

Court of Queen's Bench of Alberta

Citation: Normtek Radiation Services Ltd v Alberta (Environmental Appeal Board), 2018
ABQB 911



Date: 20181121
Docket: 1701-00469
Registry: Calgary

Between:

Normtek Radiation Services Ltd.

Applicant

- and -

**Alberta Environmental Appeals Board, Secure Energy Services Inc.,
Director of Alberta Environment and Parks**

Respondents

**Reasons for Decision
of the
Honourable Madam Justice Janice R. Ashcroft**

I. Introduction

[1] Normtek Radiation Services Ltd. (“Normtek”) applies for judicial review of a decision of the Alberta Environmental Appeals Board (“the Board”). The Board refused Normtek standing, holding that it was not “directly affected” as required by the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [“*EPE Act*”].

[2] Normtek specializes in decontamination and waste management services for naturally occurring radioactive material (“NORM”) which is produced in resource development.

[3] Secure Energy Services Inc. (“Secure Energy”) provides services which include the disposal of oilfield by-products. Secure Energy applied to the Director of Alberta Environment

and Parks (“the Director”) to allow its Pembina landfill (“the Landfill”) to receive and dispose of oil field equipment which contains NORM, without decontamination.

[4] Normtek applied to make submissions to the Director on Secure Energy’s application; however, the Director rejected the statement of concern submitted by Normtek on the basis that Normtek was not “directly affected”, as set out under the *EPE Act*. The Director eventually approved the amending application and Normtek attempted to appeal the Director’s approval to the Board.

[5] The Board held that Normtek was not “directly affected” by the approval and therefore had no standing to appeal the Director’s decision.

II. Issues

[6] This judicial review raises several issues:

- Whether the Board’s *interpretation* of “directly affected”, pursuant to section 91(1)(a)(i) of the *EPE Act*, was reasonable;
- Whether the Board’s *application* of its interpretation of section 91(1)(a)(i), was reasonable. In other words, if this Court finds the Board’s interpretation of “directly affected” reasonable, were the Board’s findings and conclusions that Normtek was not “directly affected”, reasonable;
- Whether the Board “fettered its discretion” when it dismissed Normtek’s appeal because Normtek lacked standing. Normtek argues that the discretionary wording in section 95 (5)(a) and (b) of the *EPE Act* (“may dismiss” an appeal as opposed to “shall dismiss”) supports that an appeal can be allowed even when an applicant is found not to be “directly affected”; and
- Whether the Board brought the legal system into disrepute by failing to provide reasons for their decision in a timely manner. At the hearing counsel clarified that Normtek was not seeking a remedy on this issue; rather, it wanted the Court to make a declaration that the 16-month delay in issuing reasons is not acceptable.

III. Legislation, the Approval Process and the Decision of the Board

[7] As set out in section 2:

The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and the well-being of society;
- (b) the need for Alberta’s economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;
- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

- (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
- (e) the need for Government leadership in areas of environmental research, technology and protection standards;
- (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
- (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
- (h) the responsibility to work cooperatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
- (i) the responsibility of polluters to pay for the costs of their actions;
- (j) the important role of comprehensive and responsible action in administering this Act.

[8] Where a project, or an amendment to the project, requires an approval by the Director, public notice of the application is required pursuant to section 72 of the *EPE Act*. On July 29, 2014, the Director issued public notice of the application by Secure Energy for an amending approval.

[9] Section 73 of the *EPE Act* then allows for persons “directly affected” to submit a statement of concern:

73(1) Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person’s concerns with respect to the application or the proposed amendment, addition, deletion or change.

[10] Normtek filed submissions with the Director outlining its concerns with the application. The Director advised Normtek that its submission would not be considered a statement of concern because Normtek was not geographically located in close proximity to the Landfill. The Director did indicate, however, that the issues raised by Normtek would be considered in the Director’s review of Secure Energy’s application.¹

[11] The Director approved Secure Energy’s amending application for the project (“the Amending Approval”) and Normtek filed an appeal of this decision with the Board. Section 91 of the *EPE Act* states:

91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

- (a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70 (1)(a) or makes an

¹ The Director’s decision in refusing to accept the statement of concern is the subject of a second separate judicial review and is not before the Court in this judicial review.

amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

- (i) by the approval holder or by an person who previously submitted a statement of concern in accordance with section 73 and is *directly affected* by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or... [emphasis added]

[12] Normtek also applied to the Board for a stay of the Director's decision. Secure Energy cross applied to dismiss both Normtek's appeal and stay application, on the basis that Normtek was not "directly affected" and had no standing. Written submissions were received by the Board from both parties, including a rebuttal submission from Normtek.

[13] On October 13, 2016, the Board dismissed Normtek's Notice of Appeal. The Board held that Normtek was not "directly affected" by the Amending Approval. The Board indicated that its reasons would follow in due course. Its reasons were provided over 16 months later, on March 5, 2018 ("Reasons for Decision").

[14] In its Reasons for Decision, the Board referenced the jurisprudence including cases which supported that a party must demonstrate that the "approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource," before an applicant will be considered "directly affected".

[15] The Board rejected Normtek's arguments that Cody Cuthill (a Normtek executive), Normtek's employees, and Normtek's shareholders were directly affected by the Amending Approval. The Board stated that Normtek had not identified the specific natural resource Mr. Cuthill uses or any link back to the Amending Approval. The Board also held that Normtek had not shown that its employees would be using the Landfill as Normtek was not a current client, and any alleged recreational use of land by its employees near the Landfill was not supported with any specificity.

[16] The Board also rejected Normtek's argument that the test for "directly affected" should be relaxed because the Landfill is surrounded by public lands. The Board held that having a right to access land does not demonstrate a direct effect sufficient to ground a directly affected interest.

[17] Most significantly, the Board also dismissed Normtek's argument that it was directly affected economically by the Amending Approval. The Board stated that any direct economic impact was speculative and that even if economic impact existed, no causal connection had been demonstrated between any economic impact on Normtek, which would lead to an effect on the environment. The Board emphasized that a generalized interest is not enough to be "directly affected" under the *EPE Act*.

[18] Section 95(5) of the *EPE Act* states:

The Board

- (a) *may* dismiss a notice of appeal if

[...]

- (ii) In the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), g(ii) or (m) of this Act or section 115(a)(a)(i) or (ii), b(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,

[...]

and

- (b) *shall* dismiss a notice of appeal if in the Board's opinion
- (i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one of more hearings or reviews under Part 2 of the Agricultural Operation Practices Act, under the Natural Resources Conservation Board Act or any Act administered by the Alberta Energy Regulator or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with, or

the Government has participated in a public review under the Canadian Environmental Assessment Act (Canada) in respect of all of the matters included in the notice of appeal.
[emphasis added]

IV. Role of the Board and the Director on Judicial Review

[19] It is within the Court's discretion to determine, balancing a number of factors, the degree to which a tribunal may participate in a judicial review of its own decision: *Ontario Energy (Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 41-62 [*Ontario Energy*]. Counsel for the Board appropriately provided submissions only as to the legislative structure of the *EPE Act*, and the standard of review.

[20] After the hearing, I requested follow-up submissions from the named parties to the judicial review about the Director's role both before the Board and in the judicial review. Secure Energy, the Director, and the Board submitted that:

- under the *Environmental Appeals Board Regulation*, Alta Reg 114/1993 "the person whose decision is the subject of the notice of appeal" is defined as a party to an appeal before the Board: s 1(f)(ii)²; and
- receiving submissions from the Director allows the Board to provide the best advice to the Minister³ especially when the appeal before the Board is ultimately a "de novo hearing" and new evidence is accepted.

² See also section 95(6) of the *EPE Act* which allows the Board, in the context of natural justice, to hear from persons "who the Board considers should be allowed to make representations."

³ Pursuant to section 99 (1) of the *EPE Act* the Board provides a report and recommendations to the Minister regarding an appeal under sections 91(1)(a) through (m).

[21] The respondents also directed me to *Imperial Oil Ltd v Alberta (Minister of Environment)*, 2003 ABQB 388, where this Court examined the role of the Director on a judicial review of its own decision. Nation J concluded at paragraphs 16 and 17:

...As a result, the Director does have standing and the ability to speak to the statutory regime, jurisdictional issues in relation to it and factors that may apply in terms of the standard of review.

[]

All levels are restricted from making comments about their respective decisions, in terms of justifying them or entering the ‘fray’ with Imperial...

[22] The Director and Secure Energy further argue that the Director’s role on judicial review should be broader than that as set out by Nation J given that it is not the Director’s decision on standing (as opposed to the Director’s decision on the Amending Approval), that is under review before this Court. Thus, there is little risk of the Director seeming to defend his own decision.

[23] Normtek also did not take issue with the Director’s role in this judicial review. Normtek advised that there appears to be an established practice of the Board accepting submissions from the Director on the preliminary issue of whether an applicant is “directly affected”. Further, Normtek, relying on *Ontario Energy*, characterizes the Director’s function as more administrative than adjudicative, thereby reducing the risk of any perception of impartiality.

[24] The *EPE Act* gives the Director status, at the Board level, as a party because the Director rendered the decision on the Amending Approval, which is the subject of the appeal. Party status allows the Director to provide submissions on the merits of its decision to grant the Amending Approval. This status also likely extends to a determination regarding preliminary issues on the appeal such as standing.

[25] However, the Director has already decided in a previous proceeding that Normtek was not “directly affected” by the proposed amendment. There may be a perception of unfairness that the Director is now allowed to try and further convince this Court of the reasonableness of the Board’s decision that Normtek is not “directly affected”. This perception may exist even though counsel for the Director assumed an appropriate tone in both written and oral argument. Given this perception, and as Secure Energy is a sophisticated party capable of providing the Court with full submissions it is appropriate to limit the Director to arguments on the standard of review, the statutory regime and any arguments framed as jurisdictional.

V. Analysis

A. Certified Record

[26] Normtek’s materials have referred to information that is not contained in the Certified Record. No argument was put forward on whether the Certified Record should be expanded. Accordingly, my review of the Board’s decision is confined to the Certified Record: *IMS Health Canada, Limited v Information and Privacy Commissioner*, 2005 ABCA 325 at para 34.

B. Whether the Board's interpretation of "directly affected", pursuant to section 91(1)(a)(i) of the *EPE Act*, was reasonable

1. Positions of the Parties

[27] Normtek argues that an interpretation of "directly affected" as set out in sections 91 and 95 of the *EPE Act*, does not require causal connection back to the environment, in particular that the Board must find that a natural resource be affected or that the applicant's use of the natural resource is affected. Rather, the specific legislative wording requires only that the applicant be "...directly affected by the Director's decision": *EPE Act*, s 91(1)(a)(i).

[28] Normtek emphasizes that a restricted approach to "directly affected" is not consistent with an important goal of the legislation, that of public participation and investment in environmental protection. Normtek states that a review of comments of the Minister of Environment in the Hansard, when the legislation was introduced, shows that there was a strong commitment to engage and broaden public participation in all aspects of environmental decision-making: Alberta, Legislative Assembly, *Hansard*, 22nd Leg, 4th Sess, (11 May 1992 and 4 June 1992) at 805 and 1184 (Ralph Klein).

[29] Normtek notes that this particular purpose of the legislation was confirmed in *Pembina Institute v Alberta (Environment and Sustainable Resources Development)*, 2013 ABQB 567 at paragraph 28 and especially 29 [*Pembina Institute*]:

The emphasis is on public consultation, setting up administrative procedures to promote "access to information" and increase public consultation and participation in all aspects of environmental reporting and enhancement activities.

[30] Counsel for Normtek points out that the legislation makes reference to human health, ecosystem integrity, technology, economics, and protection standards (see also *Gadd v Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.*, (8 October 2004), 03-150, 03-151 and 03-152-IDI, AEAB at para 69 [*Gadd*]). Accordingly, Normtek argues that a narrow definition which requires the appellant's use of a natural resource be harmed, in order to ground standing, is incongruent with the broader purposes enunciated in the statute.

[31] Normtek argues that the Board's interpretation of "directly affected" remains largely unchanged over the years and the Board approaches the interpretation and application of this term, almost word for word in almost all of its decisions. This argument implies that the Board is not properly considering any changing norms of environmental protection and individual circumstances of applicants but rather the Board is approaching "directly affected" in a formulaic manner.

[32] Normtek argues that while the test is potential for harm, the Board seemed to require actual proof of economic loss. Normtek states that the purposes of the *EPE Act* as set out in section 2 specifically links economic interests and environmental concerns, and Normtek has, at the very least, the potential to be economically affected.

[33] Normtek points out that the Courts, have interpreted the phrase "directly affected" under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, [*Federal Courts Act*] for the purposes of determining who has standing to file judicial review, quite broadly. "Directly affected" in this context has been held to include an effect on legal rights, or legal obligations, or that a person's

rights or interests have been prejudicially affected: *Cowessess First Nation No 73 v Pelletier et al*, 2017 FC 692 at para 21.

[34] Normtek also argues that the test for who is “directly affected” should be applied broadly because the material being disposed of is radioactive and the harm may not be occurring now but will be in the future. Normtek also points out that there is limited expertise on NORM and restricting standing may result in the Board making decisions without full information.

[35] Secure Energy responds that a narrow approach to the term “directly affected” appropriately links standing back to the person and the environment, and prevents the Board’s process being used for improper purposes. Secure Energy submits that improper purposes include parties who seek standing simply to discourage business competition and protect their own economic interests. Secure Energy believes that Normtek is bringing forward a commercial interest under the guise of an environmental interest.

[36] Secure Energy also argues that the Board has set out a principled framework grounded in its past decisions and the jurisprudence of this Court, for deciding who is “directly affected”:

- The applicant needs to establish a direct personal or private interest; it must be more than just an effect on the general public or interest in the environment: *Kostuch Alberta (Director, Air and Water Approvals Division, Environmental Protection)*, 35 Admin Crown (2d) 160, 1996 CanLii 10565 (Alta QB) [(*Kostuch (QB)*)].
- An economic interest can be sufficient to show that a person is directly affected but the economic interest must be a direct result of reasonable harm to the use of the natural resource that the person uses or relies upon: *Kostuch Alberta (Director Air & Water Approvals Division, Environmental Protection)*, [1995] AEABD No 9, 1995 CarswellAlta 735 (WLCan) at para 28, [(*Kostuch (Board Decision)*)]; *Court Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 2003 ABQB 456 at paras 67-75 [(*Court*)].
- Other factors to be considered include how the approved project will affect the environment and how the effect on the environment will affect a person’s use of the area; the closer the connection, the more likely the person is directly affected: *Gadd* at para 66; *Byram Industrial Services Ltd v Director, Central Region, Regional Services, Alberta Environment re: Wasteworks Inc* (28 April 2005), 04-057-D, AEAB [(*Byram Industrial Services*)].

[37] Secure Energy also replies that while the Court in *Pembina Institute* commented that there was room for how “directly affected” was interpreted, this applied only to how the Director interpreted that term, not the Board. Secure Energy, citing *Kostuch (QB)* at paragraph 23, argues that this Court has confirmed that how the Board interprets the words “directly affected” for the purposes of standing on appeal is narrower as the Board engages an adversarial process in contrast to the Director’s information-gathering role.

2. Standard of Review

[38] The Board’s approach to “directly affected” under the *EPE Act* involves the interpretation of a home statute by a tribunal with presumed expertise. Accordingly, the standard of review as to its interpretation of “directly affected” is presumed to be reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 53-54 & 58-61, [2008] 1 SCR 190