Environmental Appeal Board

Citation: *ʔakisq̓nuk First Nation v. Assistant Water Manager*, 2024 BCEAB 44

Decision No.: EAB-WSA-24-A014(a)

Decision Date: 2024-12-23

Method of Hearing: Conducted by way of written submissions concluding on December 13, 2024

Decision Type: Preliminary Decision

Panel: Darrell Le Houillier, Panel Chair

Appealed Under: *Water Sustainability Act*, S.B.C. 2014, c. 15

Between:

ʔakisq̓nuk First Nation

Appellant

And:

Assistant Water Manager

Respondent

And:

Tretheway Beach Society

Third Party

Appearing on Behalf of the Parties:

For the Appellant:	Meaghan Conroy & Katie Lawless
For the Respondent:	Benamm Maughn, Michaela Merryfield & Aaron Francis
For the Third Party:	Glen A. Purdy, K.C. & Layla Chouchene

PRELIMINARY DECISION ON STANDING

INTRODUCTION

[1] This preliminary decision addresses whether the ʔakisq̓nuk First Nation (the "Appellant") has standing in this appeal: the right to appeal a decision to the Environmental Appeal Board (the "Board").

[2] The Appellant seeks to appeal a change approval dated September 10, 2024 (the "Decision"), issued under section 11 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "*Act*"), made by Allanah Gallus, an Assistant Water Manager working in the Ministry of Water, Land and Resource Stewardship. The Decision authorizes the Tretheway Beach Society (the "Third Party") to make changes in and about a stream: specifically, to dredge a marina it operates (the "Marina") on Lake Windermere (the "Lake") and to upgrade erosion protection nearby, subject to certain terms and conditions.

[3] On October 11, 2024, the Appellant filed a Notice of Appeal with the Board, seeking to appeal the Decision. The Board identified a preliminary issue of whether the Appellant has standing to appeal and sought submissions from the Appellant, Respondent, and Third Party (collectively, the "Parties") on the issue.

BACKGROUND

[4] The Appellant is a First Nation that is part of the Ktunaxa First Nation (the "Ktunaxa"). The Ktunaxa assert Aboriginal rights and title in their traditional territory (the "Territory"), called the ʔamakʔis Ktunaxa. The Territory includes the Lake and surrounding lands.

[5] The Appellant says that they have, since time immemorial, been stewards over the Territory, including the Lake. They have not surrendered rights or title in the area and continue to assert it, expecting their ties to the Territory to persist. Their stewardship is based on Ktunaxa laws. The Appellant says that the Ktunaxa have exercised hunting, trapping, fishing, and gathering rights in and around the Lake since time immemorial, and the Appellant's constituent people continue to do so with respect to hunting, trapping, and fishing.[1]

[6] In its Notice of Appeal to the Board, the Appellant stated that the Decision was wrong because, with respect to the Ktunaxa and/or the Appellant, there had been

[1] In asserting these facts, the Appellant relies on affidavit evidence from Lorne Shovar, Director of Lands and Resources for the Appellant and a former Nasuʔkin (Chief) of the Appellant.

inadequate consultation, a lack of or inadequate accommodation, a lack of consent, and a failure by the Respondent to uphold the honour of the Crown.

[7] The Parties advised the Board that the work authorized under the Decision, including dredging of the Marina, is scheduled to begin in January 2025. The Appellant requested a stay of the Decision pending the outcome of this appeal in their Notice of Appeal. The Respondent and Third Party have advised they will not consent to a stay. The Board indicated that before it can consider a stay, including seeking submission from the Parties on this issue, it first needs to decide whether the Appellant has standing.

ISSUE

[8] The preliminary issue that I must consider in this decision is whether the Appellant has standing to appeal the Decision under the *Act*.

PROCEDURAL HISTORY

History of Submissions

[9] The Board initially asked the Parties to provide limited information on the question of the Appellant's standing. The Board asked the Appellant to confirm under which section of the *Act* it considered it had standing to appeal. The Board also sought the positions of the Respondent and Third Party with respect to the Appellant's standing. The Parties provided the requested information and the Board advised that the opportunity to provide submissions was complete.

[10] The Appellant objected and requested the opportunity to present further argument and evidence. The Board granted that request and granted the opportunity for the other parties to reply, which they both did.

[11] The Appellant subsequently submitted an unsolicited sur-reply to the submissions of the Third Party. The Third Party objected to the Board considering the sur-reply.

[12] Subsequently, the Appellant requested the right to reply to the Third Party's submissions, arguing that it would be procedurally unfair to deny it the opportunity to do so and that the Board ought to allow a final reply, as it does when hearings are considered on their merits. In return, the Third Party objected and stated that, if the Board granted the Appellant the right of sur-reply, the Third Party wished a right of further reply (sur-sur-reply).

Procedural Ruling

[13] I deny the Appellant's request for sur-reply. The sur-reply provided was uninvited by the Board and I have not considered it for that reason.

[14] While the Appellant references the Board's normal process, whereby an appellant (or, in the case of a preliminary application, an applicant) has a right of final reply, this was not an application nor is it a hearing on the merits. The Board is empowered to control its own processes and create its own procedures to facilitate the just and timely resolution of matters before it.[2] The Board identified a preliminary issue and requested submissions from the Parties. They had the opportunity to provide submissions. In the circumstances of the case, I have decided, upon reviewing those submissions, that I do not need to hear further from the Appellant for the reasons which follow.

[15] While it would be a more thorough process for the Parties to have a further opportunity to make submissions, I do not consider that necessary in the circumstances. Given the short timeframe before dredging of the Marina is to begin and the stay application that the Board will need to address if it determines the Appellant has standing, I do not consider the more thorough process to be appropriate. The Parties had a fair opportunity to respond to the issue raised by the Board and I will not consider the Appellant's sur-reply or any other further submissions in coming to my decision.

LEGISLATIVE CONTEXT

[16] Section 105(1) of the *Act* grants rights of appeal from orders issued under the *Act* that arise from exercises of discretion of the comptroller, a water manager, or an engineer. The rights of appeal, also known as standing, are granted to the following individuals:

> (a) the person who is subject to the order;
>
> (b) subject to subsection (2), an owner whose land is likely to by physically affected by the order;
>
> (c) the owner of the works that are subject of the order;
>
> (d) the holder of an authorization, a riparian owner or an applicant for an authorization who considers that the holder's, owner's or applicant's rights will be prejudiced by the order.

[17] Under the *Act*, an "order" includes a decision or direction. The Decision meets the criteria in the *Act* for an appealable decision.

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[2] *Administrative Tribunals Act,* S.B.C. 2004, c. 45, s. 11.

[18] "Owner" is defined in the *Act* as:

> in relation to land, a mine or an undertaking in British Columbia, means a person who
>
> (a) is entitled to possession of the land, mine or undertaking, or
>
> (b) has a substantial interest in the land, mine or undertaking.

[19] Two rights of appeal granted under section 105(1) of the *Act* are relevant to this appeal: subsections (b) and (d). The Appellant is not a person subject to the Decision (the order in this case) or the owner of the works that are subject to the order—that is the Third Party.

[20] Subsection (2) pertains to drilling authorizations granted under the *Act* so is not relevant to this appeal.

POSITIONS OF THE PARTIES ON STANDING

The Appellant

[21] The Appellant says it has an interest in Columbia Lake Indian Reserve #3 (the "Reserve"), which includes roughly 14 kilometers of waterfront property on the Lake. This includes a portion of land that the Appellant has surrendered to the Crown under section 38(1) of the *Indian Act*, R.S.C. 1985, c. I-5 (the "*Indian Act*"), to be leased to another entity. This land (the "Leased Land") is used for residential and recreational purposes, including another marina, and was constructed and is maintained by a corporate entity.

[22] The Marina is roughly 100 metres from the Reserve, with the Leased Lands being at or near the closest border of the Reserve to the Marina.[3]

[23] The Appellant argues they have standing under subsections 105(1)(b) and (d) of the *Act*. In both cases, the Appellant argues that an "owner" is not simply one with fee simple ownership in land: the definition of "owner" in the *Act* is broader and includes those with possession of the land or with a substantial interest in it.

[3] The Appellant relied on the evidence of Donald Sam, Nasuʔkin (Chief) of the Appellant, in presenting these facts. The Appellant also relied on a memorandum of understanding between it and the Government of British Columbia, created as part of treaty negotiations, which speaks to the question of the Ktunaxa First Nation's aboriginal rights, including title, in the Territory.

[24] According to the Appellant, possession includes those with physical occupation of land, with an element of continuity.[4] The Appellant argues that it meets this definition by virtue of its possession of the Reserve.

[25] Furthermore, the Appellant argues that it also meets the test of having a substantial interest in the land of the Reserve, given the Appellant's entitlement to the "use and benefit" of that land based on the definition of a reserve, found in section 2(1) of the *Indian Act* and as evidenced by the fact that the Appellant has leased to another entity, through the Crown, the Leased Lands.

[26] Furthermore, the Appellant says it satisfies the test of ownership under the *Act* by virtue of its Aboriginal rights and title asserted over the Territory. The Appellant says it is in stage five of the six-stage treaty negotiation process with the Government of British Columbia and this establishes a presumptive (*prima facie*) case supporting their rights and title.[5]

[27] With respect to the standing test from section 105(1)(b) of the *Act*, the Appellant argues that the dredging authorized in the Decision will physically affect the Territory, the Appellant's Aboriginal rights and title, and the Reserve.

[28] With respect to subsection (d), the Appellant argues that they are a "riparian owner" because of its interest in the Reserve and in Ktunaxa Aboriginal rights and title associated with the Lake. The Appellant says that the common law definition of "riparian" is used in interpreting the standing provision in the *Act*: a riparian owner is one with land abutting upon water.[6] The Appellant says it meets this definition because of its ownership interest (as defined in the *Act*) in the Reserve.

[29] The rights the Appellant says would be impacted by the Decision relate to the Ktunaxa's stewardship rights and obligations and their sustenance-related rights of hunting, fishing, trapping, and gathering. The Appellant says that those sustenance-related rights have become harder to exercise given the cumulative effects of ongoing development and increasing recreational activities in the area.[7]

[30] The Appellant relies on the evidence of Mr. Shovar, Director of Lands and Resources for the Appellant (and documents he, in turn, referenced) in arguing that the dredging authorized in the Decision will negatively impact fishing rights related to

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[4] See, with reference to parallel standing wording under the *Act*'s precursor, the *Water Act*, R.S.B.C. 1996, c. 483, as set out in *Chief Kathi Dickie in her own right and on behalf of the members of the Fort Nelson First Nation v. Assistant Regional Water Manager*, 2012 BCEAB 17 (CanLII) [*Fort Nelson*], at para. 92.

[5] The Appellant references *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), at para. 30.

[6] *Fort Nelson* at para.126 and *North Saanich (District) v. E.M.P. Estates Ltd.*, 1975 CanLII 1015 (BC CA).

[7] This assertion is based on affidavit evidence provided by Mr. Shovar.

mussels in Windermere Lake; salmon that is being re-introduced into the lake; native fish (salmon and burbot) that will face predation from invasive bass that will benefit from deeper water in and around the Marina; and burbot that may face spawning disruptions as a result of noise related to dredging operations.[8] The Appellant further relies on the evidence of Nasu?kin (Chief) Sam, who says that impacts to sustenance rights will also impact intergenerational teaching that occurs during such activities.

[31] The Appellant has clarified that it does not own or operate the marina on the Leased Lands. It does not receive any funds from that marina and did not dredge that marina. In short, the Appellant says that the marina is operated and maintained independently and, in any event, the authorization allowing dredging there is not relevant to the question of standing in this appeal.

The Respondent

[32] The Respondent agrees that the Appellant should have standing under section 105(1)(d) of the *Act* but encourages the Board to make no findings about standing under section 105(1)(b) of the *Act*.

[33] With respect to subsection (d), the Respondent says that the Appellant satisfied its burden to establish, on a *prima facie* basis, that it has standing.[9] The Respondent says the Appellant's interest in the Reserve means it is a "riparian owner" under subsection (d) and accepts that the Appellant considers it has rights that are or would be prejudiced by the Decision.

[34] With respect to subsection (b), the Respondent says the Board does not need to make findings on a number of points, for which the Appellant advanced incorrect statements or insufficient evidence. Those points are that:

- asserted (not proven) Aboriginal rights are sufficient to establish ownership as defined under the *Act*;
- acceptance of the Ktunaxa First Nation into the treaty process or a signed memorandum of understanding with the government of British Columbia is evidence of Aboriginal title;
- alleged impacts to submerged lands should be considered when assessing standing under the *Act*; and

[8] Mr. Shovar's affidavit also asserts that there is an inter-relationship between mussels and salmon. He says that this relationship may impact salmon spawning and so salmon populations in the Lake.
[9] The Respondent references *Bruce Gibbons v. Assistant Water Manager*, 2018 BCEAB 10 (CanLII) [*Gibbons*] and *Lynda Gagne v. Director, Environmental Management Act*, 2014 BCEAB 5 (CanLII) [*Gagne*] in arguing the standard the Appellant must meet to establish standing.

- certain unproven assertions can be accepted as statements of fact.

The Third Party

[35] The Third Party says the Appellant has not advanced any evidence to support the grounds of appeal it provided in its Notice of Appeal. They raised this argument prior to receiving the full submissions provided by the Appellant with respect to their standing argument.

[36] The Third Party says the Appellant has attempted to raise new grounds of appeal without amending its Notice of Appeal, which the Appellant should not be permitted to do. In addition, the Third Party notes that the Appellant has merely asserted rights and title: these have not been recognized or agreed to. These assertions have not described the impacts to rights or title with clarity, or at all, as it is obligated to when raising such arguments.[10]

[37] The Third Party references the Notice of Appeal filed in this case and says that the only negative impact of the Decision would be to "… contribute to the already unacceptable cumulative impacts of recreational development on the Columbia Headwaters watershed," without specifying what those impacts are or how they impact the Appellant. The Third Party says that this alleged impact relates to navigation and shipping, an area of federal jurisdiction.

[38] Furthermore, with respect to the physical impact to land, the Third Party argues that section 55(2) of the *Land Act*, R.S.B.C. 1996, c. 245 (the "*Land Act*") ensures that interests in the bed or shore of a body of water below a natural boundary cannot be vested in a person. The Third Party argues that is the only land that is physically affected by dredging and the Appellant has not responded to that argument.

[39] With respect to the Appellant's assertion of riparian rights, the Third Party says it is inconsistent to say that the Reserve abuts against the Lake for 14 kilometres, but also that shorefront property has been leased through a surrender to the federal government. The Third Party says the Appellant has accordingly failed to identify its asserted riparian rights with clarity, as it ought to do.

[40] Furthermore, with respect to standing as a riparian owner, the Third Party says that the Appellant bears the burden of proof in establishing standing on a balance of probabilities.[11] The Third Party argues that the Appellant has failed to show that any

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[10] In support of this argument, the Third Party quotes from *Xats'ull First Nation v. British Columbia (Ministry of Environment)*, 2008 BCEAB 8 (CanLII), which quoted from *Haida Nation v. British Columbia (Minster of Forests)*, 2004 SCC 73 (CanLII) [*Haida*].

[11] The Third Party references *Gibbons*, at para. 34, in support of that statement.

riparian rights that it has may or will be prejudiced. The Third Party says the speculative comments of Nasuʔkin Sam and Mr. Shovar are insufficient.[12]

[41] In fact, the Third Party says, the Appellant had authorized a similar dredging operation in or about the Reserve, for the benefit of another marina which services similar vessels to those serviced by the Marina.

[42] Additionally, the Third Party argues that there is no expected increase in recreational use of the Lake as a result of the dredging of the Marina, and little to no environmental impact associated with the dredging. The surrender of part of the Reserve, was for residential and recreational purposes, increasing the very harm that the Appellant alleges will flow from the dredging of the Marina.

[43] Furthermore, the Third Party says that, while the Appellant asked questions of the consultant the Third Party retained to plan the dredging of the Marina, the consultant answered those questions. At least some recommendations for environmental protection during work in the Lake are to be undertaken in dredging the Marina.[13]

PANEL'S FINDINGS AND ANALYSIS

[44] I agree with the Appellant and the Respondent, that the Appellant had demonstrated standing to the requisite burden of proof, based on the requirements of section 105(1)(d) of the *Act*. I do not need to address the requirements of section 105(1)(b) nor do I consider it appropriate to do so.

[45] For this reason, in addressing the burden of proof, I do not find *Gibbons* to be helpful. *Gibbons* discusses the burden of proof with respect to section 105(1)(b), which incorporates the requirement that a physical effect on land must be "likely". Subsection (d) does not impose the requirement of likelihood. What subsection (d) requires for standing to exist is that the appellant in a given case must:

- be the holder of an authorization, a **riparian owner** or an applicant for an authorization; and
- consider that their rights will be prejudiced by the order they seek to appeal.

[46] I do not need to address the burden of proof in this case as I conclude that the Appellant satisfies both the requirements indicated above, whether on a balance of probabilities or on a *prima facie* basis.

[47] I agree with the Appellant that their interest in the Reserve qualifies as ownership under the *Act*. With respect to land, the *Act* defines an owner as one who "has a substantial

[12] The Third Party references *Gagne* in support of this contention.

[13] The Third Party's factual assertions are based on affidavits signed by Randall Pasay, a director and the Secretary of the Third Party, and upon several documents upon which his affidavit relies.

interest in the land." The Appellant qualifies under this branch of the test, so I do not need to address the other: whether the Appellant "is entitled to possession of the land" and I decline to do so.

[48] The Appellant's substantial interest in the land of the Reserve is enshrined in the *Indian Act*, which defines a reserve as "a tract of land … that has been set apart by Her Majesty for the use and benefit of a band." I consider such an interest to be substantial, as evidenced by the fact that the Appellant has the power to, among other things, lease portions of the Reserve based on the provisions of the *Indian Act*.

[49] I also agree with the Appellant that they are a riparian owner, insofar as the Reserve is concerned. The Reserve, even if one were to exclude the Leased Lands, abuts against the Lake, which is the "stream"[14] in which changes are authorized in the Decision. In reaching this conclusion, I have applied the test from *Fort Nelson*[15] and *North Saanich*, which correctly reference the common law definition of riparian owner. This is the correct definition for use under the *Act*, as the *Act* does not provide a contrary definition, and it (and its precursor legislation) are properly contextualized in the common law which pre-existed that legislation.

[50] While the Third Party argues that the Appellant did not set out the riparian character of its ownership with sufficient clarity, I disagree. It is important to not conflate the requirements for clarity and promptness when raising issues related to Aboriginal rights and title with meeting the standing test set out in the *Act*. I am satisfied, at least on a balance of probabilities, that the Appellant is a riparian owner of the Reserve, as contemplated in the *Act*. As I have said, this is so even if I exclude the Leased Lands from the analysis. This is sufficient to meet the test of standing and I do not need to delve further into the issue.

[51] Having determined that the Appellant is a riparian owner, I turn to the second part of the standing test under subsection 105(1)(d): whether the Appellant has shown that they consider that their rights will be prejudiced by the order they seek to appeal (in this case, the Decision). This is a subjective test: the Appellant does not need to prove any prejudice to their rights or even that future prejudice to their rights is likely at this stage. All they must show is that they consider their rights will be prejudiced, to meet the requirement for standing under subsection 105(1)(d).

[52] I find that the Appellant has done so. Based on the evidence of Mr. Shovar and Nasu?kin Sam, the Appellant demonstrated it considers that its rights to fish, hunt, and trap will be prejudiced by the Decision. The Appellant has raised concerns that the changes to the Lake authorized in the Decision will impact mussel populations, affect fish habitat that will in turn impact populations of salmon and burbot, and affect spawning

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[14] A "stream" as defined in the *Act* includes a lake.

[15] At para. 125–126.

activities of burbot while the authorized changes are being carried out. The Appellant's submissions also reference stewardship rights and responsibilities and concerns about cumulative effects; however, for the purposes of this standing decision, I do not need to address those. It is sufficient that the Appellant has identified prospective impacts to rights of hunting, fishing, and trapping. Section 55(2) of the *Land Act* is not implicated, as these identified sustenance rights do not depend on the vesting of any rights in the bed or shore of the Lake.

[53] I understand that the Appellant's Notice of Appeal does not clearly discuss these asserted impacts in detail; however, this preliminary decision is not based on an application to amend the Notice Appeal, an application to strike the Appellant's pleadings, or on an application for particulars (to provide more clarity and detail with respect to the grounds of appeal it is raising). This preliminary decision addresses the threshold question of whether the Appellant is allowed to file this appeal. Setting out the particularized prejudiced rights in the Notice of Appeal is not necessary to determine that Appellant has standing. However, I do find that what the Appellant has set out in their Notice of Appeal provides sufficient detail that there are Aboriginal rights the Appellant considers will be impacted by the changes authorized in the Decision.

[54] It is important to reiterate: the Appellant does not need to demonstrate the existence of these rights at this point. This preliminary decision concerns whether the Appellant considers that their rights will be prejudiced by the Decision.

[55] Furthermore, for the purposes of this preliminary decision, the Appellant does not need to prove these Aboriginal rights they consider will be prejudiced by the Decision to the standard set in *Haida* for the purpose of determining standing. This would, at least in this case, amount to holding a First Nation appellant to a higher standard than non-Indigenous appellants in order for them bring an appeal under section 105(1)(d) of the *Act*. I note that the Appellant's Notice of Appeal raises issues related to Aboriginal rights specifically, however, the nature of such rights is not relevant to this standing decision.

[56] For the purposes of this preliminary decision on standing, all that is required is that the Appellant consider that a right it enjoys will be prejudiced by the Decision. The role of the Board in this preliminary decision, to quote from *Gagne*, "is to screen out the mere busybody without losing the benefit of contending points of view." The Appellant is not a mere busybody, and that is established by it satisfying the standing test in section 105(1)(d) of the *Act*.

[57] In closing, I also acknowledge the Third Party makes other arguments, which are not relevant to this preliminary decision. The Third Party has argued that the harm identified by the Appellant in its submissions is not expected to come to pass and, in any event, is authorized by federal law. The Third Party has also expressed concerns that the Appellant is selectively challenging the dredging of the Marina when it did not challenge the dredging of the marina on the Leased Lands, with the associated, sustained or increased recreational use of the Lake. The Third Party argues there will be little or no

environmental impact as a result of the activities authorized in the Decision, and that the work has been planned in a manner consistent with some or all environmental stewardship recommendations and after discussions with the Appellant. I do not need to consider these arguments in this preliminary decision establishing that the Appellant is an owner who considers its rights will be prejudiced by the Decision. That is the standard for the purposes of establishing standing, and I find that the Appellant has met this standard. These issues may be more persuasive if and when this appeal is heard on its merits, but it is premature for me to make any findings related to those arguments at this stage in the appeal.

DECISION

[58] For the reasons provided above, I find that the Appellant has established standing to appeal the Decision under section 105(1)(d) of the *Act*.

[59] In reaching this conclusion, I have considered all the evidence and submissions submitted by the Parties, whether or not they were specifically mentioned in this preliminary decision.

"Darrell Le Houillier"

Darrell Le Houillier, Panel Chair
Environmental Appeal Board