

Court of Queen's Bench of Alberta

Citation: Pembina Institute v Alberta (Environment and Sustainable Resource Development), 2013 ABQB 567



Date:
Docket: 1203 18391
Registry: Edmonton

Between:

Pembina Institute, Fort McMurray Environmental Association

Applicants

- and -

**Director, Northern Region, Alberta Environment and Sustainable Resources Development
and Southern Pacific Resource Corp.**

Respondents

**Reasons for Judgment of the
Honourable Mr. Justice R.P. Marceau**

Table of Contents

I. Introduction.....	2
II. Facts	3
A. OSEC	3
B. The Respondents.....	4
C. STP's Application for Approval	4
D. The Statement of Concern	5
E. Briefing Note	9

III.	Analysis.....	12
A.	Standard of Review	12
B.	Purpose of the <i>EPEA</i> and <i>Water Act</i>	12
C.	Fundamental Principles of the Duty of Procedural Fairness	15
IV.	Decision	16
A.	Who are the Applicants to be Recognized as Statement of Concern Filers?.....	17
B.	Directly Affected	17
C.	Conclusion and Decision	19

Acronyms/Abbreviations

Cumulative Environmental Management Association	CEMA
Director Northern Region Alberta Environment and Sustainable Resources Development	The Director
Environmental Appeals Board	EAB
Environmental Impact Assessment	EIA
Environment Protection and Enhancement Act RSA 2000 Chapter E-1	EPEA
Fort McMurray Environmental Association	FMEA
Oil Sands Environmental Coalition	OSEC
Pembina Institute	Pembina
Southern Pacific Resource Corp.	STP

I. Introduction

[1] The applicants, Pembina and FMEA, seek judicial review of a decision by the Director to reject the applicants' Statement of Concern submitted pursuant to section 73 of the *EPEA* and section 109 of the *Water Act*, RSA 2000, c. W-3 (collectively "the Acts").

[2] Section 73 of the *EPEA* and section 109 of the *Water Act* entitle a "person" who may be "directly affected" by an application for an oil and gas extraction project, and other activities, to submit a "Statement of Concern" to the Director. This in turn entitles the person to other participatory rights under the *Acts*, including the right to appeal the Director's decision to issue an approval.

[3] In March 2012, the applicants submitted a Statement of Concern with respect to Southern Pacific Corp's ("STP") application to construct and operate a steam-assisted gravity drainage oil sands project on the MacKay River (the "Project"). The applicants hold a licence to occupy land for recreational purposes on the MacKay River about 42 kilometers downstream from STP's proposed expansion. It is to be noted the expansion would not take water directly from the MacKay River but from a groundwater source several kilometers from the MacKay River.

- [4] The applicants submit that the Director's decision is wrong in law because it:
- a. misinterpreted "person" to exclude legal entities other than individuals;
 - b. applied a majority affected test to the applicants' individual members;
 - c. required the applicants to prove that they "are" directly affected by the application rather than show a reasonable probability of a direct effect;
 - d. breached the principles of natural justice by taking into account improper and irrelevant considerations; and
 - e. in the alternative, if the Director's interpretation of the relevant provisions of the Acts is correct, his conclusion that the applicants are not affected by STP's applications is unreasonable given the facts before the Director on the Record.

II. Facts

A. OSEC

[5] There was some confusion about titles used by OSEC and the individuals who are part of OSEC, only two of which (FMEA and Pembina) applied for judicial review. OSEC itself is not a legal entity. It is an unincorporated coalition of legal entities or "persons" comprising at the time of the filing of the Statement of Concern:

- a. Pembina, who is a legal person because it is a non-profit environmental research and policy analysis organization founded in Alberta in 1985. It has 62 employees, many of whom work in Alberta but no evidence was supplied to the Director that any of these employees live closer than Edmonton to the proposed STP plant expansion.
- b. FMEA, who is a legal person because it is a society consisting of residents living in and around Fort McMurray. The majority live in Fort McMurray but there were also members in Fort McKay and Anzac. Fort McKay is downstream of the MacKay River from where the proposed plant expansion might have an effect on groundwater and on the MacKay River. Both Anzac and Fort MacKay are on the Athabasca River which the MacKay River flows into at Fort McKay. Presumably

what affects water levels, water quality and fish habitat in the MacKay River could affect the Athabasca River downstream of the confluence of the MacKay River and the Athabasca River.

- c. Alberta Wilderness Association, who I assume to be a legal person but they are not party to the application and determination of whether they are directly affected by STP's proposed plant expansion is irrelevant to the application.
- d. Toxics Watch Society of Alberta. It is not clear that this society was a member of the coalition at the time of the submission of the Statement of Concern. They are not applicants before me and determination of whether they are directly affected by STP's proposed plant expansion is irrelevant to this application.

B. The Respondents

[6] The Regional Approvals Manager, Northern Region (the "Director"), is a professional engineer and is the designated authority pursuant to section 25(1) of the *EPEA* for the purposes of making decisions and issuing approvals under Part 2 of the *EPEA*: Environmental Assessment Process, Approvals and Registrations, and the designated authority pursuant to section 163(1) of the *Water Act* for making regulatory decisions under the *Water Act*.

[7] Southern Pacific Resource Corp. ('STP') submitted applications to the Director for approvals under the *Acts* for an oil sands extraction project, for which the Applicants submitted a Statement of Concern to the Director on March 28, 2012.

C. STP's Application for Approval

[8] In November 2011, STP applied to the Director for approval under the *Acts*. Specifically STP applied:

- a. to amend its existing EPEA Approval No. 255245-00-00 in order to expand an existing oil sands extraction scheme called the STP McKay Thermal Project – Phase 2; and
- b. for a water licence to divert 1 424 000 m³/annum of fresh groundwater to be used as the water source for steam generation in the extraction of bitumen.

[9] The Project is located 40 km southwest of Fort McKay with a processing plant and multiple deep well steam injection and oil sands extraction wells on the MacKay River and is designed to produce an additional 3,816 m³/day of bitumen, for a total of 5,724 m³/day of bitumen, for approximately 25 years. The well pads are located on both sides of the MacKay River and its tributaries. The Project expects to use up to 1705 m³/day of groundwater for the life of the Project and 4,000 m³/day of groundwater for the first two years of operation. The west portion of the Project is proposed to be located within the Wabasca-Dunkirk Caribou Management Zone, which provides habitat for a broad range of mammals, birds and amphibians.

[10] As required by *EPEA*, STP submitted an Environmental Impact Assessment (EIA) in support of its *EPEA* and *Water Act* applications. The EIA concluded the Project could result in:

- a. a decrease in groundwater entering the river as a result of the Project and other expected oil sands developments in the area; and
- b. a shift in the hydraulic relationship between the MacKay River and underlying groundwater units such that MacKay River would be supplying recharge to the groundwater units instead of the other way around.

[11] However, the EIA also concluded that:

- c. the expected loss from the MacKay River is a negligible quantity in comparison to the mean seasonal flow of the MacKay River.

[12] On January 25, 2012, the Director issued a public notice of STP's applications. The public notice provided opportunities for public participation in reviewing STP's applications stating:

- a. any person who may be directly affected by the applications may submit a written Statement of Concern under the *EPEA* and the *Water Act*;
- b. if no Statements of Concern are received, the applications may be approved without further notice; and
- c. failing to submit a Statement of Concern may affect the right to file an appeal with the Environmental Appeals Board. The right to file an appeal within the Environmental Appeals Board is decided by the Environmental Appeals Board but a person who has been denied the right to file a Statement of Concern has no right to file an appeal with the Environmental Appeals Board.

D. The Statement of Concern

[13] On March 28, 2012, OSEC submitted its Statement of Concern with respect to STP's applications to the Director. The Statement of Concern provided as follows:

- a. OSEC is a coalition composed of FMEA, Pembina, the Alberta Wilderness Association and the Toxics Watch Society of Alberta.
- b. OSEC "holds a recreational lease" on lands directly downstream of the Project which are used for camping, hiking, fishing, wildlife, viewing and swimming. (A subsequent letter to the Director dated May 31 2012 clarified that the Applicants, Pembina and FMEA, hold the licence to occupy the Lands on behalf of the members.)

- c. The Project would directly impact OSEC's use and enjoyment of the Lands due to the loss of wildlife populations, increased air emissions, reduced flow rates on the MacKay River, increased fishing pressure due to increased traffic, and the risk of spills and damage to the MacKay River. For clarification the document referred to as "a recreational lease" is better described as a contract with Fort McKay Métis Local No. 63, who holds a lease on Crown land in two areas along and abutting the MacKay River near Fort McKay. By that contract certain portions of the Métis leased lands may be occupied by Pembina and FMEA for recreational purposes. Those purposes include fishing, hiking, camping, kayaking, canoeing and like activities. The benefit of this contract is available to all members of Pembina and FMEA. As a matter of law it appears the general public may not without permission of the Métis Local No. 6 occupy the Métis lease land. However, the rest of the MacKay River, excluding the Métis Local No. 6 lease and the hamlet of Fort McKay, appears from the maps provided in evidence as part of the record to be unoccupied Crown land on both banks of the MacKay River so members of the public can access Crown land including the river and its banks for purposes of recreation including hunting, fishing, camping, canoeing, kayaking and the like. From the map it is obvious that the average Albertan's access to the MacKay River is restricted by the lack of road access including access by off-highway vehicles.

[14] On May 2, 2012, the Director received a Statement of Concern from Fort McKay First Nation and the Fort McKay Métis Community which included a technical review of STP's EIA that concluded the Project could cause the MacKay River to be drained of all water during low flow periods:

- a. STP's assessment of its Project effects on the flow of the MacKay River flow is based on an average of March to October flow rates;
- b. The Project could have a significant impact on the MacKay River in low flow winters;
- c. In the Application case (the Project plus approved projects), the predicted reduction in groundwater interaction with surface water would create a 59% decrease in water levels during low flow conditions; and
- d. In the Planned Development Case (the Project in addition to approved and planned projects), 100% of the water would be eliminated during the lowest flow conditions recorded for the River. The River could be dry in places and the established ice cover could settle onto the river bed. Approving an application that could lead to the elimination of all flow in a river the size of the Mackay River would be precedent setting.

[15] On May 8, 2012, the Director wrote OSEC in response to its March 28, 2012 Statement of Concern requiring further information from OSEC to determine whether the March 28, 2012 “submission constitutes a Statement of Concern,” including:

- a. number of OSEC members “that are directly affected by the proposed project” with details of their “individual activities”;
- b. number of “people” that are members of OSEC with documentation of “persons officially belonging to” OSEC;
- c. how “one” becomes a member of OSEC;
- d. a breakdown of OSEC membership in terms of the communities in which the members live; and
- e. a description of the “recreational lease land” and how the land “is directly affected by the proposed project.”

[16] On May 31, 2012, OSEC responded to the Director’s letter of May 8, 2012 on behalf of its members stating:

- a. the members of OSEC are FMEA, Pembina, and Alberta Wilderness Association;
- b. all OSEC members are directly affected by the proposed project; all OSEC members have access to the Lands; FMEA and Pembina on behalf of all members of OSEC have an interest in land by way of the licence to occupy where members can access the Lands;
- c. OSEC has participated in over 14 Energy Resources Conservation Board hearings for oil sands projects; and
- d. any individual or organization sharing OSEC’s objectives can become a member.

[17] Attached to this May 31, 2012 letter was Pembina and FMEA’s licence to occupy the Lands and a description of how the Lands could be directly affected by STP’s applications including impacts on water quantity and quality, wildlife, air quality and land access including:

- a. the Project requires significant amounts of groundwater with steady-state make-up water at 1,708m³/d and approximately 4,000m³/day of make-up water in the first two years;
- b. decreases in groundwater entering the MacKay River are likely given the proximity of the well pads to the MacKay River and the underground aquifer/channel that parallels the River under the Project;

- c. there is risk the River could run dry in the winter which will impact recreational activities such as fishing; and
- d. STP's application predicts elevated arsenic concentrations to occur in non-saline aquifers that could contaminate the River and restrict the recreational use of the Lands.

[18] On June 15, 2012, STP wrote the Director with respect to OSEC's Statement of Concern of March 28, 2012 and its responding letter of May 31, 2012, arguing that OSEC's Statement should not be accepted as an "official statement of concern."

[19] By letter dated June 26, 2012, the Director responded to OSEC's May 31, 2012 letter and advised that OSEC's "submission will not be considered a Statement of Concern pursuant to section 73 of [EPEA] and section 109 of the *Water Act*" because:

- a. the information provided by OSEC "does not sufficiently demonstrate that a majority of OSEC or its members are directly affected by the subject applications;" and
- b. the licence to occupy "does not demonstrate that OSEC or its members are directly affected" by STP's applications.

[20] On July 6, 2012, OSEC's legal counsel wrote the Director requesting him to review and reconsider his decision of June 26, 2012 stating that:

- a. there is no statutory requirement or legal principle that a majority of OSEC's members or a majority of the members' individual membership must be directly affected by STP's application;
- b. OSEC is not a legal entity but short hand for the combined efforts of its organization members;
- c. Pembina and FMEA are "persons" as legally defined that have legal rights directly affected by STP's applications; and
- d. Pembina and FMEA's rights to the use and enjoyment of their licence of occupation may be reduced in value and utility by STP's applications.

[21] On July 17, 2012, the Director responded to the July 6, 2012 letter re-affirming his decision that the Applicants did not file a "valid statement of concern stating:

- a. he applied the most recent decisions of the Environmental Appeals Board to determine if "OSEC was directly affected";
- b. he asked for information about OSEC's membership to "determine if there were individuals who could be directly affected"; and

- c. he considered whether the “project could possibly have any effect” on the licence to occupy; OSEC did not identify “individuals who could be reasonably affected by the project.”

E. Briefing Note

[22] On March 11, 2013, the Director filed the record in these proceedings. It contains a Briefing Note to the Deputy Minister of Alberta Environment dated August 12, 2009 on the subject “Statement of Concern Rejection of Oil Sands Environmental Coalition” in connection to OSEC’s statement of concern submitted for another oil sands project. The Briefing Note described the reasons for “Alberta Environment rejecting the coalition as a statement of concern filer” including OSEC’s withdrawal from CEMA. The significance of this document is so pivotal to this decision that I reproduce it in full:

BRIEFING NOTE

☐ Minister
☒ Deputy Minister

☐ For Decision
☒ For Information

AR 37229

SUBJECT: Statement of Concern Rejection of Oil Sands Environmental Coalition

DATE: August 12, 2009

ISSUE:

Alberta Environment is rejecting the Oil Sands Environmental Coalition as a Statement of Concern filer for the Syncrude Southwest Sand Storage Conversion Project *Environmental Protection and Enhancement Act* and *Water Act* applications.

BACKGROUND:

The application for the Syncrude Southwest Sand Storage Conversion Project was advertised on January 14, 2009 with Statements of Concern due to Alberta Environment by March 20, 2009. The department received 21 submissions, only four met the Statement of Concern requirements. There was an obvious coordination amongst the environmental community to respond to the notice, with specific reference to the Energy Resources Conservation Board tailings Directive.

The Oil Sands Environmental Coalition has traditionally been accepted as a Statement of Concern filer for oil sands mine project applications. The Oil Sands Environmental Coalition is composed of three environmental groups: The Fort McMurray Environmental Association (with 40 members from Fort McMurray and Anzac); The Pembina Institute (with 56 staff & 31 members from across Alberta); and the Toxics Watch Society (with 3 staff & 15 members from

across Alberta). The Pembina Institute has published documents about the oil sands for several years.

The Oil Sands Environmental Coalition has been a consistent Statement of Concern filer over the past decade, for most major mineable oil sands projects. There had at one point been an internal decision to accept them, setting some precedence for continued acceptance. Considerations for accepting them in the past included: the Fort McMurray Environmental Association was quite active in local multi-stakeholder groups like the Cumulative Environmental Management Association for the Wood Buffalo Region and the Wood Buffalo Environmental Association; many of the members of the Fort McMurray Environmental Association live in and around Fort McMurray; they have been relatively simple to work with as Statement of Concern filers (they've never appealed a decision); the Oil Sands Environmental Coalition has engaged in the Statement of Concern process since its early stages, when the "directly affected" test had not yet been fully established; and they were given the benefit of the doubt. The Oil Sands Environmental Coalition and its member organizations have since withdrawn completely from the Cumulative Environmental Management Association, and as reflected in the Pembina Institute's recent publications about the oil sands, are now less inclined to work cooperatively.

After consulting with Alberta Environment's legal team it has been concluded that information provided is insufficient for the Oil Sands Environmental Coalition to meet the test of directly affected. Alberta Environment is rejecting the coalition as a Statement of Concern filer. It has been decided that we should continue to ask the Oil Sands Environmental Coalition to prove how they are directly affected on future applications.

We have been more consistently applying the directly affected test to the groups or individuals who submit Statements of Concern. With more parties providing submissions, there is a need to identify the groups or individuals who are truly directly affected, and this test needs to be fairly applied between the stakeholders.

The Oil Sands Environmental Coalition may criticize this decision. Given their withdrawal from the Cumulative Environmental Management Association, and the Pembina Institute's publication of negative media on the oil sands, the following actions may result from this decision: the Oil Sands Environmental Coalition could make statements that Alberta Environment is pushing the public out of the Statement of Concern process; they could do a membership drive to gain more members in Fort McMurray and area who could then claim to be directly affected; it could trigger statements from groups such as Greenpeace or Sierra Club or it could trigger the Oil Sands Environmental Coalition to take a more legalistic approach where opportunities arise, including asking the Environmental Appeals Board to review its directly affected status.

Alberta Environment Executive, Communications, and other relevant staff need to be aware of the decision to reject the Oil Sands Environmental Coalition as a Statement of Concern filer on this application and why it was made, so that we are able to defend our position clearly.

The Fort McMurray Environmental Association may be able to meet the directly affected test on its own (outside of the Oil Sands Environmental Coalition banner) for some future projects.

RECOMMENDATIONS:

Executive and Communications should be prepared for any question raised by the Oil Sands Environmental Coalition and its member organizations by this decision.

For Minister's Use:

☐ Agree with recommendations

☐ Disagree with recommendations

MINISTER AND/OR DEPUTY MINISTER'S COMMENTS/DECISION:

CONTACT: Tanya Richens

TELEPHONE: (780) 415-9630

SUBMITTED BY: Environmental Management

☐ Requires legislative/regulatory change

[23] Concerning this document I note:

- a. Until the record was filed in this matter the present applicants were unaware of the "Briefing Note."
- b. As the "Briefing Note" indicates, the decision had been made (but not yet published) to disallow OSEC as a Statement of Concern filer in the matter of the application by the Syncrude Southwest Sand Storage Conversion Project. The Director also rejected OSEC as a Statement of Concern Filer in the matter of CNRL Kirby Expansion Project (Letter of Concern April 19, 2012; rejection September 25, 2012) and in the matter of Tech Resources Limited Frontier Oil Sands Mine Project (Letter of Concern June 4, 2012; rejection September 21, 2012). The present rejection of OSEC as a Statement Concern filer is the fourth consecutive decision of the Director consistent with the "Briefing Note."

- c. There is, in fact, no reference in the Director's reasons on any of the four rejections to any of the reasons stated to be the "reasons for rejecting OSEC as a Statement of Concern filer" in the "Briefing Note." The reasons provided are so close to being identical they seem to have been cast from the same template.
- d. Finally, I note that only a party who has been accepted as a Statement of Concern filer by the Director may appeal the decision of the Director concerning the application for an environmental and water permit to the EAB. The EAB may decide not to allow a Statement of Concern filer to appeal by deciding, for instance, that the Statement of Concern filer, while allowed that status before the Director during the decision making process, is not sufficiently "directly affected" by the Director's actual decision to be allowed to appeal it. The significance of this is that by denying OSEC, or perhaps more correctly Pembina and FMEA, status as a Statement of Concern filer, the Director has foreclosed the possibility that these two organizations could be allowed status as an appellant of the Director's decision.

III. Analysis

[24] In my view the entire process in this case is so tainted by the "Briefing Note" that in arriving at my decision, I need only refer to the applicants' contention that the Director breached the principles of natural justice by taking into account improper and irrelevant considerations.

A. Standard of Review

[25] *Baker v Canada* [1999] 2 S.C.R. 817 states the fundamental principles of the duty of procedural fairness are:

1. a fair and open procedure
2. the right to be heard
3. consideration by the decision maker tasked with the duty to decide and
4. decisions are to be free from the reasonable apprehension of bias.

[26] Procedural fairness is reviewed on a correctness standard. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 19-22, 2011 3 SCR 708; *Edmonton Police Association v. Edmonton (City of)*, 2007 ABCA 184 at para 3; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 19 and 22.

B. Purpose of the *EPEA* and *Water Act*

[27] The purpose of the *EPEA*, as set out in section 2 of the Act, is "to support and promote the protection, enhancement and wise use of the environment" while recognizing a set of principles set out in subparagraphs (a) to (j):

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to 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 co-operatively 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 responsive action in administering this Act.

[28] The appellants placed considerable emphasis on subparagraphs (a), (f) and (g). The respondent Director highlighted subparagraph (b) with an emphasis on the balancing act the Director must perform to arbitrate between the need for Alberta's economic growth and prosperity and doing so in an environmentally responsible manner. Nowhere in the *EPEA* and the *Water Act* is there a suggestion that promoting Alberta's economic growth in an environmentally responsible manner permits the Director to reject Statements of Concern from those persons or groups who voice negative statements about proposed oil sands development. The applicants cited from Hansard what was said by the Minister of the Environment at the time EPA was enacted:

The seventh principle is the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. In other words, Mr. Speaker, this Act, Bill 23, is not just a set of laws; it really is an environmental agenda. It's an environmental agenda that will be amended and probably changed through the course of time but only through the input of the citizens of Alberta. Basically this principle allows the facilitation of public access and service by providing a single-window approach to Alberta Environment

making for more streamlined administrative procedures. It includes an access to information section, a requirement for state-of-the-environment reporting, increased public consultation and participation in all aspects of environmental protection and enhancement activities, provisions supporting studies on the environment, a library, educational materials, public consultation in the development of guidelines, objectives, and regulations, public consultation in the environmental impact assessment process and the approvals process, opportunities for appeals for parties directly affected by decisions through the creation of an environmental appeal board. This board will provide an independent review of the decisions made by directors and other people within the department to provide a system of checks and balances on those decisions. This principle also provides for allowing for requests by citizens for investigations and contraventions.

Alberta, Legislative Assembly, *Hansard*
22nd Leg., 4th Sess. (4 June 1992) at 1184

[29] 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] I also make reference to the approvals program policy APPC-2008-01 Environmental Division dated September 22, 2008. This is the policy in force when OSEC filed its Statement of Concern. I refer under the heading of Policy 2(i):

- (i) Directly affected – Anyone living in the geographic vicinity of the activity will be considered directly affected. (Note: For small facilities with minimum potential for offsite impact, geographic vicinity may be considered as encompassing an area of only a few kms in radius from the site whereas for larger activities the area may be much larger – this will have to be assessed on a case-specific basis.) Any organization that has a portion of its members living in the geographic vicinity of the activity will also be considered directly affected, e.g., a community league. In general, associations representing the general public or people who just periodically visit in the geographic vicinity of any activity will not be considered directly affected.

[31] I refer also to 2(v), which emphasizes that where there is a doubt, the concern should be accepted as a Statement of Concern; and 2(vi):

- (vi) *Rejection/Acceptance of Statements of Concern from Organizations* – When organizations file a Statement of Concern and it is unclear whether they are directly affected, a letter should go to them requesting information on how the organization is directly affected.

C. Fundamental Principles of the Duty of Procedural Fairness

[32] I will now deal with the four aspects of the fundamental principles of the duty cited in *Baker v Canada*.

1. Fair and Open Procedure

[33] Obviously a fair and open procedure does not allow the Department of the Environment to ignore the purposes of the Act as published, the statements of principles enunciated in the legislature by its Minister or consideration of his public policy document, while apparently operating under an undisclosed policy (the Briefing Note). That Briefing Note contradicts the publicly stated policies of the *EPEA* encouraging public participation in the regulatory process by using as criteria for acceptance of the "Statement of Concern" whether the filer:

- a. has been "relatively simple to work with," i.e., whether they have appealed a decision";
- b. is perceived as being cooperative by gauging whether their publications are supportive of oil sands – participation in Cumulative Environment Management Association (I can only assume from the language used in the Briefing Note that members of this association are regarded as supportive of oil sands development, i.e., "cooperative"); and
- c. has published negative media on the oil sands.

2. The Right to be Heard

[34] Pembina and FMEA cannot complain they were not allowed to make submissions as to why they should be allowed to be a Statement of Concern filer. However, they were not told about the "Briefing Note" and consequently could not have answered the allegation that Pembina was regarded as uncooperative because it had withdrawn from CEMA and had published negative comments about oil sands development. This clearly violated the principle that one has the right to be heard and, in this case, to answer allegations made against it in secret.

3. Consideration by the Decision Maker Tasked with the Duty to Decide

[35] The reasons given are sparse. They reference decisions of the Alberta Environmental Appeals Board which certainly can be referred to by the Director for guidance. The reasons are fatally flawed, however, because the entire process was tainted by the Briefing Note which I interpret as a formula for rejection of future submissions of Statements of Concern from Pembina and OSEC. The principles of natural justice clearly require the decision maker to not consider irrelevant and improper reasons. Since as a matter of policy the Director was told to consider whether the Statement of Concern filer was cooperative and whether it had published negative media about the oil sands in coming to the Director's conclusion, the reasons are fatally flawed.

4. Decisions are to be Free from Reasonable Apprehension of Bias

[36] The test for reasonable apprehension of bias is set out at paragraph 46 of *Baker* from the judgment of L'Heureux-Dubé J. I quote only part of the paragraph:

The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394.

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information ... [T]hat test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 11, *per* Major J.; at para 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para 111, *per* Cory J.

[37] In my opinion a well-informed member of the public, reading the purposes of the *EPEA* as set out in section 2 of the *Act*, reading the comments of the Minister of Environment as cited by me from Hansard and reading the approval policy cited by me from the record in these proceedings, would perceive that the valid object of the *EPEA* to give the citizens of Alberta as much input as reasonable into the environmental concerns that arise from proposed industrial development is hijacked by the Briefing Note. That note basically says that the interpretation of “directly affected” will be changed in such a way that OSEC will no longer qualify as a Statement of Concern filer for oil sands projects. The reasons given for the change—lack of cooperation by Pembina because they withdrew from CEMA and have been publishing negative media about the oil sands—clearly indicate Pembina in particular and OSEC generally were targeted. It is difficult to envision a more direct apprehension of bias unless it is the Premier of Quebec telling the Quebec Liquor Commission to revoke a restaurateur's liquor licence because the proprietor of the restaurant is a Jehovah's Witness as happened in *Roncarelli v Duplessis*, [1959] S.C.R. 121.

IV. Decision

[38] Accordingly the Director's decision breaches all four of the principles of natural justice and must be quashed.

[39] I have been asked by the applicants to make further comments to guide the Director in deciding this and future applications by OSEC or its member groups to be granted status as the Statement of Concern filer. I will comment on several areas which were argued before me. I

specifically decline to make any further rulings on the arguments so these comments are to be considered *obiter dicta*.

A. Who are the Applicants to be Recognized as Statement of Concern Filers?

[40] This question arises in this case because OSEC stated it was a coalition consisting of Pembina, FMEA, Alberta Wilderness Association and another member who had withdrawn from the organization before the Director's decision. Mainly it relied for the "directly affected" status on the licences of occupation held only by Pembina and FMEA. OSEC, as a coalition, did not seek judicial review of the Director's decision; only Pembina and FMEA did. As I indicated in argument, I see no reason why "persons" with like interests and concerns should not coalesce to make one Statement of Concern. This tends to minimize the proliferation of like submissions before the Director. I do not find it unreasonable for the Director to obtain details of the interests of the individual members of the coalition including the residences of those members who are individuals and to ask how they are impacted by the proposed development. It would not necessarily be unreasonable for the Director to decide some members of the coalition are directly affected while others are not. Nor is it necessarily unreasonable for some members of a coalition to seek judicial review while others do not since a coalition such as OSEC has not created a separate entity known to law, and it is its members who enjoy the status of being "legal persons."

B. Directly Affected

[41] I believe this Court is bound by the decision in *Castlecrown Wilderness Coalition v Alberta (Director of Regulating Assurance Division, Alberta Environment)*, 2005 ABCA in which Justice Ritter with whose reasons the other two members of the panel concurred wrote at page 31:

- 31 The Supreme Court wrote in Dr. Q that, as a general principle, increased deference is called for where legislation is intended to resolve and balance competing quality objectives or the interests of various constituencies:
- 30 As the reviewing judge noted at para 22 of her decision, the EPEA and the environmental assessment process mandates policy considerations and the weighing of competing interests. This factor suggests a high degree of deference.

[42] The fact that the Director, when deciding whether a person is directly affected, is interpreting his own statute, indicates the decision is to be reviewed on a standard of reasonableness. As I wrote above, the Director's reasons should indicate application of the principles set out in paragraph 2 of the *EPEA* and its own statements of policy such as the approvals program policy, APPC-2008-01, Environmental Division. Furthermore, I think the process of identifying who is "directly affected" should not be decided by the application of rigid rules at the level of Statements of Concern. I agree with paragraphs 24 and 25 of the EAB's decision cited as *Ouimet et al v Director, Regional Support Northeast Boreal Region, Regional*

Services, Alberta Environment, re: Ouimet Packers (2000) Ltd. (January 28, 2002), Appeal No. 01-076-D (footnotes omitted):

24 The Board notes that the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision. This purpose is properly reflected in the “Policy on Acceptance of Statement of Concern (1997).” This policy, established by then Assistant Deputy Minister Al Schulz, states:

“... considerable judgement will have to be exercised in determining what constitutes a valid Statement of Concern and where there is any doubt the concern should be considered a Statement of Concern.”

25 The purpose of the directly affected test *vis-à-vis* the Board is somewhat different. While still promoting good decision-making, the Board's decision respecting directly affected determines whether the person (or in this case, a person and an organization) has a right to appeal. The Board is more strictly focused on the burden of proof and involves a more adversarial process. As a result, the board's determination respecting an appellant's standing must, by its very nature be more specific.

[43] The EAB interprets the words “directly affected” for the purpose of standing on appeal as a higher standard to meet than the persons asserting they are directly affected for the purpose of being allowed to be a Statement of Concern filer.

[44] The Respondents cited my decision in *Kostuch v Alberta (Environmental Appeal Board)* (1996), 182 A.R. 384. In that case the Director (who performed the same role as the Director in the case at bar) amended a permit granted to the Alberta Cement Corporation by extending the deadline for construction of a cement plant from November 1, 1994 to November 1, 1995 and provided for additional soil and groundwater monitoring. The applicant, Martha Kostuch, objected to the Director's decision by filing a notice of objection with the Environmental Appeal Board, the Board similar to the Environmental Appeals Board constituted under the present *EPEA*. The Board ruled that Ms. Kostuch was not directly affected by the Director's decision and denied her status as an objector. I note that under section 84(1)(a)(iv) of the *Environmental Protection and Enhancement Act* in force at that time a notice of objection could only be submitted “by the approval holder or by any person who had previously submitted a statement of concern in accordance with section 70...”; legislation almost identical to the present legislation. At para 12 of my decision I stated “[t]he applicant had filed a statement of concern.” Since the test of who is “directly affected” is less stringent before the Director than at the level of the EAB,

my decision approving the EAB's decision is not directly applicable in this case. It simply shows that status may be granted as a Statement of Concern filer but that same person may not meet the definition of "directly affected" for the purpose of an appeal to the EAB. Although I agreed with the EAB's decision, I stated they were entitled to deference in interpreting their statute.

[45] I voiced at the hearing of this matter and reiterate here my concern that the only persons who gained status of Statement of Concern filers were an Aboriginal band, Fort McKay First Nation, and a Métis association, the Fort McKay Métis Association (both of whose close ties to the land are indisputable), but that OSEC, self-described as "a coalition of Alberta-based environmental organizations with a longstanding interest in environmental and socioeconomic issues associated with oil sands development" should not be granted status as a Statement of Concern filer. The applicant STP is heard; the Aboriginal interests are well represented; but those who voice environmental concerns including Fort McMurray, Fort McKay and Anzac residents and a major environmental organization, Pembina, are not allowed a voice. Apparently no one else applied to be heard so I wonder how real the concern expressed on page 2 of the "Briefing Note" is: "with more parties providing submissions, there is a need to identify the groups or individuals who are truly directly affected, and this test needs to be fairly applied between the stakeholders." Keeping in mind that repetition of identical concerns by those generally and similarly impacted is to be discouraged, there is room for flexibility in the definition of "directly affected."

C. Conclusion and Decision

[46] For the reasons given above, the decision of the Director is quashed as being in violation of the rules of natural justice.

[47] The parties may speak to costs by appointment if necessary.

Heard on the 5th of September, 2013

Dated at the City of Edmonton, Alberta this 1st day of October, 2013.



R.P. Marceau
J.C.Q.B.A.

Appearances:

Karin E. Buss
Klimek Buss Bishop Law Group
for the Applicant

Wendy L. Thiessen and Alison L. Altmiks
Alberta Justice and Solicitor General
for the Director, Northern Region, Alberta Environment and Sustainable Resources
Development

Maureen Killoran and Thomas Gelbman
Osler Hoskin & Harcourt LLP
for Southern Pacific Resources Corp.