

OFFICIAL TRANSCRIPT

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Action No. 0403 18462

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IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON

IN THE MATTER OF THE ENVIRONMENTAL APPEALS BOARD (the  
"Board) as established under the ENVIRONMENTAL  
PROTECTION AND ENHANCEMENT ACT, R.S.A. 2000, c. E-12, as  
amended ("EPEA");

AND IN THE MATTER OF WATER ACT Approval 00188589-00-00  
and EPEA Amending Approvals 11767-01-02 and 46972-00-01  
(collectively, the "Approvals");

AND IN THE MATTER OF THE BOARD'S DECISION OF MAY 26,  
2004, to grant Ben Gadd standing to appeal the Approvals  
(the "Standing Decision");

AND IN THE MATTER OF THE BOARD'S DECISION DATED  
SEPTEMBER 9, 2004, denying a request for a stay of its  
proceedings (the "Stay Decision");

AND IN THE MATTER OF THE BOARD'S DECISION DATED  
SEPTEMBER 9, 2004, granting numerous persons the right  
to participate in the Board hearing (the "Intervener  
Decision")

1 BETWEEN:

2 CARDINAL RIVER COALS LTD.

3 Applicant

4 - and -

5  
6 THE ENVIRONMENTAL APPEALS BOARD and BEN GADD

7 Respondents

8

9

10 REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE CLARKE

11

12 THE COURT:

13 This is a judicial review  
14 application to determine whether the Environmental  
15 Appeal Board, the Board, erred in law when it determined  
16 that the respondent, Ben Gadd(Gadd), was a person  
17 "directly affected" and therefore entitled to submit a  
18 notice of appeal.

19 In 2000, the Cheviot project was finally approved.  
20 It contemplated that the coal being mined would be  
21 processed at the mine site. Conditions I gather have  
22 changed and the applicant, Cardinal River Coals Ltd.  
23 (CRC), want to take the mined coal and transport it by  
24 truck to its Luscar site for processing and shipping.

25 In the 2000 approved project, there was a  
26 transportation corridor between the two sites which  
27 included an upgraded road, upgrading of the existing  
railway and a right of way for electrical power

1 transmission lines. Because of the change where the  
2 coal will be processed, CRC wants to change the road  
3 portion of the transportation corridor which is called  
4 the Haul Road. The Haul Road will need significant  
5 upgrading to handle the truck traffic moving the coal.  
6 I gather indeed that that work has already been done.

7 The Director for Alberta Environment approved the  
8 changes and issued the appropriate documentation for CRC  
9 to go ahead with the approvals. The Board received a  
10 Notice of Appeal from Gadd. CRC promptly challenged  
11 Gadd's standing to appeal on the ground that he did not  
12 meet the "directly affected" person requirement mandated  
13 in the legislation to have standing. That would be  
14 pursuant to Sections 91(1)(a)(i) and 95(a)(ii) of the  
15 Environmental Protection and Enhancement Act, R.S.A.  
16 2000, c. E-12.

17 On April 26, 2004, a preliminary meeting was held  
18 to determine amongst other matters, whether Gadd is  
19 "directly affected" by the approvals given by the  
20 director. Gadd appeared and gave oral evidence in  
21 addition to his written affidavit on this issue and a  
22 letter followed from the Board granting standing.

23 On October 8, 2004, the Board issued its Decision.  
24 In that Decision, the Board set out the tests that it  
25 used to determine what "directly affected" meant and  
26 from that decision I quote paragraphs 66 to 68.

27 "What the Board looks at when assessing the

1 the directly affected status of an appellant  
2 is how the appellant will be individually  
3 and personally affected and the more ways in  
4 which the appellant is affected the greater  
5 the possibility of finding the person  
6 directly affected.

7 The Board also looks at how the person  
8 uses the area, how the project will affect  
9 the environment and how the effect on the  
10 environment will affect the person's use  
11 of the area. The closer that these two  
12 elements are connected (their proximity)  
13 the more likely the person is directly  
14 affected. The onus is on the appellant  
15 to present a prima facie case that he is  
16 directly affected.

17 The Court of Queen's Bench stated an  
18 appellant needs only to show that there is  
19 a potential for an effect on their interests.  
20 This potential effect must still be within  
21 reason and plausible for the Board to  
22 consider it sufficient to grant standing.  
23 The effect does not have to be unique in  
24 kind or magnitude, however the effect that  
25 the Board is looking for needs to be more  
26 than an effect on the public at large (it  
27 must be personal and individual in

1 nature) and the interest which the  
2 appellant is asserting as being affected  
3 must have something more than the  
4 generalized interest that all Albertans  
5 have in protecting the environment."

6 With respect to Mr. Gadd, the Board says:

7 "It is also clear that the appellant's  
8 use of this area is different from  
9 that of other Albertans. He obtains  
10 a portion of his income from operating  
11 wilderness tours in the area. This is  
12 a personal impact that is beyond that of  
13 a generalized interest in protecting  
14 the environment. His particular use of  
15 the area requires the wilderness aspect  
16 of the area be maintained as much as  
17 possible. It is irrelevant that he does  
18 not require federal or provincial  
19 permits to conduct his business in the  
20 area or that he does not own property or  
21 live in the area. While these types of  
22 property interests may be of assistance  
23 in making a determination that someone is  
24 directly affected, it is not a pre-requisite.

25 Other Albertans may use the area  
26 for recreational purposes and to enjoy the  
27 natural setting and although their enjoyment

1 of the area may be generally affected by  
2 the Haul Road, their livelihood in most  
3 cases is not dependant on the protection  
4 of the wilderness around the mine site."

5 The Board then reaches its conclusion at paragraph 76  
6 where it says:

7 "The Board concludes that the appellant has  
8 provided enough evidence to indicate his  
9 economic livelihood could be affected by  
10 the construction and operation of the Haul  
11 Road. This means that the appellant is  
12 directly affected and the Board therefore  
13 grants the appellant standing for the purposes  
14 of these appeals."

15 At this application, counsel for the Board quite  
16 properly raised the issue of prematurity. CRC filed its  
17 application for Judicial Review on September 17. The  
18 Board hearings were scheduled for September 27 and 28.  
19 The Board had to this point resisted bringing its  
20 proceedings to a halt. CRC requested an adjournment  
21 after it filed its Judicial Review Application and CRC  
22 achieved its objective to bring the Board proceedings to  
23 a halt. The hearings were adjourned pending this  
24 application.

25 Judicial Review is a discretionary remedy. The  
26 Courts have discouraged resort to judicial review  
27 remedies while the administrative proceedings are still

1 ongoing except in extraordinary circumstances. CRC says  
2 it had to act now since the six-month time limit for  
3 judicial review is running and it does not know when the  
4 Board will issue its Report and when the Minister will  
5 make a Decision. The Board does not make any decision  
6 with respect to the approvals obtained by CRC. It only  
7 issues a Report to the Minister and it is the Minister  
8 who makes the Decision.

9 I am satisfied that the time limits for judicial  
10 review only begin to run from the time that the Minister  
11 makes a decision. It is possible, for example, that the  
12 Minister may simply approve the Director's Approvals and  
13 therefore the whole standing issue would become moot.

14 Also, if I had to conclude that this issue was not  
15 premature and that the Board's standing decision is  
16 valid, where does that leave the parties when the  
17 Minister ultimately makes a Decision.

18 CRC relied heavily on the case of CPR vs. Matsqui  
19 Indian Band (1995), 1 SCR 3. In that case, the Federal  
20 Government and Indian bands had set up a process whereby  
21 the bands could assess and tax lands within the reserve.  
22 After the CPR was served with tax notices, it commenced  
23 proceedings in Federal Court to set aside those  
24 assessments on the basis that since they had fee simple  
25 title to the lands, they were not "within the reserve"  
26 for assessment and taxation purposes.

27 The Federal Court of Appeal allowed the action to

1 proceed and an appeal was taken to the Supreme Court of  
2 Canada. The Court was split five to four in its  
3 decision. One issue was whether or not the CPR was  
4 required to go through the process of appealing the  
5 assessments until they reached the Federal Court or  
6 could they challenge the process now. The majority  
7 allowed the motion of CPR to strike the proceedings at  
8 this early stage to proceed. They noted that such an  
9 application is discretionary and it is proper for the  
10 Court to consider the policy underlying the scheme in  
11 the Act to determine how to exercise the discretion.

12 In addition, the Court considered the issue to be  
13 one of law in which the Bands had no particular  
14 expertise. In my opinion, this case is distinguishable  
15 since I have concluded that the scheme of this act  
16 intends that the Board will determine who is or who is  
17 not directly affected and that involves not only a  
18 question of law, but also of fact as well as policy and  
19 expertise. I am satisfied that this conclusion fits  
20 within the legal principle set out in the CPR Case  
21 supra.

22 Our Court when considering a similar issue, that is  
23 a claimed jurisdictional issue, decided that until the  
24 overall process is concluded and a decision is made by  
25 the Minister, it is not appropriate for the Court to  
26 interfere. See McCains Foods Canada vs. Alberta  
27 Environmental Appeal Board (2000), at 469. The rationale



1 for this position is explained by the Ontario Divisional  
2 Court as follows and I quote:

3 "For some time now the Divisional Court has,  
4 as I have indicated, taken the position that  
5 it should not fragment proceedings before  
6 administrative tribunals. Fragmentation  
7 causes both delay and distracting interruptions  
8 in the administrative proceedings. It is  
9 preferable, therefore, to allow such matters  
10 to run their full course before the tribunal  
11 and then consider all the legal issues  
12 arising from the proceedings at their conclusion."

13 See the Ontario College of Art vs. Ontario (Human Rights  
14 Commission) (1993), 99DLR 4th, 738 and 740.

15 On the finding that the application is premature, I  
16 am dismissing the application. If I am wrong in making  
17 that decision, I am in any event going to decide the  
18 application on its merit.

19 In so doing, the first issue I must decide is what  
20 is the appropriate standard that the Court should apply  
21 in reviewing the Board's decision. I have concluded that  
22 the issue has been settled by the Case of Court vs.  
23 Environmental Appeal Board (Alberta) (2003), 333 Alberta  
24 Reports 308. It was a decision of my brother judge, Mr.  
25 Justice McIntyre. That case dealt with exactly the same  
26 issue. The standing of the applicant in that case as a  
27 directly affected person. Justice McIntyre said the

1 question was one of mixed fact, law and policy (see  
2 paragraph 56) and concluded that the issue of standing  
3 was intended by the legislature to be left to the  
4 exclusive jurisdiction of the Board. It is only  
5 reviewable on the 'patently unreasonable standard (see  
6 paragraph 58). I agree with that decision.

7 CRC submits that although the decision was not  
8 appealed, it was nonetheless wrong. In particular, at  
9 paragraph 41 and 42, Justice McIntyre refers to the very  
10 strong privitive clause to conclude give great deference  
11 should be shown in reviewing the Board decision. CRC  
12 says that is an error because the privitive clause does  
13 not apply to a Board deciding someone has standing.

14 The privitive clause, Section 102, only applies  
15 where the Board is empowered or compelled to do  
16 anything. Section 95(a)(ii) only empowers the Board to  
17 decide if a person is "not directly affected by the  
18 decision". It does not empower the Board to decide that  
19 a person is directly affected. That decision comes  
20 under Section 91(1)(a)(i) which says a person may submit  
21 an appeal to the Board if they are directly affected.  
22 It is CRC's submission that the Board is not empowered  
23 to decide that issue so that the privitive clause does  
24 not apply. I do not agree.

25 The Act clearly empowers the Board to decide that a  
26 person is not directly affected and in so doing, they  
27 have to answer the question, what is the test that we

1 will use and applying that test if the Board decides  
2 that the person does not fit within the not directly  
3 affected category, the only conclusion left is that the  
4 person is directly affected. In my judgment, the Act  
5 clearly empowers the Board to determine the standing of  
6 an appeal person as directly affected or not. So I  
7 conclude that Justice McIntyre did not err in his  
8 analysis at paragraphs 41 and 42 of that decision.

9 To say that the Board made a jurisdictional error  
10 is no longer helpful. The courts have moved away from  
11 that description. Where this description of an error  
12 occurs today is to find that an error, after the outcome  
13 of the pragmatic and functional analysis or the  
14 tribunal, where this tribunal does not make a correct  
15 interpretation. The proper question today as I  
16 understand it is to ask did the legislature and the  
17 legislation intend to have the Board make the decision  
18 as to whether or not someone was directly affected.  
19 Section 95(5) (a) (ii) makes the legislature's intention  
20 patently clear on that issue.

21 CRC also says that the decision of Justice McIntyre  
22 did not refer to a House of Lords and a subsequent Court  
23 of Appeal decision decided in different context which  
24 were defining the term directly affected means. As I  
25 understand it, the Board in that particular case, did  
26 consider those cases. I am satisfied that the Board has  
27 properly decided the legal definition of those words. I

1 am satisfied that I should follow the court decision and  
2 the standard to be applied to the Board's decision in  
3 this case is one of patent unreasonableness. The Board  
4 decision clearly was not patently unreasonable and the  
5 application should be dismissed on that ground.

6 The Board knew that it had to find that Gadd was  
7 directly affected but also knew that Gadd was also  
8 personally affected (see paragraph 68 of the Board  
9 decision). The Board found on the evidence, a personal  
10 impact on Gadd. CRC complains that Gadd had no permit  
11 or exclusive license to lead for profit tours in that  
12 area. The Board has previously decided that such a  
13 permit or license makes it easier to find that a person  
14 is directly affected in the personal way required, but  
15 such exclusivity or permitted license right is not fatal  
16 to a person being directly affected.

17 CRC says that the Board deciding "directly  
18 affected" for the purpose of Section 91 is a pure  
19 question of law. I do not agree. The legal definition  
20 of directly affected does have a component which is a  
21 legal component. I am also satisfied that the Board in  
22 this particular case applied the correct legal  
23 definition and on the facts reached correct decision,  
24 but I am also satisfied that in addition to the legal  
25 and factual elements for the purposes of either Section  
26 91 or 95, there is as well proper policy considerations  
27 which apply. Thus, if I am wrong in concluding that

1 patent unreasonable is the test and it is one of  
2 correctness, then in my judgment the Board was correct  
3 in the decision that it made on standing.

4 The application is therefore dismissed. By earlier  
5 court orders, as I understand it, no costs are to be  
6 awarded with respect to this application and Madam Clerk  
7 I think that concludes our proceedings.

8

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9 PROCEEDINGS CONCLUDED

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11 Delivered orally at the Law Courts Building, Edmonton,  
12 Alberta on the 4th day of November, 2004.

13

14 S. Finlay, Ms.

15 For the Applicant

16

17 J. Klimek, Ms.

18 For the Respondents

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20 B. Jones

21 Court Clerk

22

23 TH - Transcript Management Services, Edmonton

24 Typed - 12th November, 2004

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**IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL DISTRICT OF EDMONTON**

IN THE MATTER OF THE ENVIRONMENTAL APPEALS BOARD (the "Board") as established under the *ENVIRONMENTAL PROTECTION AND ENHANCEMENT ACT*, R.S.A. 2000, c. E-12, as amended ("EPEA");

AND IN THE MATTER OF *WATER ACT* Approval 00188589-00-00 and EPEA Amending Approvals 11767-01-02 and 46972-00-01 (collectively, the "Approvals");

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AND IN THE MATTER OF THE BOARD'S DECISION DATED SEPTEMBER 9, 2004, granting numerous persons the right to participate in the Board hearing (the "Intervener Decision")

BETWEEN:

**CARDINAL RIVER COALS LTD.**

Applicant

- and -

**THE ENVIRONMENTAL APPEALS BOARD and BEN GADD**

Respondents

BEFORE THE HONOURABLE MR. ) IN THE LAW COURTS, CITY OF  
JUSTICE. C. PHILIP CLARKE ) EDMONTON, PROVINCE OF  
IN CHAMBERS ) ALBERTA, THIS 4<sup>TH</sup> DAY OF  
) NOVEMBER, 2004

**ORDER**

UPON THE APPLICATION OF THE APPLICANT; AND UPON HEARING COUNCIL FOR THE APPLICANT; AND UPON HEARING COUNCIL FOR THE RESPONDENT, THE ENVIRONMENTAL APPEALS BOARD; AND UPON HEARING COUNCIL FOR THE RESPONDENT, AND BEN GADD;

IT IS HEREBY ORDERED AND ADJUDGED THAT:

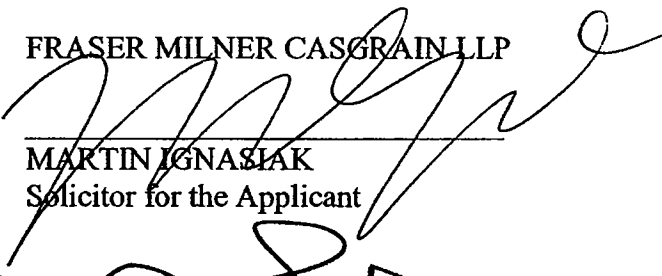
1. The Judicial Review application is dismissed.
2. There will be no costs in this action.

*for clerk* "Kim Lukay"  
~~HONOURABLE JUSTICE C. PHILIP CLARKE~~  
of the Court of Queen's Bench

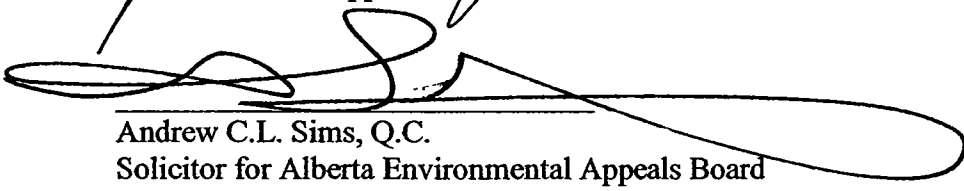
APPROVED AS TO FORM AND CONTENT:

FRASER MILNER CASGRAIN LLP

Per:

  
MARTIN IGNASIAK  
Solicitor for the Applicant

20  
December 2004

  
Andrew C.L. Sims, Q.C.  
Solicitor for Alberta Environmental Appeals Board

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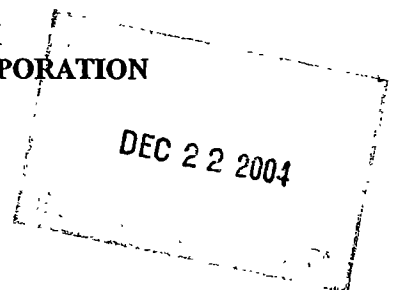
- and -

**THE ENVIRONMENTAL APPEALS BOARD  
and BEN GADD**

Respondents

**ORDER**

**JENNIFER J. KLIMEK  
PROFESSIONAL CORPORATION  
Barrister & Solicitor  
240, 4808 - 87 Street  
Edmonton, Alberta  
T6E 5W3**



Phone: (780) 468-1843

Fax: (780) 468-3437

File: 5-999.JJK