ENVIRONMENTAL LAW CENTRE

NEWS BRIEF

IN THIS ISSUE

WHO GOVERNS THE GOVERNMENT? THE ROLE OF ADMINISTRATIVE LAW

By Cindy Chiasson, *Executive Director*

Many Canadians expect or take it as a given that our governments work to protect our individual interests. They believe that decisions made by our elected representatives, government officials and related agencies will treat us all fairly and result in the best outcomes for all concerned. However, let's be realistic. Governing is a challenging job: there are innumerable interests that must be balanced in most decisions; society changes at a rapid pace; and government is made up of people. Sometimes those peoples' judgments differ from our own, and sometimes those people make mistakes.

So what happens when government makes mistakes, when citizens feel their interests haven't been protected or they haven't been treated fairly in decision-making that affects them? This is where the field of administrative law comes in. Governments do not hold unlimited powers or rights simply due to their being "the government." Any action taken by government must be under authority given by either legislation or the common law. Administrative law deals with how the law limits actions of governments and their officials, and the remedies that may be available when those limitations are exceeded.[1]

What is "government"?

From a legal perspective, Canadian government is made up of three branches: the legislative branch (Parliament and provincial legislatures); executive or administrative branch (Cabinet ministers, government officials and agencies); and judicial branch (courts). At their most basic, the legislative branch makes laws (statutes), the executive branch implements and administers the laws and the judicial branch determines disputes about interpretation and contraventions of the laws.

In reality, government function is not so neatly divided. This is particularly the case in relation to the executive branch, which includes not only cabinet ministers and government officials, but also a multitude of agencies that deal with the day-to-day operation, regulation and administration of a wide range of programs and topics. Where these agencies have significant decision-making powers similar to those of the courts, they are often referred to as administrative tribunals.

How do courts and administrative tribunals differ?

Canadian courts interpret and determine the application of both statutes and common law to matters that come before them. Depending on the particular matter, the courts may make orders, direct punishment or payment of money damages, and make determinations about the rights of parties before them. While the courts' powers can be limited or prescribed by legislation, Canadian courts also hold broad decision-making powers and discretion from the common law.

There are two court systems in Canada. The provincial court system operates within each province and may vary in structure from province to province. In Alberta, the court system includes, by increasing level of authority, the Provincial Court, Court of Queen's Bench and Court of Appeal. Each of these courts may deal with both criminal and civil matters and, subject to their procedural rules, decisions may be appealed from a lower court to the higher courts.

The federal court system includes the Federal Court Trial Division and the Federal Court of Appeal. This court system deals with matters where legal relief or remedies are claimed against the federal government, including federal boards or agencies; for example, income tax matters or challenges to decisions made by a federal cabinet minister. The Supreme Court of Canada is the final court of appeal for both the provincial and federal court systems, and its decisions are binding on all courts in Canada.[2]

As mentioned above, agencies within government that have significant decision-making powers are commonly referred to as administrative tribunals. Alberta examples of administrative tribunals that address environmental matters include the Energy Resources Conservation Board (ERCB), Natural Resources Conservation Board (NRCB), and Alberta Utilities Commission (AUC). Bodies like the ERCB, NRCB and AUC not only administer their enabling statutes and other relevant statutes, but also have powers to make certain rules and regulations (like the legislative branch) and to carry out decision-making proceedings that may look very similar to court processes.

While administrative tribunals may at times look much like the courts, they do

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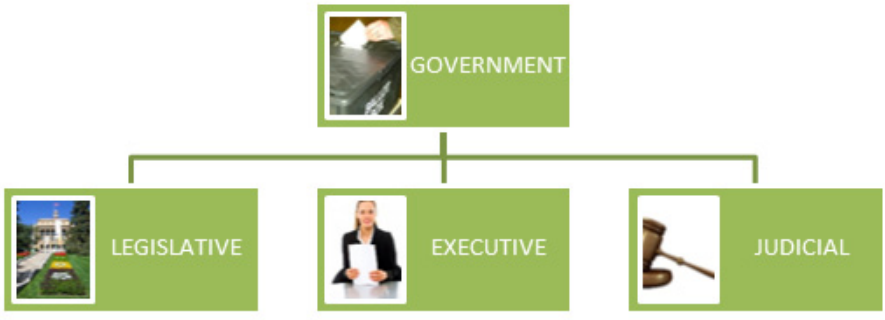

not hold the same broad discretionary powers. Administrative tribunals are limited to exercising the powers given to them by their enabling legislation and can only make decisions which fall within the scope of their legislated authority. They are also subject to a broad duty under administrative law to be fair, which focuses on the processes by which these tribunals carry out their work, rather than the substance of decisions made by them. Challenges to the fairness of administrative procedures or the jurisdiction of tribunals are commonly made to the courts. It should be noted that these limitations and duties also apply to other decision-makers given power by legislation, such as Cabinet ministers and designated officials (e.g., "the Director").

No simple answers

Because there is such a broad variety of administrative bodies and decision-makers in Canada with wide-ranging duties and powers, administrative law does not offer simple answers that apply in the same way to all bodies, tribunals and decision-makers. On questions of jurisdiction, the courts will look to the legislation that governs the decision-maker being challenged. Where a failure to meet the duty to be fair is alleged, the courts will consider a range of factors, including the type of decision made, the decision-making process, the statutory system being implemented, and the effect of the decision on the rights of the person challenging it.[3] The scope of the duty to be fair can vary depending on the particular decision-maker, subject matter and circumstances.

Other articles in this issue discuss aspects of administrative law such as the court review process, remedies and recent cases. It's important to keep in mind that there are limitations to both the courts and administrative tribunals, and that neither may offer the specific solutions that those dealing with environmental concerns may be seeking. In many instances, more effective solutions may be found in the arenas of public opinion and politics, via new or amended legislation. •

[1] For more details on the basics of administrative law, see David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*, 5th ed. (Toronto: Carswell, 2009) at 3.

[2] This material on the Canadian court system was modified from earlier material published by the Environmental Law Centre; see Cindy Chiasson, *Community Action on Air Quality: Background Materials for Community Involvement in Air Quality Monitoring and Enforcement* (Edmonton: Environmental Law Centre, 1999) at 72-73.

[3] See Jones & de Villars, *supra* note 1, chapter 8.

FROM THE EDITOR

One of my first days at the ELC I was told that I could never make environmental law sexy. I didn't argue, mostly because, unlike me, the person who said it had experience in the field. I decided that rather than try for sexy, I'd try for interesting and accessible. It really hasn't been a difficult task because I work with fantastically talented people who love what they do and genuinely want their work to help with yours.

A couple of months ago the lawyers decided that there was a need and appetite for information about administrative law and that this issue of *News Brief* should be themed accordingly. As usual, I went away from that meeting scratching my head at what they were talking about, but also knowing that I'd come away from this project with answers to the questions I had. I also came away with another warning: "Admin law is booooooring."

"Oh no!" I thought. "Being unsexy is bad enough. Now booooooring too?"

The deadline for articles rolled around and I printed them off to do my first edit. Intimidated by what was certain to be an excruciatingly dull editing experience, I sharpened my red pencil, poured a fresh cup of coffee and settled at my desk. But, I couldn't seem to get to it. That's when my boss suggested editing may best be done with a glass of wine. So, I packed up and headed home with a decent bottle of Malbec (which, by the way, is a really great gift for a writer/editor).

I had totally overreacted. The articles weren't booooooring. Sure, the subject matter isn't the most titillating ever, but I think the lawyers have done a fantastic job of breaking down some basic and very important topics. I didn't even need the wine in the end.

I'm sure I'm not alone in mistakenly thinking that law always means courts and judges and lawyers. It turns out there are many other - and sometimes more appropriate - ways to come at the various issues we find ourselves concerned with. I guess that's my biggest takeaway from this issue of *News Brief:* an understanding of how important it is to know all available methods to influence change when it comes to environmental law and policy in this province. I hope you learn something new, too.

I hope you all have a wonderful holiday season and best wishes to you and yours in the new year!

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CHALLENGING ADMINISTRATIVE DECISIONS

By Brenda Heelan Powell, *Staff Counsel*

Important decisions affecting environmental issues are often made by administrative bodies. An administrative body is a government agency, board or committee, such as the Energy Resources Conservation Board (ERCB), that has been delegated decision-making power by the government. An administrative body is created by legislation (the "enabling legislation"). The enabling legislation delineates the purpose, functions and decision-making powers of that particular administrative body. An administrative body may not act outside the parameters set by its enabling legislation.

What happens if a person disagrees with a decision made by an administrative body?

If a person disagrees with a decision made by an administrative body, that decision may be appealed or may be subject to judicial review.[1] The right to appeal an administrative decision exists only if the enabling legislation creates such a right. However, the right to judicial review exists by virtue of the courts' inherent jurisdiction to maintain the rule of law.

Appeal

The enabling legislation will indicate whether or not a person may appeal the decisions made by an administrative body. If there is a right to appeal, the enabling legislation will indicate the grounds upon which an appeal may be made, the procedures for appealing a decision and the appropriate body for hearing the appeal.

For example, the ERCB's enabling legislation provides that all decisions made by the ERCB are final and not subject to review except as specified in the legislation.[2] The enabling legislation allows the ERCB itself to review, rescind, change, alter or vary its decision (ss.39 and 40). It also allows an appeal to the Alberta Court of Appeal on a question of jurisdiction or a question of law (s. 41). There is no provision allowing an appeal on a question of fact. Essentially, the ERCB's enabling legislation allows an appeal to the Alberta Court of Appeal only if the ERCB purportedly exceeded its powers as delineated in its enabling legislation or otherwise made an error of law.

If a successful appeal is made, the body that hears the appeal may substitute its own decision for that of the administrative body or may send the matter back to the administrative body to be reconsidered.

Judicial review

Unlike an appeal, judicial review does not consider the merits of the decision made by the administrative body. Rather, the court considers the process by which the administrative body made its decision. An administrative decision may be subject to judicial review due to errors in jurisdiction, errors of law or breaches of natural justice.

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If an application for judicial review is successful, the court can set aside the administrative decision and require the administrative body to make a new decision ("*certiorari*"). The court can also prohibit the administrative body from proceeding ("prohibition") or require the administrative body to perform a duty set out in its legislation ("*mandamus*").

Standard of review

Regardless of whether the court is reviewing an administrative decision due to an appeal or due to a judicial review, the question arises as to the appropriate standard of review. The standard of review essentially is the level of deference that the court will give an administrative body. There are two standards of review: correctness and reasonableness. Correctness means that, in order to uphold the administrative decision, the court must agree with it. Reasonableness means that the court need not agree with the administrative decision but the decision must be reasonable to be upheld.

The Supreme Court of Canada has established a two-step process for determining the appropriate standard of review in a particular case:[3]

> In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

One factor considered in identifying the proper standard of review is the existence of a privative clause. A privative clause is a provision of the enabling legislation that purports to eliminate or otherwise limit appeals or judicial review of the administrative body's decisions. Another factor considered by the court is whether the issue raised is a matter of law or fact. The court will also consider the purpose of the administrative body as determined by interpretation of its enabling legislation

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and the expertise of the administrative body.

The courts require an administrative body's decision to be correct (that is, the same as the court's conclusion) if the matter is a question of law that is of "central importance to the legal system… and outside the… specialized area of expertise" of the administrative body.[4] For example, an administrative body must correctly determine the limits of its jurisdiction (that is, whether its enabling legislation gives it the authority to decide a particular matter).[5]

On other questions, the courts require an administrative body's decision to be reasonable. If a decision needs only to be reasonable, the court will apply deference to the administrative body's decision (even though it may not agree). As stated by the Supreme Court of Canada, "[r]easonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise."[6]

The standard of reasonableness is usually applied to questions of fact, discretion or policy. The standard of reasonableness also usually applies where the "legal and factual issues are intertwined with and cannot be reasonably separated."[7] The courts also apply deference (that is, refraining from interfering with the decision of the administrative body) to matters with which an administrative body has particular expertise. The presence of a strong privative clause also strongly suggests, but is not determinative, that the appropriate standard of review is reasonableness. It should be noted that no one factor dictates that the appropriate standard of review is reasonableness; rather, all these factors should be considered together.

A timely tip about challenging a decision made by an administrative body

If a person decides to challenge the decision of an administrative body, the first step is to contact the administrative body to inquire about its review processes (if any). An administrative body may have a process for review of its decisions without resort to the courts. Ultimately, this process might address a person's concerns with the decision.

In some cases, a person must exhaust the administrative body's own review processes before turning to the courts for assistance. In other cases, a person can proceed directly to the courts without engaging the administrative body's review processes.

If a person disagrees with an administrative decision, it is *very important* to start the challenge immediately. There are often strict deadlines for filing appeals using the administrative body's process and for filing an appeal/judicial review before the courts. In some instances, a person may need to engage the administrative body's review process and commence an appeal/judicial review at the same time to avoid missing deadlines. •

1 See "Government Agencies, Boards and Committees: Your Rights and Remedies" in *Special Report on Administrative Law by LawNow Magazine* (January/February 2007), B.E. Maxston.
2 *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10.
3 *Dunsmuir* v. *New Brunswick*, [2008] 1 SCR 190 at para. 62.
4 *Dunsmuir* v. *New Brunswick*, *ibid*. at para. 55.
5 *Dunsmuir* v. *New Brunswick*, *ibid*. at para. 59.
6 *Canada (Canadian Human Rights Commission)* v. *Canada (Attorney General)* [2011] SCC 53 at para. 29.
7 *Dunsmuir* v. *New Brunswick*, *supra* note 3 at para. 53.

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A WIN IN COURT MAY NOT BE A WIN IN RESULT: REMEDIES THROUGH JUDICIAL REVIEW

By Jason Unger, *Staff Counsel*

When a decision of the government, an administrative tribunal or some other government delegate is challenged through judicial review, it is important to understand the nature of the remedies available. Assuming that the judge has found that a statutory delegate has made some reviewable error (as described earlier in this *Newsbrief*), the court may consider a number of remedies.

In Alberta, available remedies are codified in the *Alberta Rules of Court* and reflect an adoption of two types of common law remedies: public law remedies (or prerogative remedies) and private law remedies. Section 3.15 of the Rules of Court states:

> **3.15(1)** An originating application must be filed in the form of an originating application for judicial review if the originating applicant seeks from the Court any one or more of the following remedies against a person or body whose decision, act or omission is subject to judicial review:
>
> (a) an order in the nature of *mandamus*, prohibition, *certiorari*, *quo warranto* or *habeas corpus*;
>
> (b) a declaration or injunction.

A remedy is discretionary

A key aspect of these remedies is that they are granted at the court's discretion. Even where the decision-maker or tribunal has made a reviewable error or has exceeded their jurisdiction the court may decide that granting a remedy is not appropriate in the circumstances. This discretion becomes highly relevant to a decision whether to proceed with a judicial review. Typical reasons for refusing to grant a remedy include:[1]

> (a) where the applicant has waived its right to object to the defect in the statutory delegate's proceedings, or acquiesced in them;
> (b) where there is unreasonable delay in bringing the application to the court;
> (c) where the applicant's conduct disentitles it to the remedy; and
> (d) where there is an equally effective alternative remedy.

Where the error of law involves a procedural error, however, it appears that courts will be hesitant to refuse a remedy.[2]

The situation captured in (d) above is particularly relevant in determining whether to proceed to a judicial review prior to exercising all the other statutory rights of appeal a person may have. The court will go down the road of assessing whether a statutory right of appeal will provide an adequate remedy.[3] An assessment of these other potential areas where a remedy might be refused should also be undertaken prior to proceeding.

Prerogative remedies

Prerogative remedies have a long judicial history and include *mandamus*, prohibition, *certiorari*, *quo warranto*, and *habeas corpus*. They are referred to as prerogative remedies or "prerogative writs" because they are discretionary and inherent powers of the court, evolving from the power of the Crown over government officials.[4] The terms used describe the nature of an order that is issued by the court in granting a remedy.

The remedies themselves are described below. *Certiorari* is noted first as it is one of the least intrusive judicial remedies and is quite common as a result.

Certiorari – The court ordering that the decision in question is quashed (i.e., revoked). (Depending on your level of frustration you can also consider the decision "squashed.") The court is effectively saying "you made an error in your decision, so I will undo it." The end result is typically that the decision-maker will rehear the matter and be guided by the context and reasoning of the court. The decision-maker may come to the same result but avoid making the error that got their previous decision quashed.

Mandamus – The court ordering that a decision-maker must undertake a specific act. The court is effectively saying "you will do what I say." This is used "where the statutory delegate refused to exercise power it is compelled to use."[5] *Mandamus* is granted sparingly due to its intrusive nature of basically allowing the court to impose its will on government action. There are a variety of conditions that must be met prior to granting *mandamus*.[6] The end result where the court issues an order in the nature of *mandamus* is quite clear. The concern that the end result may be the same is greatly diminished as the decision-maker has little choice in the matter.

Prohibition – The court may make an order prohibiting some action by a statutory delegate or decision-maker. In this way the court may be preventative in its approach. The court is effectively saying to the decision-maker "don't even think about doing that."

Quo warranto – This remedy is focused on the legality of someone occupying public office, "whether created by the Crown, by charter or by statute."[7] The Court effectively will determine whether a government or tribunal member rightly occupies their position. Jones & de Villars note that this remedy is rarely used as typically there is a statutory mechanism to challenge whether someone rightly occupies public office.[8]

Habeas corpus – The court quashes or ends the illegal detention of an individual.[9] This prerogative power results in the government decision-maker being brought before the court to explain why they are detaining a person.

Private law remedies

The Rules of Court incorporate two remedies which are also part of private law remedies: injunctions and declaratory relief. Injunctions are basically similar to prohibitions and mandamus insofar as they are court orders prohibiting or mandating some act. It has been noted that this overlap has resulted in injunctions being used relatively rarely in relation to statutory delegates or decision-makers.[10] Nonetheless, there are instances where injunctions may be used in the administrative or public law context. Further, it should be noted that injunctions involve a different legal test being conducted by the court to determine whether it is appropriate to grant an injunction in a specific instance.

The test for an injunction (including the staying of a government decision) was set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* as requiring the applicant to establish:[11]

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(a) There is a serious issue to be determined.
(b) The applicant will suffer irreparable harm if an injunction is not granted.
(c) The balance of convenience, taking into account the public interest, favours retaining the status quo until the court has disposed of the legal issues.

Declaratory relief is a determination by the court of "the legal position of the parties or the law applicable to them."[12] It is fundamentally different from the other remedies or relief discussed above as it does not result in any sanction against the decision-maker; rather, it is a process of establishing the relative legal and statutory rights of a person (vis-à-vis the Crown).

Seeking monetary damages for government decisions - not the place for judicial review

It is important to note that one can seek damages against the Crown for the negligence of statutory delegates or employees; however, this proceeds by way of filing a statement of claim against the Crown and not a judicial review.

Remedies and environmental law

The vast majority of recent environmentally based judicial reviews have focused on decisions arising from federal legislation, the *Canadian Environmental Assessment Act (CEAA)* and the *Species Act Risk Act* (*SARA*) specifically. This includes several cases in Alberta related to oilsands mines,[13] sage grouse[14] and woodland caribou.[15] Applicant environmental groups have had mixed success in challenging decisions under *CEAA.* In those instances where *certiorari* was granted by a court, the end result was not significantly different. One case was returned to a tribunal with no real change in the outcome. In another case, Parliament amended *CEAA* to allow the government to do what was previously deemed an error. Several cases involving *SARA* have been successful, with the court granting a remedy of *certiorari*. In one case, dealing with greater sage-grouse, the court struck out inadequate provisions of the recovery strategy related to identifying critical habitat, requiring government to revisit identification of this habitat. In another, the court set aside a decision not to issue an emergency order (*certiorari*) in relation to woodland caribou. The caribou case also resulted in a court declaration that the Minister had failed to prepare a recovery strategy within the statutory timeline for woodland caribou. The applicants had sought an order in the nature of *mandamus* in relation to the emergency order, but the court denied the applicants that remedy.[16]

Judicial reviews of decisions based on provincial legislation have also occurred, but there have been fewer in recent years. One judicial review case that has had a long lasting impact is the *Friends of the Athabasca Environmental Association v. Public Health Advisory Board,* a decision which has created a difficult precedent about standing for public interest groups where there is a "directly affected" test involved. [17] The Friends had sought a remedy of *certiorari* to quash the decision made by the tribunal (the Public Health Advisory Board) that the group was not "directly affected" and therefore had no standing to bring an appeal. The court in this case deferred to the decision of the Public Health Advisory Board, finding that the Board had acted lawfully and within its jurisdiction and denying the applicant its remedy.

Another provincially based judicial review involved the decision of the Director of Alberta Environment exercising discretion regarding the need to conduct an environmental assessment related to the Castle Mountain ski resort.[18] The applicant had sought a remedy of *mandamus,* asking the court to order the Director to require an environmental assessment. Instead the Queen's Bench judge granted the remedy of *certiorari*, quashing the Director's decision not to issue an environmental assessment, only to have that decision overturned by the Court of Appeal (on grounds related to the level of deference owed to the Director).[19]

Other provincial reviews have included challenging environmental protection orders issued by the Environment Ministry and upheld by the Environmental Appeals Board.[20]

Conclusion

Judicial review remedies are interesting beasts insofar as they give the judiciary the power to put themselves in the place of a statutory delegate to overturn or to mandate certain government actions. The nature of the most common remedy, *certiorari,* poses a problem though as the decision-maker often gets a second kick at the cat, and the end result often does not change at all. The decision-maker need only ensure that they abide by the court's decision, which, depending on the circumstances, may be easier in some instances than others. Sometimes the court decision is framed in such a way that it is clear that the court is of the opinion that a different result is required but may hesitate or be limited by the circumstances in ordering a remedy in the nature of *mandamus.* Also, because a judicial review challenges government decisions, there is always the ability of the government to limit the precedential value of these cases by amending the legislation. In the world of judicial review remedies; therefore, your success may still in fact lead to environmental failure. •

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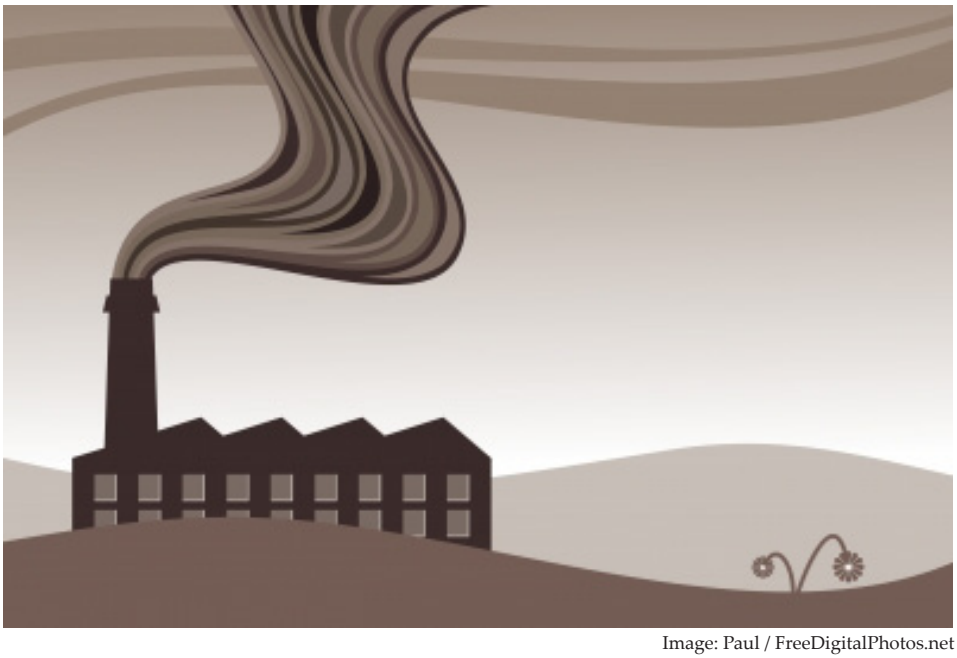

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PUBLIC PARTICIPATION UPDATE: STANDING AND COSTS

By Adam Driedzic, *Staff Counsel*

Rights to a hearing and to recuperate the financial outlay were frequent topics of administrative law decisions in 2011.

Standing

Kelly v. Alberta (Energy Resources Conservation Board), 2011 ABCA 325.

The Alberta Court of Appeal returned a matter to the Energy Resources Conservation Board for reconsideration on the basis that a person who resides within a defined zone of sour gas exposure is eligible for standing. The Court held that the proper meaning of "directly and adversely affected" is a legal issue. The concept arises from the Board's home statute and engages the Board's expertise so the standard of review is reasonableness. The applicant did not have to demonstrate that it was affected to a greater degree than the general public or demonstrate with certainty that it would be exposed to sour gas. It is the lurking risk which is "adverse." The right to intervene under the *Energy Resources Conservation Act* [RSA 2000, c.E-10] 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 and true busybodies. The Court did not address the Board's finding of no evidence that the appellants' medical conditions would heighten sensitivity to oil and gas operations.

> [24] . . . the suggestion that evacuation is not an adverse effect involves circular reasoning.
>
> [25] . . . The reasoning of the board . . . does not withstand scrutiny on the reasonableness standard. It is not transparent and intelligible, nor is it a method of analysis available on the facts and the law.
>
> *Kelly v. Alberta (ERCB)*, 2011 ABCA 325.

Pembina Institute for Appropriate Development v. Alberta (Utilities Commission), 2011 ABCA 302.

The Alberta Court of Appeal granted the Pembina Institute standing to appeal the Alberta Utilities Commission's approval of a coal-fired power plant. The approval was made through an Interim Decision with no hearing. The Interim Decision noted that delay in approval could allow pending federal emissions regulations to apply to the project. The Court held that standing was available under the *Alberta Utilities Commission Act* [SA 2007, c. A-37.2] and the common law. "Certain circumstances" can provide standing on appeal to a party denied standing by the Commission. The issues on appeal were with the decision so could not have been raised at a Commission hearing. Further, a challenge to the legality of an administrative decision is a "justiciable issue" for which public interest standing is available. The appeal was moot, as the Interim Decision being challenged was replaced by a Final Decision. Even if the appeal was not moot, it would be dismissed on account of deference to the Commission respecting the date of approvals.

Reece v. Edmonton (City), 2011 ABCA 238

The Alberta Court of Appeal denied three animal welfare organizations the right to seek a declaration that a municipal zoo is violating the *Animal Protection Act* [RSA 2000, c. A-41]. The Court held that it is an abuse of process to seek a civil declaration that a penal statute has been violated without having suffered private harm. The Court declined to consider whether the applicants had standing as the relief sought was not available.

[1] Jones and de Villars, *Principles of Administrative Law*, 5th Ed (Toronto, Thompson Reuters 2009)
[2] See *Friends of the Oldman River Society* v. (*Canada) Minister of Transport* [1992] 1 .S.C.R. 3, online: Judgments of the Supreme Court of Canada <http://scc.lexum.org/en/1992/1992scr1-3/1992scr1-3.html>. This case involved a remedy being sought to bind the federal government to comply with a "Guidelines Order" in relation to the construction of the Oldman Dam in Alberta. The trial judge refused to grant a remedy of *certiorari* or *mandamus* on the basis of "unreasonable delay and futility." The majority in this case found that the Court of Appeal was justified in overturning the refusal to grant a remedy, in part, because the nature of the review that would be required under the process of the Guidelines Order (which was found to be binding in this case) may have been qualitatively different from the reviews that had taken place (and hence not futile, as judged by the trial judge).
[3] See *St. Albert (City of) v. Sturgeon County*, 2004 ABQB 620 (CanLII), at 77, online: CanLII, http://www.canlii.org/eliisa/highlight.do?text=chad+investments+&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/ab/abqb/doc/2004/2004abqb620/2004abqb620.html citing *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561.
[4] *Supra* note 1 at 634-635.
[5] *Ibid.* at 643.
[6] *Ibid.* at 643-645.
[7] *Ibid.* at 646.
[8] *Ibid.*
[9] *Ibid.* at 637.
[10] *Ibid.* at 737.
[11] 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311.
[12] *Supra* note 1 at 755.
[13] See *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2004 FC 1265 (CanLII), online: <http://canlii.ca/t/1jhc7> retrieved on 2011-11-15, *Prairie Acid Rain Coalition v. Canada (Minister of Fisheries and Oceans)*, 2006 FCA 31 (CanLII) - 2006-01-27 online: <http://www.canlii.org/en/ca/fca/doc/2006/2006fca31/2006fca31.html>, *Prairie Acid Rain Coalition, Pembina Institute for Appropriate Development, and Toxics Watch Society of Alberta v. Minister of Fisheries and Oceans of Canada, Truenorth Energy Corporation*, 2006 CanLII 21123 (SCC), online: <http://www.canlii.org/en/ca/scc-l/doc/2006/2006canlii24423/2006canlii24423.html> 2006 CanLII 24423 (SCC) - 2006-07-20 (leave denied) and *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 (CanLII), online: <http://canlii.ca/t/1vxtx> retrieved on 2011-11-15.
[14] *Alberta Wilderness Association v. Canada (Environment)*, 2009 FC 710 (CanLII), online: <http://canlii.ca/t/24rrf> retrieved on 2011-11-15.
[15] *Adam v. Canada (Environment)*, 2011 FC 962 (CanLII), online: <http://canlii.ca/t/fmkj2> retrieved on 2011-11-15.
[16] *Ibid.*
[17] *Friends of the Athabasca Environmental Association v. Public Health Advisory & Appeal Board*, 1994 CanLII 8931 (AB QB), online: <http://canlii.ca/t/28p62> retrieved on 2011-11-16.
[18] *Castle-Crown Wilderness Coalition v. Flett*, 2004 ABQB 515 (CanLII), online: <http://canlii.ca/t/1j0ts> retrieved on 2011-11-15.
[19] *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environnment)*, 2005 ABCA 283 (CanLII), online: <http://canlii.ca/t/1lkj5> retrieved on 2011-11-15.
[20] *Legal Oil and Gas Ltd. v. Alberta (Minister of Environment)*, 2000 ABQB 388 (CanLII), online: <http://canlii.ca/t/5n7k> retrieved on 2011-11-15, *Imperial Oil Limited and Devon Estates Limited v. Director, Southern Region, Regional Services, Alberta Environment* (6 April 2005), Appeals Nos. 03-124 and 125-DOP (A.E.A.B.), and *McColl-Frontenac Inc. v. Director, Enforcement and Monitoring, Bow Region, Environmental Service, Alberta Environment* (7 December 2001), Appeal No. 00-067-R (A.E.A.B.).

One dissenting judge held that:

- The case raises novel points of law not suitable for summary dismissal**.** The claim for declaratory relief has a reasonable prospect of success.

- Failure to address standing is an error of law as issues of standing and abuse of process are connected. The test for public interest standing will address abuse of process, but abuse of process cannot be used to deny standing. The test for abuse of process is "whether it is plain and obvious that allowing the action to continue would be contrary to the interests of justice."

The appellants should have public interest standing. There is a serious issue of government non-compliance with legislation. The appellants demonstrate a genuine interest in the issue, and there is no other reasonable and effective way to bring the issue before the court.

> [39] . . . Lucy's case raises serious issues not only about how society treats sentient animals. . . but also about the right of the people in a democracy to ensure that government itself is not above the law.
>
> [70] . . . If animals are to be protected in any meaningful way, they, or their advocates, must be accorded some form of legal standing. . .
>
> Dissenting Reasons of Chief Justice Fraser
>
> *Reece v. Edmonton (City)*, 2011 ABCA 238.

Alberta Wilderness Association et al. v. Director, Southern Region, Environmental Management, Alberta Environment, re: *Eastern Irrigation District* (30 August 3011), Appeal No. 10-038-043-ID1 (A.E.A.B.)

The Environmental Appeals Board denied three environmental organizations and two biologists standing to challenge a water license amendment granted to the Eastern Irrigation District under the *Water Act* **[**RSA 2000, c. W-3]. The Board found that the appellants were genuinely interested in the aquatic ecosystem but that "their interests were too general in nature." The Board found that it "cannot and will not grant public interest standing in these circumstances." The Board granted standing to one rancher receiving water from the District. Apart from considering the effect on the appellant's cattle, the appeal will consider whether the amendment complies with the *Water Act*, the South Saskatchewan River Basin Water Management Plan and Alberta Environment's administrative licensing criteria.

The Board found that it had no jurisdiction to consider whether the license amendment contravened the *Irrigation Districts Act* [RSA 2000, c. I-11].

Costs

Smith v. Alliance Pipeline Ltd., 2011 SCC 7, [2011] 1 SCR 160.

The Supreme Court of Canada awarded solicitor-client costs to a landowner in dispute with a pipeline company over the terms of their agreement for reclamation and compensation. Costs were awarded for all proceedings including two arbitration committees under the *National Energy Board Act* [RSC 1985, c. N-7], appeals through the Federal Court system and a separate Queen's Bench application. The Court held that the standard of review for a tribunal interpreting the costs provision in its "home statute" is reasonableness. Cost awards are fact-sensitive and discretionary. The statute provided the arbitration committee with authority and discretion to award costs. Full compensation was a principle of the statute and of expropriation law generally. The multiple proceedings related to one single claim. Further, the landowner should not have to bear the costs of a "test case" brought by a company facing other claims. One concurring judge rejected any presumptive "home statute" rule. Factors warranting deference were legislated discretion to award costs and the expertise of the decision-maker. The Court considered the *Smith* case in applying the reasonableness standard to tribunal cost awards in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* [2011 SCC 53]. A decision-maker cannot use liberal statutory interpretation to implement its own costs policy that differs from the legislative intent.

Have feedback? Ideas for content? Let us know by email at lorr@elc.ab.ca or phone at 1-800-661-4238.

The next issue, out in February 2012, will focus on political engagement. We're looking to answer the question: "Who do you speak with (and how) outside the courts to influence law and policy?"