

licence. Once a decision is made to issue, or for that matter not to issue, the licence, then there is an appeal period in which the applicant for the licence or anyone who is directly effected (and who filed a statement of concern) can file an appeal. The time limit in which an appeal must be filed is prescribed so that all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

[13] Once this process is complete, the water licence “crystallizes” and all of the parties can move forward on that basis - the parties can carry on with their business affairs, making decisions based on the known terms and conditions of the water licence. If there were no time limits placed on the appeal period, the applicant for a water licence would never know when it could proceed with its project, as there would always be the possibility of an appeal that could result in changes to the licence.

[14] If a right of appeal was allowed to exist for an indefinite period of time, procedural fairness would require that not only would the Appellant have the right to file an appeal, but any individual who was directly affected (and who filed a statement of concern) would also have the ability to file an appeal at any time. The uncertainty this would create would make it impossible for the Appellant (a licence holder) to properly plan its investments, to carry out construction with respect to any works that are needed to exercise the water right granted by the Licence, and to ensure that they have a stable water supply.

[15] The time lines included in the legislation, and the certainty that they create, balance the interests of all the parties. This certainty was of benefit to the Appellant when it obtained the Licence, because the Appellant knew when the appeal period was over for those directly affected individuals who had filed a statement of concern. After the appeal period was over, the Appellant could proceed on the basis that the terms and conditions of the licence were certain (subject to any changes permitted by the *Water Act*).

[16] The *Water Act* recognizes the importance of integrating the conservation and management of water with the need for economic growth.³ Uncertainty would create

³ Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

(a) the need to manage and conserve water resources to sustain our environment and

unfavourable conditions for economic growth. Companies need to know that decisions that are made that affect the way they are required to operate will not be susceptible to continuous change.

[17] Therefore, taking into consideration the importance of certainty in any decision made by the Director and the potential impact uncertainty would bring for continued economic growth in this province, the Appellant has not presented sufficient reasons to justify allowing the appeal to proceed at this late date, and therefore the appeal must be dismissed.

2. Extension of Time

[18] The second consideration the Board examined was whether the Appellant had provided sufficient reasons to grant an extension of time to file an appeal. To allow an extension of time, the Appellant must be able to show that extenuating or special circumstances existed that prevented it from filing within the legislated timeframe. In its response to the Board's letter asking for reasons why an extension should be granted, the Appellant stated the "...30-day appeal period permitted in the licence did not permit sufficient time to assess the conditions of the licence." The Board does not accept this argument. The argument that 30 days was insufficient time to review the Licence does not demonstrate the special circumstances that are required for the Board to extend the time period. It is an argument that many appellants would, and do, argue, but it is not enough to discharge the Appellant's onus to convince the Board that time should be extended.

to ensure a healthy environment and high quality of life in the present and the future;

- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act."

[19] The Board recognizes that the Appellant now has two years of potentially relevant data that could be used to support its appeal, but delaying filing an appeal until now does not constitute special circumstances. It constitutes delay. The *Water Act* states that appeals must be filed within 30 days of issuing a licence. The Appellant was explicitly informed of the deadlines and the resulting consequences if the deadlines were not adhered to in the letter it received with the Licence in 2001.

[20] Further, in its submission, the Appellant stated: “Our Engineers identified at the time of the license issuance that based on the historical data for the Little Smoky River, they felt the license to divert was not sufficient for the Town’s system.”⁴ It therefore appears to the Board that the Appellant not only had adequate time to assess the conditions in the Licence when it was issued, but in fact did assess the conditions and found them, from their perspective, to be unsatisfactory. If this was the case, then the Appellant should have filed an appeal at that time, based on that assessment.

[21] The Appellant stated that it had concerns regarding the amount of water it was allowed to divert at the time the Licence was issued. The Board notes the current demand, as stated by the Appellant, is 400,000 cubic metres per year and the licence allows for 668,400 cubic metres.⁵ Based on these figures, over 40 percent of its allocated water is not presently being used. Therefore, it is unclear why the Appellant has needed to request a number of temporary diversion permits in the past, unless they were specifically related to the timing of the diversions. In any event, if the Appellant had concerns regarding the amount of allowable diverted water at the time the Licence was issued, it had the opportunity in January 2001 to file an appeal and present its concerns. It did not do so.

⁴ See: Appellant’s letter, dated June 18, 2003. In its letter, it states:

“Our Engineers identified at the time of the license issuance that based on the historical data for the Little Smoky River, they felt the license to divert was not sufficient for the Town’s system. The Town and their consultant have met with the Alberta Environment Regional Services and no action was taken. The Town of Valleyview also was required to conduct a Value Engineering Study by Alberta infrastructure which included members representing all departments of the Province and the problem of the diverting of the water or limitations were not identified by any member of Alberta Environment.”

⁵ See: Appellant’s letter, dated June 9, 2003.

[22] Thus, based on the above observations, the Appellant has not provided the Board with the evidence of the special circumstances required to grant an extension of time to file an appeal, and the appeal must therefore be dismissed.

3. Amendment Process

[23] The third consideration of the Board was to assess what the Appellant intended to achieve by filing the Notice of Appeal. Essentially, what the Appellant is, in effect, attempting to accomplish by way of its Notice of Appeal is what should more properly be characterized as an amendment to its Licence. The Appellant has operated under the Licence for over two years and is discovering that the terms and conditions of its Licence are not meeting its needs. However, filing an appeal more than two years after a licence was issued is not the proper procedure to follow to obtain an amendment, as this defeats the amendment process provided for in the *Water Act*.

[24] The Appellant can apply to the Director to amend the terms and conditions of its Licence. The Director will consider the amendment request of the Appellant providing the required information is provided in the proper form and manner, the required fees are paid, and, most importantly, notice is properly given as specified in the *Water Act*. If the Director decides to issue the amendment, the Appellant would have the water diversion it requested. Allowing the Appellant to obtain an amendment of its Licence at this point, through the Board's appeal process, would circumvent the formal notice process that is part of the application process and would defeat the purposes of the Act as stated in section 2 of the *Water Act*. The Appellant must also be aware that an amendment such as this, that results in an increase in the amount of water diverted, will be open to appeal by other directly affected individuals. Alternatively, if the Director decides not to grant the amendment, that is a new decision of the Director and would be open to appeal by the Appellant.

[25] Therefore, if the Appellant wants the Licence changed, it should file an application to the Director requesting an amendment. Any decision related to the amendment

would be appealable, and providing the prerequisites are followed, including adherence to time limits for filing a notice of appeal, the Board would then have jurisdiction to consider the appeal.

III. CONCLUSION

[26] The Board finds that the statutory prerequisites for filing a Notice of Appeal have not been met as the appeal was filed out of time and no special circumstances exist to extend the appeal deadline. The Board is of the opinion that certainty requires that the appeal timelines be adhered to, unless special circumstances exist to warrant an extension. Additionally, the issues of concern to the Appellant are more properly considered an amendment to an existing Licence, and the appeal process is not intended to defeat the amendment process that includes notification and consultation with the public. Therefore, pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, the Board dismisses the appeal of the Town of Valleyview.

Dated on August 1, 2003, at Edmonton, Alberta.

William A. Tilleman, Q.C.
Chair