Province of British Columbia

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APPEAL NO. 95/42 WATER

BETWEEN:	Columbia River & Property Protection Society East Kootenay Environmental Society	**APPELLANTS**
AND:	Deputy Comptroller of Water Rights	**RESPONDENT**
AND:	Lake Windermere Resorts Ltd.	**THIRD PARTY**

Standing of the Appellant Before the Board

On March 26, 1996, a hearing was conducted on the sole issue of whether the Appellants have standing to appeal the December 12, 1995, decision of the Deputy Comptroller of Water Rights. The following decision is based upon the oral and written submissions provided by the parties.

BACKGROUND

In September of 1994 Lake Windermere Resort Ltd. ("Lake Windermere") received an approval pursuant to section 7 of the *Water Act* to make changes in and about a stream, i.e., to place fill in a swamp (wetlands) on its property. The approval was appealed by the East Kootenay Environmental Society ("EKES") to the Deputy Comptroller of Water Rights, J.E. Farrell.

In a decision dated December 12, 1995, the Deputy Comptroller found that EKES did not have standing to appeal the approval under the *Water Act* but that, in any event, the approval was properly issued and the appeal failed on its merits.

A newly formed society comprised of lakeshore property owners, the Columbia River & Property Protection Society ("CRPPS"), appealed the Deputy Comptroller's decision to the Environmental Appeal Board. An appeal was also filed by Mr. Gurmeet Brar on behalf of EKES, the appellant in the appeal below. Neither society is a licensee, riparian owner nor an applicant for a licence. However, some members of CRPPS are licensees.

The approval holder, Lake Windermere, was added as a Third Party to the proceedings at its request.

Both Lake Windermere and the Respondent, the Deputy Comptroller of Water Rights, challenge the Appellants' standing to appeal. They argue that neither appellant falls within the class of persons given a statutory right to appeal an approval under the *Act* nor does the Board have legal authority to grant public interest standing to the societies.

ISSUES

The issues raised in the hearing are as follows:

1. Who has standing to appeal an approval issued pursuant to section 7 of the *Water Act*?

2. Does the *Water Act* confer a right to appeal solely on the basis of public interest?

THE LEGISLATIVE FRAMEWORK

The section of the *Water Act* granting a right of appeal from a decision of the Comptroller (or Deputy Comptroller) to the Environmental Appeal Board is section 38. The relevant subsections provide as follows:

38.(1.1) An appeal lies

(a) to the Environmental Appeal Board from every order of the comptroller, and

...

(3) The person appealing from an order shall give notice of the appeal as directed by the officer from whose order the appeal is taken.

This section does not expressly restrict the class of persons that may appeal a decision of the Deputy Comptroller. Section 38(3) appears to leave the question of standing open by simply referring to "the person appealing".

Section 7 of the Act deals expressly with approvals. At the time the approval in question was granted, section 7 provided as follows:

7. (1) The comptroller or the regional manager may, without issuing a licence, approve the diversion or use, or both, of water on the conditions he considers advisable where

(a) non-recurrent use of water is required for a term not exceeding a period of 6 months;

(b) a municipality desires to exercise its powers, subject to the *Water Act*, under Division (3) of Part 13 of the *Municipal Act*;

(c) a public corporate body or a person desires to make changes in and about a stream;

(d) a minister of the Crown, either of Canada or the Province, desires to make changes in and about a stream;

but the water may only be used subject to the same provisions as if the approval were a licence.

(2) Notwithstanding that a licence has not been issued, a person is not prohibited from diverting or using water in accordance with an approval given under this section.

Section 7 was amended by sections 2 and 3 of the *Water Amendment Act*, which was brought into effect by Order-in-Council 630, effective on July 1, 1995. The relevant sections now state:

7. (1) If diversion or use of water is required for a term not exceeding a period of 12 months, the comptroller or a regional water manager may, without issuing a licence, grant an approval in writing, approving the diversion or use, or both, of the water on the conditions the comptroller or regional water manager considers advisable, but the diversion or use, or both, are subject to the same provisions as if the approval were a licence.

(2) Notwithstanding that a licence has not been issued, a person is not prohibited from diverting or using water in accordance with an approval given under this section.

7.1 (1) The comptroller, a regional water manager or an engineer may grant an approval in writing authorizing on the conditions he or she considers advisable

(a) a person to make changes in and about a stream

(b) a minister of the Crown, either in right of Canada or of British Columbia, to make changes in and about a stream, or

(c) a municipality to exercise its powers under Division (3) of Part 13 of the *Municipal Act*.

(2) A minister or other person or a municipality may only make changes in and about a stream in accordance with an approval under this section or in accordance with the regulations or a licence or under this *Act*.

Section 9 of the *Act* and section 3 of the Water Regulation, B.C. Reg. 204/88 cover licence applications, and more specifically, address who may "object" to licence applications.

9. (1) **A licensee, riparian owner or applicant for a licence** who considers that his rights would be prejudiced by the granting of an application for a licence may, within the time prescribed in the regulations, file an objection to the granting of the application.

(2) The comptroller or the regional manager has authority to decide whether or not the objection warrants a hearing, and he shall notify the objector of his decision.

(3) If the comptroller or the regional water manager decides to hold a hearing, the applicant and objectors are entitled to be notified, to be heard and to be notified of his decision following the hearing. [emphasis added]

Water Regulation

3. (2) At any time or times the comptroller or regional water manager considers appropriate during consideration of an application for a licence, notice of the application shall be given to

(a) any licensee for a water licence whose rights will not be protected by the precedence of his licence or application,

(b) any riparian owner whose rights may be prejudiced by the granting of the application,

(c) any owner whose property may be physically affected by the applicant's works, and

(d) any other person, agency or minister of the Crown whose input the comptroller or regional water manager considers advisable...

...

(5) **A licensee, riparian owner or applicant for a licence** who considers that his rights would be prejudiced by the granting of a licence and who satisfies the comptroller or regional water manager that he was not given notice of the application for the licence may file an objection to the granting of the licence at any time before issuance of the licence applied for. [emphasis added]

Issue 1 - Standing to Appeal an Approval under Section 7

All parties refer to the licensing provisions in the legislation when making their respective arguments on this issue. The sections relating to licenses, section 9 of the *Act* and section 3(5) of the Regulation, address who may "object" to licence applications, specifically, licensees, riparian owners or applicants for a licence. In a decision of the Environmental Appeal Board on the issue of standing to appeal the issuance of a licence, this Board held that those granted standing to object to a licence before the Comptroller or Regional Water Manager under the *Act* are those that will have standing to appeal the issuance of a licence before the Environmental Appeal Board (Appeal 95/06, *Allied Tsimshian Tribes Association v. Deputy Comptroller of Water Rights*, October 11, 1995).

The Respondent and Lake Windermere argue that the same restrictions on the right to appeal the issuance of a licence also apply to appeals from the issuance of approvals i.e., only those classes of people set out in section 9(1) of the *Act* and section 3(2) and (5) of the Regulation have standing to object to an approval, and therefore, to appeal. As neither society fits within those classes, neither society has standing to appeal the issuance of the approval as confirmed by the Deputy Comptroller.

In support of its argument, the Respondent states that an approval may be issued in place of a licence, but is subject to the same provisions as if a licence, to authorize short term use of water and changes in and about a stream. This

assertion appears to be founded in the following language of section 7: "... the water may only be used subject to the same provisions as if the approval were a licence".

If this is the basis for the Respondent's argument, it cannot be sustained. It is clear that this phrase relates only to the *use* of water. It has no bearing on the substantive right to object or appeal. I can find no express language in the section to assist in determining the issue before me.

Even if there is no express language in the section specifically relating to standing, the Respondent argues that the statute must be interpreted in a manner that is consistent with the statutory scheme. The Respondent maintains that the statutory scheme under the *Water Act* is one which only confers a right to object on particular classes of persons, namely, those referenced in section 9 of the *Act* and section 3 of the Regulation.

Counsel for Lake Windermere argues that if the Legislature had wanted persons other than those referred to in section 9 to have standing to object to an approval, it could have done so by using the words "anyone aggrieved" or "any interested party". He argues further that unlike licenses, approvals are informal creations; they are purely administrative, discretionary actions. As such, there is no logical reason for a larger class of persons to be able to appeal them than those classes authorized to appeal the more formal creation, a licence.

Counsel for the Appellant EKES argues that the approach taken by the Respondent and Lake Windermere is wrong in law. He points out that section 9 is not an appeal section in and of itself: it only deals with applications for licenses. The appeal section is section 38 which does not restrict or limit who may appeal a decision once it is made. Whereas the Legislature has chosen to specifically limit the people that may object to a licence, no such provision has been applied to approvals. By leaving section 7 silent, the Legislature could not have intended the limitations in section 9 licence applications to apply to section 7. Reading section 38 and section 7 together, EKES submits that there are no limitations on who may appeal an approval.

In its written submissions, EKES asserts that there are good reasons for the Legislature treating approvals different than licences. It is stated that "changes in and about a stream" is intended to encompass many activities which impact upon streams, ponds, lakes, wetlands etc., including such things as pipelines, bridges, dams or culverts and other diversions. The issues involved in such approvals are "many and varied" and may affect many people that are not adjacent landowners, licensees or riparian owners.

In contrast, he argues that the issues involved in the issuance of licenses are generally straightforward and involve, simply, the right to use water. Therefore, in relation to licenses, it makes some sense to limit the right of persons to delay the issuance of a licence granting water to those persons who also have a stake in the water involved (riparian owners etc.).

Finally, EKES argues that the provisions establishing a right to appeal in the *Water Act*, one of the oldest statutes in the province, should be given a liberal interpretation that is consistent with more recently enacted legislation such as the

Waste Management Act or the *Pesticide Control Act* where appeal rights are extremely broad.

The Appellant CRPPS similarly argues that the sections should be given a broad interpretation and the Appellants should be granted standing.

In granting standing to a party, the Board must consider the relevant legislation under which the party is requesting a hearing. In the context of this appeal, the relevant statute is the *Water Act*. However, as both sections 38 and 7 are silent on the question of standing to appeal an approval, one must attempt to discern the implied intention of the Legislature by applying the broader principles of statutory interpretation.

One of the fundamental principles of statutory interpretation is that an attempt must be made to achieve internal coherence among different parts of a statute. As the Supreme Court of Canada has stated in *Regina v. Assessor of the Town of Sunny Brae*, [1952] 2 S.C.R. 76 at 97 (per Kellock, J.):

> A statute is to be construed, if at all possible, so that there may be no repugnancy or inconsistency between its portions or members.

To interpret the *Water Act* in a manner that allows a broader class of persons to object to approvals, a less formal procedure than the more rigorous procedure respecting licences, seems somewhat inconsistent. Contrary to the position of EKES, it cannot be accepted that the approval process involves substantially more important issues to the public than does the licensing process. Both licenses and approvals may be granted for projects such as dams, mines, bridges etc. that have the potential to affect the public generally. It would seem to defy common sense that section 38 would allow "any person" to appeal an approval granted under the former section 7 or the current section 7.1, but would only allow licence holders, riparian owners or applicants for licences to appeal a licence application.

Although the "silence" of section 7 can be interpreted to mean that the Legislature did not intend the limitations set out in section 9 to apply to section 7, it can also be interpreted to suggest a legislative intent not to expand the class of objectors. That is, if the Legislature had truly desired to provide for a broader class of objectors under section 7, it would have provided express language to that effect. Such language can be found in other statutes that provide for appeals to this Board (see below).

When a particular provision of a statute is ambiguous, it is a fundamental principle of statutory interpretation that one can look to other statutes *in pari materia* (relating to the same subject) for guidance. The other statutes that provide for appeals to this Board which can be considered as *in pari materia* are as follows:

> *Waste Management Act*, section 26 states "anyone who considers himself aggrieved by a decision of a manager" may appeal to the Board.
>
> *Wildlife Act*, section 103(3) states "the person aggrieved by a decision of the Regional Manager" may appeal to the Board.

> *Pesticide Control Act*, section 15 allows "any person" to file an appeal with the Board.

In a leading text on statutory interpretation, Driedger on the *Construction of Statutes*, it is noted that while statutes *in pari materia* are presumed to be passed by the Legislature as a consistent legislative scheme, differences in wording between statutes are presumed to reflect differences in the intended meaning or effect (p. 287). Given that section 38 and section 7 do not employ the broad language seen in the statutes referenced above, it is reasonable to presume that the Legislature did not intend for a broad class of individuals to have standing to appeal under the *Water Act*. This is particularly germane given that section 7 was recently amended and the Legislature did not take the opportunity to introduce the express language seen above, for example, by using the formulation of "any person" used in the *Pesticide Control Act*.

It has been suggested that this Board should interpret standing in accordance with the modern trend to allow for wider public access to the appeal decisions of government decision-makers. However, the issue here is one of statutory standing. Therefore, I must rely on the principles of statutory interpretation to determine the legislative intent behind section 38 and the proper ambit of standing for appeals to the Board under the *Water Act*. I find that, based on the above application of those principles, standing for appeals under section 7 is limited to those classes of persons given objector status under section 9 of the Act and section 3 of the Regulation.

Mr. Brar, on behalf of CRPPS, argues that even if there is a requirement for an appellant to fit into one of the classes identified above, his society falls into one of the classes as a number of the members of the society are riparian owners who may be affected by the approval. He asserts that these members don't need to convey their riparian properties to the society in order for the society to have standing to appeal under the *Water Act.*

This Panel cannot accept Mr. Brar's position. By virtue of its membership, the society does not assume the legal status of a riparian owner. Further, neither the Director's Resolution nor the letters of "Agency and Authorization" signed by the riparian members can be interpreted to provide the society with standing to appeal. The individual members that are riparian owners may have had the right to appeal, at which time the society could have represented them in the appeal. However, for the Society to be involved, there first must be a proper appeal. In the present case there is not.

Issue 2 - Public Interest Standing

Counsel for EKES submits that, even if the Appellant does not have standing under the legislation, it does have a right to standing at common law. He relies upon *Finlay v. Canada* (*Minister of Finance*) [1986] 2 S.C.R. 207 in which public interest standing was extended to the administrative field as long as the applicant can meet the criteria set out by the court in that case. The criteria established in that case are summarized as follows:

a) the issue must be appropriate for judicial determination;

b) there must be a serious issue raised and the petitioner must have a genuine interest in the issue;

c) there is no reasonable or effective manner in which the issue may be brought before a court; and

d) there is no one with a more direct interest than the applicant.

EKES maintains that it meets all the *Finlay* criteria.

Both the Respondent and Lake Windermere argue that, unlike the courts, the Board has no power to grant public interest standing. The Board derives its powers from statute; it has no inherent jurisdiction. Therefore, the cases regarding public interest standing for the purposes of judicial review of other court challenge are not relevant to determining whether a person has a right of appeal under this statute.

I agree with the Respondent and Lake Windermere. The authorities referred to by the Appellant are all instances where the courts have considered whether to grant public interest standing. The ability to grant this standing comes from the inherent jurisdiction of the courts, something that this Board does not have. This Board is constrained by the standing provisions set out in the relevant statutes, in this case, the *Water Act*.

The *Environment Management Act* provides at section 11(10) that the Board "may hear any person". This power does not create a separate avenue of appeal. It merely allows the Board to invite evidence during an already validly commenced appeal.

However, even if I am wrong, I find that the Appellants do not meet the criteria referred to above as there is another reasonable and effective method in which the matter may be brought before Board. There are other individuals, such as adjacent landowners and the District of Invermere, with a more direct and substantial interest that could have appealed the decision. Further, some of the members of the societies could have appealed in their own right. For some reason these individuals were unwilling or unable to do so.

For the reasons note above, I find that the criteria for public interest standing have not been met.

The standing of CRPPS was also challenged on the basis that it was not a party to the appeal below. However, on the basis of the foregoing, it is not necessary to address this issue.

CONCLUSION

Two additional arguments were raised by the parties.

In his submissions to the Board, counsel for Lake Windermere argued at length that this Panel should adopt the reasoning of Board member Judith Lee found in Appeal No. 94/03 - Water, also relating to this matter. I find that the reasons in that decision were not determinative of the issue of standing in this case.

It was also pointed out that the Board has previously denied an appellant standing to appeal an approval on the basis of section 9 criteria (Heal Lake appeal). However, upon a review of that matter it is apparent that the differences in the wording of the legislation (section 7 and section 9) was not specifically considered by the Board. I am therefore of the view that this decision has no persuasive value in relation to this appeal.

The Board therefore refuses to grant standing to the Appellants for the purposes of this appeal and therefore dismisses their appeals on this ground.

David Perry, Chair
Environmental Appeal Board

August 15, 1996