IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20140314
Docket: 13-4445
Registry: Victoria

Between:

Lynda Gagne, Charles Henry Claus, Skeena Wild Conservation Trust and Lakelse Watershed Stewards Society

Petitioners

And:

Ian Sharpe in his Capacity as Delegate of the Director, *Environmental Management Act,* Environmental Appeal Board, Rio Tinto Alcan Inc., Emily Toews and Elisabeth Stannus

Respondents

Before: The Honourable Mr. Justice MacKenzie

Oral Reasons for Judgment

(In Chambers)

Counsel for Petitioners:	C. Tollefson and R.J. Overstall
Counsel for Respondent Rio Tinto Alcan Inc.:	D.G. Bennett, QC
Counsel for Respondent I. Sharpe as Delegate of the Director and the AG of British Columbia:	N.E. Brown
Counsel for Respondent Environmental Appeal Board:	M.G. Underhill
Place and Date of Hearing:	Victoria, B.C. March 10-12 and 14, 2014
Place and Date of Judgment:	Victoria, B.C. March 14, 2014

[1] **THE COURT:** At the outset I would like to thank all counsel for their very able submissions and the professional and civil manner in which they presented them. I certainly appreciate it.

[2] Also, as all counsel, especially Mr. Tollefson, have noted, time is of the essence here, so while it perhaps would have been better to have a little more time, I decided it is in everyone's best interests to have this matter dealt with this afternoon. As a result, I reserve the right to edit this oral decision for aesthetic purposes only.

[3] On April 23, 2013, Mr. Ian Sharpe, on behalf of the Director of the Northern Region of the BC Ministry of Environment (the “Director"), granted an amendment to the multi-media permit T2001 (the “Amendment”), which increased the allowable daily emission of sulphur dioxide from 27 tonnes per day to 42 tonnes per day from an aluminum smelter operated by Rio Tinto Alcan (“Rio Tinto”) in Kitimat, BC. This amendment was authorized in connection with Rio Tinto's modernization of its Kitimat smelter.

[4] This amendment was challenged by six individuals, the Skeena Wild Conservation Trust (the “Trust”), and the Lakelse Watershed Stewards Society (the “Society”). All of those challengers filed notices of appeal with the Environmental Appeal Board (the “Board”). The Board consolidated the individual appeals into a single proceeding and ultimately granted standing to two of the six individuals. The two people granted standing in the appeal are residents of Kitimat.

[5] The four petitioners in this petition were denied standing by the Board. They are two individuals, the Trust and the Society, and all of them have homes or roots in the Terrace area. The petitioners seek relief under the *Judicial Review Procedure Act* and initially ask the court to make the following orders:

1. An order in the nature of *certiorari* quashing and setting aside the decision of the Board;

2. An order directing the Board to grant the petitioners standing as appellants;

3. In the alternative to paragraph 2, an order directing the Board to reconsider the petitioners' standings as appellants, as well as any directions for the Board that this court deems appropriate and just;

4. Costs against the respondents; and

5. An order protecting the petitioners, if the application was dismissed, from costs.

[6] The petitioners' assert that the Board's determination of whether a person or entity is entitled to standing is a quasi-judicial proceeding that imposes on the Board a duty of procedural fairness: *Canada (Attorney General) v. Mavi*, 2011 SCC 30.

[7] The petitioners say that on or around August 22, 2013, the Board acted in a procedurally unfair manner when it solicited additional documentation from Rio Tinto without notifying the petitioners or providing them with an opportunity to make submissions regarding this extra material. The petitioners submit that the appropriate remedy is an order requiring the Board to reconsider its decision using only the evidentiary record as it stood on August 16, 2013.

[8] The position of the respondents is that the Board is entitled to deference in its choice of procedures, that the Board did not violate any duty of procedural fairness, and, if there was a violation, no remedy is required because the Board did grant standing to two challengers and there will be an appeal of the impugned amendment.

[9] Some of the relevant facts and dates pertaining to the petition are as follows:

1. April 23, the director granted the Amendment.

2. May 21 to 23, eight challengers submitted independent notices of appeal.

3. June 18, Rio Tinto wrote to the Board challenging the standing of these challengers on the basis that none of them was a "person aggrieved" under section 100(1) of the Environmental Management Guidelines.

4. June 19, the Board determined that standing was a live issue and a preliminary matter and requested written submissions from the challengers prior to July 3.

5. Between July 1 and July 3, the challengers sought an adjournment of the deadline and requested either a particularized notice of the issues regarding standing or a pre-hearing conference.

6. July 4, the challengers also requested a mandatory mediation; this was opposed by Rio Tinto.

7. July 5, the Board denied the challengers' application to adjourn, affirmed that the standing of the challengers was a live issue, and extended the deadline for written submissions until August 2 for Rio Tinto and the director, and gave the petitioners until August 16 to submit a final reply.

8. July 19, six of the challengers filed written submissions regarding their standing which included impact statements that referenced the Sulphur Dioxide Technical Assessment Report, which everyone in this petition has referred to as the "STAR".

9. August 1, the director responded in writing.

10. August 2, Rio Tinto responded in writing to the submissions of the challengers.

11. August 16, the challengers filed their final reply.

12. August 19, one of the challengers withdrew their notice of appeal.

13. August 28, Rio Tinto responded to a request from the registrar of the Board to provide copies of documents referred to in Rio Tinto's August 2, 2013 response.

14. October 31, the Board granted standing to the two challengers I have mentioned and denied standing to the others.

The Board Is Subject To A Duty Of Procedural Fairness

[10] In this petition the petitioners rely on the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, to support their argument that the Board is required to act with a high degree of procedural fairness. As explained in *Baker*, the duty to provide procedural fairness depends on the context and involves a number of factors. They are:

1. The nature of the decision being made and the process followed in making it;

2. The nature of the statutory scheme;

3. The importance of the decision to the individuals affected;

4. The legitimate expectations of the person challenging the decision; and

5. The choice of procedure made by the agency itself, giving weight to its institutional constraints.

[11] The petitioners divide these factors into two branches: the first dealing with the nature of the decision (factors 1 to 3), and the second with whether the decision reflected the legitimate expectations of the parties (factors 4 and 5).

[12] The petitioners also say that two rules of natural justice inform the duty of the Board to act in a manner that is procedurally fair, they are the rule that a party has the right to hear and respond to the other side and the rule against bias.

[13] The petitioners submit that the *Baker* factors and these two rules require the Board to act in a manner that can be described as transparent, citing *Therrien (Re)*, 2001 SCC 35.

[14] With respect to the first branch, the petitioners say "it tilts strongly to a very stringent level of procedural fairness" and referred to considerations that the Board's decision concerning standing is determinative; that there is no statutory right to appeal a decision regarding standing; and that the decision of the Board is of significant importance to the lives of the petitioners.

[15] I largely agree with these submissions, and with regard to the third consideration I find that there is no doubt that the amount of sulphur dioxide emitted into the atmosphere is subjectively of significant importance to the petitioners, and indeed the public in general.

[16] With respect to the second branch, the petitioners say that the Board must observe a high degree of procedural fairness because the Board has the freedom to determine its own procedures and the petitioners had a legitimate expectation that those procedures would be followed. In other words, the petitioners say that because the Board has chosen to make its own rules, the Board must abide by them. They say this is a legitimate expectation and refer to page 5 of the Environmental Appeal Board Manual (“procedure manual”) which states:

> Those involved in the appeal process can expect the Board to follow the legislated procedures and the policies set out in this Manual.

[17] Conversely, the respondents submit that the Board is not subject to such a high degree of procedural fairness and the proper question is not whether the Board deviated from the procedure manual, but whether the petitioners suffered any prejudice as a result. Essentially they submit that the appropriate question is, "was it fair or not?”

[18] In these circumstances I am unable to agree with the respondents and, after applying the *Baker* factors and the principles of natural justice, I conclude that the

Board is required to rigorously comply with the procedures outlined in its procedure manual.

The Board Can Make Reference To the STAR

[19] At the same time, the petitioners' submissions regarding procedural fairness focuses primarily on the Board's use of the STAR report, apparently a very lengthy document. The petitioners oppose the Board's use of the STAR and submit that it was an error of law. Moreover, the petitioners say the only evidence properly before the Board were the impact statements submitted by the petitioners. They say that because the STAR could not be accepted as true, the Board should have required it to be properly put in as evidence, a submission that was stressed in both this hearing and before the Board.

[20] The petitioners referred to the procedure manual which, under the heading, "Content of Submissions," describes a party's entire case as including:

> ... all evidence (which includes all means of proof including correspondence, maps, charts, graphs, affidavits, studies, reports etc.), legal authorities, and argument that the party wants the Board to consider ...

[21] The definition of "evidence" in the procedure manual is as follows:

> "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Board to decide the case in a particular way.

[22] The petitioners say that this indicates a clear distinction between evidence and argument and that a reference to the STAR in submissions only makes it argument and that the STAR itself must be submitted in order for it to become evidence. The ultimate consequence, they say, is that the Board acted in a cavalier way and its decision was "pure speculation."

[23] On this point the petitioners acknowledge that they did indeed reference the STAR in their submissions. However, they say this was perfectly reasonable because, as challengers, they had the onus of establishing standing and their

references to the STAR should not be construed as agreeing that the Board could use it in its determination.

[24] The respondents countered this argument by saying that the Board is "the master of its own procedure," that if a written submission contains unsworn evidence such as the STAR, it can be admitted, and the fact that it is unsworn should only go to weight and not admissibility. They argue that none of the petitioners' submissions are sworn evidence and just because they are attached to the affidavits of Mr. Ho or Ms. Jackson do not in any way alter this fact.

[25] The respondents also say the Board has "great liberty" to determine what is appropriate to consider in its deliberations with respect to the preliminary issue of standing and that the strict rules of evidence do not apply to the Board. As a consequence, the respondents submit that the petitioners' characterization of the written submissions to the Board as analogous to a trial record goes too far in regard to imposing a duty of procedural fairness.

[26] I agree with the respondents on these points. I also accept Rio Tinto's submission that it would be prejudicial and detrimental to parties seeking standing before the Board if they were precluded from tendering unsworn material.

[27] I also agree with the respondents when they say that the STAR was "front and centre" in the submissions of both the petitioners and Rio Tinto and that it is unreasonable to expect the Board to not consider it. There is no doubt that the petitioners had full knowledge and access to the STAR. The challenge by Rio Tinto as to the standing of the petitioners made no reference to the STAR and it was first mentioned by the petitioners in the "relevant facts" section of their written submissions on standing. Rio Tinto then referenced it in its submissions on August 2 and the petitioners addressed Rio Tinto's use of the STAR in their final reply.

[28] Therefore, it is clear to me that the petitioners made their final reply in full knowledge of Rio Tinto's reference to, and reliance on, the STAR and they clearly

agreed with its use. It is equally clear that the petitioners had the opportunity, which they took advantage of, to reply to Rio Tinto's use of the STAR.

[29] In my view the Board's determination that it could consider the portions of the STAR that were referenced in the submissions that were filed prior to August 16 is entitled to deference and I have not been persuaded that this was unreasonable, far from it. The Board was compelled to consider the STAR references in order to properly consider the appellants' submissions. Given that it is clear that the petitioners utilized the STAR in making their case for standing, I find that the Board was entitled to rely on the portions of the STAR cited in the submissions. As such, there is no basis to conclude there was a breach of procedural fairness in this regard.

The Board Breached Its Own Procedural Rules

[30] The use of the STAR is, however, different from the question of whether the Board breached its own procedural rules.

[31] With respect to this aspect of procedural fairness, the petitioners place great emphasis on what they characterize as "a request for extra record facts." It is undisputed that after submissions were closed on August 16, the registrar wrote to Rio Tinto requesting additional information. However, the Board's procedural manual imposes a number of procedural requirements on the Board in this situation, including that members of the board will not communicate with a party without providing notice and the opportunity for the other parties to participate and make further submissions regarding that communication.

[32] On this point the procedure manual states:

> In discharging its mandate to decide an appeal, the Board may find it necessary to obtain and/or consider information not tendered by the parties to the appeal (not on the record of the proceeding). “Information” means factual or legal information.
>
> Before the Board considers such information, all parties will be given prior notice of this information, will be given access to or copies of the information, and will have an opportunity to make submissions and respond to the information.

[33] The petitioners say the Board clearly breached these procedures when it solicited the additional information from Rio Tinto on or about August 22, after all submissions were made and the deadline for submissions had passed. They say that, although it was the registrar, and not the Board members, who wrote to Rio Tinto requesting extra record facts, the registrar must be considered to be acting with either ostensible or actual authority from the Board, a point the respondents have not contested in any meaningful manner.

[34] The petitioners say that this request for extra record facts was improper and violated four of the petitioners' rights. These are: the right to be notified of any communications between the Board and a party; the right to make submissions on the evidence adduced; the right to be subject to a decision based on the record; and the right to not be subject to a decision that is based on a substantive assessment of the likelihood of success of the actual appeal as opposed to a preliminary inquiry into standing.

[35] In short, as counsel put it, the petitioners say the Board "went down a dangerous road from which there was no return" and the appropriate remedy is a quashing of the Board's decision denying them standing.

[36] They also submit that the breach of the procedure regarding the request for extra record facts was compounded by the subsequent failure of the Board to allow the petitioners to respond to this information, thereby denying them the "right to confront" contrary to that principle of natural justice.

[37] Even though the petitioners acknowledge that they had access to the STAR, referred to it in their submissions and addressed its use by Rio Tinto in their final reply, they submit that there is a pattern of breaches in these circumstances and urge this court to look at the whole pattern. They say that the problem is that Rio Tinto referred to pinpoint citations in its submissions but then provided extensive extracts in response to the registrar's request, and that even if the petitioners' right to respond to the pinpoint references was satisfied by their August 16 final reply, they were also entitled to respond to the additional material provided, material that

included significant excerpts from the consultation report that was not previously before the Board.

[38] The respondents say that the petitioners' right to have their standing in this matter adjudicated on the evidentiary record as it stood on August 16, 2013, was not violated. They submit that the STAR was before the Board as of August 16, the claimants having referred to the STAR in both their submissions and their final reply, and it is inappropriate to now argue that there was no opportunity to anticipate that the Board would make use of the STAR when deliberating. The respondent Rio Tinto said it was clearly within the petitioners' contemplation that the STAR would be used.

[39] In addition, the respondents say there is no evidence that the Board considered any of the extra record facts when reaching its conclusion. They highlight the fact that the Board's decision makes no reference to any part of the STAR that is not referenced in the submissions of the parties as evidence that the Board did not use any of the alleged extra record facts in making its determination on standing. In fact, they submit that a reasonable explanation for the registrar's request for the material was to confirm that Rio Tinto was not misrepresenting the information from the STAR in its argument and that this indicates that the process was fair and that the Board used the STAR appropriately.

[40] On this point I want to be clear that in my view there is no doubt that prior to August 16 the Board acted fairly and gave the petitioners ample opportunity to provide full submissions on their application for standing. I also do not find there was any intentional misconduct on the part of any party.

[41] I accept the respondents' submission that the registrar had no intention to deprive the petitioners of the right to respond when it requested portions of the STAR after the close of submissions.

[42] I also accept that Rio Tinto provided more material than it strictly referred to in its pinpoint citations only for the purpose of providing meaningful, and perhaps valid,

context to its assertions. I also note that, although the petitioners were not informed of the request by the registrar, Rio Tinto included the petitioners in its response to the request.

[43] Finally, I cannot find that the allegation by the petitioners that somehow the STAR was fully in Rio Tinto's possession and under its control is appropriate because all the petitioners made reference to the STAR in their submissions to the Board.

[44] Nevertheless, even though I am satisfied that the Board and Rio Tinto acted in good faith throughout that proceeding, when balancing the interests of all the parties in this matter, I am satisfied that the Board's request for extra record facts from Rio Tinto was a breach of its own procedural manual and that this seriously breached the petitioners' right to procedural fairness.

The Standing Decision Must Be Reconsidered

[45] In reaching this decision, I find the following comments by the Court in *Baker* at paragraph 28 instructive:

> The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[46] Having reached this decision, I turn to the words of Binnie, J. in *Dunsmuir v. New Brunswick,* 2008 SCC 9, at paragraph 129 he stated:

> … a fair procedure is said to be the handmaiden of justice ...The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process.

[47] Furthermore, the petitioners say that because there is no requirement for them to establish that the Board would have reached a different determination if it had acted with procedural fairness, that there is no requirement for the court to determine whether they suffered any prejudice, see *Cardinal v. Kent Institution* [1985], 2 S.C.R. 643. They say that following *Cardinal* I should apply the rule that the

denial of a right to a fair hearing must always lead to invalidating the resulting decision and that consequently the Board's breach of procedural fairness can only lead to the remedy of setting aside the Board's decision to deny them standing on appeal. I accept that submission.

[48] On this point the Attorney General of British Columbia submitted that, although ordering a reconsideration of the decision is the usual remedy, a remedy pursuant to the *Judicial Review Procedure Act* is discretionary in nature and is founded in equity. The Attorney General relies on *Gook Country Estates Ltd. v. The Corporation of the City of Quesnel et al.,* 2006 BCSC 1382, for the proposition that even if the petitioners have established they are entitled to relief, there is no requirement to provide a remedy.

[49] Specifically, the government respondents say, “Parties with sufficient interest to meet the section 100 test have been granted standing to appeal. Additional parties with less than aggrieved status or interests more remote are unlikely to contribute additionally to the matters at issue before the Board” and that there two parties, namely Emily Toews and Elisabeth Stannus, who were granted standing to appeal.

[50] While I accept the logic of this submission, I am not satisfied it would be fair to these petitioners to preclude them from having the Board reconsider their applications for standing. In fact, I am convinced that the issue is not whether the petitioners suffered some prejudice, but instead it is whether the transparency of the process and the petitioners' legitimate expectation that the Board would follow its procedure manual was violated.

[51] I therefore find that the Board's decision to deny the petitioners' standing should be set aside.

[52] I also direct the Board to reconsider whether the petitioners are persons aggrieved pursuant to section 100(1) of the *EMA*.

The Society and Trust May Be A Person Aggrieved

[53] I am also providing the further direction under the authority of section 5(2) of the *Judicial Review Procedure Act* that the Board make its determination based on the submissions that it had received as of August 16, 2013.

[54] For the sake of clarity, the Board is also to reconsider whether Skeena Wild Conservation Trust and Lakelse Watershed Stewards Society are entitled to standing. On this point the petitioners argue that the Board imposed a requirement that the members of the Society and Trust, as distinct from the Society or Trust itself, must meet the requirement to be persons aggrieved. While it may be difficult for the Society or Trust to demonstrate on a *prima facie* basis, especially when compared to the position of Ms. Gagné or Mr. Claus that it is aggrieved within the meaning of section 100(1), it is clear in my view that the *Interpretation Act* means that they cannot be summarily excluded from the possibility of being a person aggrieved on the basis that they are not persons. Furthermore, there is no requirement for the Society or the Trust to demonstrate that one of their members would satisfy the definition of a person aggrieved.

The Standard of Proof Is *Prima Facie* Not Balance of Probabilities

[55] The petitioners have also alleged that the Board imposed on the petitioners a burden of proof that is higher than appropriate with regard to whether they qualified as a "person aggrieved" in the context of determining whether they were entitled to standing to appear before the Board, a determination that is clearly procedural. The purpose of standing was recently discussed by the Supreme Court in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. While that case dealt specifically with public interest standing in the context of standing before a court, the comments that "limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not should be entitled to do so," and that "screening out the mere busybody [and] ensuring that courts have the benefit of contending points

of view of those most directly affected by the determination of the issues" are applicable to this petition (paras. 22 and 25).

[56] The task of the Board when determining who has standing is to screen out the mere busybody without losing the benefit of contending points of view. In this matter, the Board is providing a gatekeeper function. In this role, the Board has significant power to dismiss a claim. In my view it must wield it with great caution and attention to process. This is especially true because, as pointed out by the respondents, the Board is a statutory decision-maker that does not have any inherent jurisdiction and as such must act in a manner that ensures it stays within the bounds of its statutory power and does not hear from those who it is not authorized to hear from.

[57] 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. On this point I refer to paragraph 21 of the Board's decision:

> … In addition, the Board has also consistently stated that, for the purposes of deciding preliminary issues of standing, an appellant is not required to provide definitive proof that he or she will be harmed by the appealed decision. In *Fleischer and Goggins* v. *Assistant Regional Waste Manager* (Appeal No. 97-WAS-11(a), November 17, 1997)(unreported), the Board stated that, "To require lay people to essentially 'prove' how they will or will likely be affected is to impose an impossible burden on them. Proof of their cases comes at the hearing stage when the merits of the case are addressed... ." Thus, the Board has consistently held that, for the purpose of establishing standing, an appellant must disclose enough information or evidence to allow the Panel to reasonably conclude that their interests are or may be prejudicially affected by the decision they seek to appeal.

[58] In practice, this means that the burden on an applicant when arguing for standing to appeal must only involve demonstrating to a *prima facie* standard that they are a person aggrieved; imposing a requirement to meet the balance of probabilities standard is too rigorous a burden at the preliminary stage of determining standing.

[59] I agree with the petitioners that the Board must be aware of the very real risk that a potentially meritorious argument may be prematurely dismissed and ensure that it does not engage in a *de facto* consideration of the merits of the petitioners' possible submissions.

[60] The application of the appropriate burden of proof is especially important in situations such as this one where the timelines are short, expert evidence would generally not be readily available, there is no pre-hearing, and specific concerns about standing are not identified.

[61] What is troubling in the present circumstance is the fact that despite emphasizing, quite properly and clearly, the appropriate burden of proof earlier in its decision, the Board appears to have imposed the standard of balance of probabilities.

[62] At paragraph 59 of the Board's decision, the Board stated:

> [59] In practice, the Board's test requires an appellant to show, objectively and on a balance of probabilities, that their interests will or may be affected, directly or indirectly, by the appealed decision. However, an indirect effect cannot be too remote or speculative. The overriding consideration is whether the person suffers, or may suffer, objectively and on a balance of probabilities, some harm that is prejudicial to the person's interests.

[63] While the Board is correct in imposing an objective requirement to the test for standing, the burden of proof should not be the balance of probabilities.

[64] The respondents have pointed to the use of the word "may" at paragraph 61 of the Board's decision as indicating that the Board only imposed a *prima facie* burden of proof. I cannot accept this submission. Given the clear and unequivocal use of the term "balance of probabilities" with respect to what an appellant must prove, I am satisfied that the Board did impose a balance of probabilities standard, a much too high burden for the preliminary procedural stage of determining standing.

[65] I am therefore directing the Board, again pursuant to section 5(2) of the *Judicial Review Procedure Act*, to determine whether the petitioners established, on

a *prima facie* basis, that they were persons aggrieved and therefore entitled to be granted standing.

[66] Because I am directing the Board to reconsider its decision because of a breach of its duty to act with procedural fairness, a review of the October 31 decision is unnecessary. However, the petitioners submitted that the court should engage in a *de novo* determination of whether the petitioners met the definition of a person aggrieved pursuant to the *Act* and provide the result of this determination to the Board as direction. They say this is warranted because the Board rejected the petitioners' argument that the Board should revisit its interpretation of section 100 of the *EMA*.

[67] While the court does have power under the *Act* to give directions to a tribunal regarding the consideration of the matter, as stated by the Attorney General, this is a discretionary remedy and I think it is neither required nor appropriate in this situation.

[68] With that caveat and because of the extensive submissions made by counsel for all parties, I will briefly comment on the test for a person aggrieved and the appropriate standard of review for a decision of the Board regarding standing, even though a court in the future may very well find these observations *obiter*.

The Test For A Person Aggrieved

[69] The petitioners submitted that the test the Board used was too restrictive and not in accordance with what the petitioners say is the evolving jurisprudence, highlighted by the Supreme Court of Canada in *Downtown Eastside*. They say the key element in any determination as to who may or may not be a person aggrieved under the *Act* should be given a liberal interpretation and focus on whether an appellant seeking standing before the Board has a genuine interest in the matter.

[70] The petitioners say that if the Board focused on the appellant's genuineness, it could still easily separate out the busybodies who would unduly hamper the efficiency of the Board in discharging its mandate.

[71] The petitioners also say the Board erred when, given the public nature of environmental issues, they concluded that for persons to be aggrieved they must have an interest that is affected beyond that of the general public.

[72] On this issue the respondents understandably point out that the specific wording of section 100 incorporates, not a subjective test similar to a genuine interest or belief, but an objective test. They specifically note the difference between the terms “a person who considers he or she is aggrieved” with the term "person aggrieved".

[73] I also find that it is well established that there must be a distinction between a “person aggrieved” and, to use Lord Denning's phrase, “the busybody”, and that this distinction must be made by a party, other than the one seeking standing, to appeal. The requirement to distinguish between those who are genuine and those who are mere busybodies requires the exercise of discretion on an objective basis.

[74] I agree that it is clear the legislation intended to remove the subjective element from the test and for the Board to employ an objective standard. I also agree with the respondents when they say that the word "aggrieved" must have some meaning that separates a challenger from the general public and the Board may require a challenger to establish, on a *prima facie* basis, something more than a subjective, genuine interest. Simply stated, a person aggrieved must demonstrate some form of prejudice to their individual interest, albeit only on a *prima facie* basis.

[75] Moreover, I accept the respondents' submission that the Board's interpretation of “person aggrieved” in section 100 is consistent with our Court of Appeal decision in *Allen v. College of Dental Surgeons of British Columbia,* 2007 BCCA 75, the legislative history of the term, and dictionary definitions of the word aggrieve. With regard to the appropriate dictionary definitions, I note that there were many definitions put forward by the Board and there is no necessity for me to repeat them.

[76] I also accept the respondents' submission that the principles enunciated recently by the Supreme Court in *Downtown Eastside* do not assist the petitioners with respect to the concept of genuine interest being the appropriate test for standing before the Board.

[77] Furthermore, I recognize that the Board is different from a court because as a creature of statute it has no inherent jurisdiction to grant standing to persons or groups on either a public interest or genuine interest basis. The Board's jurisdiction is limited by the terms of its enabling legislation and it can only grant standing to a person aggrieved. Consequently, I am unable to agree with the petitioners when they submit that the genuine interest test should be the test for standing before administrative tribunals, despite the possibility that a test requiring a genuine interest may allow the tribunal to separate valid challengers from the busybodies.

[78] In my view, the requirement for an individual to demonstrate that “an order has been made which prejudicially affects his interests,” as stated in *Allen* (quoting from *Gambia (Attorney General) v. N’Jie*, [1961] 2 All E.R. 504 (West Africa P.C.), coupled with the less restrictive *prima facie* burden of proof, adequately answers the petitioners' concerns that meritorious appeals may be foreclosed by the failure to grant standing. I note that the scope of the term “personal interest” is sufficiently broad to include organizations such as the Trust and Society who might not have a specific property or economic interest.

[79] As a result, I am not satisfied the Board was incorrect in not accepting the petitioners' submission to revise its test for determining whether or not an appellant is a person aggrieved within the meaning of the *Act*.

Reasonableness Is The Appropriate Standard Of Review

[80] With respect to the final aspect that was raised by the petitioners, that being the standard of review, because of my conclusion regarding procedural fairness, my following comments are not strictly required. However, there were, again, comprehensive submissions made on this issue.

[81] The fundamental issue was whether the term "person aggrieved", as used in section 100, should be considered part of the Board's own statute or a term of legal art. All parties acknowledge that if it is the former, the standard of review would be reasonableness and if the latter, standing would be a question of true jurisdiction and reviewable on the correctness standard. On this point the petitioners state that this is the first case where the issue of standing has been considered with respect to whether it is a question of true jurisdiction.

[82] On that point, the petitioners submit that the term "person aggrieved" is used in many different pieces of legislation and has been the subject of much judicial consideration. They say that its interpretation is beyond the expertise of the Board and consequently is an issue of true jurisdiction and any deference to the decision of the Board is inappropriate.

[83] In contrast, the respondents submit that the interpretation of “person aggrieved” and the determination of whether a party is entitled to standing is part of the "nuts and bolts" of the statute and it is the Board that has the upper hand in determining its interpretation, referring to *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, at paras. 21 and 40.

[84] Further, the respondent Rio Tinto says the meaning of the term "person aggrieved" should be determined by the application of public policy based on the expertise of the Board rather than the strict tenets of statutory interpretation employed by the courts, referring to *McLean* at paras. 33 and 37.

[85] Counsel for the Board also says that *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, stands for the proposition that the determination of an appellant's entitlement to standing is "within the wheelhouse" of the Board and that it is not appropriate for courts to consider standing as a question of true jurisdiction reviewed on the correctness standard.

[86] Counsel for the Board submits that the determination of whether deference should be provided to the Board should be based on whether the Board has the

statutory power to grant standing and that because this is clearly a power delegated to the Board, that its decision is entitled to deference.

[87] Having regard to these submissions and these authorities, and for the sake of completeness, I will state that it is clear to me that the Board has the statutory power to determine whether the petitioners have standing and that any determination it makes regarding this question is entitled to deference. In my view it is not a question of true jurisdiction.

[88] I therefore conclude that the correct standard of review for a determination by the Board with respect to standing is reasonableness.

[89] So, gentlemen and Ms. Brown, that is my decision.

[90] I will turn briefly now to costs.

[91] As Rio Tinto and the petitioners requested, I will leave that for the time being. If you are unable to agree on the issue of costs, it can be spoken to at a convenient moment.

[92] Pursuant to the provisions of the *Judicial Review Procedure Act*, the Board will be provided with these reasons as soon as is practicable.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie