



Standing in Environmental Matters

Environmental Law Centre

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The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (Alberta) Society is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. Its vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied.

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Standing in Environmental Matters

Introduction

This is a comprehensive report on “standing”: the legal status necessary to receive a hearing from a court or an administrative board or tribunal that holds hearings. The purposes of this report are to:

- Provide an informative update on the law of standing since the last comprehensive reviews of this topic in the 1980’s and 1990’s, with a focus on standing in environmental matters.
- Compare the merits of current models of standing on environmental matters based on their positive and negative impacts.
- Canvas options and make recommendations for a functional approach to standing at environmental agencies.

Part I provides a working definition of standing and identifies several reasons why standing in environmental matters is so contentious.

Part II focuses on standing in the courts. It includes a review of the mandate of the courts and introduces key principles of common law standing. It provides an update on public interest standing at the Supreme Court of Canada (SCC) since the last major law reform reports and a detailed review of standing in environmental litigation in the lower courts.

Part III focuses on standing at environmental agencies. It includes a review of the mandate of administrative agencies and identifies how the principles of standing at agencies differ from those applicable to standing in the courts. It also provides a comparison of three common models to standing at environmental agencies and the impact of these models.

Part IV explores whether common law public interest standing should apply at environmental agencies, and considers whether court interveners provide a more relevant model for standing at agencies.

Part V briefly reviews standing in environmental matters in other common law countries with a focus on Australia and New Zealand.

Part VI summarizes common trends concerning standing in court and administrative agencies and makes recommendations for reform to standing at administrative agencies.

Part I: What Is Standing, and Why is it So Contentious?

What is Standing?

Standing is a “gatekeeper” tool. It determines whether hearings should be held and who should be heard. It can control the issues that are decided and the interests that are represented in those decisions. For the purpose of this report, a person with standing is someone with the necessary legal status to trigger a hearing that would not otherwise occur, or someone with full party status in hearings that have been triggered. Standing to trigger hearings is the most contentious issue but standing for additional parties is not free of controversy.

The contentiousness of standing in environmental matters begins with simply trying to define the concept of standing. The common law rules were developed by the courts for use in the adversarial litigation system. This occurred prior to the 20th century regulatory state in which the subject matters of public administration expanded significantly. The historic definitions of standing were very focused on a private individual’s enforceable legal rights. These definitions are often unsuitable for public law matters in the courts and are even more questionable for use at administrative agencies. Some historic definitions do not distinguish between standing and the merits of the substantive claim advanced by the person seeking standing. In other words they equate standing with entitlement to the relief sought from the courts.¹ Others equate standing with entitlement to seek relief rather than the entitlement to that relief.² A common approach focuses on the “interest” that an individual holds, for example being “directly affected” by a decision.³ Modern public law jurisprudence focuses on whether the “issue” raised is suitable for determination.⁴ This shift in focus from the plaintiff’s interests to the issues is the origins of “public interest standing” in the courts as discussed in Part II. However, that form of standing is still a litigation model of questionable applicability to administrative agencies as discussed in Parts III and IV.

Standing in Court versus Standing at Administrative Agencies

As standing is a tool to discharge public decision-making duties, the model of standing should fit the mandate of the decision maker. The decision-making mandates of courts and administrative agencies are very different on account of them having different institutional roles. The courts are their own branch of government with constitutional status alongside the legislative and executive branches of government. This supports inherent jurisdiction to hear issues suitable for judicial determination. Administrative agencies are extensions of the executive branch of government whose mandates to decide issues and determine standing come from ordinary legislation. These different mandates are discussed at length in Parts II and III respectively.

¹ Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) [Locus Standi].

² *Ibid.*

³ *Ibid.*

⁴ *Ibid.*

Past law reform reports treated standing at courts and administrative agencies as different though related issues on account of these different mandates. They either focused on standing in courts, or included standing at agencies in a broader review of agency decision-making processes. The context for comparison has changed. In the 1980's and 1990's, law reform commissions in Canada and abroad found common law standing in the courts to be dysfunctional for public interest matters and in need of legislative reforms.⁵ Standing at agencies did not receive much historic attention which suggests that it may have been less of an issue. As of the 2000's, the Canadian approach to standing that is most often cited positively is the development of common law public interest standing by the courts.⁶ In contrast, there are increasing reports of questionable approaches to standing and recommendations for reforms concerning administrative agencies whose decisions may impact the environment ("environmental agencies").⁷ Litigation on standing at environmental agencies is increasing and there have been multiple legislative reforms that include standing. Court cases and academic commentary are increasingly grappling with the extent to which principles of common law standing developed by the courts should or should not apply in the administrative agency context.

The legal rules that determine standing in the courts are not clearly applicable in the administrative agency context but some of the policy rationales for and against standing are. Reasons for restrictive (or "narrow") standing include the baseline position of government as keeper of the public interest, concern with efficient use of decision-making resources, and concern with effects of standing on more directly affected third parties, especially in the regulatory context. These rationales are often articulated as the need to prevent "floodgates" and "busybodies". Reasons for relaxed (or "broad") standing include the practical need for public interest representation by non-government participants, upholding decision-making mandates by allowing issues suitable for determination to be heard, and allowing the representation of interests that should be considered in these decisions. These rationales may be expressed as concern with "fairness", "access to justice" or concern with accountability and procedural legitimacy.

Rationales for narrow standing are the most transferable from courts to the administrative agency context and are more universally applicable between agencies because they reflect generalized concerns with efficiency and harm to other parties. Rationales for broad standing vary more between courts and

⁵ Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: OLRC, 1989) [Ontario Commission]; Australian Law Reform Commission, *Beyond the Door Keeper, Standing to Sue for Public Remedies*, ALRC Report 78, (Sydney: ALRC, 1996) and *Standing in public interest litigation*, ALRC Report 27 (Sydney: ALRC, 1985) [Australian Commission]; South Africa Law Commission, *The Recognition of Class Actions and Public Interest Actions in South African Law*, Project 88, (Pretoria, SALC 1998) [South African Commission].

⁶ David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy*, (Vancouver: UBC Press, 2003) [Unnatural Law]; Donald Zillman, Alastair Lucas and George (Rock) Pring, eds., *Human Rights in Natural Resource Development: Public Participation in the Sustainable Development of Mining and Energy Resources* (New York: Oxford University Press, 2002) [Human Rights in Natural Resource Development].

⁷ Mark Haddock, *Environmental Tribunals in British Columbia* (University of Victoria Environmental Law Centre, 2011) [Tribunals in British Columbia]; Alberta Law Reform Institute, *Powers and Procedures for Administrative Tribunals in Alberta*, ALRI Report 79, (Edmonton: Alberta Law Reform Institute, 1999) [Tribunals in Alberta]; Cindy Chiasson and Jodie Hierlmeier, *Public Access to Environmental Appeals: A Review and Assessment of Alberta's Environmental Appeals Board*, (Edmonton: Environmental Law Centre (Alberta) Society, 2006) [Alberta's Environmental Appeals Board].

agencies because they are tied to substantive decision-making mandates. For example, the leading international law agreement on procedural rights in environmental matters includes separate provisions on “access to justice” in the courts and “public participation” in government decisions.⁸ Though Canada is not a signatory, this type of distinction reflects the context for debate.

Regardless of the specific rationales in play, the concept of standing may ultimately be about attempts to balance competing points of view. Many models of standing are viewed as too broad or too narrow, if not both. Most criticisms are that the historic models are too narrow, especially where public interests are at stake.

Public Interests

Standing in environmental matters in courts and administrative agencies shares one singular trait with all issues of public participation in environmental decision making: Environmental decisions create unique challenges in identifying the appropriate stakeholders because they concern public resources, public goods, and impacts on public interests.⁹ The default keeper of the public interest is the elected branch of government. Furthermore, in environmental matters the impacts on public interests may be indirect or cumulative which makes individual claims even more remote.¹⁰ The impact might even be on the “commons” owned by no one.¹¹ The end result is that persons who advocate on behalf of the environment (“environmental advocates”) often lack the legal rights that support the standing of other parties like industry, landowners, and First Nations.

Environmental advocates vary immensely. They include individual private citizens, unincorporated associations, and incorporated organizations that may or may not have members. The issues they follow, their geographic focus, and their activities also vary. Some but not all can be described as public interest groups. In the case of groups, the interests they represent are more amorphous and dispersed than those represented by other corporate entities like municipalities, industry associations, trade unions or First Nations.

There is much argument but little evidence on the practical impacts of public interest environmental advocates. The positive view of these advocates is that they improve substantive decisions and legitimize proceedings. They may have capacity to conduct responsible proceedings, make the process more efficient, or provide information and expertise to help resolve the complex issues that characterize environmental regulation. Some may be repeat players, work with other stakeholders, hold moderate positions, or attempt to improve rather than stop developments. The negative view of these advocates is that their substantive contributions and conduct are questionable. They are accused of causing delay, reputational damage, or offering irrelevant or unreliable information. They may intervene in regulatory

⁸ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998) United Nations Economic Commission for Europe (UNECE).

⁹ Nancy Perkins Spyke, “Public Participation in Environmental Decision Making at the New Millennium: Structuring New Spheres of Public Influence” (1999) 26 *Environmental Affairs* 263 [Public Participation].

¹⁰ *Ibid.*

¹¹ *Ibid.*

proceedings to draw attention to public policy issues with little expectation of influencing the decisions, or they may really be seeking political stoppages of development. Public interest groups have become an ironic threat to public participation.¹²

Knowing the individualist roots of standing and the collectivist nature of environmental claims, this debate may always be more ideological than evidentiary. While public interest advocates are criticized for pursuing their own agendas, in reality, all parties do so.¹³ The one real difference is that they claim to represent broader interests than their own.¹⁴ It is likely that judicial, political and administrative views of standing for public interest environmental advocates are influenced by latent receptivity to collective claims regardless of the articulated rules and rationales. Thus, like other issues of public participation, standing is affected by current political agendas and by deeper values and institutional traditions.¹⁵ The debate over standing is part of a larger struggle to maintain the appropriate decision-making roles of courts, legislatures and administrative agencies in western constitutional democracies.

Part II: Standing in the Courts

The Mandate of Courts

The mandate of courts is comparatively simpler than the mandates of administrative agencies. The court institution, or “judiciary”, has constitutional status independent from the “legislative” and “executive” branches of government. The role of the courts is to decide legal questions through the adversarial litigation model. This includes a role in upholding the rule of law against the other branches of government.

Standing is required to trigger court hearings. The standing parties will be the plaintiff or applicant that triggers the hearing and their opponents. These adversarial parties will have a “lis” (a legal dispute) between them and are seeking relief against each other from the courts. These parties are distinguishable from “interveners”, who are only allowed at the discretion of the court and have limited roles to assist the court without causing undue harm to the parties. In the common law system the court is largely a passive decision maker that relies on arguments and evidence from the parties and from interveners to the extent that they are enabled. The courts resist making proactive inquiries or taking notice of the context of the dispute, especially in non-constitutional cases.

¹² *Ibid.*

¹³ Chris Tollefson “Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation” (2002) 51 U.N.B.L.J. 175.

¹⁴ *Ibid.*

¹⁵ Human Rights in Natural Resource Development, *supra* note 6.

Courts have inherent jurisdiction to determine standing. They determine standing under the common law unless the common law is altered by legislation, and even then there are situations where the common law may persist. Judicial determinations of common law standing merge questions of law, fact, and policy. The court articulates legal tests for standing and requires evidence of interests to meet these tests, but it also articulates policy rationales for and against standing that have a significant impact on their decisions. Key principles of standing include the need for “justiciable” issues, the “public nuisance” rule and “public interest standing”.

The Need for Justiciable Issues

Concern with maintaining institutional boundaries leads the courts to require that all issues be “justiciable”, meaning that the issues are appropriate for judicial determination.¹⁶ The need for justiciable issues has two implications for standing in environmental matters. The first is that environmental matters that raise justiciable issues come before the courts by default more than by deliberate inclusion of the courts in the environmental regulatory process. Legislation may include courts in the process by providing statutory rights to appeal administrative agency decisions to court, or it may exclude them by limiting the administrative decisions that can be judicially reviewed, but such legislation has not definitively broadened or narrowed the mandate of the courts. The second is that courts will avoid weighing the merits of substantive environmental concerns or answering political questions that it views as best left for the legislature. Many environmental claims are non justiciable due to lack of recognition in the western human rights regime. The rights regime mostly provides “first generation” or “negative” rights that protect individuals from state interference. Many environmental claims resemble “second generation” rights claims in that they would impose positive duties on governments.¹⁷ Common law countries often omit environmental rights from their constitutions and the courts have been cautious about recognizing positive duties on government.¹⁸ The *Canadian Charter of Rights and Freedoms* (the *Charter*) fits this trend as it largely provides first generation rights and omits expressed provisions on the environment. In Canada, most environmental rights and positive duties on government depend on being provided by ordinary legislation. Claims that transcend human interests such as the rights of animals or the environment itself may well be “third generation” rights and even further removed from the current regime.

The Public Nuisance Rule

The status of government as the default public interest litigant results from the English common law “public nuisance rule” which was imported to Canada in the early decades of the 1900s. This rule provided that the appropriate plaintiff to enforce public rights was the Attorney General or someone with consent of the Attorney General.¹⁹ The Attorney General could not, and still cannot, be challenged for

¹⁶ Locus Standi, *supra* note 1.

¹⁷ David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment*, (Vancouver: UBC Press, 2011) [Environmental Rights].

¹⁸ *Ibid.*

¹⁹ Ontario Commission, *supra* note 5; Locus Standi, *supra* note 1.

declining to litigate. A private citizen without consent of the Attorney General could only enforce public rights if their own private rights were violated at the same time or if they suffered special damages that were different than those suffered by the public at large.²⁰ Thus the test creates needs for evidence and causation.

In the 1980's the public nuisance rule was criticized by the leading academic commentary and by the Ontario Law Reform Commission (the "Ontario Commission"), which reviewed reports from other common law jurisdictions.²¹ The consistent criticisms are that:

- The rule is difficult to apply. There are inconsistent articulations of the need to be differently affected, suffer special damages, show unique harm or show particular prejudice.
- It is not clear whether the difference from the general public must be one of kind or degree.
- The rule inappropriately lets the Attorney General control access to the courts where public rights are at stake.
- The rule applies private law reasoning to proceedings of an entirely different character.
- The rule lacks contemporary relevance as the relationship between citizens and the state has changed fundamentally. It originates from 19th century individualist ideology and is at odds with a 20th century state model that includes citizen roles in government decisions and the advancement of public interests.²²

The Ontario Commission also noted that these problems are a particular concern in environmental law and concluded that "the law of standing has greeted the new world with the tools of the old".²³

Public Interest Standing at the Supreme Court of Canada

Common law public interest standing is a divergence from the public nuisance rule without fully abolishing it. The starting point is the role of the courts in upholding the rule of law against the other branches of government, and its inherent jurisdiction to hear justiciable issues. For issues that concern the legality of government action, the Attorney General is not the appropriate plaintiff so the courts find discretion to grant standing to other persons. Determining public interest standing involves a different legal test and an expressed balancing of judicial policy rationales.

The development of public interest standing by the Supreme Court of Canada (SCC) has not been a straight path. This forty year evolution has included the initial recognition of public interest standing in the 1970's, a period of expansion in the 1980's, a commitment to non-expansion in the 1990's, and a shift to more relaxed approach to standing in the 2000's.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ Ontario Commission, *ibid.*, page 72.

The Test for Public Interest Standing

The SCC originally made public interest standing available to challenge the constitutionality of legislation in three 1970s cases: *Thorson v. Attorney General of Canada*, *Nova Scotia Board of Censors v. McNeil* and *Minister of Justice of Canada v. Borowski (Borowski)*.²⁴ In the 1986 case of *R v. Finlay (Finlay)* the SCC made public interest standing available to challenge the legality of administrative action in non-constitutional cases.²⁵ *Finlay* articulated three factors from *Borowski* to consider in determining public interest standing:

- A “serious and justiciable issue”;
- A plaintiff that was “directly affected” or had a “genuine interest” in the matter; and
- “No other reasonable and effective manner in which the issue may be brought before a court”.²⁶

Finlay further established that standing can be determined as a preliminary matter instead of being determined with the merits of the substantive claim. This can be done if the issues, evidence and arguments available provide the court with a sufficient understanding of the interest being asserted.²⁷

When the Ontario Commission published its report in 1989, public interest standing was still sufficiently new to create uncertainty as to its availability and its impact on the public nuisance rule. *Finlay* was a clear expansion of where standing is available without having to pass the rule, yet there was criticism of the “genuine interest” factor being vaguely defined and shifting focus from the issues back to the interests of the plaintiff as in the historic rules. The Ontario Commission stated that standing tests based on required interests are “asking the wrong questions”.²⁸ Its concern with access to justice was sufficient for it to recommend legislative reform to common law standing even in the wake of *Finlay*. The recommendations were for standing to be discretionary and guided by numerous factors including the existence of non-trivial issues, the number of people affected, the need to prevent issues from being immunized from review, other proceedings against the defendant, and fairness to persons whose interests are against the litigation. It further recommended that standing not be denied based on failure to meet one factor or requirement. The recommendations were to reform standing through a comprehensive Access to Justice Act that would also address costs and interveners. These recommendations were not adopted.

²⁴ *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 [Thorson]; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265 [McNeil]; *Minister of Justice of Canada v. Borowski*, 2 S.C.R. 575 [Borowski].

²⁵ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 [Finlay].

²⁶ *Finlay*, *ibid.*; *Borowski*, *supra* note 24.

²⁷ *Finlay*, *Ibid.*

²⁸ Ontario Commission, *supra* note 5.

Finlay has attracted ongoing interest from administrative law commentators.²⁹ Like the Ontario Commission, the commentary frames a connection between public interest standing on administrative law matters, the growth of the regulatory state, and the need to reconsider the public nuisance rule.³⁰ It also identifies two extreme points of view on this subject. One is that any citizen should be able to challenge the legality of administrative action as there is a general public interest in this, and the other being that only directly affected individuals should have this right since ensuring legality is the role of the Attorney General.³¹

In the 1990's the SCC stated that there was no need to change the test for public interest standing. This was both an affirmation of broader standing and a quelling of it. In *Canadian Council of Churches v. Canada (Canadian Council)* the SCC stated that it should take a "liberal and generous" approach to the test, but in fact took a rigid approach, treating the three factors like independent requirements that must all be met.³² In *Canadian Council* and a second 1990s case *Hy and Zel's Inc. v. Ontario (Hy Zels)* the third factor was interpreted to deny public interest standing despite the other two factors being met.³³

During this period the third factor emerged as the most restrictive one. The SCC's articulation of this factor created uncertainty around whether the public plaintiff must only provide a reasonable means to hear the issue, whether there must be no practical likelihood that a more directly affected person would litigate, or whether there must be no theoretical other way for the issue to be heard. *Hy Zels* created further uncertainty as to whether the interpretation of standing tests can vary with the nature of proceedings, as the plaintiffs were directly affected for the purpose of criminal proceedings yet denied public interest standing by the SCC in civil proceedings flowing from the same dispute.

In the 2000's the SCC showed signs of relaxing its approach to the third factor. In *Chaoulli v. Quebec* it considered the lived reality of individuals that were more directly affected than the public interest plaintiff and the breadth of the legal challenge that this plaintiff sought to make.³⁴ A private health care advocate was seeking to use the *Charter* to bring a challenge to the constitutionality of an entire provincial health plan which the court described as a "systemic" challenge. In considering the existence of more directly affected persons the court found it unreasonable to expect that a seriously ill person on a long wait list would bring such litigation.

The SCC deliberately relaxed its approach to the entire test in the 2012 case of *Canada v. Downtown Eastside Sex Workers United against Violence (Downtown Eastside)*.³⁵ The court considered the policy rationales behind standing prior to articulating the test and held that a "flexible and purposive" approach

²⁹ Robert MacCaulay and James Sprague, *Hearings Before Administrative Tribunals, Second Edition* (Toronto: Carswell, 2002) [Hearings Before Administrative Tribunals]; Gerald Heckman, Gus Van Harten and David J. Mullan, eds., *Administrative Law Cases, Text and Materials* (6th edition, (Toronto: Emond Montgomery, 2010) [Administrative Law].

³⁰ *Hearings Before Administrative Tribunals, ibid.*

³¹ *Administrative Law, supra* note 29.

³² *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 [Canadian Council].

³³ *Ibid.*; *Hy and Zel's Inc. v. Ontario (Attorney General)*; *Paul Magder Furs Ltd. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 [Hy Zels].

³⁴ *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791 [Chaouli].

³⁵ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524 [Downtown Eastside].

to the test was warranted. The three factors were to be considered cumulatively rather than as independent requirements. The SCC deliberately restated the third factor in a more relaxed manner, asking whether the proposed suit, in all of the circumstances, was “a reasonable and effective means” (“reasonable means”) to bring the case. It provided numerous factors to consider in making this determination. These included [significantly paraphrased]:

- The plaintiff’s capacity, resources and expertise;
- A sufficient factual setting;
- A case of “public interest” that transcends the interests of those most directly affected;
- Realistic alternative means that would favor more efficient and effective use of judicial resources and present a context more suitable for adversarial determination;
- Whether the plaintiffs would bring any useful or distinctive perspective to the resolution of the issues; and
- Even if other persons have more direct interests, the plaintiff may have a distinctive and important interest different from them.

This restatement of the test for public interest standing in *Downtown Eastside* was driven by attention to judicial policy and the lived reality of persons entitled to litigate. The case was a broad *Charter* challenge to a suite of anti-prostitution provisions brought by a group of sex workers, and the court considered that individual sex workers would be unlikely to bring the same litigation in the context of criminal defense proceedings.

The Policy Rationales Underlying Public Interest Standing

The SCC cases articulate fairly comparable rationales for and against public interest standing, though with different emphasis. The most frequent articulated rationales are:

The role of the courts in upholding legality

Upholding the rule of law against the other branches of government is the dominant rationale in favor of public interest standing. This rationale has been articulated by the SCC in different ways. *Finlay* noted the role of the courts in having the laws obeyed. *Canadian Council* articulated concern with “access to the courts”.³⁶ *Downtown Eastside* included both articulations: a “principle of legality” that state action should be lawful and that there be a “practical and effective way to challenge the legality of state action”, and concern with “access to justice for disadvantaged persons in society whose legal rights are affected.”³⁷ The legality rationale is the basis for not screening out justiciable issues simply due to politicized contexts.

The adversarial system’s need for facts and argument from the plaintiffs

The adversarial system’s reliance on the parties fueled historic preference for directly affected persons on the belief that they would provide the best factual foundation and argument. However the more recent

³⁶ Canadian Council, *supra* note 32.

³⁷ *Downtown Eastside*, *supra* note 35 at p. 31 and 51.

SCC cases suggest that private litigants are not always superior.³⁸ In *Downtown Eastside* the SCC held that courts should benefit from the contending points of view from persons most directly affected but it also noted that the court depends on these persons for skillful presentation of evidence and argument. In determining that public interest standing was a reasonable means to bring the matter to the courts it noted that public interest plaintiffs may have distinctive or important interests different from those with more direct interests.

Concern with scarce judicial resources

This rationale recognizes the impact of standing on the courts. *Downtown Eastside* may connect concern with scarce judicial resources to a preference for directly affected plaintiffs as it states that persons with a personal stake in the issues should be a priority for court resources. It also found that the serious issue factor helps conserve judicial resources.

Concern with the rights of more directly affected third parties

Public interest standing could undermine the decisions of more directly affected persons not to sue or otherwise prejudice their interests.

Floodgates and busybodies

The need to limit standing may be expressed as fear of opening the floodgates or allowing standing for busybodies. These are not necessarily additional rationales but concerns as to what could consume scarce judicial resources and harm third parties. The floodgates and busybodies concerns are interrelated but can be distinguished. The floodgates concern is that the courts will be overwhelmed by sheer volume of litigation. The busybodies concern is that broad standing will invite meddlers with no real stake in the issues. *Downtown Eastside* connected the need to screen out busybodies to preventing impacts on third parties rather than to the conservation of judicial resources. Despite these distinctions, SCC cases including *Downtown Eastside* articulate the various rationales against standing in a fairly interwoven manner.

Striking a Balance on Competing Policy Rationales

The three early constitutional cases and *Finlay* did not give much weight to the floodgates and busybodies concerns.³⁹ Following these cases the Ontario Commission found that limits on standing were warranted, but found fears of floodgates and busybodies to be overstated as numerous sources supported that conclusion and because there are practical disincentives to litigation.⁴⁰

SCC cases since the Ontario Commission have articulated the need to strike a balance between the rationales for and against standing. During the non-expansion 1990s, the SCC in *Canadian Council* emphasized the discretionary nature of public interest standing, the need to maintain limits on standing, and noted that Canadian public interest standing is relatively broader than in other jurisdictions:

³⁸ Chaoulli, *supra* note 34., *Downtown Eastside*, *supra* note 35.

³⁹ Thorson, Borowski, McNeal, *supra* note 24; *Finlay*, *supra* note 25.

⁴⁰ Ontario Commission, *supra* note 5.

“It may be illuminating to consider by way of comparison the position taken in other common law jurisdictions on this issue of standing. The highest Courts of the United Kingdom, Australia and the United States have struggled with the problem. They have all recognized the need to balance the access of public interest groups to the Courts against the need to conserve scarce judicial resources. It will be seen that each of these jurisdictions has taken a more restrictive approach to granting status to parties than have the courts in Canada.”⁴¹

In its most cited passage the SCC treats floodgates, busybodies, scarce resources and impacts on third parties as interwoven concerns:

“... the need to grant public interest standing in some circumstances does not amount to blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants”.⁴²

Academic commentary from the non-expansion period states that the SCC’s concern with floodgates and busybodies must be read cautiously as it was likely reactive to increased access to the courts causing a corresponding drain on judicial resources in the post-*Charter* years.⁴³ This is a narrow context in which there might have been “too much of a good thing”.⁴⁴

The SCC was also criticized for expressing concern with impacts on third parties in a manner that presumed contentment with decisions when this might not be true for disadvantaged constituencies that face deterrents to litigation.⁴⁵ Multiple commentators during the non-expansion period stated that public interest litigants are no more likely than private litigants to create floodgates and busybodies as, given further access to justice barriers and practical deterrents to litigation, it is more likely for people to litigate in defense of private interests than public ones.⁴⁶

In *Downtown Eastside* the SCC returned to its earlier position that fear of floodgates and busybodies are overplayed. It noted that few people “bring cases in which they have no interest and which serves no purpose”, citing academic commentary that this busybody “is a spectre that haunts the legal literature, not the courtroom”.⁴⁷ It held that concerns with floodgates and busybodies must be assessed practically

⁴¹ Canadian Council, *supra* note 32.

⁴² *Ibid.*

⁴³ Scott Fairley, *Is the Public Interest Falling From Standing? Two Recent Comments From the Supreme Court of Canada* (1993) 11 *The Philanthropist* 28, [Falling from Standing].

⁴⁴ *Ibid.*

⁴⁵ Russell Binch, *The Mere Busybody: autonomy, equality and standing*, (2002) 40 *Alberta Law Review* 367, [Mere Busybody];

⁴⁶ *Ibid.*, Peter Bowal and Mark Cranwell, *Persona Non Grata: The SCC further constrains public interest standing*, (1994) 33 *Alberta Law Review* 192, [Persona Non Grata].

⁴⁷ *Downtown Eastside*, *supra* note 35 at p.28.

in light of the circumstances rather than abstractly or hypothetically.⁴⁸ The SCC further proposed that blunt denial of standing is not necessarily the most appropriate means to guard against these concerns, noting that courts can screen claims for merits, intervene to prevent abuse of process, award costs, and should consider these alternative forms of control. The SCC was fairly adamant in its skepticism towards the floodgates and busybodies concerns and its preference for alternative controls as it stated this entire position twice: once during its preliminary review of the policy rationales then again while reviewing the serious issue factor. *Downtown Eastside* also sets out how these policy rationales should be balanced against each other: the role of the courts in upholding legality must be balanced against the need for appropriate plaintiffs, concern with scarce judicial resources and impacts on third parties.

Legal Tests Can Undermine Policy Rationales

Most criticism of the SCC's approach to public interest standing is levied at the non-expansion 1990's and it is very consistent.⁴⁹ Rigid application of the legal test undermined the policy rationales for and against standing. The SCC's strict requirement for no other way for issues to be heard ignored which parties and proceedings were most suitable for the issues. This approach allowed the best persons to assist in resolving complex issues to be denied standing based on the technical or even hypothetical existence of less capable people who were entitled to litigate.

Even where policy rationales were articulated they were not well applied.⁵⁰ Conserving judicial resources was not well reconciled with upholding legality as denials of standing allowed the constitutionality of legislation to be immunized from scrutiny. Nor did denying standing always conserve judicial resources. In *Hy Zels* the SCC squandered judicial resources by denying standing even though standing was not an issue at earlier stages. A dissenting judge in *Hy Zels* held that the concerns with standing were overstated, and there was nothing to be gained by denying standing where benefits to granting standing were evident and the case was already in the system.

Downtown Eastside suggests judicial uptake of such criticisms. Multiple commentators view the decision as offering a functional approach that should allow standing to parties that would be the most suitable representatives for the issues.⁵¹

⁴⁸ *Ibid.*

⁴⁹ Mere Busybody, *supra* note 45; Persona Non Grata, *supra* note 46; Laura Best, "Standing Against Justice? A Critique of the Canadian Approach to Public Interest Sanding" (2009), [unpublished, archived at Environmental Law Centre (Alberta) Society]; Falling From Standing, *supra* note 43.

⁵⁰ Persona Non Grata, *ibid.*

⁵¹ Christina Lam and Theresa Yurkewich, "Some Much Needed R&R: Revisiting and Relaxing the Test for Public Interest Standing in Canada", (ABlawg.ca, October 18, 2012), online: <http://ablawg.ca/2012/10/18/some-much-needed-rr-revisiting-and-relaxing-the-test-for-public-interest-standing-in-canada/>; Jane Bailey and Angela Chaisson, "On Being Part of the Solution": Public Interest Standing after SWUAV SCC,() 1 Canadian Journal of Poverty Law 121.

Unanswered Questions Regarding Standing in Environmental Matters

None of the SCC cases on public interest standing concern environmental matters. Every SCC case but *Finlay* is a constitutional challenge rather than a challenge to administrative action and cases since the 1990's have been *Charter* challenges, which is an even narrower context. There are no SCC cases on administrative inaction, positive duties on government (legislated or otherwise) or standing at administrative agencies. The SCC cases show the court's preference for constitutional challenges concerning subject matters of national interest such as official languages, immigration, health care, and criminal offenses.

This leaves many unsettled questions concerning the availability of public interest standing in environmental matters. These questions include whether legal issues may be found non-justiciable on account of politicized contexts, whether there are more serious issues for which standing is available than those recognized by the SCC, what indicates the genuine interest of environmental groups, and what amounts to appropriate means for issues to be heard in the context of the larger resource development process where legislation often speaks to standing and appeal rights.

Justiciable issues in politicized contexts

The "serious and justiciable issue" factor leaves uncertainty as to whether issues of legality are always suitable for judicial determination or whether the courts should avoid legal issues with political dimensions. Public interest standing reflects a trend towards judicial scrutiny of government action that has been called one of the most significant political developments in democratic nations in decades.⁵² Whether this trend is for better or worse is the subject of debate. *Finlay* was lauded for ensuring that the legality of administrative action may be scrutinized, but it also invited criticism of judicial intervention into the political realm.⁵³ Some commentary favoring *Finlay* concludes that it is better for courts to risk tackling politicized subject matters than to allow issues of legality to be immunized from scrutiny.⁵⁴ This would be consistent with the recommendations of the Ontario Commission and the SCC's emphasis on legality in *Downtown Eastside*. Furthermore, the *Charter* era has already injected political considerations into the courts so to refuse standing on such grounds would be hypocritical.⁵⁵ However, most environmental matters are not *Charter* cases which reduces the applicability of this argument.

"Serious issues" in administrative law

The SCC has not settled the extent to which public interest standing is available in the administrative law context. It has only recognized the availability of public interest standing in non-constitutional cases to challenge the legality of administrative decisions, but has not clearly limited what may be a serious issue. The SCC rationalizes limits on serious issues out of concern for scarce judicial resources rather than articulating these limits as a rule of law. The SCC has been silent on whether common law public interest standing applies at administrative agencies, the topic of Part IV.

⁵² Unnatural Law, *supra* note 6.

⁵³ Hearings Before Administrative Tribunals, *supra* note 29.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

Indicators of genuine interest

There is little guidance from the SCC on what amounts to a genuine interest. This is because most plaintiffs in the public interest standing cases have been directly affected by the legislation or decision that they were challenging or somehow had an individual interest in the outcome of the litigation. Economic interests underlay standing in multiple early cases as some involved taxpayer concerns and in *Finlay* the plaintiff was a social assistance recipient. Other plaintiffs were exposed to regulatory or criminal liability under the laws they were challenging. *Hy Zels* is an extreme case as the plaintiffs were commercial operators seeking to avoid the impact of regulation on their economic interests.

The only purely public interest organization in SCC cases to date was denied standing in *Canadian Council*. The plaintiff was an umbrella organization of religious institutions seeking to challenge immigration laws out of its concern for refugee claimants. It met the “genuine interest” factor through its history of involvement in the issues and might have had the misfortune of encountering the SCC’s above mentioned desire to quell increasing *Charter* litigation. While *Downtown Eastside* granted standing to a group, this group’s members and general constituency may have been directly affected as they were sex workers challenging anti-prostitution laws. The SCC has never created a specific test for groups. The proposals for group standing made by SCC interveners and academic commentators have focused on groups representing constituencies or members who may be directly affected. SCC interveners have proposed standing for groups who were composed primarily of the disadvantaged class, were promoting equality as an object and had a connection between the issues raised and the disadvantage characterizing the group.⁵⁶ One commentator proposed screening groups through a mix of judicial scrutiny and organizational consciousness whereby the courts would balance objective and subjective views of the group.⁵⁷ These proposals would be disadvantageous to organizations lacking directly affected members or to persons concerned with indirect effects so would be dysfunctional for environmental matters.

The SCC’s increasing attention to whether representatives are appropriate for the issues is more suitable for environmental matters than these proposals for group standing. The SCC’s approach to public interest standing increasingly resembles the manner in which public law “interveners” are screened based on their ability to assist the proceedings without unduly impacting efficiency or directly affected parties.

Reasonable means within larger decision-making processes

The SCC’s analysis of reasonable means is exclusively focused on means for courts to hear the issues and does not look at other ways for the person seeking standing to raise issues or advance their interests. This raises two questions concerning application of the test when standing is sought within the larger regulatory process. One is whether legislation providing rights to appeal administrative decisions to court alters common law public interest standing. A second is whether administrative proceedings can provide other means for the issues to be heard. Presumably the issue would have to be identical and the courts would have to feel that their role is not being compromised, but if administrative agencies can

⁵⁶ *Mere Busybody*, *supra* note 45.

⁵⁷ *Ibid.*

determine the issues this could invoke the general principle of having to exhaust administrative avenues before turning to courts. It would also conserve judicial resources.

Common Law Standing in Environmental Litigation

In contrast to the SCC environmental matters figure prominently in standing cases at the lower courts. The barriers to public interest standing differ as compared to the SCC cases but in conventional challenges to administrative action the test for public interest standing had been elaborated on and is proving functional. However there are divergent lines of authority between the courts, with the Federal Court being most open to public interest environmental advocacy, Alberta least so and BC taking a middle path.

Barriers to Standing in Environmental Litigation

The common law standing principles do not overtly discriminate against environmental advocates but the nature of environmental matters creates different barriers to standing than in the SCC cases. The public nuisance rule persists and the lower courts are unwilling to recognize new “serious issues” that would allow divergence from the rule. They are questioning the justiciability of legal issues in politicized contexts, showing a new concern with “abuse of process”, and have found that public interest standing is not available to add parties where hearings are already triggered.

The general rules apply

Government remains the default public interest plaintiff. The public nuisance rule is a disproportionate barrier to standing on environmental matters as environmental advocates rarely have affected private rights or the ability to show differential harm. Twenty five years after the Ontario Commission, the public nuisance rule continues to be inconsistently articulated and applied.

The public nuisance rule clearly bars standing where private citizens seek to enforce environmental legislation against non-government defendants. In *Shiell v. Amok Ltd.* the Saskatchewan Court of Queen’s Bench (SCQB) denied a citizen standing to enforce environmental legislation against a private party, noting that the legislation had provided for its own enforcement.⁵⁸ The rule has been applied in this manner where the defendant is a public body. In *Society for the Preservation of the Englishman River Estuary v. Nanaimo (Englishman River)* the British Columbia Supreme Court (BCSC) denied standing to an environmental organization seeking to force a provincial environmental assessment of a municipal dam.⁵⁹ It noted that although the purposes of the legislation included public participation, it provided for its own remedial code and contained “nothing to suggest a legislative intention for public interest groups to be actively involved in enforcement”.⁶⁰ The relief sought was the same as what government would seek

⁵⁸ *Shiell v. Amok Ltd.* (1987), 1987 CanLII 4563 (SK QB)

⁵⁹ *Society for the Preservation of the Englishman River Estuary v. Nanaimo (District of)*, 1999 CanLII 6691 (BCSC) [Englishman River], online: <http://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii6691/1999canlii6691.html>

⁶⁰ *Ibid.* at p.26.

and the Attorney General was “uniquely suited, as representative of the public interest, to make this decision”.⁶¹

Multiple cases have ostensibly applied the public nuisance rule to dismiss claims against public bodies for lack of private harm without actually articulating the rule or any principle of standing. In *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta (Oldman River)* the Alberta Court of Appeal (ABCA) held that an environmental organization had no right to appeal the decision of professional discipline proceedings to court.⁶² The organization had been a complainant in the proceedings but this did not make it a party under the legislation. The ABCA held that the organization was owed no duty of fairness, that the decision “did not affect their personal or economic rights or obligations” and it had no more interest in the professional conduct than any other member of the public.⁶³ Despite this obvious denial of standing based on the public nuisance rule the ABCA stated that it “need not decide the issue of standing”.⁶⁴ The ABCA repeated this practice of dismissing public interest litigants for lack of private harm while claiming to have not determined standing in *Reece v. Edmonton*, discussed and cited below.

Reluctance to recognize new “serious issues”

Departing from the public nuisance rule requires recognizing a serious and justiciable issue for which the Attorney General is not an appropriate plaintiff. The lower courts interpret “serious issue” to mean the two situations recognized by the SCC: a constitutional challenge to legislation or a challenge to the legality of administrative action. Like the SCC they have not limited “serious issue” as a legal rule but rather rationalize these limited issues as conserving scarce judicial resources.

In *Metropolitan Authority v. Coalition of Citizens for a Charter Challenge, (Citizen’s Coalition)* the Nova Scotia Court of Appeal (NSCA) overturned a broad view of “serious issue” taken by the lower court.⁶⁵ It upheld public interest standing but narrowed the issues to those concerning the constitutionality of a regulatory scheme, finding that a broad attack on incineration in general would be a waste of judicial resources. This rationalization based on scarce resources was unnecessary as the environmental group’s position on the merit of waste incineration could have simply been dismissed for not raising a justiciable issue. In *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan* the Saskatchewan Court of Appeal (SKCA) granted standing to seek an order for disclosure of information to members of the public as part of a public consultation process.⁶⁶ The SKCA found that legislation created a positive duty related to a public consultation process and distinguished this circumstance from one where private citizens simply seek to enforce a public right. These reasons cannot count as having recognized standing to challenge inaction.

⁶¹ *Ibid.* at p. 44

⁶² *Friends of the Old Man River Society v. Association of Professional Engineers, Geologists and Geophysicists of Alberta*, 2001 ABCA 107 [Oldman River].

⁶³ *Ibid.*

⁶⁴ *Ibid.* at para 51.

⁶⁵ *Metropolitan Authority v. Coalition of Citizens for a Charter Challenge*, 20 Admin LR (2d) 283, 125 NSR (2d) 241 [Coalition of Citizens].

⁶⁶ *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety)* [1992], 7 C.E.L.R. (N.S.) 165 (SKCA).

Several cases have dismissed the efforts of private citizens to enforce regulatory compliance against public bodies. This is an ostensibly serious legal issue that has yet to be recognized by the SCC for which Attorney General may not be an appropriate plaintiff and the legality rationale could apply. In *Englishman River* the BCSC recognized that diverging from the public nuisance rule requires recognizing new serious issues and that enforcing statutes of general application against public bodies would extend public interest standing “beyond its generally accepted parameters”.⁶⁷ Two further cases reach the same conclusion without clearly articulating the public nuisance rule or the serious issue requirement. Both concern standing for animal rights advocates which reflects unreceptivity to second or third generation rights claims. Both cases show an emerging judicial concern with abuse of process where civil litigation is used to establish regulatory liability. In *Cassels v. University of Victoria (Cassels)* the BCSC denied standing to an animal rights advocate who alleged that a university was violating provincial wildlife regulations.⁶⁸ The court held that there was no challenge to administrative action as the provincial government was not a party and the university was acting in its private person capacity. The court was unwilling to find a civil cause of action for breach of statute where the statute itself provided a remedy and noted that the SCC was cautious in expanding the circumstances where public interest standing is available. In *Reece v. Edmonton* the ABCA split over standing for animal rights advocates who alleged that a municipal zoo was violating provincial animal protection legislation.⁶⁹ The majority held that it was an “abuse of process” to use civil litigation to establish regulatory liability without having suffered private harm. The separation of standing from the relief sought did not go this far. The legality rationale did not apply to the operational decisions of the zoo or the provincial government’s policy choice not to act on the advocates’ complaints. The ABCA held that in light of this conclusion it “need not consider standing”.⁷⁰ The majority reasons are problematic as they did ostensibly consider standing and denied it through a combination of the public nuisance rule, lack of a serious and justiciable issue, and a view of administrative process as the appropriate means for the issue to be heard.

The dissent in *Reece v. Edmonton* would have made public interest standing available based on the legality rationale. It held that there was a serious issue of a public body not complying with legislation in the exercise of its authority, and the animal protection legislation was “serious in its own right”. Also there was no other reasonable and effective way to bring the issue before the court as no animal could do so. The dissent took notice that the law of standing and law of standing and the law of animal protection were both evolving and found that the question of “who if anyone” can access the courts to protect animals from mistreatment raised novel issues.⁷¹ The changing legal paradigm for the treatment of animals had caused Alberta to legislate positive duties of care towards animals, but a flaw in this model is that there was no way to intervene against unlawful treatment of animals by government as efforts by citizens or advocacy groups to uphold the law “may be silenced, and often are, by denying legal

⁶⁷ *Englishman River*, *supra* note 59.

⁶⁸ *Cassels v. University of Victoria*, 2010 BCSC 1213 [Cassels].

⁶⁹ *Reece v. Edmonton (City)*, 2011 ABCA 238 [Reece v. Edmonton].

⁷⁰ *Ibid.* at p.37.

⁷¹ *Ibid.* at p.53.

standing”.⁷² The dissent held that if animals are to be protected in any meaningful way, they, or their advocates, must be accorded some form of legal standing. Striking novel pleadings would stifle the evolution of the common law, and the courts as “gatekeepers of access to justice” should not readily strike pleadings unless the action has no reasonable prospect of success.⁷³

Reece v. Edmonton is on the frontier of the law of standing in multiple regards. The majority dismissed standing in a manner that did not apply the established principles of standing, while the dissent would have expanded the recognized situations where public interest standing is available. The fact that it involved animal interests put it on the frontier of the western rights regime as well. An application for leave to appeal to the SCC was dismissed, which was criticised for the lost opportunity to consider these novel questions.⁷⁴

Emerging reasons to deny standing

The lower courts are sufficiently concerned with not expanding the situations where public interest standing is available that they may be adding new reasons to deny it. None of these emerging reasons are necessary to deny public interest standing which could be done under the established test and could have the added effect of immunizing questions of legality from scrutiny.

Aversion to politicized contexts

In the 1990’s several environmental cases resembled *Finlay* in that the court was willing to enter politicized contexts so long as there was a legal issue. In *Reese v. Alberta* the Alberta Court of Queen’s Bench (ABQB) granted public interest standing to several environmental advocates seeking to invalidate a forest management agreement between a company and the provincial government.⁷⁵ The court found that if this agreement was not designed to serve its legislated purpose then that was matter for the courts.⁷⁶ The court cited *Finlay* for the principle that an issue may be justiciable “even if it may have a policy context or implications” which are reviewable by the legislature or executive.⁷⁷ In *Sierra Club of Canada v. Canada (Sierra Club)* the Federal Court granted standing to an environmental organization to challenge the sale of nuclear reactors to China without an environmental assessment.⁷⁸ The court held that the fact that this organization was opposed to nuclear power did not establish that the litigation was for political purposes. It held that the organization’s position was not inconsistent with public interest standing as all litigants advance their own interests or those they support.

Cases from the 2000’s show judicial propensity to make standing an issue in politicized contexts. In the *Sierra Club of Canada v. Comox Valley Regional District (Comox Valley)* the British Columbia Court of Appeal (BCCA) held that the lower court should have assessed the standing of two environmental organizations

⁷² *Ibid.* at p. 63.

⁷³ *Ibid.* at p.48.

⁷⁴ Peter Sankoff, “Opportunity Lost: The Supreme Court of Canada Misses a Historic Chance to Consider Question of Public Interest Standing for Animal Interests”(2012) 30 Windsor Yearbook of Access to Justice 129.

⁷⁵ *Reese v. Alberta*, 11 Admin LR (2d) 265; 85 Alta LR (2d) 153 [*Reese v. Alberta*].

⁷⁶ *Ibid.*, at p.40.

⁷⁷ *Ibid.*, at p.41.

⁷⁸ *Sierra Club of Canada v. Canada (Minister of Finance)*, [1999] 2 FCR 211, [*Sierra Club*].

even though their standing was not challenged.⁷⁹ The court noted that the environmental groups were opposing a municipal development permit that was politically controversial. It held that courts must be wary of being drawn into political disputes and that they should be satisfied of the standing of persons challenging the “political decision of municipal government”.⁸⁰ The BCCA also held that the lower courts should always assure themselves of the standing of persons who are not directly affected because public interest standing is at the discretion of the courts so cannot be obtained by consent between the parties.

The reasoning in *Comox Valley* is problematic in multiple ways. The development permit was for an allowable land use under existing municipal bylaws but the bylaw required a council resolution to issue the permit. This creates some uncertainty as to whether this was a legislative decision or a regulatory decision, and if the later it would be a serious issue for which public interest standing is available. Furthermore the court’s concern that the environmental organizations were not directly affected suggests that directly affected persons could challenge equally politicized decisions without comparable concern.

Two cases from the 2000’s engage in a “justiciability” analysis that goes beyond merely requiring a legal issue that courts could determine. In *Friends of the Earth v. Canada (Friends of the Earth)* the Federal Court (FC) denied standing to an environmental organization seeking to enforce legislation that would require the federal government to comply with Canada’s international obligations to reduce greenhouse gas.⁸¹ The court found a serious issue in whether the legislation allowed government to make a climate change plan that was non-compliant with its international obligations, but the climate change plan was non-justiciable for numerous reasons:

- The legislation provided for policy laden considerations and provided no objective criteria to determine compliance;
- The federal government could not unilaterally ensure compliance with international obligations;
- The duties in the legislation were softly worded so not intended for judicial scrutiny; and,
- The legislation provided for parliamentary accountability, and while this will not always displace the court it did in the overall context of this case.

The FC held that even if it was wrong on justiciability, it would still dismiss the claim as there was no meaningful remedy. The Federal Court of Appeal (FCA) adopted the lower courts’ reasons and upheld the dismissal.⁸²

The reasons in *Friends of the Earth* are problematic for including notice of contextual factors that are irrelevant to whether there is an issue of legality. The court noted that the legislation began as a private members’ bill that was not supported by government, and that government for policy reasons had no intention to comply with the international obligations.

⁷⁹ *Sierra Club of Canada v. Comox Valley Regional District*, 2010 BCCA 343 [Comox Valley].

⁸⁰ *Ibid.* at p.26.

⁸¹ *Friends of the Earth v. Canada (Governor in Council)*, 2008 FC 1183 [Friends of the Earth].

⁸² *Friends of the Earth v. Canada*, 2009 FCA 297.

In *Morton v. British Columbia (Morton)* the BCSC undertook an analysis of justiciability after the rest of the standing test had been readily met.⁸³ The plaintiffs were seeking to challenge the constitutionality of provincial legislation enabling provincial regulation of open-water fish farms on the grounds that fisheries were a matter of exclusive federal jurisdiction. The court considered that the practical outcome they sought – to stop fish farms– would depend on the federal parliament regulating this activity. The court concluded that there was nonetheless an issue of legality with the provincial legislation that was within the role of the court to decide.

Cases from the 2000's suggest that established serious issues of legality might be found non justiciable on account of political controversy or the agendas of persons seeking standing. This would create a disproportionate barrier to public interest standing on environmental matters, undermine the legality rationale and warrant a revisiting of the test by the SCC.

Abuse of process

Both of the above animal rights cases saw the court express concern with establishing penal liability through civil proceedings.⁸⁴ In *Reece v. Edmonton*, the dissent would not shelter public bodies in this manner without fully considering the principles of standing. The dissent held that the test for public interest standing would address abuse of process, but abuse of process is not a reason to deny standing.⁸⁵ The dissent was not overly concerned with establishing regulatory liability in civil proceedings as the only penal consequence was a fine to a corporation and this situation did not invoke *Charter* values. She further held that the majority applied an incorrect test for abuse of process by focusing on the action being contrary to the interest of the defendant instead of whether it was “contrary to the interests of justice”.⁸⁶ The dissent is sound on these points.

Abuse of process is not part of the established test for public interest standing. The doctrine has emerged in cases where the defendants are public bodies, which potentially undermines the role of the courts in upholding legality. If the issue is not one where public interest standing is available then standing can simply be denied under the public nuisance rule as done where citizens seek to enforce legislation against private parties. If the issue is one for which public interest standing is available then the established way to deny standing is to exercise discretion not to grant it. The factor to consider would be whether civil proceedings as opposed to criminal proceedings provide reasonable means for the issue to be heard, as debated by the SCC in *Hy Zels*.

Public interest standing is not available for adding parties

The lower courts have recognized that use of public interest standing to add parties to existing hearings is a fairly untested issue. In *Western Copper Corp v. Yukon Water Board* the Yukon Territory Supreme Court allowed an environmental group to join existing proceedings as a full party but it chose to do so under

⁸³ *Morton v. British Columbia (Agriculture and Lands)*, 2009 BCSC 136 [Morton].

⁸⁴ *Reece v. Edmonton*, *supra* note 69; *Cassels*, *supra* note 68.

⁸⁵ *Ibid.* at p.141.

⁸⁶ *Ibid.* at p.144

legislated rules rather than common law public interest standing.⁸⁷ The court considered that all SCC authorities concerned standing to trigger hearings and that where issues are brought before the courts through other means the need for public interest standing disappears. However, the court noted that “there was no spectre of opening the floodgates” as this was one of the few environmental groups in the Yukon, and it would have granted public interest standing if necessary to trigger a hearing.⁸⁸

Elaboration of the Test for Public Interest Standing

Despite the barriers created by the limited issues for which public interest standing is available, if one of these issues is made out then the lower courts have shown consistent willingness to grant standing. They have developed objective indicators of genuine interest that are proving easier to apply than the directly affected test. They have taken a practical approach to reasonable means and this factor has not created barriers to standing on environmental matters as it has in non-environmental matters at the SCC. The lower courts follow the SCC on concern with scarce judicial resources and harm to third parties but they have not shown much concern with floodgates or busybodies.

Serious issues are widespread

While constitutional challenges are rare in environmental matters there is no shortage of issues with the legality of administrative decisions. The Federal Court’s environmental jurisprudence recognized the need for public interest plaintiffs in this context prior to the SCC’s decision in *Finlay*.⁸⁹

A common serious issue concerns the enforcement of positive duties created by legislation. In *Great Lakes United v. Canada* the FC articulated the strength of the legality rationale in this situation.⁹⁰ After granting public interest standing and deciding the case in favor of the environmental organizations it stated that the “public is the loser” where government “turns a blind eye” to its own duties.⁹¹ Numerous positive duty cases in which public interest standing has been granted concern complex federal requirements to conduct environmental assessments.⁹² At least two of these cases concern standing to enforce public participation rights.⁹³ In *Friends of the Island Inc. v. Canada (Friends of the Island)* the FC granted public interest standing to a group of fishermen, farmers, environmentalists and citizens seeking to force an environmental assessment of the bridge to Prince Edward Island.⁹⁴ One argument against standing was that an environmental assessment in which the group had participated had already occurred. The FC found that the order for the environmental assessment required “meaningful” public involvement but that the participation opportunities provided were hasty and inconvenient.⁹⁵ It further found it strange

⁸⁷ *Western Copper Corporation v. Yukon Water Board*, 2010 YKSC 61 [Western Copper].

⁸⁸ *Ibid.* at p.84

⁸⁹ *Energy Probe v. Canada (Atomic Energy Control Board)* (1984) 2 FC 138 (TD).

⁹⁰ *Great Lakes United v. Canada (Minister of the Environment)*, [2010] 2 FCR 515, 2009 FC 408 [Great Lakes United].

⁹¹ *Ibid.* at p.145 and 207.

⁹² *Sierra Club*, supra note 78, *Friends of the Island Inc. v. Canada (Minister of Public Works)*, [1993] 2 F.C.R. 229 [Friends of the Island]; *MiningWatch Canada v. Canada (Minister of Fisheries and Oceans)*, 2007 FC 955 [Miningwatch]; *Citizens’ Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of The Environment)*, [1999] 163 FTR 36; 17 Admin LR (3d) 287 [Citizens’ Mining Council].

⁹³ *Miningwatch, Ibid.*, *Friends of the Island, Ibid.*

⁹⁴ *Friends of the Island, Ibid.*

⁹⁵ *Friends of the Island, Ibid.*

that the plaintiff would lose their right to enforce procedural requirements on account of having participated in the process. In *MiningWatch Canada v. Canada* the FC court granted standing to challenge an environmental assessment that had been scoped narrowly so as to avoid public consultation requirements.⁹⁶ Like *Friends of the Island*, the FC found that the purposes of the legislation included “opportunities for timely and meaningful public participation”. It further held that “the issue of public participation is of importance. . . . not just in this case, but for future projects across Canada”.⁹⁷

The Federal Courts have not allowed procedural formalities or the complexity of the environmental assessment process to preclude hearing issues of legality. In *Alberta Wilderness Association. v. Canada* the FCA granted standing to challenge a development permit based on deficiencies with an environmental assessment on which the permit was based.⁹⁸ It would not deny standing simply because the environmental organizations did not challenge the permit itself. The court held that the legislation prohibited issuance of a permit without an environmental assessment so a deficiency in the assessment would invalidate the permit.

Although standing is not granted to challenge administrative inaction in the absence of legislated duties, serious issues can include whether a decision maker fettered their discretion to take environmental protection action. For example in *Chetwynd Environmental Society v. Dyer (Chetwynd)* the serious issue was whether an environmental agency mistakenly believed that it could not refuse to issue permits.⁹⁹

Indicators of genuine interest

The lower courts have established numerous objective indicators of genuine interest though this approach took time to be settled. Cases from the 1990s diverged on the need to separate those with a genuine interest from the general public. In *Englishman River* the BCSC interpreted the factor in a manner resembling a softer public nuisance rule, finding that: “a genuine interest requires more than the interest every citizen has in seeing public rights enforced”.¹⁰⁰ In contrast, the ABQB in *Reese v. Alberta* found that where there is an issue of keeping public authorities within the law a person may be recognized to have a genuine interest “even if he shares it with thousands of others”.¹⁰¹ These divergences reflect the extreme views on who should be able to challenge administrative decisions in the wake of *Finlay*.

The prevailing approach has been a middle path between any person and the public nuisance rule. The FC has been a leader in developing this approach. In *Sierra Club* it found that the environmental organization’s challenge was fueled by more than an abstract concern with the rule of law.¹⁰² In *MiningWatch* it held that a genuine interest requires more than a bona fide interest or concern about

⁹⁶ *Miningwatch*, *supra* note 92.

⁹⁷ *Ibid.* at p.168.

⁹⁸ *Alberta Wilderness Assn. v. Canada (Minister of Fisheries and Oceans)*, 1998 CanLII 8879 (FCA) 1998-12-01, online : <http://www.canlii.org/en/ca/fca/doc/1998/1998canlii8879/1998canlii8879.html?searchUrlHash=AAAAAQaEYWXiZXI0YSB3aWxkZXJlZXRzIGFzc29jaWF0aW9uAAAAAAE> [*Alberta Wilderness v. DFO*]

⁹⁹ *Chetwynd Environmental Society v. Dyer*, 1995 CanLII 3352 (BC SC), online: <http://www.canlii.org/en/bc/bcsc/doc/1995/1995canlii368/1995canlii368.html> [*Chetwynd*].

¹⁰⁰ *Englishman River*, *supra* note 59 at p.41.

¹⁰¹ *Reese v. Alberta*, *supra* note 75 at p. 28.

¹⁰² *Sierra Club*, *supra* note 78.

environmental issues.¹⁰³ It may approach the genuine interest factor somewhat like intervenor screening, looking for “experience and expertise” or an “understanding” relevant to resolving the issues.¹⁰⁴ The person seeking standing must establish their interest with facts, but the courts have not applied stringent evidentiary standards.

There are no necessary criteria for genuine interest but the courts use fairly consistent indicators that may favor incorporated organizations. The most important indicators of genuine interest are organizational purposes and a record of involvement with the issue or the substantive environmental subject matter. This inquiry into the mandate and qualities of the advocate occurs in the Courts of Alberta, BC, the Federal Court, and in innumerable cases.¹⁰⁵ Secondary indicators of genuine interest include activities related to the dispute and participation in related proceedings. Examples of activities include raising concerns with government¹⁰⁶, letter writing, seeking information¹⁰⁷, attending meetings¹⁰⁸, engaging in public discourse¹⁰⁹, public petitioning¹¹⁰, participation in government committees and initiatives¹¹¹, and making submissions on the subject matter.¹¹² Activities and prior participation tends to ‘help not hurt’ in that the absence of prior activities and participation does not preclude standing.¹¹³ The FC has noted that participation in environmental agency proceedings may not provide appropriate means to raise the issues for which standing in the courts is sought.¹¹⁴ The BC courts have given more attention to activities and participation, but always in the context of granting standing.¹¹⁵

Geographic proximity to environmental impacts or evidence of impacts on the interests of the plaintiff is less often considered and is less relevant to a genuine interest analysis. The FC has stated that geographic proximity should not be the determinative factor for public interest standing “given the complexities and interconnectedness of modern society”.¹¹⁶ The BC Courts have considered geographic proximity and impacts where these indicators favored standing.¹¹⁷ In *Chetwynd* the BCSC noted that a wilderness area was of special interest to the organizations seeking standing and that the permits they were challenging would cause environmental damage.¹¹⁸ In *West Kootenay Community EcoSociety v. Her Majesty the Queen* the BCSC found that the impact of a road on wetland species contributed to finding a genuine interest on the part of an organization incorporated with purposes related to the local ecosystem.¹¹⁹

¹⁰³ Miningwatch, *supra* note 92.

¹⁰⁴ Sierra Club, *supra* note 78.

¹⁰⁵ Sierra Club, *ibid.*; Miningwatch, *supra* note 92; Reese v. Alberta, *supra* note 75; Chetwynd, *supra* note 99; *West Kootenay Community EcoSociety v. Her Majesty the Queen*, 2005 BCSC 744 [West Kootenay].

¹⁰⁶ Sierra Club, *ibid.*, Miningwatch, *ibid.*

¹⁰⁷ Sierra Club, *ibid.*

¹⁰⁸ Great Lakes United, *supra* note 90.

¹⁰⁹ *Ibid.*

¹¹⁰ West Kootenay, *supra* note

¹¹¹ Reese v. Alberta, *supra* note 75.

¹¹² Reese v. Alberta, *supra* note 75.

¹¹³ Sierra Club, *supra* note 78.

¹¹⁴ Miningwatch, *supra* note 92.

¹¹⁵ Chetwynd, *supra* note 99; West Kootenay, *supra* note 105.

¹¹⁶ Miningwatch, *supra* note 92 at p.183.

¹¹⁷ Chetwynd, *supra* note 99; , West Kootenay, *supra* note 105,

¹¹⁸ Chetwynd, *ibid.*

¹¹⁹ West Kootenay, *supra* note 105.

For organizations, evidence of genuine interest may relate to the involvement or activities of organization's directors,¹²⁰ individual members or member organizations in the case of umbrella organizations.¹²¹ The interests of members can help establish the interests of an incorporated organization, for example in *Friends of the Island*.¹²² However the lack of members or interests held by members will not hurt an incorporated organization.

The jurisprudence demonstrates that assessing the standing of individual citizens, unincorporated associations, or groups formed for the dispute is more difficult than screening incorporated and established public interest organizations. For example in *Friends of Point Pleasant Park v. Canada* the FC granted standing to some but not all members of an unincorporated association seeking to stop a municipality from cutting trees in a park.¹²³ Some members had a genuine interest for having been involved in producing a survey and report, others were involved on behalf of citizens who lived adjacent to or used the park, one member could have seen the value and enjoyment of her property affected and another acted as spokesperson for the group and was involved in opposing the municipal decision.

The directly affected test is harder to use

The challenge of screening individuals and unincorporated groups results from the fact that they may claim genuine interests but the courts' analysis may move towards the directly affected test. Most cases on this situation are from the FC as the *Federal Courts Act* encodes the directly affected test but the court asserts jurisdiction to grant public interest standing. In *Friends of the Island* the FC cited the leading academic commentary on the challenge of the narrower test:

“Who is “directly affected” under section 28(2)? The application of this standing test requires the court to traverse a semantic wasteland similar to that encountered in deciding who has an “interest”, who suffers “special injury” or who is a “person aggrieved”.”¹²⁴

The court found that past cases on the “directly affected” test were hard to reconcile and concluded that where standing is not based on clear legal rights or obligations it is a matter of judicial discretion. The court found jurisdiction to grant public interest standing using the genuine interest factor, which it affirmed in *Canada (Parks and Wilderness Society) v. Superintendent* and further environmental cases.¹²⁵ The number of cases on this same issue suggests that having the two tests for one form of standing creates litigation on an answered question and wastes more judicial resources than simply using the genuine interest factor.

¹²⁰ *Sierra Club*, *supra* note 78.

¹²¹ *Miningwatch*, *supra* note 92.

¹²² *Friends of the Island*, *supra* note 92.

¹²³ *Friends of Point Pleasant Park v. Canada (Attorney General)*, 188 FTR 280 [Point Pleasant].

¹²⁴ *Friends of the Island*, *supra* note 92, (citing *Locus Standi*, *supra* note 1).

¹²⁵ *Friends of the Island*, *supra* note 92; *Sierra Club*, *supra* note 78; *Canada (Parks and Wilderness Society) v. Superintendent of Banff National Park*, [1996] 20 CELR (2d) 171; 44 Admin LR (2d) 201. [Sunshine Village].

The complexity created by the directly affected test became apparent in subsequent cases featuring individuals and unincorporated associations. In *Shiell v. Canada* the FC misstated the test for public interest standing as requiring a direct interest. In doing so it denied standing to an individual on the basis that they lived geographically distant from a proposed project, had only a generalized concern with the environment, and no history of involvement with the particular project. *Shiell v. Canada* was distinguished in *Sierra Club* and *Citizen's Mining Council* where the court applied the genuine interest factor to organizations. In two cases the FCA overturned denials of standing under the “directly affected test”. In *Moresby Explorers Ltd. v. Canada (Moresby)* the FCA granted standing to a tourism operator challenging a decision concerning their own permit.¹²⁶ The FCA applied *Moresby Explorers* in *Friends of Canadian Wheat Board v. Canada* where it granted standing to some individuals but declined to address standing for an unincorporated organization.¹²⁷ In both cases the FCA refused to consider public interest standing on the basis that it granted standing under the narrower test.

A practical approach to “reasonable means”

Unlike the SCC cases the “reasonable means” factor rarely creates a barrier to public interest standing in environmental matters. The lower courts articulate the factor somewhat inconsistently but the focus is on the practical likelihood that others would litigate the same issue. There are no lower court cases since *Downtown Eastside* in this report with respect to this test factor.

As with “genuine interest” the FC has significant jurisprudence on “reasonable means”. In *Friends of the Island* it held that standing should not be denied based on theoretical alternative litigation.¹²⁸ In *Sierra Club* the FC used an approach that foresaw the SCC approach in *Downtown Eastside* in many ways. It recognized that the case law was unclear on what was required for reasonable means but was unwilling to infer more appropriate plaintiffs.¹²⁹ It rejected restrictive standing where there was apprehensible harm to vulnerable persons and considered how public interest plaintiffs could assist the proceedings. The facts assisted in developing this approach as the case concerned the sale of nuclear reactors to China. The FC considered that residents of China may be more directly affected but they were unlikely to raise a challenge to Canadian law in the FC. It also considered Canadians concerned with uranium mining as potentially affected but found this did not provide a more appropriate means to bring the case.

In multiple cases the FC was accepting of large groups so long as there was no evidence that more directly affected people would litigate. In *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada* it granted standing to an incorporated organization that served as a “coalition of over 465 persons and 12 socio-environmental organizations representing some hundreds of additional persons” and whose purposes related to mining that was the subject of the litigation.¹³⁰ The court acknowledged that directly affected individuals could litigate the mine, but there was no evidence that others would raise the issue. In *MiningWatch* it granted standing to an umbrella organization of groups concerned with the social and

¹²⁶ *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144 [Moresby Explorers].

¹²⁷ *Friends of the Canadian Wheat Board v. Canada (Minister of Agriculture)*, 2011 FCA 101. [Wheat Board].

¹²⁸ *Friends of the Island*, *supra* note 92.

¹²⁹ *Sierra Club*, *supra* note 78.

¹³⁰ *Citizens' Mining Council*, *supra* note 92.

environmental impacts of mining quite broadly.¹³¹ The organization had not been involved with the mine in question but no one else demonstrated sufficient interest or the means to bring the case. The FC held that public interest standing “must” be denied if more directly affected persons are likely to bring the case but held that standing will not be denied just because others share the concern but have not brought the action.¹³²

The BCSC has also approached “reasonable means” in a relatively relaxed way on environmental matters. In *Chetwynd* the BCSC found that a sparsely populated wilderness area made standing for environmental organizations a reasonable means.¹³³ In *West Kootenay* it found that the nature and location of a local dispute about a park road made standing for a local environmental organization an appropriate means.¹³⁴ In *Morton*, the case concerning the constitutionality of fish farm regulation, the BCSC granted standing to five plaintiffs including an individual activist, a conservation society, multiple vessel associations and tourism operators.¹³⁵ This diverse array of plaintiffs provided an appropriate means as a similar challenge would not come without them having standing. The provincial Attorney General would not consent to the challenge and the federal Attorney General declined to make submissions. The BCSC considered that the legislation could be challenged by unsuccessful applicants for provincial fish farm permits but such persons would “not necessarily be affected in the way or to the extent” as the challengers.¹³⁶ This is a curious case as being differently affected actually benefitted environmental advocates, while at the same time the fact that some plaintiffs had economic interests did not detract from their suitability as public interest advocates.

The ABQB has been very brief in its assessment of reasonable means. In *Reese v. Alberta* it simply concluded that no person with a more direct interest than the individual and environmental organizations granted standing would be likely to raise the issue.¹³⁷

Cases from the BCSC and ABQB were ahead of the SCC’s *Downtown Eastside* decision with respect to treating “serious issues”, “genuine interest” and “reasonable means” as interconnected factors as opposed to a checklist of requirements.¹³⁸

Rationales for narrow standing are sufficiently upheld

The lower courts are very brief in articulating and applying the policy rationales against standing but they might do it more consistently and less contentiously than the SCC. They have consistently articulated the rationales of conserving judicial resources and preventing harm to third parties but they have not shown much concern with floodgates or busybodies. In *Morton* the BCSC held that hearing from all of the five parties granted standing to challenge fish farms would not waste judicial resources or fail to

¹³¹ Miningwatch, *supra* note 92.

¹³² *Ibid.*

¹³³ Chetwynd, *supra* note 99.

¹³⁴ West Kootenay, *supra* note 105.

¹³⁵ Morton, *supra* note 83.

¹³⁶ *Ibid.*, p.92.

¹³⁷ Reese v. Alberta, *supra* note 75.

¹³⁸ Chetwynd, *supra* note 99; , Reese, *ibid.*

screen out busybodies. Nor have the lower courts been creating new policy rationales where the test for standing is met. For example in *Friends of the Island* the court was not convinced that delay to the proposed development was relevant to determining standing. If it was relevant, the prejudice that might be suffered was not “so obvious or so drastic” as to warrant denying standing.¹³⁹ The FC has even shown some efficiency concern with persons unsuccessfully opposing standing.¹⁴⁰

As the lower courts are not expanding the situations where standing is available and cite the limit on “serious issues” as conserving scarce judicial resources, the established test for public interest standing is a sufficient screening tool. The volume of litigation is mostly dependent on the extent of unlawful government action.

Divergent Authorities on Standing in the Courts

There are enough cases from the Federal Court, British Columbia and Alberta to identify divergent lines of jurisprudence between these jurisdictions. Three points of divergence are the courts’ commitment to determining standing as a preliminary matter, their concern with the effect of legislation on standing and their latent attitudes towards public interest environmental advocacy. The Federal Courts have been most receptive to granting standing and the substantive claims, Alberta the least so, and BC has taken a middle path. Courts from further provinces have seen relatively fewer environmental matters and have produced less reliable authorities.

Standing as a preliminary matter

The courts’ willingness to determine standing as a preliminary matter, and reasons not to, can be indicative of its receptivity to public interest standing. Preliminary determinations reinforce the decoupling of standing from entitlement to relief and warrant the use of lower evidentiary standards. The FC is clearly committed to determining standing as a preliminary matter. Many determinations of standing are made by a protonothary (a judicial officer) prior to the lower court hearing. If standing is granted it often ceases to be an issue. If standing is an issue at the FC then the court’s evidentiary requirements are favorable to standing. The court requires persons seeking standing to show facts to establish their interests, but requires that persons opposing standing prove on a balance of probabilities that there is no arguable case. The FCA usually only considers standing if standing was denied by the FC. In *Moresby Explorers* the FCA held that “standing is used to discourage meddlers and not to pre-emptively determine that litigation has no cause of action”.¹⁴¹

The courts of the provinces are less committed to determining standing as a preliminary matter but their rationale for this differs. The BC courts appear concerned that preliminary determinations could unjustly deny standing. In *Kitimat v. Alcan* the BCCA recognized the tension between the efficiency of preliminary determinations and the risk of denying standing where not all evidence is available.¹⁴² It held that

¹³⁹ *Friends of the Island*, *supra* note 92.

¹⁴⁰ *Point Pleasant*, *supra* note 123.

¹⁴¹ *Moresby Explorers*, *supra* note 126 at 17.

¹⁴² *District of Kitimat v. Alcan Inc.*, 2005 BCSC 44.

standing may be a preliminary matter where having full evidence would not change a decision to deny standing, but if standing is likely to be granted then it is more expedient to hear all issues together. The Alberta courts show greater propensity to merge standing with entitlement to relief. In *Reese v. Alberta* the ABQB held that standing may need to be considered with the merits of the case to assess a genuine interest, and if so the list of factors to guide discretion may be longer.¹⁴³ In *Reece v. Edmonton* and *Oldman River* the ABCA ostensibly dismissed standing for no cause of action.¹⁴⁴ The dissent in *Reece v. Edmonton* held that the majority incorrectly equated standing with entitlement to relief rather than entitlement to seek relief.¹⁴⁵

The impact of legislation on standing

The lower courts diverge on their concern with the impact of legislation on common law public interest standing. Their varying levels of concern may be unrelated to the actual prescriptiveness of the legislation.

The FC has the most reason to curtail common law standing but is most adamant about not doing so. As discussed above the *Federal Courts Act* provides standing for directly affected persons. It also provide standing for the Attorney General which makes the provision resembles an encoding of the public nuisance rule.¹⁴⁶ In *Friends of the Island* the FC held that this provision should not be read restrictively where public interest standing was justified.¹⁴⁷ In *Sierra Club* it held that interpreting the “directly affected” test as precluding public interest standing would be incongruous with other courts and the role of the courts in upholding legality.¹⁴⁸ It reinforced this position in *Friends of Point Pleasant* by distinguishing jurisprudence where a legislated “directly affected” test precluding public interest standing at an administrative agency.¹⁴⁹ It found that context to not be relevant to the court interpreting its legislation.

In contrast, the ABQB has considered that legislation could limit public interest standing even though there was no indication that it did. In *Reese v. Alberta* the ABQB noted that the legislation under which the decision being challenged was made did not contemplate public participation in the decision being challenged.¹⁵⁰ It held that a genuine interest is more readily inferred where the statute provides participation roles in the process leading to the decision, but that a genuine interest may still be found even where no such role is contemplated under legislation, “so long as to recognize it would not be inconsistent with the inherent nature of the statutory process”.¹⁵¹

¹⁴³ *Reese v. Alberta*, *supra* note 75.

¹⁴⁴ *Reece v. Edmonton*, *supra*, note 69; *Oldman River*, *supra* note 62.

¹⁴⁵ *Reece v. Edmonton*, *ibid.*

¹⁴⁶ *Federal Courts Act*, R.S.C., 1985, c. F-7, s.18.1 (1).

¹⁴⁷ *Friends of the Island*, *supra* note 92.

¹⁴⁸ *Sierra Club*, *supra* note 78.

¹⁴⁹ *Point Pleasant*, *supra* note 123.

¹⁵⁰ *Reese v. Alberta*, *supra* note 75.

¹⁵¹ *Ibid.* at p. 24

Numerous Alberta cases concern statutory rights of appeal to the ABCA from the decisions of regulatory boards. The legislation provides standing on the original decisions to persons that may be “directly and adversely affected”, provides a right to appeal on questions of “law” or “jurisdiction”, but is silent on who may appeal.¹⁵² This creates uncertainty respecting who may appeal and what test to apply in public interest cases.

In *Athabasca Tribal Council v. Amoco* the SCC held that a First Nations umbrella organization representing persons who would be entitled to intervene at the agency was itself entitled to appeal.¹⁵³ In *Big Loop Cattle Co. Ltd. v. Alberta* the ABCA held that normally an appellant would be a party or intervener in the original decision but there may be “limited circumstances” where someone else may appeal.¹⁵⁴ This case featured landowners and a First Nation contesting energy development, and an individual who did not participate in the agency proceedings sought to raise *Charter* issues with the agency decision at the ABCA. The ABCA declined leave to appeal on these issues, but found that if it had granted leave then it might be necessary for an individual to intervene on the appeal. In *Benston v. Alberta* the ABCA held that legislated limits on standing at the agency did not preclude standing in court on an alternate basis.¹⁵⁵ This case concerned an even narrower test that limited “directly affected” persons at the agency to municipalities where feedlots were proposed. The appellants were local landowners, campground operators and creek stewards seeking to raise substantive environmental concerns that were suitable for agency determination. The court indicated that standing on appeal would be available for directly affected persons other than the municipality who chose not to appeal. However it denied leave to appeal on the issues as there was no question of law or jurisdiction with the agency decision.

The ABCA has developed a test for leave to appeal that requires “serious arguable points” of law and provides factors to consider in this determination.¹⁵⁶ This does not preclude common law public interest standing but the court does not give it much attention. In *Pembina Institute for Appropriate Development v. Alberta* the ABCA affirmed that “certain circumstances” can provide standing on appeal to someone who lacked standing on the original decision and granted standing to an environmental organization in this position.¹⁵⁷ The court granted standing under the statutory appeals provisions and common law public interest standing, but its analysis of the latter is sparse. It may have relied as much on what it saw as unique facts of the case than a fulsome application of the standing test. The environmental organization had originally sought to raise substantive environmental concerns about a proposed coal plant at the agency. The agency held that no one was directly affected as required by legislation so it issued a permit without hearing from anyone but the developer. The permit decision was an interim decision, and its wording implied that it was expedited based on the developer’s concern that delay could allow future federal regulations to apply. The ABCA held that there was an issue with the legality of this decision that

¹⁵²*Natural Resources Conservation Board Act*, RSA 2000, c N-3, s.31 [NRCBA]; *Responsible Energy Development Act*, SA 2012, c R-17.3, s.45 [REDA]; *Energy Resources Conservation Act*, RSA 2000, c E-10, s.41 [repealed] [ERCA, repealed]; *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s.29[AUCA].

¹⁵³ *Athabasca Tribal Council v. Amoco Canada Petroleum Co. Ltd. et al*, [1981] 1 SCR 699. [Athabasca Tribal].

¹⁵⁴ *Big Loop Cattle Co. Ltd. v. Alberta (Energy Resources Conservation Board)*, 2010 ABCA 328, [Big Loop].

¹⁵⁵ *Bengston v. Alberta (Natural Resources Conservation Board)*, 2003 ABCA 173 [Bengston].

¹⁵⁶ *Big Loop*, *supra* note 154 at p.51.

¹⁵⁷ *Pembina Institute for Appropriate Development v. Alberta (Utilities Commission)* 2011 ABCA 302 [Pembina v. AUC].

was not suitable for self-review by the agency. There was a question of law to satisfy the test for statutory appeal and there was a “serious and justiciable issue” as required for public interest standing. The ABCA found a genuine interest with minimal analysis and found no other means for the issue to be heard as there was no one found directly affected by the agency. However it dismissed the appeal for mootness because the interim decision had since been replaced by a final decision. Overall this line of jurisprudence may be of limited applicability to the statutory regime.

In contrast to the FC and the Alberta courts, the BC courts have applied pure common law standing principles in all cases reviewed here. They have not had to surmount legislated limits on standing like the Federal Court, but neither have they been concerned with legislated limits on standing that may not actually exist as in Alberta. The relative ease with which the BC courts determine standing suggests that one singular approach is more functional and efficient than having to interpret legislation and apply multiple tests.

Latent judicial attitudes

The lower courts diverge on their general receptivity to public interest environmental advocacy regardless of the standing tests or rationales.

The Federal Courts are clearly receptive to public interest environmental advocacy. The court has granted standing to at least some parties in every case that raised a serious and justiciable issue, which is all but two of those reviewed here. One of the two cases in which standing was refused was later distinguished by the court and those cases in which not all parties received standing concerned application of the directly affected test. The FC has used the genuine interest factor to provide plaintiffs that assist the court and has shown little concern with floodgates or busybodies despite a large environmental case load. The one notable sign of unreceptivity to environmental advocacy is the court’s enhanced concern with justiciability in *Friends of the Earth*. This overall receptivity may be attributable to a context that is highly suitable for public interest advocacy. Many FC cases concern complex environmental regulatory schemes that create positive duties on government, nationally significant developments, no directly affected people, and the existence of large public interest organizations with the capacity to assist.

The Alberta Courts are unfavorable to public interest environmental claims regardless of the expressed rules or rationales. Every case reviewed here was dismissed. If standing was granted then the case was dismissed on the substantive merits or for other procedural reasons. The ABCA has declined to hear issues with the legality of administrative decisions, one of which was a *Charter* claim, and has struggled with what counts as a genuine interest and appropriate means for issues to be heard. They Alberta Courts have expressed concern with floodgates and busybodies despite seeing relatively fewer environmental matters. This general unreceptivity may flow from contextual problems too. Many cases involve directly affected persons in local disputes which conflate public and private interests, while at the other extreme the courts faced national animal rights activists bringing novel claims.

The BC courts have struck a fairly symmetrical balance on standing in environmental matters relative to the other jurisdictions. Public interest standing was granted in three of the six cases reviewed here. BC decisions are relatively short but fairly complete in their articulation and application of the standing principles. They are apt to consider the legal tests and policy rationales in an interwoven manner, and don't overemphasize any particular rationales.

Jurisdictions that see fewer environmental matters are more apt to see anomalous ones. The cases where public interest standing was denied to litigate purely private disputes, raise substantive environmental concerns or join existing hearings are all from such jurisdictions. This indicates that judicial receptivity to public interest environmental advocacy is likely circular. If there is sufficient environmental litigation then environmental advocates become more capable of raising issues for which public interest standing is available and warranted.

Part III: Standing at Environmental Agencies

The Mandates of Administrative Agencies

Administrative agencies are not courts; they are extensions of the executive branch of government rather than being separate institutions with their own constitutional status. This has two significant implications for standing. One is that agency matters are not litigation and the adversarial model should not always apply. The other is that agencies lack inherent jurisdiction to decide issues, hold hearings and control standing as their mandates come through ordinary legislation.

Administrative agency matters are distinguishable from litigation in several ways. Litigation is 'backward looking' in that it involves settling facts, answering questions and granting relief concerning something that has occurred. Agency matters are more 'forward looking' in that they concern plans for the future, requests for permits and conditions on future actions. The type of issues decided by administrative agencies allow for numerous reasonable conclusions.¹⁵⁸

Agency matters rarely involve a "lis" (a legal dispute between the parties as described in Part II). Superficial resemblances between agency hearings and court hearings, such as evidence and arguments from the parties, can create the appearance of a lis that does not exist.¹⁵⁹ Examples of common agency decisions involving hearings illustrate this fallacy:

- There is no lis in the requirement to obtain a regulatory permit:
- There is no lis in the review of development proposals; and
- There is usually no lis between parties to administrative appeals, although this possibility exists.¹⁶⁰

¹⁵⁸ *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9.

¹⁵⁹ Hearings Before Administrative Tribunals, *supra* note 29.

Even when there is a lis in agency matters, the agency cannot make simple 'yes or no' decisions that side with one party against another as there are further interests at stake that it must recognize. Treating agency matters like litigation creates confusion when "the real issue is the public interest".¹⁶¹

Public interest mandates

Many administrative agencies have legislated mandates to uphold the "public interest" through their decisions. Even where these specific words are absent from legislation it is hard to avoid this conclusion where agency decisions concern public resources, impacts and benefits. Public interest mandates are often vague, fuelling divergent views on what is substantively and procedurally required for decisions to be in the "public interest".

Defining the substantive content of the public interest is more challenging and has received less attention to date.¹⁶² Legislation may provide little guidance on what issues agencies should determine or what interests they should consider. Agency decisions may not articulate public interest considerations and in the worst case may use the words "public interest" as justification rather than guidance.¹⁶³ The procedural aspects of public interest decision making have received much more attention. A purely procedural view would find the public interest in the advancement of democratic values regardless of substantive decision outcomes.¹⁶⁴ One of the most cited reconciliations is that public interest mandates have procedural and substantive components that should be harmonious.¹⁶⁵ Participation in decisions must fit the issues to be determined and interests to be weighed. Likewise, substantive decisions that do not consider these issues or take these interests into account are not in the public interest. This doesn't resolve the debate on standing as a broad view of the issues to be decided would warrant broad standing while a narrow view would warrant narrow standing.

The typical debate over what issues should be decided in environmental permitting, review and appeals decisions is over the extent to which agencies should enter the policy realm or be limited to technical regulatory issues and private dispute adjudication. Concern with an overly broad view is that agency would make public policy through individual regulatory decisions. Concern with an overly narrow view is that limiting environmental issues to compliance with regulations ignores site-specific concerns or even the fact that individual developments can raise public concerns. Furthermore, policy debate at agencies is not necessarily about what policy should be but rather how it is interpreted and applied. Public interest advocates are apt to have already participated in policy development if opportunities existed and may be looking to regulatory decisions as the implementation stage or 'proving ground' for those policies.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Jodie Hierlmeier, "The Public Interest: Can It Provide Guidance for the ERCB and NRCB?" (2008) 18 JELP 279.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

Regulatory boards, environmental review panels, and appeals tribunals

Beyond the general differences between courts and administrative agencies, the mandate of a specific agency is relevant to standing. Three common types of environmental agencies reviewed in this report are regulatory boards, review panels, and appeals tribunals. All of these agencies have a level of independence from the executive and hold hearings.

Regulatory Boards make the original decisions on permits for specific industries and have ongoing oversight over these industries. Regulatory boards frequently have legislated “public interest” mandates, but these mandates may not expressly require environmental considerations, and if they do are likely to require considering ‘environmental, social, and economic’ impacts collectively. Regulatory boards can hold adjudicative hearings on a public interest decision and may require that these hearings be triggered by standing. This practice fuels conflation between the adversarial litigation model and public interest decision making. However, the party that triggers the hearing is often called an “intervener”. This affirms that they are not a plaintiff in a lis with the permit applicant. Standing for regulatory interveners may be granted based on their interests being affected by the pending decision or being adverse in interest to the applicant, but the function of intervention is also to assist the decision. Most regulatory boards allow participation in variable roles including full party status for persons who cannot trigger hearings. These persons may also be called ‘interveners’ or have other names such as ‘discretionary participants’.

Review Panels scrutinize the environmental impacts of proposed developments under a formal environmental assessment process. The model of review and standing varies immensely. Environmental reviews may be conducted by regulatory boards, environmental assessment agencies, environment ministries, or joint panels. The agency conducting the environmental review may or may not have permitting authority and ongoing regulatory oversight of the developments they review. Many environmental reviews are not triggered by standing. The trigger depends on the model but may include the type of development, type of permit, the significance of possible environmental impact, public concern, or executive order. Reviews by regulatory boards may use their stock model of standing, or the environmental review process may have an expressed public participation, a purpose that results in open standing and different participation roles. The ambiguous nature of environmental assessment as a planning tool and a regulatory permit requirement feeds debate over the proper breadth of standing on environmental reviews.

Appeals Tribunals are quasi-judicial agencies that hear challenges to decisions made by environment ministries. Appeals tribunals may lack expressed “public interest” mandates yet they have public interest functions as they are created under environmental legislation to review environmental decisions and make substantive decisions that may impact the environment. Appeals Tribunals always require standing to trigger hearings. This person becomes the appellant and without their appeal there is no decision to be made. Other parties to the appeal will include the original decision maker. Many appeals are brought by the person subject to the original decision (usually a permit holder). If the appellant is a third party then the permit holder may become a party to the appeal alongside the appellant and the

original decision maker. Appeals tribunals may grant discretionary participation to persons who cannot trigger hearings. These participants are called interveners and resemble court interveners in that their function is to assist the agency without causing undue harm to the parties. Unlike court interveners, it is possible for appeals board interveners to be elevated to full party roles.

Other Decision-Makers: Standing at the above agencies is sought on decisions that occur within larger processes for natural resource development, municipal development or environmental management. While these stages are often out of order an order can be theorized. Prior to permits being issued there will be public policy development, regulation making, land use planning and the leasing of land and resource rights. After the permit stage there will be compliance, enforcement and end-of-project-life decisions. The cumulative effects of development are an increasing environmental issue that may not be addressed at any stage.

Requests for standing can result from lack of public participation opportunities at these other stages because there is no other way to be heard. Even where participation opportunities at other stages exist they may not provide access to decisions makers or the type of proceeding that is sought. Contested standing could be a symptom more than a cause of regulatory dysfunction and may indicate a need for larger systemic fixes.

Principles of Standing at Administrative Agencies:

The need for administrative agency mandates to come through legislation creates uncertainty regarding the exact principles of standing. The common law principles may not apply and the context invokes broader policy rationales for and against public participation in environmental decisions.

Common Law Rules

The common law standing rules are not the starting point for standing at administrative agencies. The public nuisance rule and public interest standing as described in Part II may be inapplicable as agencies are not courts. However, legislation can provide a practical equivalent in that the legislature controls the standing test unless an individual has enforceable common law rights to a hearing. The common law can provide rights to a hearing through duties of fairness that are owed to persons that may be directly affected by decisions, typically adjudicative decisions. Duties of fairness do not always require a hearing but they can where the duty is strong.

Jurisdiction From Legislation

Agency mandates to decide issues, hold hearings and control standing must come through ordinary legislation. Unlike courts, agencies have no jurisdiction unless mandated by legislation and the scope of their jurisdiction varies immensely. Regardless of whether the common law applies, agencies determining standing and courts reviewing those decisions will look to legislation first.

Agency jurisdiction may be found in statutes enabling the agency, statutes on the subject matter of the proceeding, and statutes of general application such as administrative powers and procedures legislation.¹⁶⁶ Indicators of jurisdiction may include regulations made by the executive, while regulations or rules made by the agency may indicate interpretation of jurisdiction. Specific legislative provisions are the most important indicators of agency jurisdiction after which one may look to the broader legislative scheme and other factors.¹⁶⁷

Agencies also have implied powers when needed as a matter of practical necessity to discharge their mandate.¹⁶⁸ Limits on implied powers should be expressed, and agencies “should not be frustrated in performance of a statutory mandate by an overly technical interpretation of its statute”.¹⁶⁹

These general principles suggest discretion to grant standing to hear issues suitable for determination by the agency unless clearly restricted by legislation. The academic authority *Hearings Before Administrative Tribunals* states that agencies should favor hearing issues unless legislation is “very clear” that a specific person should not be heard, and even then such legislation could be counter to the *Charter*.¹⁷⁰ Most agencies have legislated tests for standing to interpret and apply, and many are not clear.

Policy Rationales Relevant to Standing at Agencies

Rationales for and against standing at agencies resemble rationales for and against standing in court in a general sense but not with respect to the specifics that would apply in a specific determination of standing.

Judicial rationales

Judicial policy rationales tied to the role of the courts are of questionable applicability. The needs of the adversarial system should only apply if agency process is deliberately adversarial. Even then, where there are public interest issues the courts are abandoning the presumption that directly affected persons provide the best facts and arguments. The rationale for granting standing to scrutinize legality might apply at an appeals tribunal with a mandate to scrutinize the legality of decisions. However it would not apply to standing on original decisions which would include most decisions made by regulatory boards and review panels. Even if these agencies have self-review powers, issues of legality with original decisions should be unsuitable for self-review.

The judicial rationales for maintaining limits on standing are more clearly applicable in the agency context and less dependent on the mandate of a specific agency. Concerns with scarce institutional judicial resources and harm to third parties can be translated into concerns with efficiency and certainty of decisions. The floodgates and busybodies concerns apply despite the findings that they are overstated.

¹⁶⁶ *Hearings Before Administrative Tribunals*, *supra* note 29.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

Efficiency

There is much academic commentary on the value of administrative efficiency. The Alberta Law Reform Institute has proposed making efficiency a general guiding principle for administrative agencies.¹⁷¹ One commentator proposes that the physical realities faced by agencies are relevant in structuring agency process.¹⁷² Concerns with efficiency and harm to other parties are common in the environmental regulatory context. These concerns are apt to be shared by the development industry and the political branches of government. Efficiency concerns are apt to be high in two situations: where a large amount of regulated activity creates the prospect of numerous proceedings or where a large proceeding will occur and will be hard to manage. One commentator states that costs and delay in environment and natural resource proceedings hurts all parties.¹⁷³

There is an 'exchange of efficiency' principle in the regulatory context as well. This principle is that investment of time and resources at the beginning of a process will produce long term savings. The implication is that narrower standing is not necessarily more efficient than broader standing if standing becomes a disputed issue. *Hearings Before Tribunals* states that decades of practice have shown that "there is far less time consumed and fewer risks taken by admitting rather than excluding a party".¹⁷⁴

Harm to directly affected third parties

Harm to third parties is a contentious rationale against standing at administrative agencies.

Administrative law commentators have re-articulated the principle that directly affected persons should be free to live with a decision as they choose to and that this favors limits on standing.¹⁷⁵ In the environmental regulatory context there are numerous possible third parties including include landowners, First Nations, and industry competitors who may settle their grievances with the developer or chose to live with permit decisions. However, the problem of presuming contentment discussed in relation to the SCC cases reviewed in Part II persists in the regulatory context. The power imbalance between these third parties and industrial developers can be high. Furthermore the plethora of third parties is a direct result of agency proceedings being public interest decision making, not litigation. In this context agencies must balance the interests of the persons appearing at the agency with the interests of the agency, and if irreconcilable then the agency comes first.¹⁷⁶

The most contentious applicability of the harm principle is to a regulatory permit applicant as they are not a third party. They are a direct party. In court, if public interest advocates seek standing to challenge a development permit, the litigation is against government and the permit holder is clearly a third party with rights at stake. The situation is somewhat similar at appeals tribunals although the agency must still consider broader interests. At a regulatory board or review panel however, the permit decision has yet to

¹⁷¹ Tribunals in Alberta, *supra* note 7.

¹⁷² Hearings Before Administrative Tribunals, *supra* note 29.

¹⁷³ Human Rights in Natural Resources Development, *supra* note 6.

¹⁷⁴ Hearings Before Administrative Tribunals, *supra* note 29.

¹⁷⁵ Lorne Sossin, *Access to Administrative Justice and Other Worries*, (2007) [unpublished draft] online: http://www.law.utoronto.ca/documents/conferences/adminjustice08_Sossin.pdf [Access to Administrative Justice].

¹⁷⁶ Hearings Before Administrative Tribunals, *supra* note 29.

be made so a developer's claim to protection from public interest representation is weaker. They may have already acquired land or leased resources in expectation of development but this is still not analogous to being a third party affected by litigation. Concern with harm to permit applicants caused by standing at administrative agencies is not so much a common law rationale but more a political concern. Developers and governments seeking to promote the industry may understandably fear inefficiency and uncertainty in the regulatory process and it would be naïve to think that this is not driving limits on standing. However these concerns still must still be pursued through legislation and policy for them to be relevant to determining standing. This is even more the case if the concerns relate to the competitiveness of the industry in general.

Substantive and procedural rationales for public participation

Some rationales favoring standing at agencies resemble generic rationales for public participation in environmental decision making. Just as there are substantive and procedural definitions of "public interest" there are substantive and procedural rationales for public participation. Like efforts to define the "public interest", the substantive rationales for public participation are less developed than the procedural ones.

The substantive rationale is basically that participation improves decisions. This is the key rationale respecting regulatory interveners who lack legal rights or interests as their purpose is to assist the decision maker. This rationale should make capacity, expertise and relevance of submissions factors in determining standing. One problem with this rationale is that, as discussed in Part I, evidence that participation improves decisions can be lacking. One commentator concludes that "while sound process does not guarantee good decisions, poor process is certain to risk poor ones."¹⁷⁷ A second problem with a purely substantive rationale is that standing can also be warranted to uphold legality, fairness and access to justice regardless of the effectiveness of the party.

The procedural rationale is basically that participation legitimizes proceedings, levels the playing field or prevents capture of agencies by the industries that they regulate. It is often raised where public interest decision making involves a utilitarian balancing act or a battle of interests that favors economic interests over environmental ones. The procedural rationale converges with the exchange of efficiency concept. For example, rationales articulated by the Canadian Institute of Resources Law for participation at the Alberta Energy Regulator include "conflict management, thereby reducing future transaction costs" and "generating buy-in by increasing accountability and transparency of decision-making processes".¹⁷⁸

Access to administrative justice

A procedural rationale resembling the judicial ones is that access to justice includes access to administrative justice.¹⁷⁹ At least one commentator argues that the rule of law is no less important in the

¹⁷⁷ Human Rights in Natural Resource Development, *supra* note 6.

¹⁷⁸ Nickie Vlavianos, "A Single Regulator for Oil and Gas Development in Alberta? A Critical Assessment of the Current Proposal", (2012) Resources 113, Canadian Institute of Resources Law, online: <http://cirrl.ca/resources/archive> [Single Regulator].

¹⁷⁹ Access to Administrative Justice, *supra* note 175.

boardroom than the courtroom, and perhaps more so.¹⁸⁰ Fairness owed to directly affected persons is the established example, but access to justice concerns are foreseeable where persons seek to represent public interests. The problem with a purely procedural rationale for standing at agencies is that it invites interest representation before clarifying what substantive issues an agency should decide. While environmental advocates may balance out private economic interests the proceeding is no less a battle of interests.

The fact that agencies are not courts, that the common law principles may not apply, and that more generic policy concerns are in play would all suggest that standing at agencies should be more relaxed and more informal than in court. In general, administrative agencies are more open and democratic than courts concerning the issues and interests they will entertain.¹⁸¹ There is some argument that most agencies should hear from most participants as this practice is itself in the public interest.¹⁸² This is definitely not the current practice at many environmental agencies. Agencies and the courts that review their decisions may treat standing as a question of law and fact without much articulation of policy other than legislative intent. This legislative intent may be deduced through strict statutory interpretation of standing tests with little consideration of the broader mandate. This occurs in several of the models discussed below.

Current Models of Standing at Environmental Agencies

The functionality of legislated standing at environmental agencies is a critical issue. The models have been characterized by two extremes: open standing on some provincial and federal environmental reviews prior to reforms in 2012, and requirements for individual interest standing to trigger hearings at regulatory boards and appeals tribunals in multiple provinces. Neither extreme has proven to uphold the rationales for and against standing. Fully open standing has not necessarily legitimized past processes nor proven necessary for sound decisions but there is evidence that participation has made a difference. The efficiency impacts are unsettled as inefficiency may flow from the process management challenge of numerous non-standing participants or from aspects of the regulatory process unrelated to standing. Conversely, individual interest standing is extensively criticized for undermining the rationales for and against standing. Issues suitable for determination are precluded or decided through disputing. The tests resemble the common law, are not suited for preliminary determinations of standing and are subject to shifting interpretations. Litigation is increasing and the courts are intervening in denials of standing. Individual interest standing raises the case for an exchange of efficiency, especially interventions come from there being no other way to be heard. Several models of standing at agencies take a middle path between these extremes. While they have also attracted criticism, it is less intense and more linked to the details of a model than the general approach.

¹⁸⁰ *Ibid.*

¹⁸¹ Hearings Before Administrative Tribunals, *supra* note 29.

¹⁸² *Ibid.*

Open Standing at Environmental Reviews

There are two models of open standing. One is that legislation can provide standing to “any person”. These provisions are more common in other countries as discussed in Part V. The second model is to have no standing test. This requires that hearings be triggered by means other means but once triggered, participation is open to the general public and full party standing is available to persons who follow the necessary procedure. Open standing has been used by the Manitoba Clean Environment Commission and for federal environmental assessment reviews panels prior to 2012. Legislation enabling these agencies is similar in that it makes public participation an expressed purpose of the environmental review process and provides a screening process for participant funding that is relevant to a discussion of standing.

Legislation creating the Manitoba Clean Environment Commission provides an expressed mandate of “developing and maintaining public participation in environmental matters”.¹⁸³ The agency’s Process Guidelines are intended to ensure that hearings “remain fair and open forums for the exchange of information and ideas and that they “provide a full opportunity for public involvement in the environmental management process.”¹⁸⁴ The Guidelines and practice directions identify different parties and their responsibilities. While there is no legislated test for standing, participant funding regulations provide a test for funding that uses similar criteria. Funding is provided to “interested” parties to assist in representation at hearings.¹⁸⁵ Some funding considerations resemble the common law genuine interest factor by asking whether the applicant has a demonstrated interest in the potential effects of the development, whether a group has an established record of concern or has demonstrated a commitment to the interest that it represents. Other considerations resemble the type of positive and negative impact considerations commonly used to screen non-standing interveners. The agency may consider whether “representation of the interest would assist the panel in investigating the potential effects of the development and contribute substantially to a hearing, and whether the applicant has attempted to bring related interests into an umbrella group.”¹⁸⁶

Likewise, one legislated purpose of the federal environmental review process is to “ensure that opportunities are provided for meaningful public participation” in environmental assessment.¹⁸⁷ This purpose survived the 2012 reforms although open standing on major reviews did not. The legislation requires the reviewing agency to establish a participant funding program but it does not provide a test.¹⁸⁸ The Canadian Environmental Assessment Agency program requires that applicants for funding show that they will generally add value to the process and that they fit one of several categories. The categories include direct, local interests such as residential or property interests, community knowledge or Aboriginal traditional knowledge, expert information, or interests on the impacts on Aboriginal treaty claims and rights.

¹⁸³ *Environment Act, The*, CCSM c E125, s.6.

¹⁸⁴ Clean Environment Commission, *Process Guidelines Respecting Public Hearings*, online; http://www.cecmanitoba.ca/understanding_the_process/legislation_acts_and_regulations_to_follow/

¹⁸⁵ *Participation Assistance Regulation* Man. Reg. 125/91, s.6 [Participant Assistance Regulation].

¹⁸⁶ *Ibid.*

¹⁸⁷ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s.4 [CEAA 2012].

¹⁸⁸ *Ibid.*, s.57 and 58.

Criticisms of open standing

The functionality of open standing is likely affected by the number of matters an agency sees, the magnitude of the developments it reviews, and profile of the advocates that it attracts. The Manitoba and federal regimes are legislatively similar with respect to public participation yet there are no well-publicized criticisms of open standing in Manitoba. The greater criticism of the Manitoba model is the lack of legislated guidance on substantive factors to consider in determining the public interest.¹⁸⁹ Tellingly, some public interest advocates have been neither for nor against the development being reviewed. Instead they have sought to improve the agency's decision making process by bringing broader perspectives and promoting the development of agency jurisprudence on public interest considerations.¹⁹⁰

In contrast, the debate over open federal reviews is intense. There is qualitative evidence that public participation in federal reviews has had a positive impact on decisions.¹⁹¹ One survey of participation in federal environmental assessments found evidence of direct impacts as public concerns and ideas were reflected in panel deliberations and recommendations.¹⁹² It also cited examples of direct impacts where developers had changed or improved their project plans.¹⁹³ It concluded that public reviews panels provide the best process for facilitating an exchange of ideas about how and whether a project should be allowed. It also suggested an efficiency benefit as failure to incorporate public consultation in environmental assessments has increased costs.¹⁹⁴

However, the 2012-2013 Northern Gateway pipeline hearings invited criticism of the federal review process as creating a free-for-all atmosphere that does not work. These hearings were described as an "epic battle" involving 4,500 participants and seventy five 12-hour hearing days.¹⁹⁵ The participation opportunities produced little participant satisfaction with the substantive outcomes or feelings that the process was legitimate.¹⁹⁶ There was debate over whether funding categories should restrict submissions to those categories. Some participants felt muzzled by limits on submission content and intimidated by procedural formalities.¹⁹⁷ Some hearings were cancelled where insufficient registered participants confirmed their attendance through additional procedures.¹⁹⁸ There were also concerns with the legitimacy of the participation that was occurring.¹⁹⁹ Environmental advocates allegedly engaged in

¹⁸⁹ Manitoba Public Interest Law Centre, personal communications.

¹⁹⁰ Manitoba Public Interest Law Centre, personal communications.

¹⁹¹ Susan Rutherford and Karen Campbell, "Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels" (2004) 15 JELP 69 [Survey of Public Participation].

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ Sandy Carpenter, "Fixing the Energy Project Approval Process in Canada: An Early Assessment of Bill C-38 and Other Thoughts" (2012) 50 ALR 2 [Approval Process in Canada].

¹⁹⁶ *Ibid.*

¹⁹⁷ Process participants, personal communications.

¹⁹⁸ *Ibid.*

¹⁹⁹ Approval Process in Canada, *supra* note 195.

hearing flooding, caused the industry to be “double teamed” by the number of participants, and deliberately misused the process to cause delay.²⁰⁰ Yet in the end the pipeline was approved with numerous conditions reflecting issues raised by the participants, suggesting that participation made a positive contribution to the decision.

The Northern Gateway Pipeline controversy leaves uncertainty about the merits of open standing for substantive public interest decision making. On one hand it exemplifies the issue of a project-specific regulatory decision attracting numerous advocates with very broad policy concerns like global climate change. On the other hand, even commentators critical of the process noted that reforms must provide full participation by some public interest advocates to allow a full canvassing of the issues.²⁰¹

The Northern Gateway Pipeline controversy is also inconclusive on the effects of open standing on efficiency because the efficiency concern was not caused by equal standing for environmental interests. Despite equal opportunity, environmental advocates were underrepresented among the full standing parties, comprising roughly 7.5% of the full parties as compared to 18% for industry and larger percentages for First Nations and affected individuals.²⁰² Beyond being underrepresented, this environmental sector included a diversity of educational, local and regional organizations. If open standing invites the ‘wrong’ environmental advocates, it may be because funding and ability to navigate procedural hoops become the practical tests for standing. The larger efficiency challenge was with the huge number of non-standing participants seeking to make oral presentations. This is a process management issue. Similarly, some concern with the conduct of environmental advocates was with communications tactics outside of the hearing process aimed at causing reputational damage.²⁰³ This cannot be alleviated by denial of standing and could even be aggravated by that act. The Northern Gateway Pipeline hearings might reflect the larger systemic issues of vague public interest mandates, inadequate policy guidance on the course of major development and no other ways for issues to be heard.

The 2012 reforms to the federal environmental assessment process revealed the systemic problems. Seventeen out of twenty reform recommendations from the Parliamentary Committee concerned efficiency.²⁰⁴ Some industry-side recommendations barely mentioned standing at all, showing much more concern with redundant and uncertain process, long agency timelines, lack of clarity regarding Aboriginal consultations, and general bureaucratic inefficiency.²⁰⁵

The conclusion may be that, while open standing is consistent with a public participation purpose and enables modest positive contributions to decisions, it may be unnecessary to produce better decisions, does not clearly legitimize the process, and contributes somewhat to efficiency concerns. The 2012

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² Data from percentages generated by author using data number of parties in each category as recorded in List of Parties (A30408), [CEAA Registry number reference number 06-05-21799]

²⁰³ Approval Process in Canada, *supra* note 195.

²⁰⁴ Approval Process in Canada, *supra* note 195.

²⁰⁵ Energy Policy Institute of Canada, *Regulatory Reform Draft* (2011) [unpublished] online: <http://www.canadasenergy.ca/wp-content/uploads/2011/12/EPIC-Regulatory-Reform-Draft-November-2011-Final.pdf>

reforms that narrow standing on federal environmental reviews are discussed below under options that take a middle path.

Individual Interest Standing at Regulatory Boards and Appeals Tribunals

Numerous regulatory boards and appeals tribunals use models where individual interests are required to trigger hearings. This form of standing at environmental agencies is fairly restrictive against anyone other than the regulatory permit applicants subject to the decision. There are at least three broad categories of such standing at agencies, one under the common law and two under legislation. One is the right to a hearing as a possible result of common law duties of fairness as discussed above.²⁰⁶ A second example is where legislation provides standing only for prescribed classes of rights holders. This model is very restrictive but provides some certainty of who has standing. For a Regulatory Board example, standing at the BC Oil and Gas Tribunal is available to the permit applicant or permit holder and the landowner where resource extraction occurs.²⁰⁷ There is no standing for neighbours or other aggrieved persons.²⁰⁸ For an Appeals Tribunal example, standing at the BC Environmental Appeals Board on water licensing decisions is limited to specified holders of land rights and water rights, excluding other water users.²⁰⁹

The third and most common model is for legislation to provide one general test for standing to trigger hearings. There are countless articulations but the most common are that a person must be “aggrieved”, “directly affected”, or “directly and adversely affected”. In Alberta variations of the “directly affected” or “directly and adversely” affected test are used at all of the regulatory boards, the Environmental Appeals Board, and for written statement of concern to the environment ministry. In BC the “person aggrieved” test is used for some appeals to the Environmental Appeals Board.

Standing at the Alberta regulatory boards

An ideal case study of individual interest standing at regulatory boards is provided by energy regulation in Alberta. This is a busy regulatory field producing significant jurisprudence on standing. The original agency was the Energy Resources Conservation Board (ERCB), which was renamed the Energy and Utilities Board (EUB) in light of an expanding mandate, then partitioned into an ERCB responsible for oil and gas and an Alberta Utilities Commission (AUC) responsible for utilities. For simplicity this report refers to the ERCB with respect to the oil and gas function. The ERCB was disbanded in 2012 and replaced by a new Alberta Energy Regulator. Non energy natural resource projects are reviewed by the Natural Resources Conservation Board (NRCB). All of these agencies were provided with comparable public interest mandates and variations of the “directly affected” or “directly and adversely affected” test. The history of these agencies provides a study of public interest decision making, agency practice on standing and further participant roles, shifting interpretations of the legislated test at the agencies and in court, and divergent approaches to standing at agencies provided with superficially similar tests.

²⁰⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 [Baker]; David Mullan, *Administrative Law*, *supra* note 29.

²⁰⁷ Tribunals in British Columbia, *supra* note 7.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

All of the Alberta agencies but for the new Alberta Energy Regulator were provided by legislation with comparably broad mandates to determine if developments were in the public interest having regard to their economic, social and environmental effects. The ERCB rarely articulated this mandate in a fulsome way in decisions. In one decision the ERCB articulated the mandate as requiring a balancing between the benefits of the proposed project and the potential risks to the public and environment.²¹⁰ It stated that if risks outweigh gains then the project is contrary to the public interest. There are very few cases in the past several decades where this has been found to be the case on account of environmental risks. The ABCA had at least two opportunities to consider that agency's public interest mandate but has offered little substantive analysis.²¹¹ In general there were competing broad and narrow views of this mandate, and particularly the extent to which the agency should allow policy debate in regulatory hearings.²¹² These broad and narrow views of the agency's mandate extended to broad and narrow views of the participation that should occur.

Legislation creating the ERCB provided that persons who may be "directly and adversely" affected by a decision be provided reasonable opportunities to furnish evidence and make representations, including rights to cross examination if required by fairness.²¹³ This provision did not state outright that a hearing was required but it was interpreted in that manner by the agency and the courts. The legislation provided for appeals to the ABCA on questions of law and jurisdiction, which produced numerous cases on agency denials of standing. Legislation also provided the Alberta agencies with power to hold hearings on their own motion but this power is not used trigger hearings on permit applications.

The ERCB interpreted the standing test in a manner that often required geographic proximity and economic and property interests. There are few public decisions to this effect as the ERCB almost always determined standing on paper submissions with the decision conveyed in a letter to the parties. In its history the ERCB held one notable hearing on standing which produced a public decision document. In *Re. Compton Petroleum*, numerous municipal, community, and landowner representatives in the southern Alberta foothills were all denied standing on a gas well application that could have been the leading edge of larger regional development in this socially and environmentally significant area.²¹⁴ The ERCB had previously issued an Information Letter stating that proposals in the region may require development plans, public consultation and environmental assessment. However in the standing decision it found that no one was directly affected so there would be no hearing. The decision did not consider the regional implications of the well although it stated that the ERCB's Information letter needed clarifying. In other instances, interveners at the ERCB resorted to an absurd tactic to ensure that hearings would be triggered. Landowners, First Nations and local community groups who could pass the "directly and adversely

²¹⁰ *Re. Polaris Resources Ltd.* (2003) EUR Decision 2003-101 [Polaris].

²¹¹ *The Public Interest*, *supra* note 162.

²¹² Nickie Vlavianos, "The Issues and Challenges with Public Participation in Energy and Natural Resources Development in Alberta", (2010), Resources 108, Canadian Institute of Resources Law, online: <http://cir.l.ca/resources/archive> [Challenges with Public Participation].

²¹³ ERCA, repealed, *supra* note 152 at s. 26(2).

²¹⁴ *Decision on Requests for Consideration of Standing, Re. Compton Petroleum Corporation* (2004) EUB Decision 2006-052. [Compton Petroleum].

affected” test would enter a ‘straw man’ coalition with environmental organizations that could assist with the public interest issues but were not directly affected. This allowed the environmental organizations to be ‘piggybacked’ into hearings through the standing of the landowners.

If hearings were triggered then the ERCB often included discretionary participants beyond those with standing. There was no legislated test for these discretionary participants but agency practice recognized “interested parties” and favored “relevant information”.²¹⁵ These determinations were made at prehearing meetings setting the issues, participant roles and eligibility for costs. The ERCB occasionally provided discretionary participants with party status but may have done so inconsistently with a preference for interveners with economic interests resembling those that provide standing.

The ERCB’s attitude towards hearings shifted over time despite little change in the public interest mandate, standing test or power to grant discretionary participation. The initial trend was towards frequent hearings. For example in 1984-85 the ERCB held 78 hearings.²¹⁶ This trend correlated with growing public concern over increasing energy activity on the environmental significant Eastern Slopes of the Rocky Mountains. A change to the Province’s Eastern Slopes Policy in 1984 fueled debate over appropriate development as it stated that no legitimate proposals would be categorically rejected. Eastern Slopes hearings were also quite fulsome in that they included numerous environmental advocates ranging from local groups to large organizations and other government agencies making substantive representations.²¹⁷ Two hearings involving the extremely unique Whaleback region in which environmental advocates and local landowners were provided full party status concluded with no development.²¹⁸ This indicates that standing impacted the substantive outcomes, although the ERCB decisions reflect more regulatory procedure concerns than environmental value protection. By the 1990s the clear trend was growth in public participation.²¹⁹ The ERCB subsequently shifted focus towards promoting negotiations and alternative dispute resolution.²²⁰ This program was successful for resolving private disputes but it raised questions of how well the public interest was served where issues were not heard.²²¹

Hearings from the 1990’s and 2000’s indicate that the ERCB found broader public interest issues like cumulative effects, landscape management and land use policy to be outside its mandate, and it may have been frustrated by gaps in these areas. In one Eastern Slopes decision all of the parties agreed that regional cumulative effects were of concern, but the ERCB decided the issue by finding that the developer

²¹⁵ *Re. BA Energy Inc., Prehearing Meeting* (2004) EUB Decision 2004-2010. [BA Energy]; Compton Petroleum, *ibid.*

²¹⁶ ERCB Annual Report 1984-85.

²¹⁷ *Re. Shell Jutland* (1986) ERCB Decision 86-2; *Re. Shell* (1987) ERCB Decision 87-16; *Re. Shell* (1988) ERCB Decision 88-16; *Re. Husky* (1994) ERCB Decision 94-2.

²¹⁸ Polaris, *supra* note 211 ; *Re. Amoco*, (1994) ERCB Decision 94-8.

²¹⁹ Patricia Rowbotham, “The Growth of Public Participation in Decisions of the Energy Resources Conservation Board”, (1994) 32 *Alberta Law Review* 468. [Growth of Public Participation].

²²⁰ *Ibid.*

²²¹ *Ibid.*

had complied with cumulative effect assessment guidelines.²²² However, it expressed criticism of provincial land management and noted the limits of its own adjudicative process for dealing with such issues.²²³ In another Eastern Slopes decision the ERCB would not defer a development permit decision until following a proposed regional plan was completed, noting that there were no current plans that would exclude the development.²²⁴

In the mid-2000's the agency was split in two with the ERCB regulating oil and gas and the AUC regulating utilities. Legislation mandating the two agencies replicated the existing public interest considerations, standing test and power over discretionary participation. The evidence suggests that the ERCB side of this split demonstrated a decreasing propensity to grant standing and hold hearings. For example in the years since 2010 the ERCB held an average of 8-12 hearings a year, despite regulating roughly 180,000 oil and gas wells and 400,000 kilometers of pipeline.²²⁵

As the ERCB became more restrictive the amount of litigation concerning standing and other issues of participation and fairness increased. From 2004 to 2011 ABCA heard at least eleven such requests for appeals from the ERCB.²²⁶ As this litigation mounted the ABCA showed signs of shifting from upholding the ERCB's restrictive regime to intervening in ERCB denials of standing and costs.

Prior to 2009 the ABCA repeatedly upheld denials of standing despite little consistency in the ERCB's reasons. The early cases show judicial propensity to uphold denials of standing despite articulating ostensibly low legal and factual requirements for standing. In *Whitefish Lake First Nation v. Alberta* the ABCA established that standing only requires showing a "prima facie" case or that the person "may" be affected.²²⁷ In *Dene Tha' First Nation v. Alberta* the ABCA held that the determination of "directly affected" involved a two part test: a person must have an "interest recognizable to law" and there must be sufficient facts to show that it may be affected.²²⁸ Leave to appeal to the SCC was dismissed.

These early cases featured bad facts on which to develop a general approach to the directly affected test. Both cases involved First Nations asserting treaty rights over territories outside of their reserves, so a judicial preoccupation with legal rights and geographic proximity may have been foregone conclusions. Subsequent ABCA cases upheld ERCB denials of standing to recreational users of public land²²⁹, fur trappers²³⁰ and numerous landowners or surface rights advocates. Repeat denials of standing by the

²²² Steven Kennett, "Spinning Wheels in the Castle: A Lost Decade for Sustainability in Southwestern Alberta", CIRL Occasional Paper #14 (2003) Canadian Institute of Resources Law, citing *Re. Shell* (2000) ERCB Decision 2000-17; online: <http://ciril.ca/publications/occasional-papers>

²²³ *Ibid.*

²²⁴ *Re. Petro-Canada*, (2010) ERCB Decision 2010-022.

²²⁵ Annual Reports from the former ERCB as of 2012 may be archived at the Alberta Energy Regulator, online: <http://www.aer.ca/data-and-publications/publications/aer-annual-report>

²²⁶ Challenges with Public Participation, *supra* note 212.

²²⁷ *Whitefish Lake First Nation v. Alberta* (Energy and Utilities Board) 2004 ABCA 49.

²²⁸ *Dene Tha' First Nation v. Alberta* (Energy and Utilities Board) 2005 ABCA 68, leave to appeal to SCC dismissed [2005].

²²⁹ *Sawyer v. Alberta* (Energy and Utilities Board) 2007 ABCA 297.

²³⁰ *Prince v. Alberta* (Energy Resources Conservation Board), 2010 ABCA 2014.

ERCB showed its propensity to require adverse impacts on property or economic interests and to impose high evidentiary standards.

As of 2009 the ABCA has been more favorable to persons seeking standing and costs at the ERCB. It has shown less deference to ERCB's strict interpretations of the legislated test and it has intervened in factual questions where concerned with the ERCB's high evidentiary standards. Three important cases feature the same group of landowners challenging multiple similar applications for sour gas wells that created exposure to health risks. For simplicity these decisions may be referred to as *Kelly #1*, *Kelly #2* and *Kelly Costs*.

The *Kelly* cases are very significant in that the court is not interpreting the legislated tests as a form of public nuisance rule, it has begun to consider the ERCB's public interest mandate as relevant to hearings, and it is articulating policy rationales for and against standing at agencies. These rationales merge the common law concerns with a view of agency process as less adversarial.

In *Kelly v. Alberta (Kelly #1)* the ABCA overturned an ERCB denial of standing and ordered the ERCB to grant standing and hold a new hearing.²³¹ The factual scenario on which standing was denied by the ERCB was very complex and important. A landowner fell within a high risk zone created by the ERCB's modelling of airborne gas. This zone indicted the risk of life threatening and possibly irreversible health effects. This level of proximity also resulted in the landowner having a right to be consulted by the developer under an ERCB Directive (an agency-made rule with regulatory weight). The court held that a person with this right was directly and adversely affected for the purpose of standing. The ABCA rejected the ERCB's interpretation of the standing test as requiring that a person show that a potential effect on them was to a different or greater degree than the general public. This differs from older ABCA authorities discussed in Part IV below that interpreted a "directly affected" test in a manner resembling the public nuisance rule.

After being ordered to grant standing, the ERCB changed its modelling to exclude the landowners from this primary risk zone, claiming a technical error in the prior model. In *Kelly v. Alberta (Kelly #2)* the ABCA overturned an ERCB denial of standing to a landowner residing within a "tertiary zone" where persons would be advised to either evacuate or take shelter in the event of a gas incident.²³² The landowner claimed to be directly and adversely affected on the basis that exposure to gas would aggravate an existing medical condition, which the ERCB rejected based on inadequate evidence of causation. The ERCB further found that the landowner was not "adversely affected" as required by legislation, as while there was potential of being evacuated, this was not an "adverse effect" as evacuation is a benefit. The ABCA rejected the ERCB's finding on this point as well. Most notably, the court stated:

²³¹ *Kelly v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 [Kelly #1].

²³² *Kelly v. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325, [Kelly 2].

“The right to intervene ... is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have a recognizable impact on their rights, while screening out those who have only a generic interest in resource development (but no ‘right’ that is engaged), and true ‘busybodies’ ... that balancing is the responsibility of the Board, provided that it is done on a proper legal foundation.”²³³

This trend of intervening in ERCB decisions and articulating policy rationales for standing continued in *Kelly vs. Alberta (Kelly Costs)*.²³⁴ In this case the ABCA overturned the ERCB’s denial of intervener costs on the rehearing ordered in *Kelly #1*. The ERCB had granted standing as ordered by the ABCA but it denied costs based on a narrower legislated test requiring a directly affected interest in land. In finding that the interveners were eligible for costs, the ABCA stated that:

“The requirement for public hearings is to allow those “directly and adversely affected” a forum within which they can put forward their interests and air their concerns. In today’s Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.”²³⁵

The ABCA in *Kelly Costs* further articulated a view that regulatory interventions are not purely win-lose and that the adversarial approach is not necessarily consistent with public interest decision making:

“In normal civil litigation costs generally go to the “winner”. Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying “winners and losers”; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived “success” of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are “successful” when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.”

The AUC side of the ERCB-AUC split deserves attention because despite a semantically similar public interest mandate and standing test to the ERCB it has shown propensity to interpret this mandate and test more broadly. This may be attributable in part to the fact that it regulates large power lines which makes public interest issues and large hearings fairly inevitable. An example of the AUC interpreting its mandate broadly and being receptive to standing is provided by the decision in *Re. Capital Power*.²³⁶ This

²³³ *Ibid.* at p.26.

²³⁴ *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19.

²³⁵ *Ibid.* at p.33.

²³⁶ *Re. Capital Power Management Inc.* (2011) AUC Decision 2011-026.

hearing was a developer-triggered review of conditions on a permit. The conditions were on the permit because at the time of project approval an environmental organization had acquired standing through the above described coalition tactic, successfully leveraged environmental commitments from the developer and convinced the agency to make these commitments conditions on the approval. When the developer applied to have the conditions removed, the AUC readily found that the coalition had standing based on its prior involvement. The AUC decided to uphold the condition, finding environmental considerations in its “public interest” analysis could go beyond ensuring the proposed developments comply with the regulatory baseline. An example of the AUC’s different approach to standing is provided by the “enhanced public participation process” used for large power lines where hearings are certain to occur. The AUC provides a presumption of standing to persons within prescribed geographic proximity without having to engage in the “directly and adversely” affected analysis in every case.²³⁷ Another example is an AUC public inquiry on the regulation of hydroelectric development which basically recommended keeping the directly affected test but interpreting it more broadly.²³⁸ The inquiry canvassed proposals including a “genuine interest” test, different participation requirements geared to the scale of the project, and holding regional consultations rather than proceeding project-by-project. While it recommended keeping the test the focus was clearly on the prospect that broader participation earlier on would produce an exchange of efficiency. There is no evidence that this approach to standing impacts efficiency as the agency has performed at near 100% on decision timeliness for several years running.²³⁹

The ABCA reviewing the AUC has not had to consider such egregious denials of standing as in in ERCB cases. However, the jurisprudence shows the same preference for property and economic interests as in ERCB cases.²⁴⁰ Where the AUC has denied standing the ABCA has upheld this denial through similar reasoning as in early ERCB cases. The court applies the same test requiring a legally recognizable interest and evidence that this interest may be directly and adversely affected, only requires a prima facie case of impacts, yet will find that this ostensibly low evidentiary standard has not been met.²⁴¹

The AUC remains in place but the ERCB and its enabling legislation were repealed and replaced in 2012 by the creation of a new Alberta Energy Regulator. The new legislation is an overt attempt to increase the clarity of the agency’s mandate by removing reference to the public interest”.²⁴² This change followed recommendations to separate regulatory matters and “private interest” issues from policy development and “common interests”.²⁴³ Ironically the reforms perpetuate uncertainty concerning standing. The new legislation provides that “directly and adversely affected” persons have a right to be heard where hearings occur but does not clearly provide that this person can trigger a hearing.²⁴⁴ There is no jurisprudence on the new provisions at the time of this report.

²³⁷ Alberta Utilities Commission, *Enhanced Participation Process*

²³⁸ Alberta Utilities Commission, *Hydroelectric Power Generation Development Inquiry* (Calgary: Alberta Utilities Commission, 2011). online: <http://www.energy.alberta.ca/Electricity/pdfs/HydroelectricPowerInquiry.pdf>, at 7.7.3 and 7.7.4.

²³⁹ Ministry of Energy, *Annual Reports*, see AUC “facilities” applications online: http://www.energy.alberta.ca/About_Us/1001.asp

²⁴⁰ *Cheyne v. Alberta (Utilities Commission)*, 2009 ABCA 348 [Cheyne].

²⁴¹ *Ibid.*

²⁴² REDA, *supra* note 152.

²⁴³ Regulatory Enhancement Project, *Technical Report* (Edmonton: Government of Alberta, 2010).

²⁴⁴ REDA, *supra* note 152.

Despite these reform efforts the new agency may have trouble separating regulatory and policy issues as the context in Alberta involves a lack of land use policy guidance for regulatory decisions, significant public concern with energy projects, and no other way to be heard by decision makers other than through regulatory hearings. The new agency is already moving towards a regulatory approach for unconventional oil and gas resources (fracking and in-situ oil sands) that would allow it to consider regional issues and cumulative effects.²⁴⁵ This proposal implies broader public input than would be provided on site-specific permit applications.

Standing at the Alberta and British Columbia Environmental Appeals Boards

Individual interest standing is used at the Alberta Environmental Appeals Board (Alberta EAB) and several matters at the British Columbia Environmental Appeals Boards (BC EAB). Both agencies are responsible for reviewing similar decisions and produce decisions on standing that may be judicially reviewed to the superior courts. Despite being provided with semantically different standing tests these two agencies demonstrate similar challenges screening groups and maintaining appropriately low evidentiary standards. The BC EAB has been involved in more questions of fairness and both agencies have refused to grant common law public interest standing.

The Alberta EAB is created under environmental protection legislation that recognizes a “shared responsibility of all Alberta Citizens” for ensuring environmental protection and refers to opportunities for citizens to provide advice on decisions affecting the environment.²⁴⁶ Despite this participatory purpose, this legislation and the legislation under which water licenses are issued provide appeal rights to persons that are “directly affected”.²⁴⁷ The agency finds that this excludes appeals by further persons and this interpretation has been upheld on judicial review.

Numerous Alberta EAB decisions show requirements that a development interfere with an individual’s health, property, or economic interests.²⁴⁸ The agency has called it very important that the impacts on a person seeking standing be on natural resources used by them or their use of natural resources.²⁴⁹ The agency has held that these impacts must be greater than those on the public generally but they need not be unique in kind or magnitude.²⁵⁰ These articulations resemble a soft articulation of the public nuisance rule.

²⁴⁵ Energy Resources Conservation Board, *Regulating Unconventional Oil & Gas in Alberta: A discussion paper*; Alberta Energy Regulator *Play Based Regulation Pilot Project* online: <http://aer.ca/about-aer/spotlight-on/pbr-pilot-project>

²⁴⁶ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s.2 [EPEA].

²⁴⁷ *Ibid.*, s.91; *Water Act*, RSA 2000, c W-3, s.115 [Water Act].

²⁴⁸ Alberta’s Environmental Appeals Board, *supra* note 7.

²⁴⁹ Alberta’s Environmental Appeals Board, *Ibid.*; *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection re: Smoky River Coal Limited* (19 October 1998) Appeal No. 98-230-D (A.E.A.B.) [Bildson].

²⁵⁰ *Ibid.*; Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.) Online through Alberta Environmental Appeals Board : <http://www.eab.gov.ab.ca/judicial/Cardinal%20IR.pdf> [Gadd v. Director]; upheld on judicial review but based on prematurity of the judicial review: *Cardinal River Coals v. the Environmental Appeals Board and Ben Gadd*, 2004 ABQB 0403 18462 [Cardinal River Coals].

Geographic connection is important but residency is not necessarily required. In *Gadd vs. Director* it granted standing to a commercial outdoor guide who operated in an area where he did not live.²⁵¹ The agency has treated geographic proximity somewhat inconsistently based on the strength of the rights that are affected and the geographic range of those rights. For example, it has granted standing to First Nations many kilometers from projects yet subjected local landowners and community representatives to greater scrutiny.

The Alberta EAB has found persons more likely to be directly affected if their interests relate to policy underlying the legislation creating the agency but it has applied this view inconsistently.²⁵² Numerous decisions have emphasized an economic interest as supported by purpose provisions on economic growth and sustainable development but the agency has overlooked the purpose referring to “shared responsibility of All Alberta Citizens” for environmental protection. This approach to standing diverges from its approach to determining costs where it does consider the citizen responsibility clause.²⁵³

The Alberta EAB has continuously struggled with how to treat groups. In the mid 1990’s it showed some receptivity to groups by finding a community group to be directly affected.²⁵⁴ During the 2000s the agency became more restrictive towards groups by not recognizing group standing absent member standing. First it required that individual members of the group be directly affected.²⁵⁵ In a later decision it required that half the members be directly affected.²⁵⁶ One 2013 decision did not apply this 50% rule so its status is uncertain.²⁵⁷

The agency also prefers groups formed for the regulatory process over groups with a longstanding involvement in environmental matters.²⁵⁸ This analysis of group members and preference for groups formed for the proceedings resembles a form of claims pooling and is only applied to community and environmental groups.

The ABQB has upheld denials of standing by the Alberta EAB based on a narrow interpretation of “directly affected”, but it has found that standing should be a preliminary matter using relaxed evidentiary standards. In *Kostuch v. Alberta* the ABQB upheld a denial of standing to a citizen seeking to challenge a development permit on public land in a remote area, finding that her history as an environmental advocate and participation in government initiatives were not relevant.²⁵⁹ The court held

²⁵¹ *Gadd v. Director, ibid.*

²⁵² Alberta’s Environmental Appeals Board, *supra* note 7.

²⁵³ *Ibid.*

²⁵⁴ *Ibid.*, James Mallet, “Group Standing and the Environmental Appeals Board: The Latest Word” News Brief, Vol.20 No.1, (Edmonton: Environmental Law Centre, 2005) online: <http://www.elc.ab.ca/publications/news-brief/volume-20-2005.aspx> [Group Standing]

²⁵⁵ *Ibid.*

²⁵⁶ *ibid.*; *Jericho v. Director, Southern Region, Regional Services, Alberta Environment re: St. Mary River Irrigation District* (4 November 2004) Appeal Nos. 03-145 and 03-154-D (AEAB).

²⁵⁷ *Gull Lake Water Quality Management Society et al. v. Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: Delta Land Co. Inc.* (03 October 2013), Appeal Nos. 12-019-021, 023-025, and 027-029-R (A.E.A.B.).

²⁵⁸ Alberta’s Environmental Appeals Board, *supra* note 7; Group Standing, *supra* note 254.

²⁵⁹ *Kostuch v. Alberta* (Director, Air & Water Approvals Divisions, Environmental Protection), 35 Admin LR (2d) 160; 182 AR 384; 21 CELR (2d) 257. [Kostuch].

that it was bound by ABCA authorities interpreting the test with respect to a defunct predecessor agency called the Public Health Advisory and Appeals Board. These ABCA authorities, discussed in Part IV, found a legislative intention to provide standing based on personal rather than community interests. The ABQB also found need for a causal connection between their personal interest and the matter under appeal. In *Court v. Alberta* the ABQB took a narrow view of the directly affected test but overturned a denial of standing to a citizen seeking to challenge a cement plant permit in proximity to her land and community.²⁶⁰ The court held that standing was a question of “law, fact and policy”, and that the policy to consider was that provided by the legislation. The court held that the effects on the interests of the person seeking standing need not be different in kind from any other Albertan or user of the area. It further held that standing should be determined as a preliminary matter and only require showing a prima facie case that the interests may be affected, not that they are affected. It found that the agency imposed a patently unreasonable test and evidentiary requirements that were not in keeping with the participatory role envisaged by the act. The agency had determined standing with the substantive merits of the appeal at the end of proceedings. The effect was that the appeal was dismissed and the permit remained untouched even though by that point in the proceedings the agency had recognized some concerns with it. The ABQB’s rulings in *Kostuch* and *Court* entrenched an interpretation of the interpretations of the test resembling the public nuisance rule but as a policy of the legislature rather than the court. Neither *Kostuch* nor *Court* is widely cited. Both cases predate the *Kelly* cases in which the ABCA took a more relaxed approach to the ostensibly more stringent “directly and adversely affected” test. Nonetheless the ABQB’s approach persisted concerning a request for common law public interest standing at the Alberta EAB, discussed in Part IV.

The ABQB upheld a grant of standing by the Alberta EAB in *Cardinal River Coals v. Alberta*.²⁶¹ It found that a court challenge to standing was premature as the EAB has yet to decide the substantive appeal. This decision avoids analysis of the test but it is still informative as there are few cases challenging grants of standing by agencies and almost none where standing has been revoked. If the judicial review turned solely on the interpretation of the standing test then it is possible that the court would have deferred to agency.

Where hearings are triggered the Alberta EAB may add “interveners”. Intervener screening is more formal than the recognition of discretionary participants at Alberta regulatory boards described above. Rules of practice provide that interveners should “materially assist” the agency in a manner directly relevant to the appeal, show a “tangible interest” in the substantive subject matter of the appeal, “not be an unnecessary delay”, substantially support or oppose the appeal and not repeat or duplicate evidence.²⁶² The intervener rules are unclear on what roles interveners can play. The rules refer to “parties” but in practice interveners often provided more limited roles.

²⁶⁰ *Court v. Alberta Environmental Appeal Board*, 2003 ABQB 456

²⁶¹ *Cardinal River Coals*, *supra* note 250.

²⁶² Environmental Appeals Board, *Rules of Practice*, Rule 14, (2012) Online: <http://www.eab.gov.ab.ca/pub/Rules-May-2012.pdf>

In contrast to becoming restrictive against groups, the Alberta EAB's approach to interveners has become more liberal over time.²⁶³ It has granted interventions based on human health, residential proximity, specific or unique information or personal experience.²⁶⁴ It also takes a more flexible approach to the test. In *Shapka v. Director* the agency granted intervener status to a landowner who was denied standing for not being directly affected, but who had a "genuine interest", knowledge of the local area and expertise relevant to the technical issues.²⁶⁵ The agency held that the intervener test in its rules was "a general rule not an absolute one".²⁶⁶

The Alberta EAB may also be more receptive than the Alberta regulatory boards to providing interveners with fulsome roles. In *Doull v. Director* the agency granted intervener status with full party roles to a community league and a society who did not have standing to trigger the hearing.²⁶⁷ The substantive appeals were somewhat successful as the agency recommended conditions on the permit.²⁶⁸ This was a case of the agency recognizing widespread community concerns with air emissions based on evidence. In *Shapka v. Director (Reconsideration Decision)* the agency continued the trend of recognizing strong intervener status by considering whether interveners may apply for reconsideration of decisions, a right typically belonging to full parties.²⁶⁹ It did not allow the intervener in question to request reconsideration but did not preclude the possibility. This was another case where substantive appeal where somewhat successful as the agency recommended enhanced conditions on the permit.

The BC EAB uses different individual standing approaches under different legislation. Standing on water license appeals is limited to categories of rights holders while standing on environmental permit appeals is provided to persons who are "aggrieved" by decisions.²⁷⁰ Under this test there is no public interest standing and incorporated groups must have members that can show standing.²⁷¹

The BCSC has engaged in a more thorough analysis of the BC EAB's jurisdiction to hold hearings than has the ABQB with the Alberta EAB. In *Houweling Nurseries v. District Director* the BCSC used contextual interpretation of the legislation to find that the BC EAB had jurisdiction to hear certain issues.²⁷² The decision suggests judicial concern with lack of clarity on what issues were for the legislature and what ones were for the agency. The court also considered the lack of finality to decisions that could occur by

²⁶³ *Ibid.*

²⁶⁴ Alberta's Environmental Appeals Board, *supra* note 7.

²⁶⁵ *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment, re: Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal No. 08-037-ID2 (A.E.A.B.) [Shapka].

²⁶⁶ *Ibid.*

²⁶⁷ *Preliminary Issues: Doull et al v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited-* (October 11, 2002); Appeal Nos. 02-018-041, 047, 060, 061, 073, and 074-ID1.

²⁶⁸ *Maga et al. v. Director, Northern Region, Regional Services, Alberta Environment re: Inland Cement Limited* (17 January 2003), Appeal Nos. 02-023, 024, 026, 029, 037, 047 and 074-R (A.E.A.B.).

²⁶⁹ *Reconsideration Decision: Shapka v. Director, Northern Region, Environmental Management, Alberta Environment, re: Evergreen Regional Waste Management Services Commission* (02 July 2010), Appeal No. 08-037-RD.

²⁷⁰ Randy Christensen, "An Overview of Selected "Tools" Available In a Public Interest Environmental Law Context", (Prepared for Continuing Legal Education Society of British Columbia, September 2008) online:

http://admin.cle.insinc.com/upload_file/document/20080916-142934-18208_1_Christensen.pdf

[Environmental Law Context]

²⁷¹ *Ibid.*

²⁷² *Houweling Nurseries v. District Director of the GVRD et al.*, 2005 BCSC 894.

triggering proceedings and held that the “finality principle” should not be given the weight in the regulatory context that it receives in adjudicative proceedings.

The BCSC has identified fairness concerns with BC EAB process in multiple cases. In *Island Protection Society v. Environmental Appeals Board* it held that it would be “fundamentally wrong” for the BC EAB not to hold a hearing where it had already allowed community members a right to appeal or intervene in a decision on pesticide spraying.²⁷³ It held that common law duties of fairness do not always require a hearing but they may. In this case it found that the legislation required a hearing for fairness even if one was not always required under the common law. In *Turnagain Holdings Ltd. v. Environmental Appeals Board* the BCSC held that the BC EAB erred by refusing to hear an appeal about fairness with the original decision.²⁷⁴ The alleged breach of fairness was that the original decision maker held a hearing and denied intervention to persons whose rights were directly affected. However the court dismissed the claim based on delay by the applicant.

The issues of fairness and standing for groups came to a head in the 2014 case of *Gagne vs. Sharpe*.²⁷⁵ In this case the BCSC overturned a denial of standing by the BC EAB for reasons including unfairness, overly high evidentiary standards and unnecessary requirements that members of incorporated groups have individual standing. The reasons for decision are significant as it found judicial policy rationales and the mandate of the agency relevant to determinations of standing under the legislated test. It also included obiter dictum on the availability of public interest standing, discussed in Part IV.

Like many cases on individual interest standing the facts are important. Six individuals, a local environmental organization and a regional environmental organization all appealed an emissions permit for an aluminum smelter. The BC EAB granted standing to two local residents but denied standing to the rest, all of whom were based in the broader region. Standing was determined as a preliminary matter on written submissions. The appellants had requested a pre-hearing conference and particulars on the issues concerning standing but the agency denied these requests. After the final submissions on standing were submitted, the agency requested extra material from the developer in relation to determining standing and did not notify the appellants of this or provide them with an opportunity to respond. The agency’s Procedural Manual stated that the agency could obtain information not tendered by the parties, but before considering the same it must give all parties notice and opportunities to respond. The Manual also stated that those involved in the process could expect the agency to follow the procedures in the Manual and legislation.

Concerning fairness, the BCSC held that there was a strong duty towards persons seeking standing as decisions on standing were determinative, there was no statutory right to appeal, and the decision was of significant importance to the person denied. It found that the agency breached its own procedural rules and there was a legitimate expectation that these rules would be complied with. It also held that there

²⁷³ *Island Protection Society v. Environmental Appeals Board* (BC) [1986] BCJ No. 880; 8 BCLR (2d) 30.

²⁷⁴ *Turnagain Holdings Ltd. v. Environmental Appeals Board*, 2001 BCSC 795.

²⁷⁵ *Gagne v. Sharpe*, 2014 BCSC 2077, online: <https://environmentallawcentre.files.wordpress.com/2014/06/gagne-oral-bcsc-per-mackenzie-j.pdf> [Gagne].

was no requirement to show that the agency would have reached a different decision through fair process. Concerning evidentiary standards, it held that a “balance of probabilities” was too rigorous a standard for preliminary determinations on standing and that definitive proof of harm was not necessary. It saw risks that meritorious arguments may be preliminarily dismissed and held that agencies should not engage in consideration of the substantive merits at the preliminary stage. A low evidentiary standard was further supported by short timelines, the non-availability of expert evidence, the lack of a prehearing, and the lack of identification of the specific concerns with standing. Concerning groups, it held that incorporated environmental organizations may qualify for standing as persons without having to show that their members would have standing.

The BCSC found some judicial policy rationales articulated by the SCC in *Downtown Eastside* to be relevant to standing at agencies. Rationales against standing included ensuring the benefit of contending views from those most directly affected and the need to screen out busybodies. Rationales favoring standing included access to justice concern and a preference for lower evidentiary standards for determining standing. The court noted the risk of foreclosing meritorious appeals by denying standing but found that this risk may be prevented by combining requirements that individual interests be prejudiced with lower evidentiary standards. The court believed that this approach was broad enough to include environmental organizations that lacked specific property and economic interests although it admitted that they may face challenges.

Individual interest requirements at environment ministries

Individual interests can be required to participate at earlier stages of regulatory process prior to hearings at boards and tribunals. In Alberta legislation requires that persons be “directly affected” for their statements of concern on environmental assessments, environmental permits, and water licencing decisions to be accepted as valid by the environment ministry.²⁷⁶ The environment ministry has long taken a restrictive view of this test.²⁷⁷ The interpretation is guided by ministry policy that changes over time so there is little consistency between reasons for rejection. Statements of concern have been denied where effects are not unique as compared to the general public, where the submitters are not legal persons, where the majority of group members are not affected and where there are no adverse effects on land.

One recent refusal was found by the ABQB to be quite egregious. In *Pembina Institute v. Alberta (Environment)* the ABQB found that denying a coalition of community groups and environmental organizations the right to submit a statement of concern regarding an environmental permit in the oil sands raised a reasonable apprehension of bias.²⁷⁸ This was a near indisputable finding as apprehension of bias was made out on all four recognized grounds for bias. The facts were that the coalition had a longstanding interest in oil sands issues and its submissions on prior similar decisions had not been

²⁷⁶ EPEA, *supra* note 247, s.44,s.73; Water Act, *supra* note 247, s.109.

²⁷⁷ Cindy Chiasson, “Alberta Environment Takes a Restrictive View of Directly Affected” *Environmental Law Centre News Brief* Vol 19 No. 2 (2004), online: <http://www.elc.ab.ca/publications/news-brief/volume-19-2004.aspx>

²⁷⁸ *Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, 2013 ABQB 567 [Pembina v. Alberta (Environment)].

challenged. After being rejected, the coalition made an access to information request and discovered an internal memorandum stating that more parties were providing submissions so there was a need to identify those who were “truly” directly affected. The memorandum further noted that the coalition was less inclined to work cooperatively than in the past. The court found that the ministry changed its interpretation of “directly affected” so that this coalition that had participated in similar past decisions would no longer qualify. In doing so it articulated some rationales for standing and public participation more generally. The court noted that the developer was heard, aboriginal interests were well represented but those with environmental concerns were “not allowed a voice”.²⁷⁹ It was skeptical of the floodgates concern expressed in the memorandum as no one other than the coalition had filed submissions. It further noted that submissions by coalitions of like interests minimize the proliferation of like submissions, such repetition should be discouraged, and consequently there was “room for flexibility in the definition of directly affected”.²⁸⁰

Criticisms of individual interest standing:

Using individual interest standing as the sole hearing trigger is the most intensely criticised model of standing at environmental agencies.²⁸¹ These criticisms are consistent and of fairly universal applicability despite the differing mandates of regulatory boards and appeals tribunals using this model. Alberta’s use of the “directly affected” test simply to submit statements of concern on environmental assessments has been singled out as an acute case of legislation “designed to fail”.²⁸² Individual interest standing is a leading example of environmental decision making not keeping pace with the issues to be decided and the range of interests at stake.

The root criticism is identical to that concerning the common law public nuisance rule in that this model was developed for use in adversarial private litigation before the birth of the regulatory state. The legislated version of this rule reflects a tradition of natural resource legislation being rights-based rather than stewardship based, is restrictive against affected third parties and public interest representatives, and would be considered narrow in many non-Canadian jurisdictions.²⁸³ The tests promote uncertainty, can undermine the substantive or procedural aspects of public interest mandates even if framed narrowly, create fairness issues that would not otherwise exist, and they may not promote efficiency or reduce harm to other parties.

Uncertainty: The tests are indescribably complex to articulate, interpret, and apply to the facts. The jurisprudence is fragmented as cases may or may not consider the interpretation of similar tests under other legislation. The tests are subject to shifting interpretations by agencies and courts and the results

²⁷⁹ *Ibid.*, at p.45

²⁸⁰ *Ibid.*

²⁸¹ Jenny Scott, “Directly Affected and the Alberta Public Health Advisory and Appeal Board: Can the Public Nuisance Rule Survive?” (1996) 6 JELP 275 [Public Nuisance Rule]; Joan Sherman, Michael Gismondi, and Mary Richardson, “Not Directly Affected : Using the Law to Close the Door on Environmentalists” (1996) 31 Journal of Canadian Studies 102 [Not Directly Affected]; The Public Interest, *supra* note 162; Tribunals in British Columbia, *supra* note 7; Alberta’s Environmental Appeals Board, *supra* note 7; Unnatural Law, *supra* note 6; Group Standing, *supra* note 255.

²⁸² Unnatural Law, *ibid.*

²⁸³ Tribunals in British Columbia, *supra* note 7.

are near impossible to reconcile. The BC EAB test requiring one to be “aggrieved” is ostensibly the narrowest as the courts find need for a particular prejudice, yet can be interpreted more broadly than the tests requiring a direct effect on interests. Of those articulations, the “directly and adversely affected” test is ostensibly the narrowest, yet the ABCA only requires that a legally recognizable interest be affected which could theoretically apply to large swaths of the public. The mere “directly affected” test is ostensibly broader, yet it has been interpreted by the Alberta EAB and ABQB as requiring that persons be differently affected than the public at large. This is akin to the public nuisance rule, and the courts have struggled with the same questions of whether the difference must be one of kind or degree.

A second uncertainty is that the tests replicate the right to a hearing provided by common law duties of fairness. It is not clear whether the test simply encodes common law fairness and need not preclude standing to further persons, or whether they restrict standing to persons who would be owed hearings under the common law anyway. If agencies interpret the tests more narrowly than the common law duty then the courts intervene, but if the legislature was to clarify intentions for the tests to be that narrow then they might be unconstitutional.

Even if the legislated tests clearly replace the common law, the shifting articulations, interpretations and applications make them inherently unstable. The ERCB history demonstrates how the tests are vulnerable to agencies’ latent receptivity to triggering hearings. Where the ABCA upheld denials of standing the agency applied these decisions as legal rules to deny standing in different factual circumstances, but when the ABCA overturned a denial of standing the agency responded by changing the factual circumstances required for standing.

Standing as a preliminary matter: Individual interest standing tests are clearly hard to apply as a preliminary matter using low evidentiary standards as ostensibly preferred by agencies and courts. The need for sufficient facts to establish harm to legal interests ties standing to the merits of the substantive claims. It is much harder to show evidence of impacts on economic interests, property rights, use of natural resources or personal health than it is to show genuine interest factors like organizational purpose and record of involvement in the subject matter. Agencies that articulate the low “prima facie case” standard may actually apply the higher “balance of probabilities” standard from civil litigation. In some cases they have even articulated the higher standard. Causation and proximity matter like they do in litigation. Standing to raise public health concerns may resemble “toxic tort” litigation where individuals must show evidence of disease causation. This is difficult in large trials yet alone a letter decision based on paper submissions.

Impacts on substantive rationales: The negative effect of individual interest standing on substantive decision making at environmental agencies is potentially profound. Even under a narrow view of agency mandates, there is no rational connection between the interests required to trigger hearings, the issues suitable for agency determination and the role of regulatory interveners.

Individual interest standing can ensure that environmental issues cannot be raised at all.²⁸⁴ In multiple cases concerning development on public land or in remote areas the agency heard from no one but the developer. Interpretations that require persons to be differently affected from the public at large have a perverse effect where the more people are affected, the less chance that anyone will have standing. These tests have slightly different impacts on the mandates of regulatory boards and appeals tribunals. As regulatory boards are more apt to have broad mandates to determine the “public interest”, the negative impact is that there is no full analysis or balancing of interests as required by these mandates. Not hearing from public interest advocates can also mean there is no check on developers making broad economic representations or policy arguments that might exceed the agency’s mandate just as surely as some environmental concerns might. Individual interest standing allows environmental issues to be settled by mere regulatory compliance while allowing social and economic impacts of developments to be amorphous or speculative. At appeals tribunals the negative impact is that administrative decisions are sheltered from scrutiny by the same agency whose mandate is to scrutinize those decisions. It also excludes the hearing of environmental concerns from agencies created to implement environmental protection legislation.

Even if hearings occur, individual interest standing promotes adversarial hearings that conflate private disputes with public interest issues. Agencies are required to grant full party standing as a right to persons that are not required to make any meritorious contribution, while interveners that could potentially assist with the issues are excluded or relegated to lesser roles. This institutional reliance on the developer and privately interested parties to represent public interests is illogical. It is also unfair to these private parties as they may legitimately wish to settle their disputes. If they settle then the public interest issues will go unheard, so it is legally possible for two private parties to contract out of a public interest analysis.

Individual interest standing requires innumerable factors to ensure public interest deliberations. Persons with individual interests must trigger a hearing, the agency must exercise discretion to grant full party roles to public interest interveners, and the individually interested parties must see the hearing to conclusion.

Impacts on procedural rationales: Individual interest standing raises serious fairness and access to justice concerns. The strongest duties of fairness and greatest access to the system are owed to persons seeking to cause environmental impacts while the weakest position belongs to the interests bearing the impacts as these are usually indirect.

Fairness: Fairness to directly affected persons is a sufficient concern under these tests that the courts have intervened in multiple jurisdictions. The fair treatment of groups under these tests is practically impossible. As agency jurisdiction to allow public interest representation is questionable, agencies are unlikely to be more permissive towards groups than required and they may be more restrictive than required. Environmental and community groups must basically pass some form of class certification or

²⁸⁴ Not Directly Affected, *supra* note 281.

claims pooling and there is little consistency to this analysis. Groups that represent directly affected persons can be found to not be directly affected themselves, but if a group may be directly affected then the agencies may find that its members are not. An extreme case like *Pembina v. Alberta (Environment)* reveals the moving goalposts. That the courts have found bias against groups in multiple jurisdictions affirms that latent attitudes can prevail over legal rules or policy rationales.

Access to Justice: The access to justice concern may be highest at appeals tribunals as their mandate resembles that of courts to the extent that they scrutinize administrative decisions. Individual interest standing at appeals tribunals allows administrative decisions to be sheltered from scrutiny by the same agency created to scrutinize them. Furthermore, the person seeking standing is apt to be ‘double teamed’ by the original decision maker defending their decision and the developer to whom the permit was granted. This can pit corporations and governments against individuals, community groups or local organizations, all of whom face legal barriers to individual interest standing. This power imbalance is near opposite of that created by open standing on environmental reviews, where large environmental organizations and innumerable citizens face no legal barriers to standing.

Procedural legitimacy: Lack of standing and hearings creates a burden of justifying autocratic decisions. Granting standing has not necessarily proven to legitimize process but denying standing is likely to have a delegitimizing effect. If development is supported by the political branch of government who in turn uses legislation to avoid scrutiny of decisions, this will promote reservations about government representing public interests. This lack of trust in the regulatory system has political and commercial implications as it may undermine “social license” for the regulated industry (public acceptance of the industry).

Impacts on rationales against standing:

Individual interest standing creates its own inefficiencies without necessarily protecting third parties from harm.

Administrative efficiency and scarce judicial resources: The challenge of interpreting vague tests, the need for facts, questionable evidentiary standards, and common law rules of fairness and bias create countless issues for agencies and courts. Contested standing diverts resources and focus from the substantive issues while fueling disputes that would not otherwise exist. Litigation over denials of standing is increasing in Alberta and perhaps BC as well. Part of this trend is that denials of standing are increasingly hard to defend. In multiple courts the historic concern with upholding legislated restrictions on standing may be ceding to more flexible interpretations, consideration of policy rationales and agency mandates.

The tests may create a particular inefficiency at appeals tribunals as they promote multiple proceedings flowing from the same dispute. Where no one has standing at the agency, the only way to prevent a potentially unlawful administrative decision from being immunized from scrutiny is to seek public interest standing to challenge it in court. This may require filing an appeal with the appeals tribunal and

filing for judicial review before the appeals tribunal determines standing. To not file an appeal with the agency would risk not exhausting administrative avenues as often required by the courts. However to not file a judicial review application prior to the agency's determination of standing would risk missing the statutory limitation period for judicial review.

In contrast to this morass, the AUC example of providing presumptive standing and participation streams where hearings are inevitable suggests that process management may be a more effective response to efficiency concerns than is narrow standing.

Individual interest standing creates the strongest argument for the "exchange of efficiency" discussed above. It may even create a convergence of the rationales if it creates administrative inefficiency and consumes scarce judicial resources. This convergence of rationales has yet to be recognized in the jurisprudence but there may be opportunity as more litigation on individual interest standing at agencies is certain.

Harm to third parties: The jurisprudence indicates that individual interest standing has limited ability to protect third parties from harmful regulatory interventions or appeals because the vast majority of challenges to denials of standing are brought by privately interested parties. These parties are defending legal rights or property and economic interests so they can potentially pass narrow interpretations of the test or be owed common law duties of fairness. Almost all of the Alberta cases on standing at administrative agencies, and those cases concerning statutory appeals to court covered in Part II, are brought by landowners and First Nations. Much litigation is brought by industry players or surface rights advocates and is not covered in this report. The *Kelly* litigation suggests that some landowners will continually seek to intervene and litigate in defense of that right, but there is no comparable example with environmental advocates.

If the harm concern is with reputational damage to government and industry this cannot be avoided by narrow standing as harmful representations may be made outside of the regulatory process. Nor is it entirely clear that broader participation creates vulnerability to reputational attacks. One study from Alberta found that well-designed participation processes can improve the accuracy of reputations.²⁸⁵ This study concerned community participation in the environmental assessment review for a coal plant. It found that participants in well-designed proceedings have more difficulty holding negative stereotypes and become better at taking the role of other stakeholders.²⁸⁶ What public participation didn't necessarily change were negative reputations that prove to be well founded. In this study the developer's reputation fared better than that of the ministry, who was perceived as not doing much for the affected community. It further suggested that group participation may not increase exposure to financial harm as the community group only pursued community issues, leaving the compensation demands of landowners to those individuals.

²⁸⁵ J. Frideres et al., "The Effects of Public Participation on Perception of Others in a Resource Development Project: A Test of Attribution Theory", (-) 34 Citizen Participation 145, [date unknown, archived with the author of this Report on Standing].

²⁸⁶ *Ibid.*

Floodgates and busybodies: There is some evidence from Alberta that concerns with floodgates and busybodies are overstated, even though this is a development-heavy province that attracts the attention of environmental advocates. Two surveys of the preferred activities of environmental organizations in Alberta suggest that these organizations are generally disinclined to seek agency proceedings. One survey indicates that the majority of organizations pursue education and awareness activities.²⁸⁷ A smaller portion engaged in public policy work or tracked government and industry, while only the smallest portion sought to be involved in regulatory proceedings or legal actions. Another survey of environmental groups' preferred means of using the law found regulatory interventions to be in the middle of the spectrum of options: preferable to court actions but less preferable to participation in policy development.²⁸⁸ It further indicated that lack of standing, though an issue, is less a barrier than lack of costs.

Multiple commentators in Alberta have stated that environmental advocates are dissuaded from agency proceedings by further access to justice barriers.²⁸⁹ Beyond lack of costs or participant funding and the necessary outlay of resources, these barriers include lack of notice and lead time, lack of access to information necessary to participate meaningfully, lack of intervener training or assistance, uncertainty of substantive outcomes and, in the case of community groups, the risk of social stigmatization in a 'jobs vs. environment' debate.²⁹⁰ These barriers beyond standing may be greater at agencies than in courts given the complexity of the environmental regulatory process and the issues to be decided as compared to litigation. Respondents to one survey on access to the Alberta EAB indicated that the filing timelines are prohibitively short, effective participation requires legal counsel and experts, the cost of appeals exceeded the costs of a Queen's Bench trial of similar length, and that the costs of a preliminary contest on standing were themselves prohibitive.²⁹¹ The floodgates concern may be lowest with developments on public land as only persons with considerable interests in such regions pay enough attention to pursue interventions.²⁹² In the ERCB case, the fact that there have been roughly 8-12 hearings per year at an agency that regulates over 180,000 oil and gas wells suggests that broader standing would not trigger a disproportionate number of hearings.

Convergence of Rationales: The disconnect between individual interest standing and public interest decision-making, the inefficiency and waste of judicial resources created by these tests, and their limited ability to prevent harm to third parties converged in numerous ABCA applications concerning *JH Drilling*. [The citations for these authorities are in the body of this report due to inclusion shortly before publication]. These 2014 cases involved competing industry players. The company JH Drilling applied to

²⁸⁷ Alberta Ecotrust Foundation, "Mapping What Matters Survey", [Publication pending December 2014, data archived at Alberta Ecotrust Foundation], see: <http://albertaecotrust.com/2014/>

²⁸⁸ Shaun Fluker, *Some observations on using Law to preserve Wild Alberta* (2011) [unpublished, University of Calgary Faculty of Law].

²⁸⁹ Public Nuisance Rule, *supra* note 282; Shaun Fluker, "Standing Against Public Participation at the Energy and Utilities Board", online: (2007) Ablawg.ca, The University of Calgary Faculty of Law Blog, online: <http://ablawg.ca/2007/12/12/standing-against-public-participation-at-the-alberta-energy-and-utilities-board/> [Standing Against Public Participation].

²⁹⁰ Public Nuisance Rule, *supra* note 281.; Standing Against Public Participation, *ibid.*

²⁹¹ Alberta's Environmental Appeals Board, *supra* note 7.

²⁹² Standing Against Public Participation, *supra* note 289.

the Alberta environment ministry to extract gravel from public land on the same land for which an application for a rock quarry was made to a different agency, the Natural Resources Conservation Board (NRCB). The NRCB's mandate was to decide if the rock quarry was in the public interest having regard to the social, environmental and economic impacts of the development. The test for standing was whether a person may be "directly affected" by this decision. The NRCB held a preliminary conference but received no relevant submissions on the substantive issues. The only issue raised was the commercial dispute between the two potentially competing companies in the same industry. The NRCB noted that this dispute could be resolved through negotiation, litigation, or the pending decision on the gravel application. It found that the gravel company was not directly affected so held no hearing. Appeal of NRCB decisions are to the ABCA on questions of law and jurisdiction as described above.

The litigation that followed from this denial of standing consumed judicial and administrative resources. In *JH Drilling v. Alberta* [2014 ABCA 134] the ABCA granted leave to appeal on the issue of denied standing under the "directly affected" test and whether the NRCB denied a fair hearing. In *JH Drilling v. Parsons Creek Aggregates* [2014 ABCA 223] the ABCA held that this leave decision should be set aside and reargued based on fairness concerns with the leave decision having conflated the incompatible legal interests of the companies with the incompatibility of the rock and gravel developments. In *JH Drilling v. Alberta* [2014 ABCA 321] the ABCA refused to allow a challenge to the decision to allow rearguing of leave to appeal, holding that facilitating endless interlocutory applications was counter to the principles of litigation. In *JH Drilling v. Alberta* [2014 AB CA 378] the ABCA reheard the leave to appeal application and denied leave, holding that standing under the "directly affected" test was a mixed question of fact and law and in this case there was no extricable question of law to appeal.

The *JH Drilling* cases presents an apparent no win situation for the rationales underlying standing. Had the NRCB granted standing, then it would have been required to hold a public hearing on a purely private commercial dispute that would not assist in discharging the agency's substantive public interest mandate. Yet denying standing bred fairness issues, caused administrative inefficiency, wasted judicial resources, allowed harm to the developer.

Systemic issues: The fact that most litigation on individual interest standing are from Alberta affirms that contested standing can be symptomatic of larger systemic issues. Contested standing at regulatory boards and appeals tribunals in Alberta is fueled by lack of formalized public participation opportunities at other stages of the development process.²⁹³ Public consultations on policy development are mostly ad-hoc and do not provide access to decision makers. There is no public participation on the leasing of public resources or the royalties payable by developers, and these decisions are often made before development policies and land use plans are in place. There is a general duty to hold public consultations on the development of regional plans, but these plans need not be made at all. There are no legislated public rights to citizen enforcement of environmental statutes so the public nuisance rule is always in play. The directly affected test applies to almost every formalized participation opportunity. It limits the right to seek review of regional plans, submit statements of concern on environmental assessments or

²⁹³ Challenges with Public Participation, *supra* note 212.

development applications, and to be consulted by developers prior to permit applications. Company consultations provide no access to decision makers and there is debate as to whether it even counts as public participation rather than simply good business practice.²⁹⁴ This lack of other ways to be heard in land use governance in Alberta makes regulatory interventions more of a necessary evil than a matter of desire.²⁹⁵

“Interests”, Relevant “Information and Expertise” and “Third Party Appeals”

Several environmental agencies use legislated models that take a middle path between open standing and individual interest standing. The three models canvassed below are “interest” requirements that are more relaxed than individual interest standing, a two-step approach used by the Ontario Environmental Review Tribunal which requires a sufficient “interest” for standing and leave to appeal on the substantive issues, and the two category approach to standing under the *Canadian Environmental Assessment Act 2012* whereby a person may be “directly affected” or possess relevant “information and expertise”.

“Interest” requirements:

Many administrative agencies provide standing to “affected” or “interested” persons under legislation that is semantically broader than individual interest standing and affords more discretion to agencies when legally recognizable interests are not affected. Many of these models are hard to assess. The agencies do not have mandates that clearly require environmental considerations, or they are not the subject of much jurisprudence or commentary. It is possible that if these agencies were to see sufficient environmental advocacy and related disputes over standing then these vague “interest” requirements could prove non-functional.

One example worthy of consideration is the system for environmental reviews in the Yukon Territory. The *Yukon Environmental and Socio-economic Assessment Act* defines an “interested person” as including someone whose purpose is “not frivolous or vexatious”.²⁹⁶ This indicates presumptive standing subject to the rationale of preventing harm to third parties. The manner in which interested persons may participate can be determined by the Review Panel subject to its terms of reference.²⁹⁷ The Rules for review panels provide that interested persons with permission can become “interveners” and that these interveners are full parties.²⁹⁸ Interested persons seeking to be interveners must apply, stating their reason for intervention, the issues they would address and how their interest justifies becoming an intervener.²⁹⁹ The agency may refuse intervener applications based on whether these application criteria are met and may direct interveners to make joint presentations.³⁰⁰ Other members of the public who lack

²⁹⁴ *Ibid.*

²⁹⁵ Standing Against Public Participation, *supra* note 289.

²⁹⁶ *Yukon Environmental and Socio-economic Assessment Act* (S.C. 2003, c. 7), s.2. [YESEAA].

²⁹⁷ *Ibid.*, s.70

²⁹⁸ *Rules for Reviews Conducted by Panels of the Yukon Environmental and Socio-economic Assessment Board* (2006), Part 5 Intervenors online: <http://www.yesab.ca/about-yesab/panels-to-the-board/>

²⁹⁹ *Ibid.*

³⁰⁰ *Ibid.*

intervener standing are limited to written or oral presentations. The regime also provides that minor agency offices with jurisdiction to conduct minor reviews have discretion to hold public meetings, but must add interested persons to the notification list if requested by these persons.³⁰¹ This regime provides a fairly fulsome guidance on the requirements for standing and the roles and rights that follow but it is difficult to evaluate its impact relative to busier federal and provincial agencies.

Third-party appeals at the Ontario Environmental Review Tribunal

The Ontario Environmental Review Tribunal (ERT) is a busy appeals tribunal whose two-step screening approach to third party appeals is well documented through agency reports, Environmental Commissioner data, agency decisions, court cases and legal commentary. There is more ready empirical evidence of impacts of this model than nearly any other in Canada.

The ERT has the standard appeals tribunal mandate to scrutinize decisions made under environmental legislation but this function is impacted by an *Environmental Bill of Rights*.³⁰² The *Environmental Bill of Rights* was created in 1993 following the work of a multi-stakeholder task force and was established partly to ensure environmental protection, public participation, and accountability for environmental decision making.³⁰³ This initiative was meant to prevent environmentally unsound decisions and facilitate access to justice, but there is debate over its substantive impact on decisions and whether it creates its own inefficiencies and uncertainties.³⁰⁴

Most of the rights provided are procedural in nature. These include “third party” rights of appeal to the ERT on decisions specified in regulations. The two step process is created by provisions that “any person” with an interest may seek leave to appeal.³⁰⁵ The first step towards exercising third party appeal rights is to establish standing. Standing requires an “interest” in the decision and that another party would have a right to appeal under legislation other than the Environmental Bill of Rights.³⁰⁶ The interest requirement may be met by persons with private interests or by municipalities and environmental groups seeking public interest standing.³⁰⁷ The requirement for another possible appellant will be met where a developer or person subject to the original decision has a right to appeal that decision. The second step is leave to appeal. This step is much more restrictive than the interests required for standing. There is a 15 day limitation to apply for leave to appeal which the ERT has no jurisdiction to amend.³⁰⁸ Leave to appeal must be refused unless there is good reason to believe that a decision was “unreasonable” and the decisions could result in “significant environmental harm.”³⁰⁹

³⁰¹ *Ibid.*

³⁰² *Environmental Bill of Rights, 1993*, SO 1993, c 28 [Environmental Bill of Rights].

³⁰³ Richard Lindgren, “Third Party Appeals Under the Environmental Bill of Rights in the Post-Lafarge Era: The Public Interest Perspective”, (Presentation to the Ontario Bar Association, February 2, 2009) [Archived at Canadian Environmental Law Association], [Third Party Appeals].

³⁰⁴ Richard Lindgren, “Statutory Environmental Rights: Lessons Learned From Ontario’s Experience” (Prepared for the Renewing Environmental Law Conference, February 3-4, 2011, Vancouver, BC) [Archived at Canadian Environmental Law Association, [Statutory Environmental Rights].

³⁰⁵ *Environmental Bill of Rights*, *supra* note 302, s.38.

³⁰⁶ *Ibid.*

³⁰⁷ Third Party Appeals, *supra* note 303.

³⁰⁸ *Environmental Bill of Rights*, *supra* note 302, s.40.

³⁰⁹ *Ibid.*, s.41.

Early ERT decisions diverged on whether the evidentiary standards for establishing third party appeal rights required showing harm on a 'balance of probabilities' or merely a 'prima facie case'. Subsequent ERT decisions adopted the less stringent standard.³¹⁰ The key decision is *Dawber v. Ontario* (*Dawber Decision*) in which the ERT granted leave to a number of individuals and groups seeking to challenge a permit for waste burning at a cement plant.³¹¹ The interests required for standing were not a barrier to appeal. Some appellants had an interest for having filed written submissions on the original decision, other appellants were found to reside in sufficient proximity to the site even though they resided on an island several kilometers away, and some persons lacked sufficient evidence to show an interest.

The real issue was the second step: the leave test. Prior to the *Dawber Decision* the Ontario courts had characterized the leave test as stringent but without much analysis.³¹² In *Dawber v. Ontario* (*Dawber Review*, also known as the "Lafarge" litigation) the Ontario Divisional Court upheld the *Dawber Decision*, holding that the test was stringent and created a presumption against leave, but that this barrier was not insurmountable.³¹³ It further held that the unreasonable decision and substantial harm branches of the test must both be met. The court found that the evidentiary standards for the preliminary determinations of standing and leave to appeal were lower than the balance of probabilities. Evidence relevant to the reasonableness of the decision being appealed and the likelihood that it would result in harm included environmental policies that were required by legislation to be considered by the decision maker. The questions of reasonableness and likely harm were not limited to the question of whether the permit complied with regulations as regulatory compliance did not establish that significant environmental harm would not occur, the decision maker had power to make site-specific permits that were more stringent than the regulatory baseline, and the ERT could look beyond the regulations to other environmental policies. The court further held that some common law rights of landowners were relevant to participation at administrative agencies. It found that the permits may authorize actionable nuisances or otherwise contravene common law rights and if so the original decision maker could claim a defense of statutory authority. This defense would impair the use of the common law for environmental protection which would favor participation in the administrative realm. However the court did not take to an argument from the appellants that they were being discriminated against by the permit decision on account of a provincial proposal for a province-wide ban on waste burning. The Ontario Court of Appeal dismissed the developer's leave to appeal application.³¹⁴ Following the litigation the developer ceased pursuing the contentious fuels and asked to have its permit revoked.³¹⁵

Impact of the two step process: The two step process has been criticized for undermining the substantive mandate of the ERT and purpose of the *Environmental Bill of Rights*. There is no evidence that

³¹⁰ Third Party Appeals, *supra* note 303.

³¹¹ *Dawber v. Ontario (Ministry of the Environment)* [2007] OERTD No. 25; 28 CELR (3d) 281 [Dawber Decision]

³¹² *Smith v. Ontario* [2003] 1 CELR (3d) 245 (Div. Ct), p.8.

³¹³ *Dawber v. Ontario (Director, Ministry of the Environment)* [2008], 36 CELR (3d) 191 (Ont. Div. Ct.) [Dawber Review]; *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)*, 2008 CanLII 30290, online: <http://www.canlii.org/en/on/onscdc/doc/2008/2008canlii30290/2008canlii30290.html>

³¹⁴ Third Party Appeals, *supra* note 303.

³¹⁵ *Ibid.*

third party appeals by environmental advocates have created much inefficiency or harm to third parties. The greater inefficiencies may be the complexity of the approach and incidents of private parties contesting standing.

The Canadian Environmental Law Association stated that the *Dawber/Lafarge* litigation should resolve debate over third party appeal rights, may clarify the type of appeal grounds that the ERT will favor and may renew public interest in using third party appeal rights.³¹⁶ However, it also stated that the percentage of decisions appealed by third parties will remain minimal without legislative change. The short and unchangeable time limit to seek leave to appeal, the lack of participant funding, and the need to show evidence of unreasonableness and potential harm will still create barriers to seeking appeals and result in most applications being dismissed. Even if appeals are heard, the vagueness of the environmental policy statements that original decisions makers must consider will create uncertainty as to their positive legal duties regarding the environment.

In 2010 the Canadian Environmental Law Association (CELA) applied for review of the *Environmental Bill of Rights*.³¹⁷ This review did not occur but there is much evidence and commentary on the impact of the regime. CELA stated that the legislation has public support, has made a difference in environmental protection and has produced some local success stories but the procedural rights are overly restrictive and lack the support of clear substantive environmental considerations for decision makers.³¹⁸ It stated that the shortcomings of the two step process showed need to reconsider the policy rationales for its existence. Notably, the Task Force leading to this legislation favored screening appeals for merits but it did not recommend the two stage process.³¹⁹ This issue of restrictive tests defeating the purpose of the *Environmental Bill of Rights* applies to standing in court as well as standing at the ERT. The Task Force recommended legislative reform to the public nuisance rule and creating a civil action to protect public resources.³²⁰ However, the provisions that were created were found by the Environment Commissioner to be “essentially useless” as they are too restrictive and have only been used once in seventeen years.³²¹ There is no evidence of floodgates or busybodies under the *Environmental Bill of Rights*. Annual reports compiled by the Environment Commissioner indicate that most leave to appeal applications are dismissed.³²² In one statistical review of 14,000 decisions by the environment ministry only 54 were subject to leave applications under *Environmental Bill of Rights* of which only 15 were granted.³²³ By other measures leave has only been granted in 21% of applications between 1995 and 2003.³²⁴ More recent annual reports from 2009-2012 show an average of 180 -252 requests for ERT hearings per year of which only 12-27 are made under the *Environmental Bill of Rights*.³²⁵ Public interest advocates were not large

³¹⁶ *Ibid.*

³¹⁷ *Application for Review Re. Environmental Bill of Rights*, (December 21, 2010) [archived at Canadian Environmental Law Association], [Application for Review].

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ Environment and Land Tribunals Ontario, Annual Reports, online: <http://www.ert.gov.on.ca/english/publications/index.htm>

factors in this caseload as roughly ninety percent of requests for hearings were made by developers or other persons who would have standing under the legislation under which the permit decisions are made.

If third party appeal rights create inefficiency it may be from the challenge of applying this complex model. In many leave applications the ERT has struggled to meet its 30 day deadline for decisions and has been forced to extend the deadline.³²⁶ This may reflect complexity of issues raised in leave applications.

The litigation shows more judicial concern with industry interveners contesting standing than with public interest advocates. In *Lafarge Canada Inc. v. Ontario Environmental Review Tribunal* Court dismissed an application to intervene made by a coalition of industry associations created for the purpose of this litigation.³²⁷ It held that the industry coalition did not meet the legislated test for intervention under the Court Rules. The coalition's members did not have an actual direct interest in the outcome of the litigation nor would they be adversely affected in any greater way than any member of the public. Neither did the coalition qualify as a "friend of the court". It would not make a useful and distinct contribution as its position was the same as the permit holder, it had no track record of assisting the court by transcending disputes, it had no special expertise as a group apart from the knowledge of its members, and it could not show that it would not unduly delay or prejudice the determination of the rights of the parties. In contrast, the court allowed intervention by the provincial Environment Commissioner.³²⁸ It held that the Environment Commissioner was a non-partisan officer of the legislature with a policy perspective on the dispute and had special knowledge and expertise with the legislation and its impact that would make a useful contribution without causing prejudice to the parties.

"Directly affected" or "relevant information and expertise" in federal reviews

The 2012 reforms to the federal environmental assessment regime provide that reviews conducted by the National Energy Board, Canadian Nuclear Safety Commission, or a Review Panel grant standing to an "interested party". An interested party is defined as including persons who are directly affected or who have "relevant information and expertise."³²⁹ This is a narrowing of the prior open standing model described above and its impacts are still fairly speculative. There are some academic commentaries and agency decisions on the new provisions but no jurisprudence yet. The model is used for environmental reviews where triggering hearings does not depend on standing so it avoids the issue of whether interested parties who are not directly affected could or should trigger hearings.

³²⁶ Statutory Environmental Rights, *supra* note 304.

³²⁷ *Lafarge Canada Inc. v. Ontario Environmental Review Tribunal*, 243 OAC 312; CanLII 6870 (ON SCDC), online: <http://www.canlii.org/en/on/onscdc/doc/2008/2008canlii6870/2008canlii6870.html>

³²⁸ *Miller v. Ontario Environmental Review Tribunal*, 2008 CanLII 15774 (ON SCDC), online: <http://www.canlii.org/en/on/onscdc/doc/2008/2008canlii15774/2008canlii15774.html?searchUrlHash=AAAAAQANZ29yZG9uIG1pbGxlcgAAAAAB>

³²⁹ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52., s.15(b), s.2(2), [CEAA 2012].

The “information and expertise” category properly connects standing to the substantive issues but it might not uphold the procedural rationales for participation. Fairness and access to justice concerns may arise for persons that are not directly affected yet struggle to pass the new category. The irony of the reforms is that large activist organizations may have technical issue expertise and the advocacy capacity to make a case for their relevance, while local stakeholders such as recreational users or community groups now face formal hurdles to standing. Exclusions based on a formal standing test are a particular concern because public participation remains a legislated purpose of federal environmental assessment.

Whether the new test will promote efficiency and reduce harm to third parties is unknown. The whole point of narrowing formerly open standing is likely to unburden developers. However, the reforms may have unintended consequences of creating inefficiency and uncertainty as standing becomes an issue. The agency may need to interpret and apply two tests to innumerable participants, and it only takes one appeal to reopen a decision.³³⁰ The challenge of interpreting and applying the directly affected test is discussed at length above, and regarding the “information and expertise” test the first two decisions after the reforms took different approaches. The first agency ruling on interested party status was rendered by the New Prosperity Mine Review Panel and it used the common law public interest standing test. The agency found that the public law context and the “important public interests reflected in the stated purposes of the act” warranted a “liberal and generous approach” to determining interested party status as endorsed by the SCC.³³¹ The result was standing for numerous parties. The second agency ruling was the Jackpine Mine Review Panel and it took a different approach. The agency made two sets of decisions on standing: first on application forms under its own process and then a legal ruling on certain parties as requested by the developer. The legal ruling relied on the Joint Panel Agreement and the legislation for the test to use, and then used the Terms of Reference for the review to determine the relevance of information and expertise.³³²

While all of the above ‘middle path’ models attract some criticism it is nothing like that levied at open standing or individual interest standing. On the contrary there is much alignment between these middle path models and several reform proposals. What is lacking from these middle path models is the level of pragmatic functionality that would be provided by agency discretion to weigh factors and rationales instead of being bound to vague or immutable requirements. This suggests that standing at environmental agencies should indeed follow the lead of the courts on public interest standing.

³³⁰ Approval Process in Canada, *supra* note 195.

³³¹ *Ruling on Interested Party Status, Re. New Prosperity Gold-Copper Mine Project* (October 12, 2012) Canadian Environmental Assessment Agency, Registry Number 63928, online: <http://www.ceaa-acee.gc.ca/050/documents/p63928/82370E.pdf> [New Prosperity]

³³² *Re. Jackpine Mine Expansion Project, Interested parties participation in the Hearing*. (October 17, 2012) Canadian Environmental Assessment Agency, Registry Reference Number 10-05-59540, online: <http://www.ceaa-acee.gc.ca/050/details-eng.cfm?evaluation=59540>.

Part IV: Should Environmental Agencies Grant Common Law Public Interest Standing?

The Question of Jurisdiction

Whether administrative agencies can grant common law public interest standing is a question of jurisdiction. Agencies would need the necessary discretion grant standing to persons lacking a right to a hearing, and there is also an issue of common law public interest standing being tied to the role of the courts.

There is no question that agencies must find their jurisdiction under legislation but there is very little jurisprudence on this principle as it relates to standing. As discussed in Part II, the SCC in *Finlay* was silent on whether public interest standing is available at administrative agencies. There are at least four lower court cases that tackle the question: two ABCA cases from the 1990s that concern a defunct Public Health Advisory and Appeals Board, a 2013 decision concerning the Alberta Environmental Appeals Board, and the obiter dictum in the 2014 case *Gagne* case discussed in Part III concerning the British Columbia Environmental Appeals Board. These cases do not form a cohesive jurisprudence but they are all similar in many ways. All concern appeals tribunals that require standing to trigger hearings and use a legislated test that is narrower than the common law “genuine interest” factor. All of these cases found that common law public interest standing was not available in the circumstances. All reached this conclusion by distinguishing the jurisdiction of courts from that of administrative agencies and by favoring a narrow interpretation of the legislated test.

The Alberta Public Health Advisory and Appeals Board

The ABCA authorities are two sister cases, *Canadian Union of Public Employees, Local 30 v. WMI Waste Management of Canada Inc. (WMI)* and *Friends of Athabasca Environmental Association v. Public Health Advisory and Appeals Board (Friends of Athabasca)*.³³³ Both cases concern a challenge to the permitting of a private waste management facility associated with a pulp mill. The original decision maker was a local agency with legislated authority to refuse permits where it was in the “public interest” to do so. This legislation also provided that persons “directly affected” by these decisions could appeal to the Public Health Advisory and Appeals Board. This agency denied standing and that decision was upheld by the ABQB and ABCA. In these cases the ABCA treated the determination of standing as a question of “law and fact” with little articulation of policy apart from brief mention of the floodgates concern. The court took a narrow view of the test and a narrow view of the public interest mandate as being related to health.

³³³ *Friends of Athabasca Environmental Association and Edmonton Friends of the North Environmental Society v. Public Health Advisory and Appeals Board* 1996 ABCA 11 [Friends of Athabasca]; *Canadian Union of Public Employees, Local 30 v. WMI Waste Management of Canada Inc.*, 1996 ABCA 6 [WMI].

In *WMI* the ABCA noted the lack of case authority extending common law public interest standing to the administrative agency context. It rejected the applicability of the FC case of *Friends of the Island* reviewed in Part II in which the FC granted public interest standing based on a genuine interest despite the existence of a “directly affected” test in the *Federal Courts Act*. The ABCA held that the word “directly” in the Alberta legislation signalled a legislative intent to limit appeals rights and this right was “confined to persons having a personal rather than a community interest in the matter.” In reaching this conclusion in *WMI* the court considered how the agency had found that the interests of the persons seeking standing were “not distinct from that of the general community interest”.

In *Friends of Athabasca* the ABCA held that interpreting the “directly affected” test so as to include any person with a genuine interest would make the words meaningless. It found that the legislation suggested a public interest mandate but held that this did not authorize appeals by persons purporting to act in the public interest, or even by all persons affected by decisions. It held that this mandate must be construed according to legislative intention and that this intention was clear. It further held that the mandate required considering whether the interests for which standing was sought were matters of public health rather than any public interest. The court proceeded to apply the “directly affected” test to a community group and the organization was not directly affected simply on account of representing persons who may be directly affected.

Friends of the Athabasca and *WMI* provided a questionable foundation for the jurisprudence as they were likely correct in concluding that common law public interest standing was not available but the courts’ reasons were flawed. The ABCA was correct to find that *Friends of the Island* concerned standing in court and that this was a different context. However, its decision to reject this authority might have been influenced by arguments from the developer that *Friends of the Island* was wrongly decided and would be reversed by the FCA.³³⁴ This did not occur and the FC proceeded to grant public interest standing in innumerable cases. A second problem with the decisions is that the ABCA did not apply the SCC authorities on common law standing reviewed in Part II but instead relied on minor provincial authorities and an old Privy Council decision. Had it recognized the SCC authorities it might have recognized a distinction between the right to standing for directly affected persons and the possibility of discretionary standing for other persons. It still could have declined public interest standing for lack of a serious issue of legality. However, if it considered the common law test then it might have recognized that the “genuine interest” factor occupied a middle ground between “any person” and “directly affected”, which is not apparent in the decisions.

The ABCA may also have erred by accepting without question the agency’s interpretation of the “directly affected” test as requiring that a person be differently affected from the general public. This interpretation replicates the common law public nuisance rule and is not clearly the legislated intention despite the court’s assertion that the legislation is clear. This interpretation is hard to reconcile with the ABCA’s 2009

³³⁴ Public Nuisance Rule, *supra* note 281.

ruling in *Kelly #1* discussed in Part III, where it held that a “directly and adversely affected” test did not require being differently affected.

Friends of Athabasca and *WMI* have not been cited much but they have never been overturned. The Public Health and Advisory Appeals Board and its enabling legislation were repealed and some functions transferred to the Alberta Environmental Appeals Board (Alberta EAB).

The Alberta Environmental Appeals Board

The ABCA authorities have been followed respecting standing at the Alberta EAB. In *Kostuch v. Alberta* the ABQB held that it was bound by the ABCA cases in interpreting the “directly affected” test at the Alberta EAB.³³⁵ It considered whether the Alberta EAB should more readily grant standing to public interest groups where no one could show that they are directly affected, but held that the legislature could have done so and did not. This consideration resembled the common law public interest standing factor of a “reasonable means” to raise the issue, though the ABQB did not identify it as such.

In *Alberta Wilderness Association v. Alberta (Alberta Wilderness Association)* the ABQB rejected the availability of public interest standing at the Alberta EAB in a brief decision that relied entirely on strict statutory interpretation without referencing any case authorities.³³⁶ Despite breaking the line of authority in this manner the ABQB’s reasons resembled the earlier cases. It distinguished the inherent jurisdiction of courts from the legislated jurisdiction of administrative agencies, found that the legislation providing rights to appeal the particular decision restricted standing to “directly affected” persons and that this did not allow public interest appeals. The public interest advocates had argued unsuccessfully that the agency was created under a different statute, that this other statute suggested discretion to grant standing and that its purpose referred to the “shared responsibility of all Alberta Citizens for ensuring the protection, enhancement and wise use of the environment through individual actions”.³³⁷ They also made submissions on the agency’s differential treatment of environmental organizations compared to other corporate entities which is not captured in the ABQB’s decision.

The brevity of *Alberta Wilderness Association* is unfortunate as it provided an ideal test case for the issue. The question of jurisdiction was arguable either way based on the breadth of statutory interpretation as there was discrepancy between the legislation under which the decision was made and that enabling the agency to screen appeals. If jurisdiction existed then the facts may have warranted public interest standing. The litigation originated from two environment ministry decisions raising identical issues of legality as to whether the purpose of water licenses could be changed.³³⁸ These decisions also raised

³³⁵ *Kostuch*, *supra* note 259.

³³⁶ *Alberta Wilderness Association vs. Alberta (Environmental Appeals Board)* 2013 ABQB 44 [AWA v. EAB].

³³⁷ EPEA, *supra* note 246.

³³⁸ *Water Matters Society of Alberta et al. v. Director, Southern Region, Operations Division, Alberta Environment and Water, re: Western Irrigation District and Bow River Irrigation District* (10 April 2012), Appeal Nos. 10-053-055 and 11-009-014-D (A.E.A.B.) [WID Decision]; *Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment, re: Eastern Irrigation District* (30 August 2011), Appeal Nos. 10-038-043-ID1 (A.E.A.B.) [EID Decision] online: <http://www.eab.gov.ab.ca/decisions.htm>

questions of public policy as the outcome of these decisions would preclude opportunities for government to pursue water conservation objectives while at the same time enabling a private water market. Both decisions were challenged by three organizations and two individual biologists, all with records of involvement in either the environmental issues or the policy issues. The Alberta EAB denied them all standing for not being directly affected, holding that while they had a “genuine interest” in the aquatic ecosystem, they had no interest in the individual decisions and it “cannot and will not grant public interest standing in these circumstances”.³³⁹ The Alberta EAB heard an appeal of the first decision because an individual water user was directly affected but heard no appeal of the second decision raising the same issues. The advocates sought judicial review of the second exclusively on the denial of common law public interest standing decision, making no claim to be directly affected.

On account of these facts, there was an issue with the legality of an administrative decision of the type for which public interest standing is available and which was suitable for determination by the agency. The agency had recognized that the environmental advocates held a genuine and this would have been a reasonable means for the agency to hear the issue as there were no directly affected persons other than hypothetical ones.

Had the ABQB considered the principles of public interest standing they could have found the case arguable on both sides. The water license holders had argued at the agency level that public interest standing was tied to the courts as evidenced by the justiciability requirement that issues be appropriate for judicial determination.³⁴⁰ Conversely, the legality principle could have warranted standing as denying standing had the perverse effect of allowing a potentially unlawful decision to be immunized from scrutiny by the same agency whose mandate is to scrutinize such decisions. This denial of standing in light of the agency’s function raises access to justice concerns. The agency’s own description of its origins states that:

“Individuals and groups concerned about the environment, such as fish and game associations, recreational groups and conservation organizations, were also concerned. They told the review panels they wanted an independent appeal process as a way to have a say in the approval of projects that might degrade the environment. The Board was created to respond to these concerns. . .”³⁴¹

Alberta Wilderness Association may promote administrative inefficiency and waste of judicial resources going forward. As described in Part III, to challenge the legality of decisions, persons who could qualify for public interest standing in court yet who could be denied standing by the Alberta EAB would need to file for judicial review of those decisions and file appeals with the EAB simultaneously so as to meet the deadline for judicial review while also exhausting administrative avenues. This guarantees multiple

³³⁹ *Ibid.*

³⁴⁰ Erratum: Water Matters Society of Alberta et al. v. Director, Southern Region, Operations Division, Alberta Environment and Water, re: Western Irrigation District and Bow River Irrigation District (22 June 2012), Appeal Nos. 10-053-055 and 11-009-014-E (A.E.A.B.) [WID Erratum], online: <http://www.eab.gov.ab.ca/decisions.htm>

³⁴¹ Alberta Environmental Appeals Board, “Role of the Board”, online: <http://www.eab.gov.ab.ca/role.htm>

proceedings and potentially two different determinations of standing originating from the same issue of legality. Avoiding harm to third parties may have been impossible in any circumstance as the water license holders could have been exposed to harm if standing was granted at the agency and they were exposed to harm in court as evidenced by the fact that they were awarded costs against the public interest advocates.

The matter involved a questionable intervener decision as well. Prior to the ABQB hearing in *Alberta Wilderness Association*, the advocates applied to intervene at the agency on the first appeal on which they were denied standing but for which there would be a hearing for the directly affected individual. The agency denied them intervener status partly because they sought to raise questions of policy and legislation that it held to be irrelevant, and partly because it held that the appellant could address these issues.³⁴² The agency's substantive decision on this appeal concluded with obiter dictum on the same policy concerns that the groups sought to raise.³⁴³

Given how these two denials in situations where standing and intervener status could potentially have been available, one could conclude that the agency's real concern was with preventing public interest representation.

The British Columbia Environmental Appeals Board

The BC EAB resembles the Alberta EAB in its unwillingness to grant public interest standing although it many have entertained the prospect at one time. At least two agency decisions from the 1990s applied some principles of public interest standing but in a disjointed manner.³⁴⁴ In one 2005 decision the agency did not clearly dismiss jurisdiction to use the test but found that the test was not made out.³⁴⁵

In the 2014 case of *Gagne v. Sharpe* the BCSC provided an obiter dictum opinion that public interest standing was not available at the BC EAB.³⁴⁶ As discussed in Part III this case saw the BCSC overturn a denial of standing under the legislated test for reasons of fairness, bias and overly high evidentiary standards and unnecessary requirements for the members of incorporated groups to be aggrieved. First the court considered the principles articulated by the SCC in *Downtown Eastside* as guidance in reviewing the agency's determination of standing under the legislated test. During the binding part of the decision the court held that the agency should show "great caution and attention to process":

³⁴² *Hohloch v. Director, Southern Region, Environmental Management, Alberta Environment and Sustainable Resource Development, re: Eastern Irrigation District* (12 October 2012), Appeal No. 10-043-R (A.E.A.B.)

³⁴³ *Ibid.*

³⁴⁴ *Allied Tsimshian Tribes Association v. Deputy Comptroller, re. Windemere Lake Resorts Ltd.*, (11 October, 1995) Appeal No. 95/06 Water, (BCEAB); *Columbia River & Property Protection Society and East Kootenay Environmental Society v. Depute Comptroller, re. Lake Windemere Resorts Limited*, (August 15, 1996) Appeal No. 95/42 Water (BCEAB).

³⁴⁵ *Burgoon v. Regional Water Manager*, (February 29, 2008) Decision Nos 2005-WAT-024(b); 2005-WAT-025(b); 2005-WAT-026(b), (BCEAB).

³⁴⁶ *Gagne*, *supra* note 275.

“. . .this is especially true because the board does not have inherent jurisdiction and must stay within the means of its statutory power and not hear from those who it is not authorized to hear from. [Having said that, the board must exercise its gatekeeper function in consideration of the principles related to access to justice and the full execution of the board’s statutory mandate]”.³⁴⁷

Gagne is highly informative in its willingness to intervene in the agency’s denial of standing under the legislated test coupled with its view that agency had no jurisdiction to grant common law public interest standing. With so few cases on the topic it may have some weight.

Gagne does not cite the Alberta cases but much of the reasoning is similar in many ways. The courts’ articulation of the legislated requirement that one be “aggrieved” resembles the public nuisance rule. It held that “aggrieved” must mean something that separates the challenger from the general public, and it seemed to accept the argument that parties who were not “aggrieved” or who had more remote interests were unlikely to contribute to the issues. It based this interpretation on provincial authorities that concerned standing under unrelated legislation. It showed a questionable understanding of the public interest standing test as it equated “genuine interest” with the subjective interest of the environmental advocates and did not appear to recognize any middle ground between mere busybodies and persons aggrieved under the legislation. *Gagne* may further have misapplied the judicial preference for directly affected persons to the agency context. The jurisprudence on standing in court does not link this rationale to preventing floodgates or busybodies which are the concerns expressed in agency cases, but rather to the needs of the adversarial system.

Notes on Jurisdiction and Discretion

The question of agency jurisdiction to grant common law public interest standing is difficult to settle through litigation as the legislation in question is always relevant. Nonetheless, repeat findings of no jurisdiction may deter public interest advocates from driving future litigation and render the question academic. These authorities may persist though their reasoning is problematic.

The lower courts’ reluctance to recognize the availability of public interest standing at environmental agencies is not surprising considering that they are equally reluctant to expand the issues for which public interest standing is available in court as discussed in Part II. What are questionable are the judicial trends in this situation. One trend is misstatement or limited understanding of public interest standing principles even though these principles are developed and used by the courts for their own purpose. A second is the divergence from the increasing judicial propensity to intervene in denials of standing under the legislated tests. A third is adherence to strict statutory interpretation, which is highly divergent from the contextual approach to assessing jurisdiction that was articulated by the academic authorities in Part III. One could even argue that legislative restrictions on standing only apply where decision makers are

³⁴⁷ *Ibid.* at para 57.

acting within their statutes.³⁴⁸ Thus an appeals tribunal could grant public interest standing to hear challenges to the legality of decisions even if the narrower legislated test applies to other appeals.

The answer to the question of jurisdiction is further clouded by the fact that the courts rarely ever overturn agency decisions to grant standing. There are no such cases in this report. Agencies inclined to hold hearings could simply interpret their legislated tests more broadly and seek deference from the courts. Determining standing under the legislated test has more chance of being found to be a procedural matter or involving questions of fact rather than a question of law and jurisdiction. There is also the issue of agencies using public interest standing to add parties once hearings are triggered as done in the *New Prosperity* decision discussed in Part III. The agencies are not challenged with allegations that public interest standing is only available in court, or only available to trigger hearings, or only available to raise issues of legality, even though all these arguments apply. The real issue of contention is with triggering hearings that would not otherwise occur.

As a final comment, the irony of looking to common law public interest standing as a model for standing at agencies should not be missed. As administrative agencies are not courts one can ask whether they should be looking to models of standing created for the adversarial litigation system. The fact is that they already do so where legislation requires differential affects or prejudiced individual interests to trigger hearings. The fact that standing at agencies has not kept pace with standing on public law matters in the courts may be the best evidence that environmental decision-making has not kept pace with the issues.

Are Interveners a Better Model Than Public Interest Standing?

If court models are to be considered for standing at agencies then the courts approach to interveners should be included. Although court interveners cannot trigger hearings and are provided limited roles, the tests for intervention, the policy rationales for and against intervention, and evidence of the impacts of intervention are transferable to the agency context.

Like common law public interest standing there is no right to intervener status; it is always discretionary. Legislation can provide factors to guide this judicial discretion or these factors can be developed by the courts. Typically interveners will be directly affected or will be able to assist the decision through a substantive contribution. In public law matters interveners not need to be directly affected.³⁴⁹ The rationales to balance when screening public law interveners resemble the general rationales for and against public participation in environmental decision making. Rationales favoring intervention are whether it would make a useful contribution or provide a different perspective on the issues from the parties.³⁵⁰ Rationales against intervention are whether it would cause undue delay, injustice or prejudice

³⁴⁸ Shaun Fluker, personal communications.

³⁴⁹ *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396; *Morton v. British Columbia* 2010 BCSC 100; Sheila M. Tucker and Elin R.S. Sigurdson, "Interventions in British Columbia: Direct Interest, Public Law & Exceptional Interveners" 23 CJALP 183 [Interveners].

³⁵⁰ *Ibid.*

the rights of the parties.³⁵¹ All that would remain for use of interveners as the model for public interest standing at agencies would be a means to trigger hearings.

Commentary on interveners more so than commentary on standing considers whether interveners have impacted the substantive decisions. This is hard to measure as interventions cannot be measured by win/lose outcomes.³⁵² However there is a general sense that interveners make a difference, and the debate is more about whether this difference is positive.³⁵³ Positive views of interveners as assisting with the assessment of public interests and providing objective information are countered by allegations of interveners as hijacking the court's agenda or consuming resources without being helpful. One study of SCC judges revealed divergent views on the value of interveners, ranging from "often valuable" to "too political" to "varies enormously".³⁵⁴ In *Canadian Council of Churches* the SCC noted that public interest organizations that did not qualify for standing are often granted intervener status "as they should be", as interveners frequently provided assistance to the court on issues of public importance.³⁵⁵

A further relevant finding from study of interveners is that concerns are not necessarily with public interest interveners as compared to private interest ones. For example in *Morton v. Marine Harvest* the BCCA rejected the attempts of an industry association to intervene in a constitutional challenge brought by environmental advocates.³⁵⁶ The court held that the interveners' issues would not be considered, the intervention would not be helpful and would unnecessarily burden the court.

Part V: Standing in Similar Countries

General Trends

Other common law countries resemble Canada in that the historic rules requiring private rights have created barriers to standing in public law matters.³⁵⁷ The judicial trend is towards relaxing standing while maintaining "interest" requirements.³⁵⁸ There is no separate standing test for groups but some environmental organizations can meet the interest requirements based on indicators such as their objects and activities.³⁵⁹ Policy rationales underlying the legal tests for standing resemble those in Canada where

³⁵¹ *Ibid.*

³⁵² Getting Heard: "Leave to Appeal, Interveners and Procedural Barriers to Social Justice in the Supreme Court of Canada", (2010) 50 Supreme Court Law Review 1 [Getting Heard].

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Canadian Council, *supra* note 32.

³⁵⁶ *Morton v. Marine Harvest Canada Inc.* 2009 BCCA 378.

³⁵⁷ 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, Xian, China, April 11-13, 2006) [archived at Land and Environmental Court of New South Wales], Online: http://www.lec.justice.nsw.gov.au/agdbasev7wr/assets/lec/m4203011721754/preston_standing%20to%20sue%20at%20common%20law%20in%20australia.pdf [Standing to Sue].

³⁵⁸ *Ibid.*; Standing in Public Interest Cases (Queensland Public Interest Law Clearing House Incorporated, Standing, July 2005) [Standing in Public Interest Cases].

³⁵⁹ *Ibid.*

the role of the courts in upholding legality must be balanced against the needs of the adversarial system, scarce judicial resources and concern with impacts on third parties. Likewise historic concerns with floodgates and busybodies no longer dominate contemporary case law.³⁶⁰

Findings of the Australian Law Reform Commission

The Australian Law Reform Commission (the “Commission”) gave solid attention to environmental matters in two reports on standing in the courts.³⁶¹ It found that despite the judicial trend towards relaxing standing the legal tests requiring “interests” were complex, restrictive and hard to apply. Multiple tests were in play and being inconsistently applied which was causing disputes, costs, delay and variable accountability for similar decisions. It found that narrow standing was precluding needed public interest representation by non-government parties, narrow standing did not effectively limit harm to third parties in the regulatory context, and the floodgates concern was overstated. The Commission recommended legislative reforms to create one broad simple test for standing for most public law matters.

Public Interests

The Commission found that despite the relaxation trend, tests requiring special interests were “too inflexible to accommodate changing perceptions of the public interest” and “do not accommodate public interests in environmental matters”.³⁶² The Commission accepted that legislatures should be free to determine who can enforce legislation and challenge government decisions subject to constitutional limits. However it also found that “government cannot adequately represent public interests in all matters due to political, bureaucratic and financial constraints.”³⁶³ This left a role for private persons in maintaining the rule of law through enforcing statutes and reviewing decisions, “particularly in regulatory schemes concerning the environment”.³⁶⁴

Harm to Third Parties in the Regulatory Context

The Commission gave significant attention to the regulatory context in which contested standing arises. It heard concerns from the commercial sector that environmental groups seeking to challenge permit decisions can impact the permit holders by creating costs, delay and making permit holders unable to fulfill their obligations. The commercial sector feared that broader standing would undermine the certainty of regulatory permits and increase the capacity of environmental groups to litigate with the intent of causing damage. The Commission also heard broader concerns that a climate of uncertainty deters investment in the domestic industry and affects the competitiveness of the host jurisdiction.

³⁶⁰ Standing to Sue, *supra* note 357.

³⁶¹ Australian Commission, *supra* note 5.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

The Commission was sympathetic to these concerns and agreed that uncertainty of permits can have serious commercial consequences. However it found that “these concerns will not be solved by narrowing the rules of standing”.³⁶⁵ The Commission gave at least three reasons for this conclusion. First, granting standing was not the main cause of regulatory delay:

“The Commission was given several examples of legal and administrative uncertainty concerning government decisions. Generally standing was irrelevant. The examples concentrated on delays in government approvals resulting from political debate about a project, the need for detailed environmental assessments or strategies, the complexity of the relevant decision making process or, in some cases, government inertia. There were more comments on the decision-making processes used by governments than on the issue of who has standing. . . .”³⁶⁶

Second, narrow standing had limited ability to screen out vexatious litigants because many of them hold private interests:

“Furthermore, if narrower rules of standing had been introduced in these cases, the uncertainty would have remained. In many cases a commercial competitor would have had standing even on a narrow ‘special interest’ test. In other cases the commercial competitor could have caused as much delay (and thereby damage) by arguing about standing as by arguing the substantive issue”.³⁶⁷

Third, narrow standing was already acting as an ineffective gatekeeper because it was apt to be determined with the substantive merits of the case and therefore simply added issues to the dispute.

The Commission concluded that there were better ways to control futile or vexatious litigation than by narrowing the interests required for standing. Such litigation could be dismissed for non-justiciability, no cause of action, abuse of process, or deterred with costs. Litigants who were simply ineffective could be dealt with by process management.

The Floodgates Concern

The Commission’s first of two reports found a lack of evidence supporting the floodgates concern.³⁶⁸ It found that the costs, delay and the prospect of discretionary remedies were all deterrents to litigation and concluded that the floodgates concern exists more in perception than in practice. Between its two reports the Commission invited comments on the floodgates concern due to an increase in the number of public interest groups in Australia. The Commission’s second report reviewed empirical evidence and affirmed that broader standing “is unlikely to lead to a significant increase in litigation.”³⁶⁹ It found that where environmental legislation provided open standing it had only been used for 125 hearings in 15 years.

³⁶⁵ *Ibid.* Report 78 at 4.24.

³⁶⁶ *Ibid.* at 4.25

³⁶⁷ *Ibid.* at 78 4.26

³⁶⁸ *Ibid.*, Report 27

³⁶⁹ *Ibid.*, Report 78 at 4.42.

Only 32% of these 125 cases under open standing were brought by activist groups or otherwise in the ‘public interest’. The Commission also noted that open standing under trade practices legislation had not caused high levels of litigation. The Commission further considered that other access to justice reforms had little implications for standing as they were of little relevance to persons seeking enforcement of statutes or review of government decisions.

Recommendations for Reform to Standing

The Commission concluded that standing should be broader rather than narrower and that standing should not be an issue in its own right. It recommended that one broad, simple test for standing replace all common law tests and most statutory tests in public law matters. It recommended that “any person” should have standing in public law proceedings unless:

Legislation clearly indicates that a decision should not be litigated or not litigated by that person,

-or-

It would not be in the public interest due to unreasonable interference with persons with private interests to deal with the matter as they sought.

In concluding to drop the “interest” requirements, the Commission felt that “who” should raise the issue was less significant than the public interest in having the issue resolved. The Commission considered the need for capable plaintiffs but concluded that lack of capacity should not be used to deny standing. It also noted conflicting comments on its chosen approach. Some participants emphasized the need to avoid having questions of public rights resolved through inadequate arguments by incompetent parties. Other participants countered that a focus on a plaintiff’s past record can exclude capable plaintiffs, noting that important environmental cases had been brought by persons with no previous experience.

The Commission recommended that standing be determined as a preliminary matter.

The Commission also made recommendations on non-standing interveners. It recommended that interveners not have to show special interests. Courts should consider whether the intervener’s contribution will be useful and different from the parties and whether the intervention would unreasonably interfere with the ability of the private interest parties to deal with the matter differently. The Commission recommended packaging all reforms on standing, interveners, and further reforms aimed at reducing costs and delay into a single legislative framework. It found that the costs of reform would produce savings through avoiding the costs of legal disputes.

The Commission did not consider standing at administrative agencies as it felt this topic warranted a separate review that considered the agencies as extensions of the executive branch of government.

The Commission’s recommendations were not adopted as of July 2012.³⁷⁰

³⁷⁰ Australian Law Reform Commission, *Standing in Public Interest Litigation*, online: <http://www.alrc.gov.au/inquiries/standing-public-interest-litigation>

Standing in Statutory Environmental Courts

Some of the best evidence on the impact of standing cited by the Commission comes from statutory environmental courts. The mandates of these courts come through legislation and consolidate the functions of judicial review and administrative appeals. The pre-eminent example is the Land and Environment Court of New South Wales.

The Land and Environment Court of New South Wales was created to provide a specialized forum for the review of natural resource project permitting, environmental protection and land use planning decisions.³⁷¹ Legislation provides broad standing on specified matters.

The court is undoubtedly a model of success.³⁷² It has run for 30 years, has a pre-eminent international and national reputation, has received many favorable reviews and has been a basis for recommendations for environmental courts around the world.³⁷³ All reports available indicate that the court is meeting its substantive decision-making mandate and provides access to justice while meeting efficiency goals and promoting certainty of decisions.

Access to Justice: The judiciary states that the court aims to facilitate public interest litigation and access to justice, including “access to environmental justice”.³⁷⁴ Access to justice is facilitated by substantive decisions and procedures. The courts’ substantive decisions uphold statutory rights to public participation at other stages of legislative and administrative decision making while the courts’ procedure is aimed at removing barriers to public interest litigation including standing. Legislation provides open standing on select matters which is viewed by the judiciary as “an important feature of the court”.³⁷⁵

Efficiency: The judiciary claims that the court assists with the efficiency and effectiveness of development decisions.³⁷⁶ The court’s consolidated jurisdiction decreases multiple proceedings at different courts and agencies flowing from the same dispute. The court has objectives to make efficient use of judicial and administrative resources. It provides multiple disputing streams that involve judges and hearing commissioners. The judges have case management responsibilities and the court seeks to make the costs of disputing to the importance and complexity of the subject matter.

The judiciary reports reduced costs and delay and increased certainty for developers.³⁷⁷ This claim is supported by the numbers as well. The court measures efficiency by “clearance rate” – the rate at which

³⁷¹ Peter Biscoe, “Land and Environment Court of New South Wales: Jurisdiction, Structure and Civil Practice and Procedure” (Paper presented to the Australasian Conference of Planning and Environment Courts and Tribunals, Sydney, Australia, 2 September 2010.) [Land and Environment Court].

³⁷² Brian Preston, “Operating an environment court: the experience of the Land and Environment Court of New South Wales” (Paper presented to Renewing Environmental Law: A Conference for Public Interest Environmental Law Practitioners, Vancouver, 3 February 2011) [Operating and Environment Court].

³⁷³ Land and Environment Court, *supra* note 371.

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

cases are closed relative to the rate at which new appeals are brought.³⁷⁸ The annual clearance rate exceeds 100%. This performance exceeds the national standard of 90% clearance in 12 months and 100% clearance in 24 months.³⁷⁹ This indicates that caseload is decreasing and efficiency is increasing despite broad standing.

Floodgates and Busybodies: The judiciary notes that the floodgates concern was not born out in practice:

“Doom-lade forecasts that open standing would swamp the Court with unworthy litigation have been proven false. Most litigation by environmental activists has been discerning, and has often made a significant contribution to the jurisprudence of the Court”.³⁸⁰

This claim is supported by the numbers. The court’s broad jurisdiction over environmental matters results in roughly 1,100-1,400 cases a year.³⁸¹ The Chief Justice of the Court notes that only about 7 of the over 1,000 yearly cases are brought under the open standing provisions.³⁸² The majority of environmental planning and protection appeals are appeals against refusals of permits or permit modifications or appeals against pollution controls.³⁸³

Standing at Administrative Agencies in Australia and New Zealand

Two key findings concerning standing at administrative agencies in Australia and New Zealand are that the debate is cast in similar terms, but the solutions differ in that there are more formalized public participation opportunities at multiple stages of planning and development processes. As in Canada the legal rules include common law duties of fairness that are most clearly owed to persons who may be directly affected by adjudicative decisions.³⁸⁴ They also include legislated standing tests that are apt to provide the same vague requirements such as having an “interest” or being “aggrieved” which promotes narrow interpretations.³⁸⁵

As in Canada the policy rationales for and against standing at administrative agencies resemble more general rationales for and against public participation in environmental decision making rather than the specific judicial policy rationales for and against standing. The competing allegations are that overly broad participation invites regulatory inefficiency but overly narrow participation invites regulatory capture.

³⁷⁸ Land and Environment Court of New South Wales, *Annual Reviews*, online: http://www.lec.justice.nsw.gov.au/lec/annual_reviews.html [Annual Reviews]

³⁷⁹ Land and Environment Court, *supra* note 371.

³⁸⁰ *Ibid.*

³⁸¹ Annual Reviews, *supra* note 378.

³⁸² Brian Preston, personal communication.

³⁸³ Land and Environment Court of New South Wales, *Types of Cases*, online: http://www.lec.justice.nsw.gov.au/lec/types_of_disputes.html,c=y

³⁸⁴ Alexandra O’Mara, “Procedural fairness and public participation in planning” (2004) 21 EPLJ 62.

³⁸⁵ John Taberner, Nicholas Brunton and Lisa Mather, the Development of Public Participation in Environmental Protection and Planning Law in Australia” (1996) ELPJ 260, [Planning Law in Australia].

One difference between Australian jurisdictions and Canadian jurisdictions may be the prevalence of legislated participation opportunities at multiple stages of planning and development processes. The nine Australian jurisdictions demonstrate hundreds of statutes providing for participation opportunities include hearings on policy development and land use planning, environmental assessment reviews and permit decisions, monitoring and enforcement.³⁸⁶ Every state in Australia provides some level of civil or public rights to enforce compliance with legislation.

At the regulatory permit stage there are multiple examples where standing can be established early and carried forward through the process. For example Tasmania and New Zealand provide persons who made submissions on original decisions with rights to appeal to tribunals or statutory courts but persons who did not make submissions on original decisions have to pass a legislated standing test.³⁸⁷

Several Australian states also have formalized participation in shared governance regimes.³⁸⁸ The selection factors favor local stakeholders but environmental organizations and persons from outside the region are not expressly excluded. In fact environmental organizations are underrepresented more often due to time and cost deterrents and because the matters are only urgent for affected local citizens.

Regulatory Streamlining in New Zealand

A case study on regulatory inefficiency and harm to third parties is provided by reforms to the *New Zealand Resource Management Act 1991*.³⁸⁹ This legislation provided examples of open submission rights on original decisions and third party appeals to the Environment Court until as recently as 2009 at which point there was a major regulatory streamlining initiative. Commentary from the era of broad participation indicated no concern with floodgates or busybodies related to environmental advocacy:

“There is no sense that councils or the Environment Court are flooded with frivolous objectors; most people seem to have better things to do. If people living in Hamilton want to object to a project in Kaukapakapa, then they are welcome, and the question is whether they have submissions or evidence that assists the decision-maker to deal with the issues.”³⁹⁰

The standing provisions were amended in 2009 as part of a larger regulatory streamlining initiative.³⁹¹ This included removing broad third party appeal rights that allowed persons who did not make

³⁸⁶ *Ibid.*

³⁸⁷ Tribunals in British Columbia, *supra* note 7, citing examples.

³⁸⁸ Cameron Holley, “Public Participation, Environmental Law and New Governance: Lessons for Designing Inclusive and Representative Participatory Processes” (2010) 27 EPLJ 360. [New Governance].

³⁸⁹ *Resource Management Act 1991* (NZ), online: <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html> [RMA 1991].

³⁹⁰ Barry Barton in Human Rights in Natural Resource Development, *supra* note 6, page 90.

³⁹¹ *Report of the Minister for the Environment’s Technical Advisory Group* (Ministry for the Environment, February 2009) [NZ Report]; *Regulatory impact statement: Resource Management (Simplifying and Streamlining) Amendment Act 2009* [Impact Statement]; *Overview of the Resource Management (Simplifying and Streamlining) Amendment Act 2009*, [overview]; all online: <http://www.mfe.govt.nz/rma/rma-reforms-and-amendments/rmaa-simplifying-and-streamlining-act-2009>

submissions on original decisions to represent public interests on appeal.³⁹² Other recommendations were for some matters to go straight to the Environment Court, bypassing earlier stage reviews.

The recommendations expressed concern with use of process that makes no worthwhile contribution. However there were no overt references to inefficiency or harm from environmental advocates. The most clearly articulated concerns were with “frivolous and vexatious” interventions by trade competitors.³⁹³ Further delays were caused by the agency’s struggle with interpreting complex provisions requiring notices of applications.³⁹⁴ The recommendations noted that the changes risked creating barriers to participation but claimed that it could encourage early involvement.

The reformed legislation scales public participation to the proposed activity and its effects. There is a category providing no notice or submission rights, a category providing rights to affected persons, and a category of public notice and public hearings where anyone can make a submission.³⁹⁵ Agencies may also exercise discretion to hold hearings in which case they can decide who to hear from.³⁹⁶ Appeal rights are provided to any person who made submission on the original decision or has greater interest than public generally.³⁹⁷ The one exception to this rights regime is trade competitors of the applicant who are legislatively barred from making submissions that would serve such purpose.³⁹⁸

Part VI: Conclusions and Recommendations

Common Trends and Divergences

Standing is really a public law issue on which environmental matters provide an acute case. Narrow standing is much more of a problem than broad standing in this context. The historic models are dated and ideological, but evolution has been stifled by politicization and the relative role of institutions. The rules, rationales and their practical merits are most unsettled in the context of ordinary, non-constitutional administrative law matters. Litigation has not resolved many issues with standing in court or at agencies and several third-party recommendations for legislative reforms have not been adopted.

The courts are ahead on a functional approach to standing on issues that fall within their mandates. This is largely attributable to their inherent jurisdiction to hear issues, which provides control over the rules and rationales for standing. Common law public interest standing has become more relaxed over time but there is commitment to maintaining limits as a matter of policy. The situational availability of public

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ Ministry for the Environment, Getting Involved in the Resource Consent Process, <http://www.mfe.govt.nz/rma/public/consent-say/index.html>. [Getting Involved].

³⁹⁶ *Ibid.*

³⁹⁷ *RMA*, *supra* note 389 s.120, 274

³⁹⁸ *Ibid.*, s.96; s.308A and s.308B.

interest standing has not been expressly expanded beyond court challenges to constitutionality of legislation and challenges to the legality of administrative action, though the prospect is not barred. There are still barriers to standing in environmental matters, but the common law is as close as it has ever been to past recommendations for discretionary standing guided by factors that should not be applied as independent test requirements.

Standing at environmental agencies is the more critical issue for reform. As with standing in the courts the largest concern is with historic models that restrict standing to individual, private interests. These tests are inherently unstable as courts attempt to uphold perceived legislative intentions yet are increasingly intervening into agency denials of standing. Conversely, the courts have been unfavorable to recognizing the availability of common law public interest standing at administrative agencies. This leaves a pragmatic and functional approach to standing at agencies in limbo and raises the need for reforms. While recent reforms have narrowed open standing, recommendations for broader standing where restrictive models are used need to be more thoroughly developed, supported by evidence and advanced.

The need is for models of standing at administrative agencies that allow issues suitable for determination to be heard and to allow public interests to be represented by appropriate parties. Concerns with fairness and access to justice may now be greater at administrative agencies than in the courts, but counter-concerns with efficiency, certainty and harm to directly affected parties are high in the regulatory context. There is need to consider an exchange of efficiency which could do double duty by conserving judicial resources. In the agency context as compared to courts there is greater need for standing to assist substantive decisions and to serve a procedural legitimization function.

Recommendations

#1: Abolish Legislated Tests Resembling the Public Nuisance Rule.

Every reform recommendation reviewed in this report rejected tests that may be interpreted as prohibiting standing to represent public interests.³⁹⁹ These tests included the common law public nuisance rule and tests in legislation that require prejudiced individual interests such as being “directly and adversely affected” in situations where these tests are used as the sole trigger for hearings. This model of standing, whether legislated or under the common law, creates universal problems that apply equally at courts and administrative agencies. All of these problems are more acute in the agency context and especially where standing for groups is concerned.

³⁹⁹ Ontario Commission; *supra* note 5; Australian Commission, *supra* note 5; South African Commission, *supra* note 5; Tribunals in BC, *supra* note 7; Tribunals in Alberta, *supra* note 7; Alberta’s Environmental Appeals Board, *supra* note 7; Public Interest, *supra* note 162; Approval Process in Canada, *supra* note 195; Public Nuisance Rule, *supra* note 282.

The requirement for affected individual interests is an adversarial litigation model that connects standing to the substantive claim against an opposing party. It conflates private disputes with issues of public interest and is dysfunctional where there is no *lis*. These tests have proven difficult to articulate, interpret and apply wherever they are used. There is no consistency on whether one must be differently affected and whether the difference is one of kind or degree. Courts hold that these tests preclude the common law rules yet interpret them as if they were the common law rules.

These tests make it hard to settle standing as a preliminary matter due to their need for evidence of harm and causation. This undermines expressed principles and practice favoring preliminary determinations and low evidentiary standards.

These tests undermine substantive decision making mandates by precluding issues suitable for determination and appropriate representation of the interests at stake. The tests resemble encoded duties of fairness, but they actually create issues of fairness, access to justice and procedural legitimacy as they allow for moving goalposts and are vulnerable to latent attitudes. This is especially true concerning standing for groups.

The tests have a perverse effect of undermining the rationales for narrow standing. They create their own inefficiency, uncertainty and waste resources by creating disputes and multiple proceedings. This model ignores the exchange of efficiency created by front end investment. The tests have limited ability to prevent harm to the regulated industries as most zealous litigants and vexatious interveners hold private interests or legal rights so they can pass the narrow tests. It is further possible to cause harm simply by contesting standing. Where the concern is reputational damage this can occur outside of the regulatory process or be created by exclusionary process. The tests have limited ability to prevent harm to third parties impacted by development as they presume the contentment in the face of barriers to participation.

The floodgates and busybodies concerns have been found to be overstated in light of the evidence and practical barriers. This finding is consistent in every law reform report and commentary reviewed here and echoed by the most recent jurisprudence in multiple jurisdictions in Canada and in other countries with similar legal systems, resources industries and socio-political profiles. Environmental courts and appeals tribunals with provisions for broad standing or third party appeals have not been swamped. Multiple surveys indicate that environmental groups are less inclined to pursue litigation and regulatory interventions than policy development or direct action to improve the environment. The only allegations of floodgates discovered by this report were highly contextual. One concerned increasing *Charter* litigation in 1990s which is of little relevant to environmental regulatory matters and the second was the Northern Gateway Pipeline hearings where the flood was caused by open participation for the general public and a process management challenge, not by the standing parties among whom environmental organizations were underrepresented. Many complaints with inefficiency, uncertainty, costs and delay in the regulatory process have nothing to do with standing.

#2: Standing Should Be Broader than Narrower, But With Clear Limits.

Standing at environmental agencies should follow the manner in which the courts strike a balance between competing policy rationales for broad and narrow standing. Despite the vast diversity of court and agency mandates, the models of standing that follow a middle path attract less criticism and most closely resemble recommendations for reform.

Standing should be broad enough and narrow enough to enable the best contributions to the substantive environmental decisions. The substantive rationale for participation and need for appropriate representations has received little attention with respect to standing because screening out weak advocacy is not a function of standing in the courts. Recent cases are beginning to recognizing how public interest parties assist decisions in the manner that public interest interveners do, and this model is best for administrative agencies where the line between parties and interveners is more amorphous. The parties should assist the decision and the evidence is that they do. Studies of interveners in court and participants in environmental reviews indicate a qualitative difference in decisions. The courts of multiple Canadian and foreign jurisdictions have stated that intervention are successful where legitimate views are raised and considered, that interventions make valuable contributions and should be granted as this is part of the system functioning. There are numerous decisions from multiple Canadian agencies in this report where participants have assisted with evidence, identified environmental concerns, obtained commitments and conditions on developments, improved developments and in incredibly few cases produced decisions that prevented activities from occurring where they would be unsuitable.

Open standing can be desirable for some agencies whose mandates provide for public participation or planning functions such as environmental assessment review panels, commissions and inquiries. The use of open standing at environmental courts, though the evidence is that it works, occurs in the context of wholesale institutional structuring for environmental decision making. Such larger reforms would have merit but are beyond the scope of this report.

#3: Provide Clear Jurisdiction to Trigger Hearings on Issues of Public Interest.

Agencies with mandates to decide public interest issues should have clear jurisdiction to hold hearings for that purpose. Where past recommendations and current models diverge or are unclear is on whether public interest standing should be available to trigger hearings. The model would vary with the agency.

Public interest standing should be available to trigger hearings in all models where standing is necessary to trigger hearings. This would include appeals tribunals and some regulatory boards. Regulatory boards with jurisdiction to initiate proceedings on their own motion should have clear discretion to use this power to trigger hearings on public interest issues, including where requested, and to grant standing to represent these issues. Agencies such as environmental assessment review panels where hearings are not triggered by standing may simply need a standing test.

#4: Create a Test for Public Interest Standing that Fits Agency Mandates.

Standing should be discretionary in every case where it is not based on enforceable legal rights. This discretion should always be guided by clear factors. These factors should be encoded in statutes, regulations, and agency made rules. Four options follow with the last one being recommended.

Option 1: “interest” requirement

Several proposals resemble the existing legislated ‘interest’ models reviewed in Part III, or they would import the ‘genuine interest’ factor from common law public interest standing.⁴⁰⁰ The advantage of this option is that it does not require enforceable legal rights. And it would allow a more relaxed approach to groups whereby the interests of their members would not be assessed unless the group is unincorporated.

The problems with the “interest” model are the same problems that exist with the restrictive tests. It relies on one single requirement rather than providing multiple factors to guide discretion, the requirement is vaguely worded, and it asks the wrong question by focusing on the interest of the person seeking standing instead of the issues raised.

Option 2: multiple categories

Some recommendations resemble the 2012 reforms to the federal environmental review model discussed in Part III. For example the Alberta Law Reform Institute recommended a multiple category model that provides rights to standing for directly affected persons and discretionary standing for persons who “have a novel argument or perspective”, are “indirectly affected”, or “represent the public interest.”⁴⁰¹ In exercising discretion the agency would consider whether adding participants would add disproportionate costs or delay.⁴⁰² The advantage of this model is that speaks to the public interest purpose of regulatory interventions rather than replicating the adversarial litigation model. It also provides numerous factors to consider rather than one sole requirement.

The problem with this model is that it is unclear on whether the discretionary standing category could be used to trigger hearings. It may only be workable to add interveners where hearings are already triggered. This does not assure that issues of public interest will be heard. A second problem with using different tests or categories for the same party status at the same agency is that it may create inefficiencies, uncertainties, and differential treatment.

Option 3: presumption of standing

A rebuttable presumption of standing would provide standing to any person subject to policy rationales for denying standing, for example if standing were to raise irrelevant issues, cause undue delay or

⁴⁰⁰ Nuisance Rule, *supra* note 281; Public Interest, *supra* note 162, Alberta’ Environmental Appeals board, *supra* note 7, Tribunals in Alberta, *supra* note 7.

⁴⁰¹ Tribunals in Alberta, *supra* note 7.

⁴⁰² *Ibid.*

interfere with the rights of more directly affected parties. The advantages of this option are that it invites issues to be raised, shifts the focus away from the interests of the advocate, and articulates policy rationales.

The problems with this approach is that it does not indicate what issues should be heard, articulates no rationales in favor of standing, and challenges to standing are certain where concerns with efficiency and harm to third parties are high. If the substantive proceedings have already begun then the proceedings would be interrupted by disputes that could have been decided as a preliminary matter and could result in standing being merged with the merits of the substantive claims.

Option 4 (Recommended Option): legislated ‘public interest standing’

The recommended option is to follow the lead of the courts and create a form of ‘public interest standing’ adapted to fit the legislated mandates of administrative agencies.

The “serious and justiciable issue” factor should be replaced with consideration of whether an issue is suitable for determination by the agency. These issues would differ with the agency and would not be limited to issues of legality, though issues of legality would be appropriate for an appeals tribunal. This model will benefit from guidance on the issues suitable for agency determination coming from policy and legislation, and would be supported by recommendation #8 to clarify agency mandates.

The “genuine interest” factor is highly suitable for use at administrative agencies and the numerous objective indicators of genuine interest developed by the courts should be encoded. The primary indicators of genuine interest should be: the purpose, objectives or mandate of the organization, and the organization’s record of involvement with the issues to be determined or the subject matter of the proceeding. Two secondary indicators that may favor standing but should not be used to deny standing include: activities in the geographic area, and prior involvement in the proceedings or with the other stakeholders in relation to the matter. A residual consideration could be whether the person is recognized or agreed upon to represent multiple interests or consolidated submissions.

Group membership would not be analyzed unless groups are unincorporated. If the environmental advocate is an individual or an unincorporated group then the genuine interest indicators will have to be adapted to essentially determine whether the individuals establish a real stake in the proceedings.

This encoding of indicators of genuine interest would end the problem of interpreting vague interest requirements, reverting to a directly affected analysis where persons also have private interests, and avoid conflating the objective analysis with the advocates’ subjective belief in their cause.

The “reasonable means” factor requires adaptation for the agency context as it is currently concerned with other ways for the issue to be litigated. Agencies determining whether their hearings would provide a reasonable means for the issues to be heard should consider other ways for themselves to hear the issues, but recognizing that private interest parties are not necessarily the best representatives for public

interest issues. They should also recognize other opportunities for participation in the decision-making process and identify the most appropriate forum in which to raise the issues. This analysis would be assisted by recommendation #9 to formalize a comprehensive public participation process.

The “reasonable means” analysis is laden with judicial rationales of variable applicability to the agency context so agencies should be directed by policy or legislation on the relevant rationales to consider. This should involve a balancing of the potential positive and negative impacts of standing on the agency and the other parties. Agencies should consider if standing could help discharge their substantive decision making mandate by having the person assist in resolving the issues. The rationales against standing would be inefficiency and harm to more directly affected third parties, but in a conflict between these private interests and the agency mandate the mandate comes first. Agencies should consider whether the person would conduct responsible and efficient proceedings or whether they would cause undue costs or delay. These considerations are similar to those used to screen non-standing interveners and to determine costs or participant funding. The difference is that they would be used to determine standing and trigger hearings.

As in the courts these factors of the issue, interest, and reasonable means should not be independent test requirements to be applied in a rigid way where each must be met in turn. Rather they should be applied flexibly as needed for the agency to discharge its mandate. Looking through the legal tests to the underlying policy rationales in the administrative context favors having the factors encoded in statutes, regulations and agency rules.

#5: Determine Standing as a Preliminary Matter

There is widespread agreement between courts, and academic on the value of settling standing as a preliminary matter but it is not always done and sometimes thought not possible. Preliminary determinations of standing affirm that standing is detached from the merits of the substantive claims. This should always be done in the administrative agency context due to the frequent absence of a lis and the pervasiveness of public interests at stake.

#6: Use Relaxed Evidentiary Standards to Determine Standing

The authorities agree that preliminary determinations should involve more relaxed evidentiary standards. Where they diverge is on their articulation of the standard and adherence to it. The standard should only require a prima facie case of what is to be proven. Evidence of interests sufficient for public interest standing should be established through the indicators above.

#7: Use Process Management Tools Rather Than Rely on Rules of Standing

The divergent experiences with broad standing in different jurisdictions indicate that process management may be a more important efficiency tool than is standing. Agencies should use an array of tools to resolve disputes, clarify roles, stream participants, manage volume and clarify use of informal

testimony. Alternative Dispute Resolution should be encouraged for purely private disputes where it would uphold duties of fairness and where settlements would not foreclose consideration of public interest issues. Pre hearing meetings should be used to clarify issues, interests, and participant roles. Participants with less than full party roles should have clear options for making written submissions, oral submissions, or participating in informal meetings. Parties and interveners should have access to duty counsel or participant assistance to improve their contributions and conduct.

Agencies should have authority to dismiss vexatious or unmeritorious appeals and interventions in lieu of relying on narrow standing which is often ineffective for this purpose. Agencies that are not bound by the rules of evidence should clarify how the 'views' of non-standing participants will be considered and weighted relative to the arguments and evidence of the standing parties. For many of these measures no reforms will be needed as they would fall under the principle that agencies are the masters of their own procedure.

#8: Clarify Substantive Decision Making Mandates

Clarity regarding the substantive issues suitable for agency determination will assist the functionality of any approach to standing. It is crucial for a functional approach to discretionary public interest standing as the issue raised is a factor in determining standing. Clarifying substantive mandates should not require drawing hard line between regulatory and policy issues as this may be impossible. It should simply involve greater guidance on the issues suitable for determination than provided by vague mandates to uphold the "public interest" or to consider "environmental, social, and economic" impacts.

#9: Formalize a Comprehensive Public Participation Framework for the Decision-Making Process

There should be coordinated and comprehensive public participation opportunities spanning most stages of environmental and natural resource decision making processes. This framework should aim to stream issues and interests to the most appropriate forum and to produce an exchange of efficiency by providing other ways to be heard so as to reduce pressure for standing at late stage hearings. Participation opportunities at stages other than agency hearings should be provided by statutes, regulations, and administrative rules to provide certainty of rights, roles and duties. These opportunities should provide access to decision makers to ensure that they count as public participation.

One single test for standing should be used for multiple decision makers in a chain if that single test fits the mandates of the different decision makers. Under this model, standing should be determined at the earliest possible stage, and if granted, should not be challenged as a matter moves upwards. Where this model does not fit, standing at earlier stages should be at least as broad as standing at later stages so as to establish real stakes in the issues, encourage settlement, and discourage disputes from moving upwards on account of no other way to be heard. Standing at higher stages should not be narrowed through formal hoops, for example requirements to have filed a statement of concern on a decision in order to appeal that decision. Different agencies with similar mandates should have similar models of standing so

as to ensure consistency, this being qualified by need to ensure that standing fits the mandate of each agency.

Reforms to standing should be packaged with other reforms aimed at improving the decision making process such notice, timelines, participant funding and further intervener or participant roles. All of these reforms would help reduce reliance on standing as a gatekeeper.