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

Date: 20030516
Action No. 0201-17759

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY



BETWEEN:

LINDA J. COURT

Applicant

- and -

ALBERTA ENVIRONMENTAL APPEAL BOARD

Respondent

**[Note: An Erratum has been filed on May 26, 2003; the correction has been made to the text and the Erratum is appended to this Judgment.]**

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REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE PETER J. McINTYRE

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Counsel:

Grant Stapon and Bradley Gilmour
for the Applicant

Andrew Sims, Q.C.
for the Respondent

Charlene Graham
for the Director (Alberta Environment)

James Sullivan and Janice Walton
for Lafarge Canada Inc.

## I. NATURE OF APPLICATION

[1] The Applicant applies for judicial review of two decisions of the Alberta Environmental Appeal Board (Board), dated April 22, 2002 (Issues Decision), and August 31, 2002 (Final Decision), concerning the environmental approval issued for a gravel pit operation under the ***Environmental Protection and Enhancement Act***, R.S.A. 2000, c. E-12 (***Act***).

[2] In short, the asthmatic Applicant takes issue with the Board's refusal to grant her standing for the purpose of appealing the environmental approval issued for a gravel pit operating in close proximity to her residence. She takes particular issue with the Board's unusual deferment of its decision on her standing until the conclusion of the appeal hearing, at which time its finding of no standing resulted in the dismissal of her notice of appeal and, in effect, no appeal hearing. In consequence, the environmental approval stands, despite the Board's express concerns about the appropriateness of the approval.



## II. FACTS

[3] The Applicant owns and resides on property in Bowview Estates in the Municipal District of Foothills adjacent to and south of Calgary. Three gravel pits operate nearby. The Respondent Lafarge Canada Inc. (Lafarge) applied, under s. 66 of the ***Act***, for environmental approval to operate a fourth gravel pit in the same general area and approximately 645 metres from the Applicant's property (Lafarge Operation).

[4] On July 2, 2001, in response to a notice provided under s. 72(1) of the ***Act***, the Applicant submitted to the Director, Bow Region, Regional Services, Alberta Environment (Director), a statement of concern respecting Lafarge's application for approval under s. 73 of the ***Act***. Set out in the Applicant's statement of concern were four concerns, summarized in the Issues Decision, [2002] A.E.A.B.D. No. 11 at para. 13:

1. water - supply and quality of groundwater and effects on the Bow River;

2. noise/dust - dust and pollution, noise, and effects of dewatering on noise levels;

3. ecological - fish, birds, and wildlife of the area; and

4. aesthetics/recreation - view, stability of the area once product removed, recreational use of the area, environmentally sensitive area.

[5] The Director accepted, and Lafarge did not dispute, that the Applicant's statement of concern constituted a statement of concern within the meaning of s. 73 of the ***Act***.

[6] On October 2, 2001, the Director issued the environmental approval sought by Lafarge (Lafarge Approval) for a ten-year term.

[7] On November 21, 2001, the Board received a notice of appeal of the Lafarge Approval submitted by the Applicant under s. 91 of the ***Act***. The notice of appeal identified four grounds of appeal, one of which incorporated the grounds set out in the Applicant's statement of concern.

[8] Between January 8 and 22, 2002, the Board received several letters from interested and concerned persons.

[9] On January 23, 2002, a mediation meeting and settlement conference was held under s. 11 of the ***Environmental Appeal Board Regulation***, Alta. Reg. 114/93, but no resolution was reached.

[10] Following the mediation meeting and settlement conference, the Board received two additional letters from interested and concerned persons. The Board advised all interested and concerned persons that, if the matter proceeded to a hearing, they would have the opportunity to apply to the Board for intervenor status.

[11] On January 31, 2002, the Board set a schedule for its receipt of written submissions respecting the matters to be included in the hearing of the appeal.

[12] By letter to the Board dated February 4, 2002, the Applicant provided submissions identifying seven issues that she believed should be addressed in the hearing of the appeal. The seven issues identified by the Applicant, which reiterated and expanded the four grounds of appeal set out in her notice of appeal, were:

1. Whether the application submitted by Lafarge ... was insufficient, incomplete and otherwise inconsistent with the requirements of the EPEA and the *Approvals and Registrations Procedure Regulation*....

2. Whether it was incorrect and/or unreasonable for the Director to issue the Approval on the basis of an incomplete application, or on the basis of no evidence or insufficient evidence concerning matters that should have been considered by the Director.

3. Whether the impacts of the proposed pit on the environment and the Appellant are significant and adverse and therefore inconsistent with the EPEA and regulations made under the EPEA. For example,

    a. whether the proposed pit will or may produce dust and other air pollutants that will adversely impact the environment or adversely impact the health of the Appellant or the community;

    b. whether the proposed pit will or may produce an unacceptable or unreasonable noise impact to the Appellant or the community;

c. whether the proposed pit will or may impact the quantity or quality of groundwater relied upon by the Appellant as a drinking water supply;

d. whether the proposed pit will or may have adverse effects on the Bow River including adverse effects on fish, wildlife and waterfowl;

e. whether the proposed pit, combined with existing pit operations, will or may produce unacceptable cumulative impacts concerning air pollutants, noise, water quantity and quality, and the Bow River.

4. Whether it was unreasonable or incorrect for the Director to issue the Approval where it had no evidence or insufficient evidence concerning the matters listed in paragraph 3 above.

5. Whether the Director took into account irrelevant considerations or failed to take into account relevant considerations in exercising its discretion to issue the Approval and in consideration of the matters listed in paragraph 3 above.

6. Whether the Director fettered its discretion or otherwise failed to exercise its discretion in respect of the issuance of the Approval and in consideration of the matters listed in paragraph 3 above.

7. Whether the Director or [Lafarge] should be required to pay the costs of the Appellant concerning this proceeding.

[13] By letters to the Board dated February 5 and 7, 2002, the Director and Lafarge responded with submissions, in which they contended that the Applicant's submissions were insufficient to substantiate either her grounds of appeal or her "directly affected" status.

[14] By letter to the Board dated February 11, 2002, the Applicant responded with rebuttal submissions, including the following submissions as to her "directly affected" status:

> Lafarge raises the issue of whether the Appellant is directly affected. While it is clearly open for Lafarge to raise this as an issue, it is our position that it is equally clear that the Appellant is directly affected given the proximity of her property and water wells to the proposed pit. Moreover, the Director concluded that the Appellant and others in her community were directly affected by the application and provided Lafarge with an opportunity to object to that conclusion. Correspondence included in the Director's file indicates that Lafarge accepted and acknowledged that the Appellant and other Statement of

> Concern filers would be directly affected by the proposed pit. Mr. Vickery stated in his letter to the Director dated August 13, 2001 ... that Lafarge did not "disagree with your [i.e. the Director's] decision to declare the submitted letters as valid statements of concern." Lafarge made this acknowledgement after having an opportunity to review the Statements of Concern filed by the Appellant and others. The Appellant's Statement of Concern raised the very issues that we now propose be heard by the Board. Accordingly, it is the Appellant's view that neither Lafarge nor the Director has any basis upon which to argue that the Appellant is not directly affected by the Director's decision.

[15] On February 15, 2002, the Board informed the parties that it would decide the Applicant's "directly affected" status prior to deciding the matters to be included in the hearing of the appeal, and it set a schedule for its receipt of written submissions respecting the Applicant's "directly affected" status.

[16] On February 22, 2002, the Applicant provided written submissions to the Board respecting her "directly affected" status, supported by affidavit evidence of the Applicant and Dr. Donald Davies. In her affidavit dated February 21, 2002, the Applicant swore to the following:

(a) She has owned and resided on property in Bowview Estates for 20 years. Her property is situated approximately 645 metres from the Lafarge Operation.

(b) There are already three gravel pits operating nearby, so she is familiar with the air-borne emissions and noise generated by gravel pits. The air-borne emissions and noise from the three existing gravel pits have gotten progressively worse over the last 20 years.

(c) The additional air-borne emissions, namely, dust and diesel exhaust, carried on the prevailing north and northwest winds from the Lafarge Operation will further irritate her asthmatic condition, which is exacerbated by dust and exhaust fumes.

(d) The additional noise from the Lafarge Operation will further disturb the peace and tranquility of her property and the remaining natural environment.

(e) The additional air-borne emissions and noise from the Lafarge Operation will further negatively impact her recreational use and enjoyment of her property and the remaining natural environment.

(f) The impacts of the Lafarge Operation on the drinking water wells used by her and other residents of Bowview Estates, situated approximately 540 metres from the Lafarge Operation, has not been properly addressed.

In his affidavit dated February 22, 2002, Dr. Davies, an environmental risk manager, swore to the reasonable probability that the Lafarge Operation could cause a deterioration of air quality at the Applicant's residence that could adversely affect her health, a possibility heightened by her asthmatic condition.



[17] The Director and Lafarge responded with written submissions to the Board. Neither provided affidavit evidence in response to that of the Applicant or Dr. Davies. In her submissions, the Director argued that the Applicant had failed to demonstrate her "directly affected" status on the issues of noise, groundwater and natural environment but, notably, took no position on the Applicant's "directly affected" status on the issue of dust, stating:

> [T]he Director accepted Ms. Court's Statement of Concern. This acceptance was made primarily in relation to the issue of dust raised by Ms. Court. As such, the Director will not be taking a position on the issue of directly affected as it relates to dust.

In its submissions, Lafarge argued that the Applicant had failed to provide sufficient evidence to establish her "directly affected" status on all issues. It alleged a lack of expert evidence as to existing and predicted air-borne emissions and noise levels, no evidence of any connection between the drinking water wells used by the Applicant and the water underlying the Lafarge Operation and no evidence of any impact of the Lafarge Operation on the natural environment in and around the Applicant's residence.

[18] On March 11, 2002, the Applicant responded with rebuttal written submissions to the Board.

[19] On March 13, 2002, Dr. Timothy Lambert, Risk Assessment Specialist, and Dennis Stefani, Air Quality Specialist, Public Health Inspector, both with Environmental Health, Calgary Health Region (CHR), wrote to the Director expressing concurrence with Dr. Davies' health concerns regarding dust and diesel emissions and recommending that air dispersion modelling be completed respecting the Lafarge Operation and the Lafarge Operation in combination with the three gravel pits nearby. The Director had referred Dr. Davies' affidavit evidence to the CHR. The CHR's recommendations ultimately prompted the Director to hire an outside consultant to conduct an air dispersion modelling study.

[20] On March 21, 2002, the Board informed the parties that it would "assume without deciding" that the Applicant is directly affected and that it would decide the "directly affected" issue as part of the hearing of the appeal. By letter dated March 25, 2002, the Applicant requested that the Board reconsider and decide the issue of standing prior to proceeding to the hearing of the appeal, but, on April 2, 2002, the Board confirmed its decision to decide the "directly affected" issue as part of the hearing of the appeal.

[21] At para. 39 of the Issues Decision, dated April 22, 2002, the Board listed the matters to be included in the hearing of the appeal:

1. The effect that dust and other air pollutants from the Lafarge Operation may have directly on the Appellant.

2. The effect that noise from the Lafarge Operation may have directly on the Appellant.

3. The cumulative effects that dust and other air pollutants and noise from the Lafarge Operation, and as specifically regulated by the Approval, may have directly on the Appellant.

[22] In relation to the Applicant's "directly affected" status, the Issues Decision included at para. 37:

> [T]he Board wishes to stress that the cumulative effects of a project are insufficient to form the basis for the directly affected status of an appellant. While the Board is prepared to consider the issue of cumulative effects in this case, the Appellant still has the preliminary jurisdictional hurdle of standing to overcome. In the Board's view she cannot do this merely by pointing to any cumulative effect of the Approval. In the Board's view, to be considered directly affected, an appellant must be directly affected by the approval that is under appeal in and of itself. There must be a direct nexus between the approval being appealed and the impacts that the appellant is using as the foundation for standing.

[23] On May 1, 2002, the Board unsealed and included as part of its record certain letters, including the letter dated March 13, 2002, from Dr. Lambert and Mr. Stefani of the CHR to the Director.

[24] In response to notice of the hearing of the appeal, the Board received 19 requests for intervenor status, including a request from the CHR and 13 requests from owners and residents of property in proximity to the Lafarge Operation.

[25] On July 5, 2002, the Board decided that the CHR would be granted full party intervenor status and that all others requesting intervenor status would be permitted to file written submissions only. The Board's explanation for granting limited intervenor status to 11 owners and residents of property in proximity to the Lafarge Operation who opposed the Lafarge Operation is set out in its reasons dated July 12, 2002, [2002] A.E.A.B.D. No. 51 at para. 27:

> Although the Board does recognize the concerns of the Residents and their opposition to the Lafarge Operation, the Board must also look at whether they will be providing any evidence that will be different from the Appellant's arguments. The Residents' requests to intervene referred to the same issues brought forward by the Appellant, and the Board believes the Appellant will

adequately present the concerns of the Residents. Therefore, the Board will accept written submissions only from the Residents.

[26] The appeal was heard on July 24 and 25, 2002.

[27] At the hearing, the Applicant relied on the following evidence:

(a) Affidavits of Dr. Davies dated June 12 and July 15, 2002;

(b) Affidavits of Randy Rudolph dated June 12 and July 16, 2002, the latter as revised and augmented by letter dated July 23, 2002, from Brad Gilmour to the Board;

(c) Affidavit of Darron Chin-Quee dated July 15, 2002;

(d) Affidavit of David Barron dated July 18, 2002; and

(e) testimony of Dr. Davies, Messrs. Rudolph and Chin-Quee and the Applicant;

Lafarge relied on the following evidence:

(f) Affidavit of Jack Davis dated June 18, 2002;

(g) Affidavits of Dr. Douglas Leahey dated June 18 and July 12, 2002;

(h) Affidavit of Bruce Whale dated June 18, 2002;

(i) Affidavit of Dr. Brian Zelt dated June 18, 2002; and

(j) Affidavit of Dr. Robert Rogers dated June 19, 2002; and

(k) testimony of Messrs. Davis and Whale and Drs. Leahey, Zelt and Rogers;

the CHR relied on the following evidence:

(l) Affidavit of Dr. Lambert dated July 17, 2002; and

(m) testimony of Dr. Lambert and Mr. Stefani; and

the Director relied on the following evidence:

(n) Affidavit of Alex Schutte dated July 2, 2002; and

(o) testimony of Mr. Schutte and May Mah-Paulson.

The evidence of Drs. Leahey and Lambert and Messrs. Rudolph and Schutte was directed at air quality. Drs. Davies, Zelt and Rogers gave evidence as to air quality health risk. The evidence of Messrs. Chin-Quee and Davis concerned environmental noise.

[28] The parties filed written submissions for the hearing of the appeal as well as closing written arguments. Notably attached to the Director's written submissions were proposed amendments to the Lafarge Approval, explained and summarized in her submissions at paras. 23-25, 27-28:

> 23. The Director has carefully considered the concerns of the Appellants as well as the further technical information provided by the Approval Holder and from the Director's expert [Mr. Schutte] and staff.
>
> 24. As a consequence of this review, the Director recommends that the existing approval be amended by adding conditions so that:
>
> a) Lafarge will create and implement an ambient air monitoring program, subject to the Director's approval, that will monitor air quality in the approval area and create a response plan if the monitoring results exceed pre-determined values;
>
> b) Lafarge will monitor for TSP, PM 2.5 and PM 10 fo six months prior to the start of gravel mining operations;
>
> c) Lafarge will create and implement a dust suppression plan, subject to the Director's approval;
>
> d) Lafarge will provide reporting to the Director and the Calgary Health Region for the monitoring;
>
> e) the disturbed area of the site will be restricted to 10 hectares, and
>
> f) the types of equipment used by Lafarge will be specified.
>
> 25. The draft of these proposed clauses is attached to the end of this submission as Tab 2. The Director reserves the right to alter or suggest further amendments at the conclusion of this hearing....
>
> **Dust / Air Pollutants**
>
> 27. Based upon the review of the new information (put forward since the issuance of this Approval) [namely, the affidavit of Dr. Davies dated February 22, 2002, and the letter dated March 13, 2002, from

> Dr. Lambert and Mr. Stefani of the CHR to the Director], the Director is willing to amend the Approval as described above.
>
> 28. It is submitted that these modifications, along with the Terms and Conditions of the Approval, combine to ensure that the purposes of EPEA are met. [Emphasis added.]

[29] On August 31, 2002, the Board rendered the Final Decision, finding that the Applicant is not directly affected by the Lafarge Approval and, in consequence, dismissing the notice of appeal under s. 95(5) of the ***Act***: [2002] A.E.A.B.D. No. 56.

[30] The 74-page Final Decision includes the following rulings at paras. 173-176:

> In response to a preliminary motion by the Approval Holder arguing that the Appellant was not directly affected, the Board requested and received written submissions from the Parties. In most cases, the Board would review such submissions and make a decision on an appellant's directly affected status at this preliminary stage. Such a preliminary decision would determine whether a substantive hearing was required.
>
> Upon reviewing the submissions received from the Parties, the Board concluded that it required considerably more information to make the decision regarding the Appellant's directly affected status. The Board believed that in this case the issue of directly affected was inextricably linked with the substantive issues of the appeal.... When considering that the main issue to be decided at the substantive hearing was the impact of the dust, other air pollutants, and noise on the Appellant, it became apparent that in this case the directly affected question and the substantive question are effectively the same.
>
> The Board therefore decided to defer the decision on directly affected status until the substantive hearing to receive all of the evidence and arguments related to the Lafarge Operation and how it would affect the Appellant. Only through the evidence and arguments provided at the hearing, both oral and written, has the Board has been able to properly assess the directly affected issue.
>
> If the Board had held a preliminary meeting solely to determine the Appellant's directly affected status, the Parties would have had to present much, if not all, of the case they presented for the substantive issues hearing. This would likely have been a two-day preliminary meeting at least duplicating the time and efforts of all Parties and the Board. Thus it was deemed impractical and redundant.

at para. 179:

> The Board is not obligated to find an individual directly affected on the basis that the Director accepted the Statement of Concern. The criteria on which directly affected is determined by the Board and the Director are different.

at para. 190:

> The inquiry the Board is faced with is to determine whether the Appellant has discharged the onus placed upon her to demonstrate that she has a unique interest that is directly, proximately, and rationally connected to the Approval issued by the Director. In the Board's opinion, the Appellant has failed to meet this test.

at para. 191:

> Having regard to all the evidence and arguments of the Parties before it, the Board is of the opinion that the Appellant's real concern is the impact of the other existing sand and gravel operations on her. In the Board's view, it is the impact of the other existing sand and gravel operations - the Appellant's real concern or interest - that caused her to bring this appeal.

at paras. 194, 196-198, 201-202:

> Beyond the Appellant's real concern, she attempted to argue that she is directly affected as a result of the cumulative effects of the Lafarge Operation on her existing situation....
>
> It is clear to the Board that the Appellant is impacted by these other operations, but as identified in the Board's issues decision, the operations of these existing facilities are not before the Board, and the impact of these other operations on the Appellant does not mean that she is directly affected by the Lafarge Operation.
>
> Further, the cumulative impact of the Lafarge Operation in conjunction with and primarily due to these existing operations is insufficient, alone, to grant the Appellant standing....
>
> The Board has discussed in other decisions the responsibility of the Director to consider cumulative effects in decision-making processes. However, it appears that the Director did not include cumulative effects into her assessment of whether the Approval should be issued.... This position of the Director concerns the Board. Surely the Director is aware of the increasing environmental importance of cumulative effects....

> The Board does not believe a new applicant for an approval should be denied that approval because the existing situation is saturated, if that new applicant can show its operation will not have a cumulative effect of worsening an already bad situation. This by no means reduces the importance of cumulative effects in the Board's view. It does, however, indicate the importance of presenting evidence to indicate the type of potential impact, the magnitude of the potential impact, and the clear separation of the direct, indirect, and cumulative effects as well as the nature of the potential cumulative impacts. The Board believes this type of evidence, which should routinely be analyzed in these cases, will greatly assist in allowing it to uphold the purposes of the Act that requires balancing economic and environmental issues.
>
> While such cumulative effects are a concern identified by the Appellant, and it is a concern of the Board, it is a different issue to being directly affected by the Lafarge operation and is insufficient to grant the Appellant standing. She must still be directly affected by the Lafarge operation, which in the Board's view she is not.

at paras. 205-206, 210:

> The evidence the Board has before it on dust and other air pollutants and their impact on the Appellant comes from Dr. Davies and Dr. Rogers. The evidence of Dr. Davies is based on a "walk about" and a criticism of other people's work, and he concluded he is concerned there is an existing problem and speculates it may be made worse by Lafarge (the drinking glass theory exhibited at the hearing). In contrast, the evidence of Dr. Rogers was quantitative. He worked with numerical data and concluded that the impact from the Lafarge Operation will be negligible. In weighing the evidence, the Board can use the quantitative assessment of Dr. Rogers, but finds no firm footing with the qualitative interpretations of Dr. Davies. Thus, the Board accepts the evidence of Dr. Rogers that the impacts will be negligible, and therefore, the Appellant is not directly affected.
>
> The Board notes that Lafarge is willing to work with the Director to deal with the problems in the area. This is appropriate and commendable, as every effort should be made to avoid or mitigate any environmental impacts. However, this does not change the fact that the Appellant is not directly affected....
>
> The Board is of the opinion that it is unlikely that the effects of all three facilities would reach the Appellant's residence at the same time. The location of the facilities is such that the wind will not transport air-borne particles from the three facilities at the same time. If this analysis is correct, and the evidence suggests it is, the cumulative impacts calculated would be conservative.

and at para. 215:

> The Board accepts the evidence that was brought forward that noise from the existing facilities and other noise sources in the area, such as golf courses, clearly created a situation that would not be significantly impacted directly or indirectly by Lafarge. There was no clear evidence that the Appellant will be impacted by noise any more so than she is now. Therefore, it is the Board's opinion that the Lafarge Operation will not change things from their current situation. As a result, the concerns expressed by the Appellant do not demonstrate a unique interest that is directly, proximately, and rationally connected to the Approval issued by the Director to Lafarge, and the Appellant is therefore not directly affected.



[31] Concerned about the Director's inattention to cumulative effects and its inability to do anything other than encourage the Director to revisit the Lafarge Approval, the Board concluded the Final Decision with the following observations at paras. 217-219, 222-223:

> Based on the evidence received by the Board, it appears that the Director failed to take the cumulative effects of the other operations in this area into account based on a policy. This is a matter that concerns the Board. The Director stated repeatedly in her evidence that she applied the standard procedure to the issuance of this approval, and that she did not consider the impacts of the other facilities.
>
> The Board notes that a standard approval provides applicants with a firm appreciation of what may be expected of them. However, in the Board's view, the Director, in deciding whether or not to issue an approval, is required to take into account the environmental circumstances in which the proposed activity is to take place....
>
> While, the Board notes that the Director responded to the Statement of Concern filed by the Appellant and made modifications to the Approval in response, the Board is of the view that the Director failed to take into account all of the environmental circumstances in which the proposed activity was to take place prior to issuing the approval....
>
> The Board is unclear why an assessment of the local airshed did not take place prior to the issuance of the Approval. There are records of the approvals issued to the existing facilities, and in this age of technology, retrieving that information should be a relatively simple task. The Director should have been alerted that an issue might exist. The "unique" nature of the airshed due to the existing facilities in the area and location of the proposed project should have been a signal to the Director that the standard procedure may not have been appropriate in this circumstance. The existence of these other facilities should

> have been signs to the Director to delve deeper into the issue before granting the approval. The Appellant also identified in her Statement of Concern filed with the Director that there were two gravel pits operating in the area already. Other individuals who filed Statements of Concern also expressed their concerns regarding the operation of the two existing facilities plus the proposed Lafarge Operation. The Director therefore knew of the potential for issues in the area, but apparently chose to follow the standard approval process. If the Director did take the Statements of Concern fully under advisement prior to issuing the Approval, the Board is unclear why the cumulative effects of a third major gravel operation in the vicinity were not considered in greater detail.
>
> If the Director had undertaken this consideration, she may have come to the same conclusion and issued the Approval under the same terms and conditions. However, given the proposed amendments included in the Director's submission, it appears this may not have been the case. [Emphasis added.]

and at paras. 224-228:

> To her credit, in hindsight, the Director admits that had she fully appreciated the "potential problem," she would likely have done things differently and as a result, has suggested a number of amendments to the Approval. Given that the Board has determined that the Appellant is not directly affected, the Board is not empowered to make recommendations to amend the Approval.
>
> However, the Board notes that the Director does have the ability to amend the existing Approval in certain circumstances and in particular with respect to monitoring. In her submission, she recommended amendments that would require additional monitoring by the Approval Holder. Therefore, if she chooses, the Director can take steps to make this Approval more appropriate for this unique area and the existing environment in which this facility is to be constructed....
>
> The Board notes that the Director stated in her closing arguments that by "... requiring Lafarge to undertake these monitoring proposals/programs, the Director is requiring Lafarge to undertake actions which are not standard to the sand and gravel industry in Alberta but reflect the unique circumstances which exist in this situation." The Board interprets some aspects of the monitoring program as a method of providing the Director with information that she should be obtaining to understand what is going on in the airshed. What the Director is asking, is to now make Lafarge responsible for obtaining data she should have had prior to issuing the Approval, and she should be obtaining to address the concerns of the residents in the area, principally with respect to the other operations in the area.

> Although the other facilities were not an issue in this appeal, the Director indicated the information that Lafarge would be responsible for obtaining, if the amendments proposed in the Director's submission were enacted, would be used to assess the existing operations. In her closing arguments, the Director stated: "This monitoring data will be vital in the Director's consideration of the contingency plans/dust suppression plans, consideration of the other gravel pit operations as well as in determining when Lafarge can commence operations." The Board is of the opinion that requesting Lafarge to undertake such work at this time is inappropriate and ill timed.
>
> The Board also notes that many of the mitigation measures the Approval Holder stressed it would be taking are actually required under the Development Permit issued by the Municipal District of Rocky View. The Board is hopeful that the Director will take the required steps to ensure some measure of enforcement remains available to her respecting these issues. It is also the Board's hopes that Lafarge will voluntarily take additional steps to mitigate potential impacts and demonstrate that it is committed to being a good corporate neighbour. [Emphasis added.]

[32] The Applicant argues before me that there was no reasonable basis for the Board's holding, in the Issues Decision, that "the cumulative effects of a project are insufficient to form the basis for the directly affected status of an appellant".

[33] The Applicant also argues that the Board, in the Final Decision, applied an unreasonable test for determining standing.

[34] The Applicant further argues that there was no reasonable basis for the Board's refusal, in the Final Decision or otherwise, to grant the Applicant standing.

## III. ISSUES

[35] The issues raised by this application are:

(a) What is the appropriate standard of review?

(b) On application of the appropriate standard of review, should the Issues Decision and Final Decision as to the issue of the Applicant's standing be set aside?

## IV. LEGISLATION

[36] The provisions of the ***Act*** pertinent to this application are:

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning; ...

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

(e) the need for Government leadership in areas of environmental research, technology and protection standards;

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment; ...

(j) the important role of comprehensive and responsive action in administering this Act.

3 Except where this Act specifically provides to the contrary, the Crown is bound by this Act.

66(1) An application for an approval or registration must be made in the manner provided for in the regulations and must contain and be accompanied with the information required by the regulations.

72(1) Where the Director receives

(a) an application for an approval under section 66, ...

the Director shall, in accordance with the regulations, provide or require the applicant to provide notice of the application.

73(1) Where notice is provided under section 72(1) ..., any person who is directly affected by the application ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application....

91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

> (a) where the Director issues an approval ..., a notice of appeal may be submitted
>
> > (i) ... by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1)....

94(1) On receipt of a notice of appeal under this Act ..., the Board shall conduct a hearing of the appeal.

(2) In conducting a hearing of an appeal under this Part, the Board is not bound to hold an oral hearing but may instead, and subject to the principles of natural justice, make its decision on the basis of written submissions.

95 ... (2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal....

(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(5) The Board

> (a) may dismiss a notice of appeal if ...
>
> > (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) ..., the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation, ...

(6) Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.

> (8) Subject to the regulations, the Board may establish its own rules and procedures for dealing with matters before it.
>
> 99(1) In the case of a notice of appeal referred to in section 91(1)(a) ... of this Act ..., the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.
>
> 100(1) On receiving the report of the Board, the Minister may, by order,
>
> (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make, ...
>
> (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.
>
> 102 Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

[37] The ***Act*** does not empower the Board to confirm, reverse or vary certain appealed decisions of the Director, such as the decision in this case. The Minister is so empowered under s. 100, but that power is triggered only on receipt of a report of the Board following the completion of an appeal hearing. If the Board dismisses a notice of appeal under s. 95(5)(a)(ii), as it did in this case, there is no appeal hearing and no report is submitted to the Minister. In consequence, the appealed decision of the Director stands, subject to any permitted revisitation of that decision by the Director, of her own initiative.

## V. STANDARD OF REVIEW

### A. Generally

[38] The threshold issue is the appropriate standard of review to be applied by this Court in reviewing the Issues Decision and Final Decision as to the issue of the Applicant's standing. The three standards of review for judicial review of administrative action are the more exacting standard of correctness, the intermediate standard of reasonableness *simpliciter* and the more deferential standard of patent unreasonableness. See ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 at paras. 20, 24-26.

[39] In determining the standard of review, the Court must undertake the pragmatic and functional approach adopted in ***U.E.S., Local 298 v. Bibeault***, [1988] 2 S.C.R. 1048, weighing or balancing the four contextual factors set out in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982 at paras. 29-38, and enumerated in ***Ryan*** at para. 27:

> (1) the presence or absence of a privative clause or statutory right of appeal; (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question; (3) the purposes of the legislation and the provision in particular; and (4) the nature of the question–law, fact, or mixed law and fact.

[40] None of the four factors is of itself dispositive. The central inquiry in determining the standard of review is, according to ***Pasiechnyk v. Saskatchewan (Workers' Compensation Board)***, [1997] 2 S.C.R. 890 at para. 18, as approved in ***Pushpanathan*** at para. 26: "[W]as the question which the provision raises one that was intended by the legislators to be left to the exclusive jurisdiction of the Board?" In other words, in weighing or balancing the four factors, which may overlap, "[t]he overall aim is to discern legislative intent": ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 26.

**B. Specifically**

***i. Privative Clause***

[41] "The stronger a privative clause, the more deference is generally due": ***Dr. Q*** at para. 27. The privative clause at s. 102 of the ***Act*** is a full privative clause, as that concept is defined in ***Pasiechnyk*** at para. 17.

[42] This factor suggests that this Court show great deference in reviewing the Issues Decision and Final Decision.

***ii. Expertise***

[43] Expertise is described in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 50, as "the most important of the factors that a court must consider in settling on a standard of review".

[44] Expertise is a relative concept. Thus, "[g]reater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise [emphasis in original]": ***Dr. Q*** at para. 28.

[45] Relative expertise can arise in several ways. In ***Dr. Q*** at para. 29, McLachlin C.J., for the Court, observed:

> The composition of an administrative body might endow it with knowledge uniquely suited to the questions put before it and deference might, therefore, be called for under this factor.... For example, a statute may call for decision-makers to have expert qualifications, to have accumulated experience in a particular area, or to play a particular role in policy development.... Similarly, an administrative body might be so habitually called upon to make findings of fact in a distinctive legislative context that it can be said to have gained a measure of relative institutional expertise....

[46] While acknowledging that the Board has "expertise respecting certain environmental and technical matters" and "scientific expertise", the Applicant disputes the Board's expertise relative to the Court's expertise on the issue of standing central to this application. At first glance, there appears to be some merit to the Applicant's argument. However, on closer examination, I find that the Applicant's argument fails to pay heed to the relative institutional expertise developed by the Board on the issue of standing. Indeed, as early as August 1995, the Board observed that, "[s]ince [its] inception in 1993, [it had] received more than 60 appeals and ... many of those appeals [had] raised the question of 'directly affected'": ***Kostuch v. Alberta (Director, Air & Water Approvals Division, Environmental Protection)*** (1995), 17 C.E.L.R. (N.S.) 246 at para. 26 (Alta. Env. App. Bd.). In addition and more importantly, I find that the Applicant's argument fails to have due regard for the Board's role in effecting the purpose of the ***Act***, as set out in s. 2, and for the language of the provision at issue, namely, s. 95(5)(a)(ii). As to the latter, I note that "purpose and expertise often overlap": ***Pushpanathan*** at para. 36.

[47] This factor, therefore, calls for greater deference.

### *iii. Purpose of Legislation as Whole and of Provision in Particular*

[48] Increased deference is suggested by "polycentric" legislative characteristics, that is, "where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies": ***Dr. Q*** at para. 30. On the other hand, "[t]he more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show": ***Dr. Q*** at para. 32.

[49] The ***Act***, as a whole, is directed at supporting and promoting the "protection, enhancement and wise use of the environment", through the extra-judicial resolution and balancing of several competing policy objectives and the oft-conflicting interests of multiple constituencies, and the Board plays a role in effecting that purpose. This is suggestive of greater deference.

[50] Of course, the purpose of the provisions at issue, namely, ss. 91(1)(a)(i) and 95(5)(a)(ii), must also be considered. While not taking issue with the "polycentric" nature of the ***Act*** as a whole, the Applicant submits that ss. 91(1)(a)(i) and 95(5)(a)(ii), with their focus

on a particular person's standing, are directed more at the establishment of individual rights and entitlements, which, the Applicant argues, is suggestive of less deference. I cannot agree for two reasons. First, it is when a provision seeks not just to determine rights but to determine rights between two parties that less deference is warranted: ***Dr. Q*** at para. 32. Second, and more importantly, the language of s. 95(5)(a)(ii), namely, "[t]he Board ... may dismiss a notice of appeal if ... the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision [emphasis added]", is suggestive of that provision's policy-laden purpose, which, in turn, is suggestive of greater deference. See ***Dr. Q*** at para. 31; and ***Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)***, [2001] 2 S.C.R. 281 at para. 57.



[51] Therefore, this factor also calls for greater deference.

***iv. Nature of the Problem***

[52] The Applicant contends that the standing problem is a jurisdictional question, attracting review on the standard of correctness. In so characterizing the problem, the Applicant points to the Board's rulings in the Issues Decision at para. 37:

> While the Board is prepared to consider the issue of cumulative effects in this case, the Appellant still has the preliminary jurisdictional hurdle of standing to overcome.

and the Final Decision at para. 172:

> The Board first must determine if the Appellant is directly affected by the decision of the Director to issue an Approval for the Lafarge Operation. If the Board determines that an Appellant is not directly affected, the Board is without jurisdiction to hear the matter and the appeal must be dismissed.

[53] On the other hand, the Board, the Director and Lafarge characterize the standing problem as a question of mixed fact, law and policy clearly within the Board's jurisdiction.

[54] I first note that "[a]dministrative bodies generally must be correct in determining the scope of their delegated mandate [emphasis added]": ***Chieu v. Canada (Minister of Citizenship and Immigration)***, [2002] 1 S.C.R. 84 at para. 24.

[55] In all the circumstances, and with particular regard to the language of ss. 95(5)(a)(ii) and 102 of the ***Act***, I adopt the words of Iacobucci J., for the majority, in ***Canadian Broadcasting Corp. v. Canada (Labour Relations Board)***, [1995] 1 S.C.R. 157 at para. 34:

> The starting point in this analysis must be the recognition that ... courts should be reluctant to characterize a provision as jurisdictional unless it is clear that it should be so labelled....

In any event, I agree with Lafarge that the Board's rulings to which the Applicant points do not acknowledge the jurisdictional nature of the standing problem, which is well within the Board's jurisdiction to decide, but rather the jurisdictional implications of refusing standing.

[56] Indeed, in all the circumstances, and with particular regard to the language of ss. 95(5)(a)(ii) and 102 of the ***Act***, I agree with the Board, the Director and Lafarge that the standing problem is a question of mixed fact, law and policy clearly within the Board's jurisdiction. The standing problem is a question "about whether the facts satisfy the legal tests" (***Southam*** at para. 35), legal tests developed by the Board with reference to the policy objectives of the ***Act***.

[57] Generally, a question of mixed fact and law will be entitled to more deference if fact-intensive and to less deference if law-intensive. See ***Dr. Q*** at para. 34. Because the standing problem is more fact-intensive than law-intensive, in addition to being a policy-laden issue, this factor also suggests greater deference.

### *v. Appropriate Standard of Review*

[58] On weighing the four factors, all of which favour greater deference, I am satisfied that the issue of standing central to this application was intended by the legislators to be left to the exclusive jurisdiction of the Board. In consequence, the Issues Decision and Final Decision as to the issue of the Applicant's standing are only reviewable on the patent unreasonableness standard.

[59] I note, in passing, that, following the enactment of the privative clause in September 1996, the patent unreasonableness standard has been applied consistently to decisions of the Board.[1] Indeed, in ***McCain Foods Ltd. v. Alberta (Environmental Appeal Board)*** (2001), 291 A.R. 314 at paras. 36-39 (Q.B.), Wilkins J. ruled:

> [T]he issue for consideration in this hearing relates to the jurisdiction of the Director to impose a general emissions condition in an approval on terms which are not identical to the wording in section 98. In my opinion this is a question of law.
>
> When I assess these factors on a functional and pragmatic approach, I remain convinced that this Court should extend to the decision of the Minister on recommendation from the Board, the high degree of deference intended by the terms of the privative clause introduced in the **Act** by the Legislature.

[1] In ***Alberta (Director of Environmental Service, Prairie Region) v. Alberta (Environmental Appeal Board)*** (2000), 263 A.R. 55 (Q.B.), the correctness standard was applied in upholding a decision of the Board on the assumption that the problem was "solely a question of jurisdiction".

> That the issue before this Court is one of law alone is not sufficient to reduce the standard of review imposed upon these Courts by the terms of the legislation.
>
> Accordingly, it is my conclusion that the appropriate standard of review in this case is one of "patent unreasonableness."

## VI. APPLICATION OF STANDARD OF REVIEW

### A. Generally

[60] I must not interfere with the Issues Decision and Final Decision as to the issue of the Applicant's standing unless the Applicant has positively shown that they were patently unreasonable. See ***Ryan*** at para. 48.

[61] ***Southam***, at paras. 56-57, gives meaning to the phrase "patently unreasonable":

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it....
>
> The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.... This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem.... But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

[62] In ***Ryan*** at para. 52, Iacobucci J., for the Court, elaborated:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason".... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

### B. Specifically

### *i. Unreasonable Standing Test / Unreasonable Refusal to Grant Standing*

[63] The Applicant argues that the Board, in the Final Decision, applied an unreasonable test for determining standing.

[64] The Applicant further argues that there was no reasonable basis for the Board's refusal, in the Final Decision or otherwise, to grant the Applicant standing.

[65] In my view, it is readily apparent that the Issues Decision and Final Decision as to the issue of the Applicant's standing are patently unreasonable. By March 21, 2002, the Applicant had demonstrated, by personal and expert affidavit evidence, the reasonable probability that the Lafarge Operation could cause a deterioration of air quality at her residence that could adversely affect her health, and neither the Director nor Lafarge had offered evidence in rebuttal. Indeed, the Director took no position on the Applicant's "directly affected" status on the issue of dust. So, by March 21, 2002, the Applicant had sufficiently demonstrated her "directly affected" status, at least in relation air-borne emissions, yet the Board deferred its decision on her standing until the conclusion of the appeal hearing. In short, the Board applied a patently unreasonable test, both as to timing and content, for determining the Applicant's standing. That it did so is obvious having regard to the very case law that the Board has developed on the issue of standing.

[66] To illustrate, in determining the Applicant's standing, the Board acting contrary to the case law developed by it on the issue of standing, from which case law can be distilled the following principles:

[67] First, the issue of standing is a preliminary issue to be decided before the merits are decided. See ***Re Bildson***, [1998] A.E.A.B.D. No. 33 at para. 4. In ***Zajes v. Leduc (County)*** (1987), 84 A.R. 361 at paras. 11-12 (C.A.), Laycraft C.J.A., for the Court, commented:

> If the section [of the Administrative Procedures Act] is to be construed as requiring the person proposing to intervene to show with certainty that his rights will be affected, how is he to do it? A tribunal cannot know with any certainty at the start of the hearing what the proceeding will involve.... [Emphasis in the original.]
>
> The Board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing. [Emphasis added.]

Agreeing with those comments in ***Re Mizera***, [1998] A.E.A.B.D. No. 43 at paras. 24, 26, the Board ruled:

> The Board is concerned that appellants face a labyrinth of procedural barricades which must be hurdled or avoided before they can be heard on the merits of their case. The Board does not want to dismiss a case that is clearly meritorious when there is a likelihood that a hearing on the merits will substantiate standing in law....
>
> The Board is persuaded by the comments of the Court of Appeal. The Board's task is to determine at this preliminary stage of the proceedings whether on a balance of probabilities there is a potential, that is, a reasonable possibility, that any of the parties will be directly affected by the application.

In my view, and apparently in the Board's view, this principle is not impacted by ***Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)*** (1997), 200 A.R. 295 (C.A.).

[68] Before turning to the next principle, I note that the Board's reason for deferring its decision on the Applicant's standing until the conclusion of the appeal hearing was the unusual inextricable link between the issue of standing and the substantive issues of the appeal. However, a review of the case law generated by the Board discloses that it would be unusual for an issue of standing not to be inextricably linked, more or less, to the substantive issues of an appeal.

[69] Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See ***Bildson*** at paras. 21-24.

[70] Third, in proving, on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing. See ***Bildson*** at para. 33:

> What is "extremely significant" is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

[71] Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See ***Mizera*** at para. 26. In ***Bildson*** at para. 39, the Board stated:

> [T]he "preponderance of evidence" standard applies to the appellant's burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a "potential" or "reasonable probability" for harm. The Board believes that the Department's submission to the EUB, together with Mr. Bildson's own letters to the EUB and to the Department, make a prima facie showing of a potential harm to the area's wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson's factual proof. [Emphasis added.]

In ***Re Vetsch***, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

> While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.

[72] In finding that the Board applied a patently unreasonable test for determining the Applicant's standing, I make no finding as to the reasonableness of the Board's holding that it is not obligated to find a person directly affected on the basis that the Director accepted a statement of concern.

### *ii. Cumulative Effects Insufficient*

[73] The Applicant argues that there was no reasonable basis for the Board's holding, in the Issues Decision, that "the cumulative effects of a project are insufficient to form the basis for the directly affected status of an appellant" and for what she characterizes as like holdings in the Final Decision. In finding that the Board applied a patently unreasonable test for determining the Applicant's standing, I also make no finding as to the reasonableness of the

Board's holdings in the Issues Decision and Final Decision concerning cumulative effects as they relate to standing.

## VII. CONCLUSION

[74] I reiterate that the Board applied a patently unreasonable test, both as to timing and content, for determining the Applicant's standing.

[75] To achieve standing under the ***Act***, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is "directly affected" by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted. Indeed, in this case, while the Applicant's *prima facie* case was not rebutted in the preliminary stages, the Applicant's *prima facie* case was ultimately rebutted, a decision the Board was entitled to reach. However, to wait until the conclusion of the appeal hearing, and to decide on all of the evidence that the Applicant had no standing when, early on, she had produced personal and expert affidavit evidence that there is a reasonable probability that the Lafarge Operation could cause a deterioration of air quality at her residence that could adversely affect her health was to confuse when, and to what extent, the Applicant had to prove her "directly affected" status to achieve standing under the ***Act***.

[76] The Board's approach in this case was not in keeping with the participatory role envisaged for Alberta citizens by ss. 2(f) and 2(g) of the ***Act***.

[77] Moreover, "to force [a person] to succeed on the principal issue in the hearing before he has a right to appear in it ... would be applying the statute to bring about an absurd conclusion": ***Leduc*** at para. 11. That is particularly so in light of the consequences of the Board's approach. As noted above, the ***Act*** does not empower the Board to confirm, reverse or vary certain appealed decisions of the Director, such as the decision in this case. As to those certain appealed decisions, the Board's role is a reporting role vis-a-vis the Minister, who, on receipt of a report of the Board, is empowered to confirm, reverse or vary an appealed decision or make any further order considered necessary. Only following the completion of an appeal hearing is the Board required to submit a report to the Minister. If the Board dismisses a notice of appeal under s. 95(5)(a)(ii), as it did in this case, there is, in effect, no appeal hearing and no report is submitted to the Minister. In consequence, the appealed decision of the Director stands, subject to any permitted revisitation of that decision by the Director, of her own initiative, and despite, as in this case, any concerns that the Board may have about the appropriateness of that decision. Had the Board granted the Applicant standing, however, it would have submitted a report to the Minister, which would have required the Minister to exercise the broad powers set out in s. 100 of the ***Act***. As was observed in oral argument, the Minister has a broad constituency to address in arriving at the decisions required under s. 100.

[78] Given that the Board dismissed the Applicant's notice of appeal, it is unnecessary for me to consider the nature, whether permissive or mandatory, of the jurisdiction of the Board to dismiss a notice of appeal under s. 95(5)(a)(ii) of the ***Act***, an issue raised in oral argument by the Applicant.

[79] Further, it is no answer to say that the Applicant acceded to the procedure followed. When she was informed of the Board's decision to decide the issue of standing as part of the hearing of the appeal, she sought reconsideration of that decision, albeit without success.

[80] For these reasons, the Issues Decision and Final Decision as to the issue of the Applicant's standing are set aside as being patently unreasonable. On any appropriate test, the Applicant should have been granted standing. Therefore, I remit this matter back to the Board to be dealt with in accordance with these reasons, that is, on the basis that the Applicant is entitled to and has been granted standing.

## VIII. COSTS

[81] The parties may speak to costs within 60 days of the date of these reasons.

HEARD on the 27th day of February, 2003.
**DATED** at Calgary, Alberta this 16th day of May, 2003.

_____

**J.C.Q.B.A.**

Counsel:

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Charlene Graham
for the Director (Alberta Environment)

James Sullivan and Janice Walton
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On page 25, in the last sentence of paragraph [67], the words "***Chem Security v. Alberta (Environmental Board)***" have been changed to read "***Chem-Security (Alberta) Ltd. v. Alberta (Environmental Appeal Board)***".