ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – April 10, 2018

IN THE MATTER OF sections 9, 14, 123, and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 216, and 217 of the *Public Lands Administration Regulation,* Alta. Reg. 187/2011;

- and -

IN THE MATTER OF an appeal filed by Conklin Aggregates Ltd., with respect to a refusal of an application for DLO 160183 by the Director, Provincial Approvals Section, Alberta Environment and Parks.

Cite as: *Conklin Aggregates Ltd.* v. *Director, Provincial Approvals Section, Environment and Parks,* (10 April 2018) Appeal No. 17-0010-D1 (A.P.L.A.B.).

BEFORE: Ms. Marian Fluker, Acting Board Chair.

SUBMISSIONS BY:

Appellants: Conklin Aggregates Ltd., represented by Mr. Hugh Ham, Municipal Counsellors, Barristers and Solicitors.

Director: Mr. Jon Murray, Director, Provincial Approvals Section, Alberta Environment and Parks, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Conklin Aggregates Ltd. (the Appellant) applied for a Department Licence of Occupation (DLO) on public land that was currently leased by a third party in grazing lease GRL 35454 (GRL). The Director, Alberta Environment and Parks, refused the application for the DLO, because the Appellant did not have signed consent from the GRL holder as required under section 9(1)(e) of the *Public Lands Administration Regulation* (PLAR).

The Appellant appealed the decision to the Public Lands Appeal Board (the Board).

The Director made a preliminary application to the Board to dismiss the appeal on the basis the Director had no other option but to refuse the Appellant's application because of the lack of consent from the GRL holder.

The Board received submissions from the Appellant and Director, and found the appeal was not frivolous, vexatious, or without merit.

The Board dismissed the Director's application.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding the preliminary application filed by the Director to dismiss the Notice of Appeal filed by Conklin Aggregates Ltd. (the "Appellant") in Appeal No. PLAB 17-0010.

II. BACKGROUND

[2] In an application dated November 4, 2016, the Appellant applied for license of occupation DLO 160183 (the "DLO"). The Appellant was seeking access through grazing lease GRL 35454 (the "GRL") in order to access adjacent private property owned by Mrs. Mary Wallace.

[3] Alberta Environment and Park's Environmental Field Report noted consent from the leaseholder of the GRL would be provided at a later date and acknowledged there was a potential conflict between the Appellant and the leaseholder.

[4] In a letter dated February 21, 2017, Alberta Environment and Park ("AEP") informed the Appellant the application had been received and was "satisfactory for review...."

[5] AEP's Merit Rationale, dated May 5, 2017, refused the Appellant's application for the DLO. The Merit Rationale indicated consent from the leaseholder had not been received from the Appellant, and "[w]ithout the consent, the reviewer did not have adequate information to complete a comprehensive review of the DLO application."[1]

[6] A refusal letter from the Director, Provincial Approvals Section, Alberta Environment and Park (the "Director") dated June 14, 2017, was sent to the Appellant. The Director cited sections 9(1)(e)[2] and 9(5)[3] of the *Public Lands Administration Regulation*, Alta.

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1 Director's Record at Tab 10.

2 Section 9(1)(e) of PLAR states:

"An application to the director for a formal disposition...

(e) must, if the application relates to public land that is already the subject of a disposition under the Act or a timber disposition, be accompanied with a statement of consent, in a form acceptable to the director, that is signed by the disposition holder or timber disposition holder...."

3 Section 9(5)(a) of PLAR provides:

"The director

Reg. 187/2011 ("PLAR") to demonstrate he had no option but to reject the Appellant's application as required under the legislation.

[7] The Appellant filed a Notice of Appeal with the Board on June 15, 2017. The Appellant alleged the Director erred in the determination of a material fact on the face of the record, erred in law, and the decision was expressly subject to appeal under section 15 of the PLAR or section 59.2(3) of the *Public Lands Act*, R.S.A. 2000, c. P-40 ("PLA"). In the Notice of Appeal, the Appellant explained it applied for an access road (the DLO) to gain access to the municipal road allowance that leads to SW-35-30-7-W5M. The Appellant stated the grazing leaseholder of the GRL would not grant the Appellant consent, conditionally or unconditionally.

[8] The Board, finding the Notice of Appeal met all of the legislated requirements for an appeal to the Board under sections 216 and 217 of PLAR, opened a file and requested the record from the Director. In a letter dated June 22, 2017, the Director requested the Board dismiss the appeal, stating the DLO application was rejected due to the failure of the Appellant to provide the consent of the leaseholder, and the legislation requires the Director to reject the application as incomplete.

[9] In a letter dated June 26, 2017, the Board requested the Appellant provide a response to the Director's request for the Board to dismiss the appeal. After reviewing the submissions of the Appellant and Director, the Board issued a decision on October 4, 2017. The Board found:

> "The Director based his request to dismiss the appeal on his belief the Notice of Appeal failed to show there was an 'issue or question capable of being the subject of an appeal.' This question goes to the merits of the appeal and can only be decided once the Director's record has been provided and submissions are received from the parties in response to any issues identified for a hearing, if one is held. It does not provide the basis to dismiss an appeal that has been filed in accordance with the legislation."

[10] The Board again requested the Director advise the Board when the Director's Record would be provided.

> (a) must reject an application if it does not meet the requirements of this section or if the applicant is served with a notice under subsection (2) and does not comply with that subsection...."

[11] The Board received a letter from the Director dated October 17, 2017, again requesting the appeal be dismissed. The Director reiterated much of the same arguments made previously, and argued the Board had not addressed the issue raised by the Director, which was whether the Notice of Appeal raised an "issue or question capable of being the subject of an appeal."

[12] On October 24, 2017, the Board received an unsolicited response from the Appellant. The Appellant included case law and submitted "the Director has significantly overstepped the boundaries set by the case law and has become, in fact, an advocate for the holder of the grazing lease, Mr. Jensen." The Appellant requested the Board reject the Director's application and set boundaries for the role of the Director in the appeal. Alternatively, the Appellant asked the Board to consider whether to send the matter to mediation.

[13] On October 25, 2017, the Board received an unsolicited response from the Director to the Appellant's correspondence. The Director again submitted the Board had not addressed the issue, explained the Director had not argued the Appellant's Notice of Appeal did not meet the requirements of section 216 and 217 of PLAR, and took issue with the Appellant's interpretation of case law and the role of the Director.

[14] The Appellant responded with an unsolicited email dated November 9, 2017, in which the Appellant submitted the concept of *functus*[4] applied, and explained the relevance of the case law.

[15] The Board responded to the Appellant and the Director (collectively, the "Parties") on November 10, 2017. The Board disagreed with the Director's submission that the Board had not previously addressed the issue, and pointed out where the Board had done so. The Board explained that after reviewing the correspondence from the Parties, its decision remained the Notice of Appeal was properly before the Board. The Board, for the third time, requested the Director advise when the Director's Record would be provided.

[16] After legal counsel for the Director responded on January 26, 2018, that he was still waiting for instructions from his client, the Board requested a copy of the Director's Record

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4 "*Functus officio*" is defined in *Black's Law Dictionary*, 6th ed. as:

> "having fulfilled the function, discharged the office, or accomplished the purpose, and therefore of no further force or authority."

by February 12, 2018. The Record was provided on February 9, 2018, along with further arguments from the Director and another request for a preliminary decision regarding the admissibility of the Notice of Appeal.

[17] The Board sent the Director's Record to the Appellant and, in a letter dated February 16, 2018, set the schedule to receive submissions addressing the Director's motion to dismiss the appeal.

[18] The Board received submissions from the Parties according to the set schedule and reviewed the submissions, the Director's Record, and relevant legislation in making its decision.

III. ISSUES

[19] The issue before the Board is whether the appeal is frivolous, vexatious, or without merit, and should be dismissed.

IV. SUBMISSIONS

A. APPELLANT

[20] The Appellant argued section 211 of PLAR specifically allows for an appeal of the rejection of an application under the PLA for a disposition, and this includes rejections under section 9(1)(e) of PLAR. The Appellant submitted only the Board can make decisions on disposition applications where consent of a prior disposition holder is required but is withheld. The Appellant submitted if the Director's position that rejections under section 9(1)(e) are not appealable was accepted, the effect would be to grant all disposition holders exclusive possession.

[21] The Appellant submitted the timeline for the Board to reject a notice of appeal as deficient had passed and, as the Board had accepted the Appellant's Notice of Appeal, it was *functus* in that regard. The Appellant referred to section 219 of PLAR, which provides the appeals coordinator five days to reject a notice of appeal that is not compliant with sections 216 or 217 of PLAR.[5]

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[5] Section 219 of PLAR states:

[22] The Appellant cited decisions of the Alberta Court of Appeal in *Atco Gas and Pipeline Ltd.* v. *Alberta (Utilities Commission)*[6] and *1447743 Alberta Ltd.* v. *Calgary (City)*,[7] and the Supreme Court of Canada in *Northwestern Utilities Ltd.* v. *Edmonton*[8] to argue the Director did not have statutory standing as a party to appeals before the Board, and if it did have standing, it would be bound by the limits set by the Supreme Court of Canada. The Appellant submitted the Director had "significantly overstepped the boundaries set by the case law" and had become an advocate for the leaseholder. The Appellant submitted the case law cited spoke to the Director's role in appeals, whether it was to explain the basis of his decision or to oppose the appeals actively.

[23] The Appellant submitted the Director was distinguishing between an application that is incomplete due to the lack of consent from a prior disposition holder and an application that was compliant with the regulation requirements.

[24] The Appellant explained the Notice of Appeal is actually Mrs. Mary Wallace's application for a right of access to her land across the adjacent public land, and Mrs. Wallace is doing this through the Appellant.

[25] The Appellant acknowledged the Director is required under PLAR to reject an incomplete application, but argued there is no legal impediment preventing the Board from considering an appeal of such a rejection.

[26] The Appellant cited Part 17 of the *Municipal Government Act*, R.S.A. 2000, c. M-26, as an example of a board (the Subdivision and Development Appeal Board ("SDAB")) that has a broad authority to grant variances of decisions made by a Development Authority. The SDAB is granted jurisdiction to consider matters beyond what the Development Authority is authorized to consider. The Appellant submitted this is similar to the jurisdiction given to the

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> "(1) The appeals co-ordinator may, in his or her discretion and within 5 days after being served with a notice of appeal, reject the notice of appeal if it was not served in accordance with section 217 or if, in the opinion of the appeals co-ordinator, it does not meet the requirements of section 216."
>
> (2) Where the appeals co-ordinator rejects a notice of appeal, the appeals co-ordinator must provide a notice of a rejection to the appellant and must make the notice available to the public.

6 See: *Atco Gas and Pipeline Ltd.* v. *Alberta (Utilities Commission)* 2013 ABCA 316.

7 See: *1447743 Alberta Ltd.* v. *Calgary (City)* 2011 ABCA 84.

8 See: *Northwestern Utilities Ltd.* v. *Edmonton* [1979] 1 SCR 684.

Board in section 211 of PLAR to consider rejections, including ones where consent of a prior leaseholder is not obtained and the application is rejected.

[27] The Appellant submitted the Director's position is "contrary to the requirements of the Supreme Court of Canada" in *Godbout et al.* v. *A.G. for Quebec et al.*[9]

[28] The Appellant explained the leaseholder only has a license to graze cattle on the grazing lease for two weeks in June and two weeks in November. However, by refusing the Appellant's application for the DLO due to the lack of consent, the Director was allowing the leaseholder to control access to private property. The Appellant submitted the Director's actions resulted in a depreciation of the value of Mrs. Wallace's land and caused her unnecessary hardship, without any benefit to public land.

B. DIRECTOR

[29] The Director submitted that, while the Appellant's Notice of Appeal was "technically compliant with the requirements of the Act and Regulation" and a rejection of a DLO application is appealable under section 211(b) of PLAR, the Notice of Appeal failed to reveal any issue or question capable of being the subject of an appeal.

[30] The Director submitted the issue is whether the Notice of Appeal "is without merit or frivolous." The Director argued the Board did not require the Director's Record in order to make this determination. The Director interpreted section 123(5)[10] of the PLA to mean the Board has the power to dismiss a notice of appeal if it considers it to be without merit, prior to receiving the Director's Record.

[31] The Director cited Rule 4.22[11] of the Alberta Rules of Court which allows the court to assess the merits of the case in the initial stages of the action and order a party to provide security if it is considered just and reasonable to do so.

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9 *Godbout et al.* v. *A.G. for Quebec et al.*, 2017 1 R.C.S. 283, at paragraphs 112 and 113.

10 Section 123(5)(a) of the PLA provides:

"The appeal body may dismiss a notice of appeal if

(a) it considers the notice of appeal to be frivolous or vexatious or without merit...."

11 Rule 4.22 of the Alberta Rules of Court states:

"The Court may order a party to provide security for payment of a costs award if the Court considers it just and reasonable to do so, taking into account all of the following: ...

(c) the merits of the action in which the application is filed...."

[32] The Director submitted the Board has a role as a "gatekeeper," and cited the decision of the Court of Queen's Bench in *Ma* v. *Alberta (Criminal Injuries Review Board)*[12] which described the chair of the Criminal Injuries Review Board as a "gatekeeper" whose responsibility was to assess reconsideration applications that were without merit. The Director submitted he also has a role as "gatekeeper" given section 9(5)(a) requires him to reject any application that does not meet the requirements of section 9 of PLAR.

[33] The Director submitted that if he had accepted the Appellant's application, he would have committed an error of law. The Director argued it was "unreasonable for the Board not to exercise its discretion and dismiss the Notice of Appeal." The Director quoted from *Hayden* v. *Alberta Health Services*[13] where the Court of Queen's Bench stated, "A defendant equally deserves at least some protection from the costs and consequences of a case that is perhaps less than meritorious on its face."

[34] The Director cited *1985 Sawridge Trust* v. *Alberta (Public Trustee)*[14] where the Court of Queen's Bench considered when pleadings could be struck for being frivolous:

> "A pleading is frivolous if substance indicates bad faith or is factually hopeless. A frivolous plea is one so palpably bad that the Court needs no real argument to be convinced of that fact."

[35] In response to the Appellant's submissions, the Director argued *functus officio*[15] is not applicable to preliminary decisions of the Board. The Director also distinguished the case law cited by the Appellant by arguing it did not apply to tribunals.

[36] The Director submitted the *Municipal Government Act* is not analogous to the facts and legislation of this particular appeal. The Director submitted the Board's authority is "limited to providing a report and recommendation to the Minister to confirm, reverse or vary 'the decision appealed.'" The Minister, according to the Director, may likewise only confirm, reverse, or vary the decision appealed and can only make any decision the Director could have made. The Director submitted the only option was to reject the DLO application as incomplete,

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12 *Ma* v. *Alberta (Criminal Injuries Review Board),* 2011 ABQB 300 at paragraph 25.

13 *Hayden* v. *Alberta Health Services*, 2017 ABQB 111 at para 30.

14 *1985 Sawridge Trust* v. *Alberta (Public Trustee)*, 2017 ABQB 436 at para 36.

15 "*Functus officio*" is defined in *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990) as: "Having fulfilled the function, discharged the office, or accomplished the purpose and therefore of no further force or authority."

and since the Minister may only make any decision the Director could make, the Minister is required to reject the application.

[37] The Director noted the Notice of Appeal was submitted with Mr. Everett Normandeau of Conklin Aggregates listed as the Appellant and Mr. Hugh Ham as the agent for the Appellant. Mrs. Wallace, owner of the land adjacent to the GRL, is not referred to in the Notice of Appeal. The Director reserved the right to make submissions on this issue if needed. The Director submitted Mrs. Wallace's situation is not relevant to the issue of the preliminary application and requested the Board "disregard all submissions made by the Appellant alleging 'injustices' to Mrs. Wallace."

V. ANALYSIS

[38] The Director raised concerns regarding submissions where the Appellant commented on Mrs. Wallace's situation. The Board found Mrs. Wallace's situation is not relevant for the purposes of this decision, and those submissions were not considered in determining the issue currently before the Board.

[39] The Board may dismiss an appeal under circumstances outlined in section 123(5) of the PLA:

> "The appeal body may dismiss a notice of appeal if
>
> (a) it considers the notice of appeal to be frivolous or vexatious or without merit,
>
> (b) for any other reason the appeal body considers that the notice of appeal is not properly before it, or
>
> (c) the person who submitted the notice of appeal fails to provide further information required by the appeal body."

[40] The issue before the Board is whether the Notice of Appeal is frivolous, vexatious, or without merit. A frivolous case is defined as "[o]ne in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed."[16]

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16 *Black's Law Dictionary*, 6th ed., *s.v.* "frivolous."

[41] An appeal that is "without merit" means an appeal with no factual or legal basis. It is a case, which does not have a "reasonable chance of success."[17]

[42] The Board recognizes that it has a gatekeeper role and takes that role very seriously. The Alberta Court of Appeal has provided some guidance to assist in determining if an appeal is "without merit." In *Mis* v. *Alberta Human Rights Commission*,[18] it said:

> "The determination whether a complaint should be dismissed as 'without merit' is a screening or gatekeeping function performed as a paper review. We are disinclined to set the specific test as low as 'arguable case' or as high as 'reasonable prospect of success'. In our view, the standard is somewhere in between....
>
> The gatekeeper can be expected to apply his or her experience and common sense in evaluating the information in the investigator's report. The threshold assessment of merit is low and the gatekeeper (here, the Chief Commissioner) is given wide latitude in performing the screening function. The courts are not to lightly interfere."[19]

[43] The Alberta Court of Appeal has provided further guidance in *Cerny* v. *Canadian Industries Ltd. et al.*[20] regarding the jurisdiction to find a case to be frivolous or vexatious:

> "This jurisdiction is exercised to stop the abuse of the process of the Court or to prohibit scandalous, frivolous and vexatious actions. This power of the Court certainly should not be exercised to strike out a pleading or to strike out a part from an action where there is a serious point of law to be considered which cannot be said to be clear. How can such a pleading be an abuse of the process of the courts or frivolous or vexatious?"[21]

[44] Considering the above case law, for the Board to determine the case put forward in the Notice of Appeal is frivolous, vexatious, or without merit, there must be no remedy available for the Board to consider or the appeal must be an abuse of the process.

[45] This appeal is not frivolous or vexatious. The Appellant had a right to file an application for the DLO and when the Director refused the application, the Appellant had a right

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17 *R.* v. *Ewanchuk* 2000 CarswellAlta 1250 at para. 4. Although this is a criminal law case, the definition is transferable.

18 *Mis* v. *Alberta Human Rights Commission*, 2001 ABCA 212.

19 *Mis* v. *Alberta Human Rights Commission*, 2001 ABCA 212, at paragraphs 8 and 9.

20 *Cerny* v. *Canadian Industries Ltd. et al.*, 1972 CanLII 976 (ABCA).

21 *Cerny* v. *Canadian Industries Ltd. et al.*, 1972 CanLII 976 (ABCA) at pages 468 to 469.

to file a Notice of Appeal. There is no indication the appeal was filed to abuse the appeal process or the application process.

[46] In response to the Director's comments regarding the "gatekeeper" function of the Board, the Board reviews each appeal to assess whether it is properly before it. Although the Director argued that the test is whether the Appellant has a reasonable chance of success or whether the case is without merit, the Board believes the threshold for an assessment of the merits of the case is not as high as argued by the Director.

[47] In reviewing the legislation, the Board notes section 14(a) of the PLA provides a potential remedy for the appeal. Section 14(a) reads:

> "The Minister may
>
> (a) restrict the disposition of or withdraw from disposition any public land in any specified area in any manner the Minister considers warranted ...." (Emphasis added.)

[48] According to this section, the Minister may order the withdrawal of the land requested by the Appellant in the DLO application from the grazing lease.

[49] In pointing out this option, the Board is not making a judgment on whether or not this section would be applicable or whether the Board would recommend the Director's decision be confirmed, reversed, or varied. The Board will make its recommendations after hearing submissions from the Parties on the issue of whether the DLO should have been issued. The Parties may consider providing comments on the applicability of section 14(a) of the PLA in their submissions for the hearing.

[50] Based on this, the Board finds the appeal was not filed in bad faith nor is it "factually hopeless." The Board wants to emphasize it has not made any decision regarding the merits of the appeal and will only do so after the hearing is held at which the Parties will be given the opportunity to fully argue their positions.

[51] Since there is remedy available to the Board, in that it can recommend the Minister vary or reverse the Director's decision and exercise her authority under section 14 of the PLA, the Notice of Appeal cannot be considered frivolous, vexatious, or without merit. Since the Board finds the Notice of Appeal does not fall under section 123(5) of the PLA, the Board will not dismiss the appeal.

VI. OBSERVATIONS

[52] The Board notes the Director's Record is a vital consideration in every appeal. As counsel for the Director has repeatedly reminded the Board in this and many other appeals, the appeal is based on the Director's Record. Therefore, the Board wishes to receive the Director's Record before it considers any application or sets a process for submissions.

[53] The Board notes the Director's Record was requested in writing three times and the Board had to set a deadline before the Record was provided. The Board explained in each of the three requests why the Record was required in order to determine whether to grant the preliminary application to dismiss the Notice of Appeal. The Board finds the Director's refusal to provide the Record in a timely fashion to be obstructionist to the Board's process and the ability of parties to have their issues heard in a timely manner. This is especially concerning given the legislated timeline the Board must follow. The Board sincerely hopes future requests for the Director's Record will be complied with in a timely manner.

[54] Further, the Board notes the Appellant's objection to the role the Director has taken in these proceedings. This matter was recently discussed by the Environmental Appeals Board (the "EAB") in its decision, *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*,[22] where the EAB stated:

> "While not directly relevant to the standard of review applicable to the Director's decision, the Appellants raised a related argument regarding the role of the Director. As stated, the Appellants are of the view the role of the Director in the hearing process should be limited in manner like that of a tribunal being reviewed on judicial review. As has been discussed, the role of the Board in reviewing the Director's decision is not the same as the Court undertaking a judicial review, nor is it the same as the Court of Appeal undertaking a statutory appeal of the Public Utilities Board as occurred in the *Northwestern Utilities* case. Ultimately, the Board's role is to provide the best possible advice to the Minister to make her decision. In the Board's view, the active participation of the Director, where there is new evidence before the Board, is the best way to support this....
>
> This [role] is expressly different from the legislation governing the Public Utilities Board in *Northwestern Utilities*. The Supreme Court of Canada stated:

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[22] *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B).

> 'Section 65 no doubt confers upon the Board the right to participate in appeals from its decisions, but in the absence of a clear expression for the Legislature, the right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not a party. That this is so is made evident by [section] 63(2) of the *Public Utilities Board Act* ....
>
> Under [section] 63(2) a distinction is drawn between 'parties' who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered a party, in the full sense of that term, to an appeal from its own decision.'[23]

Given this difference in legislation and the purpose of the Board's process, the Board does not accept the arguments of the Appellants. The Director is a full party to the Board's proceedings."[24]

The Board is of the view the Director has the same role in the proceedings here.

VII. DECISION

[55] The Board finds the appeal is not frivolous, vexatious, or without merit. Therefore, the Board denies the Director's application to dismiss the Appellant's Notice of Appeal. The Board will proceed to a hearing of the substantive issues.

Dated on April 10, 2018, at Edmonton, Alberta.

Marian Fluker
Acting Board Chair

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23 *Northwestern Utilities Ltd.* v. *Edmonton*, [1979] 1 S.C.R. 684 at page 708.

24 *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.) at paragraphs 200 and 201.