BRITISH COLUMBIA

Environmental Appeal Board

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APPEAL NO. 2001-WAS-030

In the matter of an appeal under section 44 of the *Waste Management Act*, R.S.B.C. 1996, c.482.

BETWEEN:	Dave Stevens	**APPELLANT**
AND:	Regional Waste Manager	**RESPONDENT**
AND:	Cheslatta Forest Products Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on February 6, 2002	
APPEARING:	For the Appellant: Dave Stevens For the Respondent: Dennis Doyle, Counsel For the Third Party: W. Murray Sadler, Q.C., Counsel	

PRELIMINARY ISSUE OF JURISDICTION – STANDING

This is an application by Cheslatta Forest Products Ltd. ("Cheslatta") to dismiss the appeal of Dave Stevens. The appeal was filed against the August 22, 2001 decision of the Regional Waste Manager, Minister of Water, Land and Air Protection, to issue a permit to Cheslatta to operate a beehive burner in the Ootsa Lake area. Cheslatta argues that Mr. Stevens lacks standing to bring the appeal.

The application was conducted by way of written submissions.

BACKGROUND

In August of 2001, Cheslatta obtained Permit PA-016903 (the "Permit"), which authorizes the discharge of certain emissions from its sawmill located at Ootsa Lake, which the Permit states is approximately 60 kilometres south of Burns Lake, B.C. Section 1.1 of the Permit authorizes Cheslatta to discharge emissions into the air from a beehive burner.

On September 21, 2001, Mr. Stevens appealed the Respondent's decision to issue the Permit. He appealed the decision on the grounds that the Permit authorizes an unreasonable adverse effect on the environment; the decision to issue the Permit is

based on considerations not authorized by statute; the Permit will set a precedent that will lead to more widespread environmental degradation; and the character and conduct of the permittee are such that a Permit ought not to have been issued.

The relief sought by Mr. Stevens is an order setting aside the Permit.

On January 15, 2002, Cheslatta raised a preliminary objection to Mr. Steven's appeal. Cheslatta argues that Mr. Stevens does not have standing to appeal the Permit because he is not a "person aggrieved" under section 44 of the *Waste Management Act* (the "*Act*"). It submits that the burner will have "no effect" on Mr. Stevens because he lives and works in Smithers, which is approximately 130 kilometres away from the mill, "as the crow flies", and across several ranges of hills.

RELEVANT LEGISLATION

The following section of the *Act* is relevant to this appeal:

Appeals to Environmental Appeal Board

44 (1) Subject to this Part, a person aggrieved by a decision of a manager, director or district director may appeal the decision to the appeal board.

ISSUE

Whether Mr. Stevens is a "person aggrieved" and, therefore, has standing to bring the appeal.

DISCUSSION AND ANALYSIS

Mr. Stevens argues that he is a "person aggrieved" under the *Act*. Although he lives in Smithers, Mr. Stevens states that he travels from time to time for work or pleasure to the area in and around Burns Lake which "takes me very close to the location of the burner and raises the likelihood of exposure."

Mr. Stevens argues that past decisions of the Board support his claim that he has standing in this case. In particular, he submits that the Board's decision in *Houston Forest Products Co. and others* v. *Assistant Regional Waste Manager* (Environmental Appeal Board No. 99-WAS-06(c), 08(c), and 11(c)-13(c), February 3, 2000) (unreported) (hereinafter "*Houston*") is helpful.

In *Houston*, the issue was whether a group of residents who had lived or were living and working in Smithers, including Mr. Stevens, had standing to appeal a permit authorizing certain air emissions from beehive burners in Houston, B.C. The Board reviewed its previous decisions on the test for standing under section 44(1) of the *Act*, and found as follows:

> Both Houston and the Individual Appellants agree that "a person aggrieved" in section 44(1) of the *Waste Management Act* is "a person who has genuine grievances because an order has been made which

prejudicially affects his interests" (*Metalex Products Ltd*. v*. Deputy Director of Waste Management and Gerry Wilkin,* (Appeal No. 96/17(b), April 24, 1997), (unreported)). This is taken from the decision of the House of Lords in *Attorney General Gambia* v*. N'Jie* [1961] 2 All E.R. 504, where the Court stated as follows:

> The words "person aggrieved" are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

Although the Board initially adopted this test under the previous legislation which gave standing to a person "who considers himself or herself aggrieved," the Board has also accepted it as an appropriate interpretation of the words "person aggrieved" under the current legislation (see *Keays and Goggins* v*. Assistant Regional Waste Manager and MB Paper* (Appeal No. 97-WAS-10(a), November 17, 1997) (unreported) (hereinafter "*Keays and Goggins*")).

…

As the Board has stated in previous cases, residency and proximity are relevant to the consideration of whether a person is "aggrieved." However**, these are not the only considerations.** As previously stated, the test under section 44(1) is whether the person has a genuine grievance because an order has been made which prejudicially affects his or her interests. Air pollutants are mobile and can affect air quality at large distances (see *Keays and Goggins*). Thus, there is no defined distance beyond which persons are necessarily precluded from having standing to appeal. [emphasis added]

Applying the Board's findings in *Houston* to this case, Mr. Stevens points out that there are other relevant factors that support a finding that he is a person aggrieved. In particular, he notes that the particulate matter emitted by beehive burners is a scheduled toxin under the *Canadian Environmental Protection Act*. This, coupled with the fact that he travels for work and pleasure to the area in and around Burns Lake, means that there is likelihood that he will be exposed to the particulate matter. He submits that there is accordingly a "definite prospect of harm" to him if the emissions source continues.

Further, Mr. Stevens notes that Cheslatta has not adduced any evidence regarding the intensity, toxicity or dispersal characteristics of the emissions plume, and adds that a passing reference to the distance from Smithers or the intervening topography does not establish the *absence* of potential for harm. Mr. Stevens states that he will provide expert testimony on "the effects of even short term exposure to particulate matter of the kind emitted by the beehive burners."

Lastly, Mr. Stevens submits that the Ministry of Water, Land and Air Protection, Cheslatta, Carrier Lumber, local residents of Ootsa Lake and the Cheslatta Carrier First Nation have already endorsed his standing to raise this issue. Mr. Stevens submits that he was the principal author of a brief to Terry Roberts, the Regional Waste Manager, during the public comment period of the permit approval process. A meeting was subsequently held, he submits, which included all of the above named parties, himself and Heather Ramsey, a director of CHOKED, which is an air quality advocacy group of which he is the President. Since at no time before, during, or after the meeting did any party suggest that his standing was in question, Mr. Stevens submits that he has been accepted throughout the seven month process as a party with a legitimate interest.

Cheslatta argues that Mr. Stevens has failed to meet the onus on him to demonstrate that there is a legitimate concern that his personal interests may be affected. It submits that, in addition to the passages Mr. Stevens' quoted from the *Houston* decision, the following findings regarding the test for standing are relevant to this case:

> The Board has also stated that the grievance claimed to be suffered must be reasonable. In other words, it must be reasonable to believe that the subject matter of the appeal may prejudicially affect the person's interests. This does not require an appellant to demonstrate definitive proof of prejudice suffered. As the Board stated in *Fleischer and Goggins* v. *Assistant Regional Waste Manager et al*. (Appeal No. 97-WAS-11(a), November 17, 1997) (unreported), "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…." Failure to provide definitive proof should not deny a person standing if they disclose enough evidence for one to conclude, on reasonable grounds, that the subject matter of the appeal may prejudicially affect his or her interests.
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> …However, there is evidence before the Board to support the Individual Appellants' assertion that some of the smoke from the Houston's burner moves through the Valley to Smithers at certain times of the year. Specifically, the memorandum from the Assistant Manager sates that "smoke from the Houston mills ends up in Smithers under normal winter inversion/outflow conditions." Therefore, the Board accepts that the Individual Appellants have legitimate concerns that emissions from the burner are prejudicially affecting their interests.
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> Given the evidence submitted by the Individual Appellants in this case, wind data is not required to legitimize these concerns. … As the Board has found that the Individual Appellants may be personally affected by the pollutants, the Board finds that they have an interest that is prejudicially affected beyond that of the general public.

Based on the Board's findings above, Cheslatta argues that Mr. Stevens has the burden of demonstrating that his interest may be prejudicially affected. Cheslatta

submits that Mr. Stevens misapprehends the burden of proof with regards to the intensity, toxicity or dispersal characteristics of the plume from the burner. While it acknowledges that a lay person is not required to fully prove his case, Cheslatta argues that it is also clear from the above passages that an appellant must produce evidence that would legitimize a concern that his personal interests were being prejudicially affected. It submits that Mr. Stevens has not done so in this case.

Cheslatta submits that, in *Houston*, there was reference to evidence that smoke from the burners at Houston was affecting the air quality in Smithers. However, in this case, Cheslatta submits that Mr. Stevens offers no evidence that its burner has or could affect air quality in Burns Lake, and has failed to provide reasonable evidence on how much time he spends in Burns Lake. Although the Board has stated that distance may not be the decisive factor, Cheslatta argues that it is nevertheless an important relevant fact.

In this regard, Cheslatta submits that the burner is located far from where Mr. Stevens lives and works and is 50 kilometres from the closest location to which Mr. Stevens says he travels. Cheslatta states that the mill site is located approximately 50 kilometres in a straight line from Burns Lake, and that Francois Lake, and two ranges of higher ground lie between the mill site and Burns Lake. It submits that distance and topography are important relevant facts in this case because one of the reasons that wood smoke causes environmental concerns is that in the winter, air, and hence the smoke, tends to get trapped in valleys. Since the mill is located in a different valley than Burns Lake, Cheslatta argues that the "trapping" effect makes it less likely that the plume would have an effect on air quality in Burns Lake.

Cheslatta also challenges Mr. Stevens' assertion that Cheslatta and its principals have already endorsed his standing to bring this appeal. Cheslatta submits that the apparent basis for this assertion is that it met with Mr. Stevens during the public comment component of the approval process. Cheslatta argues that the fact that Mr. Stevens was able to engage in a consultation process does not mean that he has the right to commence an appeal. It submits that Cheslatta's willingness to meet with Mr. Stevens cannot be interpreted as an agreement by them that Mr. Stevens has standing to appeal under section 44(1) of the *Act*.

The Respondent submits that he is aware of Mr. Steven's general interest in air quality issues and participation in other appeals concerning emissions from beehive burners, but is unaware of the specific reasons for which he considers himself a person aggrieved in the context of this appeal. Consequently, the Respondent advises that it takes no position on the application.

However, the Respondent supports Cheslatta's position that an appellant under the provisions of the *Act* must be a "person aggrieved." Further, he states that "standing" is to be determined on an objective basis, taking into account the nature of the authorized discharge and the position of the appellant.

The Board has considered Mr. Steven's contention that several groups, including Cheslatta, have already endorsed his standing to bring this appeal. The Board

agrees with Cheslatta that, although Mr. Stevens was able to engage in a consultation process, this does not mean that he has a *right* to commence an appeal. Standing to appeal to the Board is governed by the relevant statute. Regardless of his previous participation in the permit approval process, the Board finds that Mr. Stevens must still meet the test required under section 44 of the *Act*; namely, that he is a "person aggrieved."

As noted by the parties, the Board has previously found that residency and proximity are not the only relevant considerations in determining whether a person is aggrieved. In *Houston*, Mr. Stevens, among others, was granted standing even though he worked in Smithers and the burner was located in Houston. On the evidence presented in that case, the Board found that all of the appellants had been or may have been exposed to the particulate matter emitted from Houston's beehive burner.

The Board therefore agrees that the distance of the burner to Mr. Stevens' home and workplace is not a decisive factor. Air pollutants are mobile and can affect air quality at great distances. However, Mr. Stevens must provide *some* evidentiary basis upon which the Board can reasonably find that he will be affected such that he is a person "aggrieved."

In this case Mr. Stevens has provided no evidence that smoke will, or even could, make its way from the mill site, located at Ootsa Lake, to Burns Lake, which is located between 50 and 60 kilometres away. Mr. Stevens provides evidence that particulate matter of the kind emitted by beehive burners is a scheduled toxin under the *Canadian Environmental Protection Act*. However, he does not provide any evidence to support his assertion that Burns Lake, or areas in and around Burns Lake, will be affected by the emissions. Moreover, Mr. Stevens does not say how often he travels to Burns Lake, the length of time he spends in the area or the time of year during which he travels. In this case, there are simply vague statements and unsubstantiated assertions.

This is distinguishable from the facts in *Houston*. In that case, there was evidence before the Board to support the assertion that some of the smoke from Houston's burner made its way to Smithers at certain times of the year. Specifically, there was a memorandum from the Assistant Regional Waste Manager stating that "smoke from the Houston mills ends up in Smithers under normal winter/inversion outflow conditions." No such evidence has been submitted in this case.

Accordingly, the Board is not satisfied that Mr. Stevens' interests are personally affected by the emissions from the Cheslatta sawmill.

It is clear that Mr. Stevens has a sincere interest in air quality issues and has taken an active role in attempting to improve the air quality in and around Smithers. This is evident from his involvement in CHOKED, in previous appeals and in the process preceding the issuance of Cheslatta's Permit. However, the Board finds that this interest and these activities alone are not sufficient to make him a "person aggrieved" under the *Act*.

Based on the evidence and arguments presented, the Board is unable to conclude that Mr. Stevens is a "person aggrieved" under section 44(1) of the *Act*.

DECISION

In making this decision, the Panel has considered all of the evidence before it, whether or not specifically reiterated herein.

The Board finds that Mr. Stevens does not have standing to appeal the August 22, 2001 decision of the Regional Waste Manager. Cheslatta's application to dismiss his appeal is therefore granted.

Alan Andison, Chair
Environmental Appeal Board

February 28, 2002