IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20141031
Docket: 14-3037
Registry: Victoria

In the Matter of the Environmental Appeal Board Decision No. 2013-EMA-005(b), 008(b), 01(b) and 012(b) dated April 17, 2014, the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; and the *Environmental Management Act*, S.B.C. 2003, c. 53

Between:

Lynda Gagne and Charles Claus

Petitioners

And:

Environmental Appeal Board, Attorney General of British Columbia and Rio Tinto Alcan Inc.

Respondents

Before: The Honourable Mr. Justice MacKenzie

Oral Reasons for Judgment

(In Chambers)

Counsel for Petitioners:	J.B. Gratl
Counsel for Respondent Environmental Appeal Board:	R. Gage
Counsel for Respondent Rio Tinto Alcan Inc.:	D.R. Bennett, Q.C. E.H. Chan
Place and Date of Hearing:	Victoria, B.C. October 30 and 31, 2014
Place and Date of Judgment:	Victoria, B.C. October 31, 2014

[1] **THE COURT:** This is an application by Ms. Gagne and Mr. Claus ("the petitioners") for judicial review of a decision of the Environmental Appeal Board ("the Board").

[2] The background to this matter is set out in my earlier decision as well as in the October 31, 2013 and April 17, 2014 decisions of the Board. As such, I will highlight only a few key facts at the outset to provide context to these oral reasons.

[3] Initially, the petitioners were among a group of eight appellants seeking to challenge an amendment to multi-media permit P2-00001 ("the amendment"). The amendment increased the allowable daily emission of sulphur dioxide from an aluminum smelter operated by Rio Tinto Alcan Inc. ("Rio Tinto") in Kitimat, B.C., as part of Rio Tinto's modernization project of that plant. As the respondents have pointed out in this application, this 50-year-old smelter is already emitting sulphur dioxide into the atmosphere.

[4] Rio Tinto challenged the standing of the eight appellants to appeal the amendment. Under section 100(1) of the *Environmental Management Act*, S.B.C. 2003, c. 53 ("the *EMA*"), standing in an appeal before the Board is extended only to "a person aggrieved by a decision," and Rio Tinto argued that none of the appellants qualified as persons aggrieved.

[5] The Board heard submissions on standing from the appellants and Rio Tinto. In its October 31, 2013, decision, the Board granted two of the eight appellants standing. These two appellants reside in Kitimat. However, the remaining appellants were denied standing on the basis that they were not persons aggrieved by the amendment. Four of those appellants, including the petitioners in the present application, sought judicial review of the Board's decision.

[6] I heard the petition of the four appellants on March 10, 11, 12 and 14 of this year and delivered oral reasons on March 14, 2014: *Gagne v. Sharpe,* 2014 BCSC 2077. That decision is hereinafter referred to as "*Gagne*".

[7] On March 14, I quashed the October 31, 2013, decision and directed the Board to: (a) reconsider its earlier decision as to whether the petitioners are persons aggrieved under section 100(1) of the *EMA*; (b) make its determination based on the submissions that it had received as of August 16, 2013; and (c) make its determination based on a *prima facie* evidentiary standard.

[8] Pursuant to those directions, the Board reconsidered the matter on April 17, 2014 (the "reconsideration decision"). The Board again found that the appellants had failed to establish they were persons aggrieved by the amendment. Two of the unsuccessful appellants, Ms. Gagne and Mr. Claus, now seek judicial review of the Board's reconsideration decision.

[9] In *Gagne*, I found that the decision to grant or deny standing in an appeal before the Board attracts review on a reasonableness standard. The petitioners have conceded that reasonableness is the appropriate standard of review in this case. I also note the decision of *Howe Sound Pulp and Paper Ltd. v. British Columbia (Environmental Appeal Board)* (1999), 29 C.E.L.R. (N.S.) 225 (B.C.S.C.), which, while decided before *Dunsmuir v. New Brunswick*, 2008 SCC 9, similarly applied a reasonableness standard to the Environmental Appeal Board with respect to the determination of standing. Accordingly, the issue to be determined in this case is whether the Board's reconsideration decision was reasonable.

[10] Even though the reasonableness standard of review has been acknowledged by the petitioners, it is helpful and instructive to briefly revisit the principles and directions of the Supreme Court of Canada as it pertains to this standard.

[11] In the leading authority of *Dunsmuir*, the Supreme Court of Canada defined reasonableness at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the

> reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[12] The meaning of reasonableness was further elaborated upon in *Canada (Citizen and Immigration) v. Khosa,* 2009 SCC 12. There the court noted at paragraph 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[13] I pause here to note that the respondents submit that not only is the standard of reasonableness applicable to the Board's initial decision, this same standard applies to the Board's April 17, 2014, reconsideration of the petitioners' application for standing. The respondents say this is so even if, as the petitioners point out, the context of the decision is different as it is a reconsideration decision subject to my reasons and directions. Even though it is a reconsideration, the respondents submit I must determine whether the decision was reasonable, having regard to my directions and the expertise of the Board in applying those directions.

[14] At paragraph 6 of the reconsideration decision, the Board, in my view, clearly noted the directions binding upon it as outlined in *Gagne*. The Board considered the legal principles guiding the determination of standing, and the *prima facie* standard of proof required in that determination: see paragraphs 23-30 of the reconsideration decision. Based on these principles, the Board formulated the test for standing under section 100(1) of the *EMA* at paragraph 28:

> Whether the person has disclosed sufficient information to establish, objectively and on a *prima facie* basis, that the appeal decision prejudicially affects the person's interests.

[15] Applying this test, the court found the petitioners did not fall within the meaning of a "person aggrieved" under section 100(1) of the *EMA* and therefore had no standing before the Board to appeal the amendment.

[16] The thrust of the petitioners' present submission is that this test was not properly applied. The petitioners cite a number of examples in the reasons of the Board where, in the petitioners' view, a higher or different standard than *prima facie* proof was required. In particular, the petitioners focus on two examples as central, or core, to their claim. First, the petitioners submit that the Board erred in requiring the petitioners to challenge Rio Tinto's evidence that the permitted emissions are not predicted to exceed B.C. Provincial Pollution Control Objectives outside of Kitimat. For example, the petitioners cite the following reasons of the Board as problematic in this regard:

> [78] The Board finds that Terrace is approximately 50 kilometres north of Kitimat, and Rio Tinto's dispersion modeling predicts that, under the Permit amendment, the level of sulphur dioxide emissions will not exceed BC Provincial Pollution Control Objectives outside of Kitimat. None of the four Appellants have challenged Rio Tinto's submissions in that regard. ... Also, none of the four Appellants have challenged Rio Tinto's submission that the dispersion modeling used a conservative approach to estimate the potential impacts of the permitted sulphur emissions.
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> [79] ... the Appellants have not challenged Rio Tinto's submission that the permitted emissions will not exceed Provincial Pollution Control Objectives outside of Kitimat, and the Appellants have provided no information regarding whether, or how, the permitted emissions are predicted to affect human health in the Terrace area.
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> ...
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> [84] Given that Terrace is approximately 50 kilometres north of Kitimat, and that Rio Tinto has provided unchallenged information that, under the Permit Amendment, the level of sulphur dioxide emissions is predicted not to exceed BC Provincial Pollution Control Objectives outside of Kitimat, the Board finds that Mr. Claus' concerns about the potential effects of the emissions on his and his grandchild's asthma are too speculative and remote to establish that he is a "person aggrieved" by the Permit amendment.

Secondly, the petitioners submit that the Board erred in requiring the petitioners to identify the threshold(s) at which the adverse effects of sulphate deposition are predicted to occur. On this point, the petitioners cite the following reasons of the Board as problematic examples:

> [81] ... for the reasons set out below in regard to Mr. Claus' standing, the Board finds that Ms. Gagne has not established, even on a prima facie basis, that soil and water bodies in the Terrace area are predicted to receive sufficient sulphate deposition for acidification to adversely affect plants, fish or fish habitat in the area.
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> ...
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> [87] In regard to Mr. Claus' concerns about the potential effects of the permitted emissions on the growth of his crops and on salmon that he consumes throughout the year, the Appellants submit that Rio Tinto's Technical Report predicts that the Terrace region will receive sulphate deposition of 10 to 19 kg per hectare per year, and that sulphate deposition in soil and water can cause acidification that can adversely impact vegetation growth, fish habitat and fish, depending on the level of toxicity. However, the Appellants did not identify the threshold(s) at which such adverse effects are predicted to occur. Moreover, Rio Tinto disputes the Appellants' submission that the permitted emissions will adversely affect plants, fish or fish habitat. Rio Tinto submits that its Technical Report does not support a finding that the permitted sulphur dioxide emissions will harm local agriculture, water, or fish. Consequently, the Board finds that Mr. Claus has not established, even on a prima facie basis, that the air, soil, or water in the Terrace area is predicted to receive sufficient additional sulphur for acidification to reach the level(s) at which plants, fish or fish habitat may be adversely affected.

[17] While there are other aspects of the Board's decision that the petitioners submit are in error, the petitioners acknowledge that these two issues are, as I have said, at the core of this judicial review application. In this regard, the petitioners say the Board acted unreasonably and contrary to this court's direction in *Gagne* when it found that the petitioners' concerns — about the potential impact of the amendment on their health, given they both suffer from asthma, as well as on the air, water and soil quality in the Terrace area — were too speculative. The petitioners say that the Board, by focusing on the fact that the petitioners presented no evidence on the level of toxicity predicted to harm persons residing in the Terrace area was in essence requiring the petitioners to provide "definitive proof" that they will be harmed by the amendment.

[18] The petitioners submit that the Board's reasoning on these points is inconsistent with the articulation of the *prima facie* standard in *Gagne*. In articulating this standard, I cited paragraph 21 of the Board's first decision on the standing of the petitioners:

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

[19] It is the position of the petitioners that for the Board to say there is no evidence to refute the B.C. Provincial Pollution Control Objectives, and to require some evidence of harmful sulphate deposition thresholds, imposed unduly burdensome and unreasonable requirements in light of the *prima facie* standard of proof. The petitioners submit that imposing these requirements effectively means the Board is prematurely judging the ultimate appeal on its merits, and runs contrary to my reasons in *Gagne* that the determination of standing is a preliminary stage in the appeal process. The petitioners specifically refer to paragraphs 59 and 60 of *Gagne* in support of their position that the Board failed to give proper regard to my reasons and directions:

> [59] ... the Board must be aware of the very real risk that a potentially meritorious argument may be prematurely dismissed and ensure that it does not engage in a *de facto* consideration of the merits of the petitioners' possible submissions.
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> [60] The application of the appropriate burden of proof is especially important in situations such as this one where timelines are short, expert evidence would generally not be readily available, there is no pre-hearing, and specific concerns about standing are not identified.

[20] For all of these reasons, the petitioners submit the Board's decision was unreasonable.

[21] While there is no need for me to reiterate the Board's response to each submission made on behalf of the petitioners in its reconsideration decision, it is significant that the Board concluded the petitioners did not challenge Rio Tinto's submissions that the modelling of the sulphur dioxide emission dispersion is a conservative estimate, and that this modelling predicts that the predicted emissions will not exceed B.C. Provincial Pollution Control Objectives outside Kitimat. Absent any challenge to this evidence, the Board was of the view that the claims of the petitioners were too speculative and remote to establish that their personal health issues would be adversely affected such that they could establish they were persons aggrieved. On this point, the Board noted that the petitioners provided no evidence regarding how the permitted emissions are predicted to affect human health in Terrace. Similarly, the Board found that there was insufficient evidence to accede to the claims of the petitioners that the increased sulphur emissions would adversely impact the land and waters in the Terrace area.

[22] As I have said, the petitioners submit this reasoning suggests the imposition of evidentiary burdens higher than the *prima facie* standard. Considering the Board's decision in its entirety, I am unable to agree. In my view, the Board did not require definitive proof on behalf of the petitioners. What it did require was *some* proof.

[23] Rio Tinto cites a decision of this court, *In The Matter of a Production Order* (6 July 2006), Vancouver BL0455 (B.C.S.C.), as an articulation of the *prima facie* standard of proof. While that case discusses the concept of a *prima facie* case in the context of the criminal law, the general principles are applicable to the requisite standard of proof in a standing application before the Board. On this point, I agree with the following comments of Madam Justice Ross at paragraph 26 of that decision:

> The standard of proof to be met when the Crown seeks to [displace] solicitor-client privilege on the basis of criminal activity is that of a *prima facie* case. Justice Hollinrake in the oral ruling cited earlier provided the additional clarification that what must be shown is more than a mere allegation of fact, but less than proof on a balance of probabilities. The "prima facie" evidentiary standard means that the petitioners must present some evidence beyond here assertions, but short of proof on a balance of probabilities.

[24] It is not inconsistent with the *prima facie* standard to require at least some objective evidence of how the amendment prejudicially affects a person's interests. In my view, it was not unreasonable for the Board to conclude that the evidence of the petitioners was insufficient in these particular circumstances. Even on a *prima facie* standard, the burden is on a person seeking standing to disclose enough information or evidence to allow the Board to reasonably conclude that the person's interests are, or may be, prejudicially affected. It was the Board's view of the totality of the evidence that the claims of the petitioners failed to meet this burden, even on a *prima facie* basis.

[25] I am satisfied that the Board did not require the petitioners to provide definitive proof that their health or the environment in the Terrace area would be harmed. The Board did, however, require some evidence that the petitioners would be adversely affected by this increase in sulphur dioxide. This is especially apposite when, as the respondents say, there is no suggestion of present harm to the petitioners, even though the smelter has been emitting sulphur dioxide into the atmosphere for about 50 years. Given the general nature of the petitioners' concerns as to the possible effect an increase in sulphur dioxide emissions may have on their asthma, I am of the view that the Board's conclusion — that the petitioners' concerns were too speculative or remote — was not unreasonable.

[26] Even though I accept the sincerity of the petitioners' beliefs and statements, I agree with the respondents when they submit that the Board was acting reasonably in considering the material and evidence in the manner in which it did, and that it acted reasonably in concluding that the petitioners had not provided sufficient evidence to establish on a *prima facie* basis that they were persons aggrieved.

[27] In this particular set of circumstances, it is important to recall that the Board has expertise in the area of environmental impact and how the environment may be affected by decisions made pursuant to the Board's home statute: see *Howe Sound*. On this point, I agree with Rio Tinto when it submits that the proper interpretation of the Board's reasons is that it did not require the petitioners to prove the merits of the

ultimate appeal with definitive evidence, but instead found there must be some evidence to advance the petitioners' case on standing beyond statements of possible harm. As such, the Board's reference to the B.C. Provincial Pollution Control Objectives and the sulphate deposition thresholds is in no way inconsistent with my comments at paragraph 59 in *Gagne*. I am unable to agree that reference to this information should be interpreted as the Board prejudging the merits of the ultimate appeal. Given the whole of the Board's reasons, I am satisfied that it was aware of the concerns I expressed in *Gagne* that potentially meritorious arguments may be prematurely dismissed at the standing stage.

[28] In addition, I agree with Rio Tinto that reference to the B.C. Provincial Pollution Control Objectives and sulphate deposition thresholds was "squarely within the Board's specialized expertise" and is entitled to considerable deference. I am satisfied there is nothing in the Board's reasons to indicate that the Board misapplied the *prima facie* standard as I directed. In particular, the Board's comments with respect to the B.C. Provincial Pollution Control Objectives and the sulphate deposition thresholds do not indicate that it required anything higher than the *prima facie* standard of proof. Although the petitioners were not required to meet their burden on a balance of probabilities, they were required to provide enough evidence to establish a *prima facie* case. The evidence of Rio Tinto was unchallenged with respect to the technical report modelling the predicted effects of increased emissions. In my view, the Board was not precluded from referring to this report and comparing its predictions to the claims of the petitioners in determining the question of standing.

[29] As a result, I do not agree with the petitioners that the Board acted unreasonably when it did not find there was a *prima facie* case based on Rio Tinto's technical report. The report acknowledged that sulphur dioxide can exacerbate existing chronic respiratory diseases and that sulphate deposition in soil and water can adversely affect vegetation growth, fish habitat and fish, depending on the level of toxicity. The petitioners submit that the Board unreasonably "latched on" to the phrase "depending on the toxicity level" in determining whether the statements

contained in the technical report were sufficient evidence to establish the petitioners were entitled to standing. In my view, the Board was entitled to conclude that toxicity levels were a necessary factor when determining whether these persons could be adversely affected in Terrace. The Board is not precluded from conducting a limited weighing of the evidence of each party in making this determination. On the contrary, the Board is required to embark upon a limited weighing of the evidence it has been presented with in order to properly exercise its statutory function with respect to section 100(1) of the *EMA*.

[30] Moreover, as the authorities make clear, and as I have alluded to, the Board's interpretation and application of section 100(1), the provision within its home statute, is entitled to deference upon review. The determination of who is a person aggrieved by a decision falls within the particular expertise of the Board. Provided the Board's reasons are transparent, intelligible and justified on the facts and the law, and provided the outcome falls within a range of possible, acceptable outcomes, I must defer to the Board's expertise in these circumstances. The Board's decision to ultimately grant standing to two residents of Kitimat, but deny standing to these particular petitioners who live in Terrace — Ms. Gagne part time — falls within this range of possible, acceptable outcomes. So long as the decision is reasonable, it is not the role of this court to substitute its view of who should or who should not be granted standing.

[31] In this regard, I note that the petitioners rely upon *Scott v. British Columbia*, 2013 BCCA 554, for the proposition that an administrative decision that falls within a range of reasonable options is not necessarily unassailable. An outcome, while acceptable on its face, may be unreasonable due to the evidence or lack thereof upon which the outcome is based, or due to the flawed reasoning process of the decision-maker. Justice Tysoe put it this way in *Scott* at paragraph 31:

> In general terms, it is correct to state that an adjudicator's decision will be regarded as reasonable if there is some evidence upon which the adjudicator's finding could reasonably be made. However, that will not be the case when the adjudicator's reasoning process is manifestly flawed.

[32] Mindful of Justice Tysoe's reasoning, I am satisfied that in this particular case the Board clearly considered all of the submissions before it when determining the appellants failed to establish on a *prima facie* basis they were persons aggrieved. When one reads the decision in its entirety, in my view it cannot be said that the Board's reasoning process was manifestly flawed in reaching this conclusion.

[33] This case is clearly distinguishable from the decisions of *Lebon v. Canada*. As counsel have quite properly pointed out, the decision-maker in the *Lebon* cases ignored objective and cogent expert evidence and merely paid lip service to the directions of the reviewing court. Here, however, I cannot agree with the petitioners that the Board merely paid lip service to my judgment in *Gagne*. The Board considered the *prima facie* standard and applied that standard reasonably and with regard to all of the evidence, including Rio Tinto's technical report and the statements provided by the petitioners. In my view, it was reasonable, given the totality of the evidence that was properly before the Board, for the Board to arrive at this particular outcome and I find no manifest error in the Board's reasoning process.

[34] As I alluded to earlier in these reasons, while the petitioners concede reasonableness as the appropriate standard of review, they submit that less deference ought to be owed to the Board in these circumstances given that the reconsideration was subject to my binding directions in *Gagne*. The petitioners rely on section 6 of the *Judicial Review Procedure Act*, R.S.B.C 1996, c. 241, which provides:

> In reconsidering a matter referred back to it under section 5, the tribunal must have regard to the court's reasons for giving the direction and to the court's directions.

[35] However, given that I have found that the Board properly considered and implemented my reasons and directions in its decision, there is no issue of affording the Board less deference than is otherwise owed in these circumstances. I am satisfied the Board analyzed all of the information and evidence in a thorough and reasonable manner and provided detailed reasons as to why, upon the reconsideration of its first decision, it arrived at its conclusion. Given the entirety of

the Board's decision, I am satisfied the Board was alive to and properly considered my directions. In this regard, I acknowledge the caution of the Supreme Court of Canada in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, where the court at paragraph 18 held "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors." As such, the Board, in my view, acted reasonably throughout its analysis and complied fully with the requirements of section 6 of the *Judicial Review Procedure Act*.

[36] In conclusion, I do not agree that the Board failed to follow the court's specific directions in *Gagne* when it reconsidered the petitioners' application for standing. Nor do I agree that the Board's decision merely pays lip service to the court's directions. Moreover, I cannot accept the petitioners' submission that because the *EMA* is silent on what factors the Board is to consider in determining whether a person is aggrieved or not, the Board was precluded from referring to the B.C. Provincial Pollution Control Objectives or the sulphate deposition thresholds. In my view, this information is clearly within the Board's "wheelhouse," and referring to it was a valid and reasonable exercise of the Board's statutory authority.

[37] The onus is on the petitioners to prove the Board acted unreasonably. For all of these reasons, I am not satisfied the petitioners have satisfied that burden and the petition is accordingly dismissed.

[38] As a result of this conclusion, it is unnecessary for me to decide the question of unreasonable delay.

[39] I now turn to the issue of costs. All the parties have made submissions on costs. As the petitioners have been unsuccessful in this judicial review, the question is whether the usual rule that costs be awarded to the successful party (or parties) should be applied.

[40] On this point, the petitioners submit that this judicial review is of broad public importance, and the issue of standing in an environmental appeal is important to access to justice and procedural fairness for all British Columbians. They submit that

public and industry stakeholders, as well as the Board itself, stand to benefit from certainty and predictability in the environmental appeal process. In clarifying the *prima facie* standard for standing, they submit this judicial review advances the public interest irrespective of the particular outcome. In addition, the petitioners point out that the respondents have a superior capacity to bear the costs of this proceeding. As a result, the petitioners submit they should be immune from an adverse order for costs.

[41] I should pause at this point in time to point out that the petitioners' submission on special or ordinary costs was premised on the assumption that they would be ultimately successful. There was no submission advanced that if the petitioners were unsuccessful, they should be awarded costs. On this point, even if the argument had been advanced, I would not have concluded this is one of those "extraordinarily rare" cases where an unsuccessful party should be granted costs: see *William v. British Columbia*, 2013 BCCA 1, at paragraph 4.

[42] Turning to whether the petitioners should be immune from an order for costs, given their lack of success, Rio Tinto submits in its written submission the following:

> The standing on these two individual petitioners is not an issue of public interest. There is no debate on the law that applies to standing generally. The statutory test for standing is set out in s. 100(1) of the EMA. The gatekeeper function of this section is accepted. The interpretation of a "person aggrieved" has been settled, the evidentiary standard has been ruled on and determined to be a *prima facie* standard. The only question remaining is whether there was an error in the [Board's] decision. [Emphasis in original.]

As such, Rio Tinto submits that the petitioners should not avoid costs in this case.

[43] As for the other respondents, the Board takes the position that this court should follow the general practice of not awarding costs to or against tribunals under judicial review. The Attorney General of British Columbia, while not appearing in person during this hearing, submits in a written response that it does not seek costs and that costs should not be ordered against it.

[44] The costs of a proceeding follow the event unless the court orders otherwise: Rule 14-1(9) of the *Rules of Court*. The court, however, retains discretion to depart from the general rule provided the court exercises its discretion judicially and in a principled manner: *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at paragraph 22.

[45] In *Victoria (City) v. Adams*, 2009 BCCA 563, our Court of Appeal identified five factors to be considered in determining whether an unsuccessful public interest litigant should be insulated from an adverse costs award. The court at paragraph 185 provided the following factors:

> (a) The proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
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> (b) The person has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
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> (c) The issues have not been previously determined by a court in a proceeding against the same defendant;
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> (d) The defendant has a clearly superior capacity to bear the costs of the proceeding; and
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> (e) The plaintiff has not engaged in vexatious, frivolous or abusive conduct.

[46] Rio Tinto submits the present case does not justify a departure from the general rule as the petitioners, in their submission, do not fall within the class of public interest litigants. On this point, Rio Tinto notes that the premise of the petitioners' case is that they have a personal and not merely public interest in the amendment, and that they in fact have a proprietary interest as well.

[47] While it is true that the petitioners must establish a personal interest to be a person aggrieved under section 100(1) of the *EMA*, it does not necessarily follow that this judicial review application concerns only the immediate personal interests of the petitioners. In my view, the statutory requirement for standing does not override the necessity to consider the broader public purposes that underlie this litigation.

[48] At the outset, it is significant that I am of the view that the petitioners have acted in good faith, and have not acted frivolously in bringing this application for judicial review. Given that this petition sought a substantive review of the Board's reconsideration decision, which turned on the application of the *prima facie* standard as directed in *Gagne,* the specific issue in this judicial review had not been previously determined. I accept that the need to clarify the standard upon which persons have a right to be heard before the Board is a significant legal issue and important to members of the public. Given the totality of the circumstances, I am satisfied that the petitioners can properly be classified as public interest litigants.

[49] At the same time it is important to remember the comments of the court in *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner),* 2005 BCCA 368, which was cited with approval in *Adams*. When considering the relevant factors in an application for costs, Justice Hall stated at paragraph 8:

> [8] Although I consider these factors as useful ones to guide the Court in the exercise of its discretion as to costs, the overarching question is still whether the normal rule is unsuitable on the facts of this case. As Smith J. (as he then was) said in *Sierra Club of Western Canada v. British Columbia (Chief Forester)* (1994), 94 B.C.L.R. (2d) 331 at paras. 49-50, 117 D.L.R. (4th) 395 (S.C.), aff'd (1995), 7 B.C.L.R. (3d) 375, 60 B.C.A.C. 230:
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> > I do not think it would be wise to establish a principle that any person bringing a proceeding out of a bona fide concern to vindicate his or her perception of the public interest should be insulated from an award of costs in all cases. Such a motive will always be a relevant and important factor, but it should not be considered to the exclusion of all other relevant and important factors. The Court must retain the flexibility to do justice in each case.
> >
> > In my view, the authorities cited do not set out any rule which must guide the exercise of my discretion. Rather, they set out examples of the relevant factors to be taken into account and illustrate that the factors ... will be given more or less weight depending on their relationship to other pertinent considerations. In the result, whether to depart from the ordinary rule that costs follow the event is a matter within my discretion. The exercise of that discretion must be informed by proper principles, but it is nonetheless a decision to be made with regard to the particular facts before me.

[50] In addition to these general principles and responding to Rio Tinto's submission in this case, it cannot be said that Rio Tinto, albeit a private party, was sitting on the sidelines and merely caught in the crossfire of the petitioners' application for standing before the Board. Once the Board extended its invitation to Rio Tinto to make submissions on the petitioners' application for standing, Rio Tinto was a significant participant throughout the process.

[51] At the same time, it is important to state that even though large corporate entities will generally have a superior capacity to bear the costs of any particular litigation, this does not mean that they necessarily should not receive costs, if successful, when such an order would be just and fair.

[52] In these particular circumstances, however, I agree with the petitioners that the present proceeding is relevant to the public interest and raises policy considerations that justify a departure from the ordinary costs rule. Applying the *Adams* test and factors, I find that the ordinary costs rule in this particular case is unsuitable, and I exercise my discretion to order that all parties bear their own costs of this hearing.

"B.D. MacKenzie, J."
The Honourable Mr. Justice B.D. MacKenzie