ENVIRONMENTAL
LAW CENTRE

January 3, 2012

Via email to: foothills.rockyview@assembly.ab.ca

Honourable Ted Morton
Minister of Energy
Room 404, Legislature Building
Edmonton AB T5K 2B6

Dear Minister Morton,

Re: Standing at administrative boards and tribunals in Alberta

The Environmental Law Centre (ELC) is a charity with a mission to ensure that Alberta's laws, policies and legal processes sustain a healthy environment for future generations. The ELC is guided by legal integrity and considers government authorities that make environmental law and policy to be among its stakeholders.

This letter follows from a conversation between yourself and John Lawson of Cowley, Alberta in September 2011. As promised by Mr. Lawson, the ELC is providing a brief of its work to improve participation at administrative agencies that consider the environment and determine the public interest. This work could assist the Alberta government with several initiatives in 2012.

The most contentious participation issue in Alberta today is 'standing': basically the right to a hearing. The ELC has identified two causes of contested standing that are especially relevant to the operation of administrative agencies. First, contested standing arises in conjunction with confusing rules and high participation thresholds.[1] Second, the mandate of several agencies with respect to the public interest is ill defined. The Energy Resources Conservation Board (ERCB), Alberta Utilities Commission (AUC), and Natural Resources Conservation Board (NRCB) are required by legislation to make social, economic, and environmental considerations, but receive little guidance on how to do so. Conversely, the Environmental Appeals Board (EAB) scrutinizes official environmental decisions, but the legislation does not clarify that this is a matter of public interest. Regulatory boards and appeals tribunals differ in some ways but the same concerns emerge wherever the environment is a consideration. All of the above agencies follow a model where public concerns and duties are to be fully met through the substantive outcome of decisions. This is inconsistent with contemporary legal theory, in which "the public interest" includes a procedural element as well. The procedural element requires that participation be harmonious with the nature of the substantive

[1] Jodie Hierlmeier and Cindy Chiasson , *Public Access to Environmental Appeals: A review and Assessment of Alberta's Environmental Appeals Board*, (Edmonton: Environmental Law Centre, 2006).

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issues.[2] These two findings are corroborated by an assessment of Canadian environmental law conducted by Dr. David Boyd. Dr. Boyd found that the lack of formal public input into decisions is a "fundamental flaw" in our system and that complex participation rules are "designed to fail".[3] Unfortunately, his example was Alberta's practice of restricting standing to parties that may be 'directly affected'.

The 'directly affected' test is being destabilized under increasing litigation. Recent cases have seen the Alberta Court of Appeal (ABCA) reject agency interpretations of 'directly affected'.[4] The ABCA is also recognizing that there are serious issues with the legality of administrative decisions in Alberta that could warrant "public interest standing" for persons with a "genuine interest".[5] In contrast, the EAB recently asserted that it "cannot and will not" grant public interest standing.[6]

Meaningful public participation is crucial to a healthy democracy. Though Alberta provides many informal consultation opportunities, meaningful participation requires some opportunities to conduct proceedings with records and reasoned decisions. Restricting standing to private interests denies any such opportunity at any point in Alberta's resource development process. The effect of this blanket restriction is twofold. First, it can marginalize segments of society, which is inconsistent with our constitutional values. Second, it can encourage officials to act with impunity, which undermines the rule of law.

Restrictive standing could push the litigation from interpreting agency legislation into the realm of the common law and constitutional challenges. This future could see an increasing amount of resources from all stakeholders diverted to contested standing. If environmental issues are to be resolved administratively and in a less adversarial manner, the onus is on Alberta's legislators to enable that.

The ELC is advocating for reform to the law of standing. To ensure the practical value of our recommendations, the ELC has interviewed numerous lawyers who appear at administrative agencies and numerous organizations that represent public concerns. Their confidential responses revealed that the current law is imprecise, administrative preferences weigh heavy, and determinations of standing are inconsistent if not arbitrary. The clearest finding may be that any standing to represent public concerns always opposed and usually denied. Some agencies might assert that individual decisions do not invoke public concern or public policy issues, but this view is definitely not shared by many parties that appear

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[2] Jodie Hierlmeier, "The Public Interest: can it provide guidance for the ERCB and NRCB?", (2008) 18 Journal of Environmental Law and Practice, p.279.
[3] David Boyd, *Unnatural Law* (Vancouver: UBC Press, 2003).
[4] *Kelly v. Alberta (Energy Resources Conservation Board),* 2009 ABCA 349; *Kelly v. Alberta (Energy Resources Conservation Board),* 2011 ABCA 325.
[5] *Reece v. Edmonton (City),* 2011 ABCA 238; *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission),* 2011 ABCA 302.
[6] *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment,* re: *Eastern Irrigation District* (30 August 3011), Appeal No. 10-038-043-ID1 (A.E.A.B.).

before them. Agencies that are required by legislation to determine the public interest must weigh multiple considerations and their decisions will impact multiple public resources. Restrictive standing could be undermining agency mandates and preventing the best decision making.

Raising social and environmental concerns is exceptionally difficult when standing requires some private interest. This approach is illogical for the agencies and unfair for the interveners because it promotes role conflation and conflicts of interest. Meanwhile, organizations that exist to represent the issues of concern and have the capacity to conduct responsible proceedings are denied standing. Agency process can become a battle of private economic interests. Agencies are disproportionately exposed to the representations of the regulated industries which can trend decisions towards those interests. This is the phenomenon of 'regulatory capture', and there is growing sentiment among reputable advocates that it is occurring in Alberta today.

In contrast, persons who were granted standing reported success in negotiating agreements with project proponents, promoting conditions that enhance public acceptance of the project, and encouraging decisions that identify project impacts and make recommendations for future actions. Basically, interveners are offering a public service. This service could be enhanced if the most appropriate service providers were allowed to participate. Tellingly, organizations who do not seek to intervene and lawyers who represent private interests still favored broader standing rules.

Restrictive standing also implies some efficiency concerns that might not be substantiated. The ELC found no realistic evidence that Alberta's agencies could be flooded with busybodies. Desirous interveners showed experience with the subject matter and working relationships with government and industry. Intervention was only considered where there was potential to contribute to the decision. Even meritorious interventions were dissuaded by further barriers including costs, social stigmatization, and power imbalances between the parties.

In sum, there is a need for clear, fair rules that enable the best decisions in accordance with agency mandates and in an efficient manner. The ELC is researching other jurisdictions that have experienced success and the most frequently cited example is Australia. Australia provides an apt comparison as it is a federal state with a common law legal tradition and significant natural resources industries. Our early findings indicate that standing can be broadened without promoting frivolous proceedings. The Australian jurisprudence recognizes that standing is an issue of public law, not private grievances.[7] In public law, the judicial trend is towards a liberal interpretation of the interests required to participate.[8] This trend affords

[7] Brian Preston, "Standing to Sue at Common Law in Australia", (Paper presented to the Joint Seminar on Legality of Administrative Behaviours and Types of Adjudication, National Judges College And Administrative Trial Division of the Supreme Peoples' Court , Xian, People's Republic of China, 111-13, April 2006), [unpublished].
[8] *Ibid.*

standing to groups and organizations.[9] Australian law reform recommendations would further this liberalization by replacing all special interest requirements with one broad test for standing.[10] A second finding is that 'floodgate' arguments can be overblown. The ELC discussed this issue with Chief Judge Brian Preston of the Land and Environment Court of New South Wales. This Court was created by statute to provide a single adjudicator for natural resource project permitting, environmental protection actions, and land use planning decisions. The legislation provides for open standing, but predictions that the Court would be flooded by environmental groups were proven false. In fact, the Court hears 2000 cases a year of which roughly 7 are brought under the open standing rule.[11]

The ELC's preliminary recommendation for Alberta is to create one consistent test for standing for all administrative agencies that process environmental concerns. This would include the ERCB, AUC, NRCB, EAB, and any future single energy regulator. At each of these agencies, multiple determinations of standing for the purpose of decision reviews or appeals should be eliminated in favor of the universal test. The test should be that parties demonstrate a "genuine interest" in the substantive subject matter of the decision. The onus of establishing a "genuine interest" will be on that party. There should be factors to consider in determining a genuine interest, including experience with the subject matter, a record of involvement, and a responsible approach to the conduct of proceedings. Parties that establish their genuine interest should not have their standing contested at subsequent stages or in other proceedings on the same subject matter. Granting broader standing in the first instance would promote administrative efficiency and conserve judicial resources. Genuine interest standing would allow for reasonable representations and deliberations on matters of public concern while preventing frivolous proceedings. Benefits would include better information for decision makers and better oversight of decisions, which in turn would produce better decisions with greater public acceptance.

Thank you for your interest in this important issue. The ELC's work on standing will continue through 2012 and we would be happy to hear from you or your officials to discuss the issue further.

Sincerely,

Adam Driedzic,
Staff Counsel

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[9] *Ibid.*
[10] Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (AGPS Canberra, 1985); *Standing in Public Interest Cases*, (Queensland Public Interest Law Clearing House, Inc., July 2005); Australian Law Reform Commission, *Beyond the Door Keeper. Standing to Sue for Public Remedies*, Report 78 (ALRC, 1996).
[11] Personal communication, February 4, 2011.