *Court*⁴ stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be within reason, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing.

IV. Analysis

[30] The Appellant stated that she lives about eight kilometres from the Landfill, but is concerned that the Landfill will affect her water well and the water supply to the lands where she grazes cattle.

[31] Although distance from a project is not determinative in assessing directly affected, it is certainly a factor that is considered. Eight kilometres is quite a distance when assessing impacts on surface and groundwater regimes.

² *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

³ See: *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

⁴ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[32] Based on the information provided, the Board finds the Appellant is not directly affected based on her home land location. It is approximately 13 kilometres and hydraulically upgradient from the Landfill site.

[33] However, residence is not the only criterion considered by the Board in determining directly affected. The Appellant explained she leases lands from Dr. Shapka and also leases the Labreque lands to graze her cattle. The Appellant did not specify where the Labreque lands she leases are located, but the Board assumes the lands are in the vicinity of the Shapka lands. These lands are within two kilometres from the Landfill and, as stated in *Tomlinson and Shapka*, there is a possibility there is a hydrogeologic connection between the Landfill and the Shapka properties. In its Report and Recommendations, the Board noted the consultants admitted the water flows to the northeast from the Landfill, which is the direction of the Shapka lands. In *Tomlinson and Shapka*, the Board found Dr. Shapka directly affected.

[34] The Appellant is concerned the withdrawal of water from the Licenced wells will impact water sources on neighbouring properties, which could impact the water sources on the Shapka and Labreque lands, thereby interfering with her use of the lands. This is a valid issue for the Board to consider.

[35] No evidence was provided by the Director or Approval Holder to rebut the Appellant's statement that she leases the properties. The Director merely argued there was no record of any lease registered on land titles. Although that may be the prudent way to demonstrate there is an interest in the property, it is not a common practice within the agricultural community when the lease arrangements are between neighbours. These lease agreements are often on an annual basis, so they often do not consider it necessary to register the interest on title. Failure to register the interest on title is not a basis to deny standing to an appellant if it is shown they have an economical use of the lands through an agreement with the landowner.

[36] The Appellant raised issues regarding the water on the property she leases being impacted by the Licenced well. These are valid concerns, and as the Licenced well is in close proximity to the leased lands and the flow of water is in the direction of the leased lands, the Board accepts the Appellant as directly affected.

V. DECISION

[37] The Board finds the Appellant, Ms. Yvonne Tomlinson, directly affected by the decision of the Director to issue the Licence and is, therefore, entitled to proceed with her appeal.

Dated on April 3, 2013, at Edmonton, Alberta.

"original signed by"

A.J. Fox
Panel Chair