

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 16, 2005

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by the Mountain View Regional Water Services Commission, Gerald Oxtoby, the City of Red Deer, Terry Little, and Kelly Smith with respect to *Water Act* Preliminary Certificate No. 00198509-00-00 issued to Capstone Energy Ltd. by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Preliminary Motions: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment* re:

Capstone Energy Ltd. (16 December 2005), Appeal Nos. 03-116 and 03-118-121-ID3 (A.E.A.B.).

EXECUTIVE SUMMARY

Alberta Environment issued a Preliminary Certificate and proposed licence to Capstone Energy Ltd. (the "Certificate Holder") on July 23, 2003, for the diversion of water from the Red Deer River for industrial (oilfield injection) purposes at SW 4-36-1-W5M near Red Deer, Alberta.

The Board received Notices of Appeal from the Mountain View Regional Water Services Commission, Mr. Gerald Oxtoby, the City of Red Deer, Mr. Terry Little, and Mr. Kelly Smith, appealing the Preliminary Certificate and proposed licence.

During the hearing process, the parties raised a number of preliminary issues. The Board determined the following:

1. The City of Red Deer's request to have the Chair of the Board recused was not granted.
2. The Parties agreed to have written closing submissions only.
3. Costs would be dealt with at the close of the Hearing, using the Board's regular process.
4. The request to postpone the Hearing until such time that Mr. Vance Buchwald could attend was denied.
5. Mr. Don Bester and Ms. Judy Winter were not allowed to testify, and the documents Mr. Bester intended to submit, dated November 28, 2001, and September 24, 2003, were not accepted by the Board.
6. The Board agreed with the Landowners that a portion of the interim costs that had been awarded to them to defray costs associated with having Dr. David Schindler appear as a witness for them should be returned to the Certificate Holder.
7. Dr. David Schindler was allowed to present evidence, and the Director and Certificate Holder were provided the opportunity for additional preparation time for cross-examination, but neither party availed themselves of the offer.
8. The City of Red Deer voluntarily withdrew the affidavit of Ms. Leanne Staldeker, as the Director and Certificate Holder agreed with the issue the affidavit intended to represent; specifically that other companies in the area are using alternate technologies.
9. The weight of the Intervenor's testimony was dependent on the relevancy and probative value of the evidence.

10. The affidavit of Mr. Mike Gallie was accepted, because unforeseen and uncontrollable circumstances prevented him from submitting the documents on the day specified.
11. Mr. Tom Tang and Mr. Doug Ohrn were requested to appear and testify at the Hearing. Their experience with the South Saskatchewan River Basin Water Management Plan Phase 2 was relevant to the issues identified for the Hearing.
12. The Chief Administrative Officer for the Town of Ponoka appeared at the Hearing to provide sworn evidence and was subject to cross-examination by Parties adverse in interest and the Board.
13. The Director's closing arguments were accepted and were within the specified page limits, as Appendix A was stricken from the record and Appendix B was already a part of the Record.

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I. BACKGROUND

[1] On July 23, 2003, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Preliminary Certificate No. 00198509-00-00 (the “Certificate”) under the *Water Act*, R.S.A. 2000, c. W-3, to Capstone Energy Ltd. (the “Certificate Holder”). The Certificate included specific terms and conditions and the proposed licence. The Certificate Holder is required to complete the terms and conditions of the Certificate before the actual licence is issued. The licence allows for the diversion of water from the Red Deer River for industrial purposes (oilfield injection) at SW 4-36-1-W5M near Red Deer, Alberta.

[2] Between August 15 and September 8, 2003, the Environmental Appeals Board (the “Board”) received Notices of Appeal from the Mountain View Regional Water Services Commission (Appeal No. 03-116), Mr. Gerald Oxtoby (Appeal No. 03-118), the City of Red Deer (Appeal No. 03-119), Mr. Terry Little (Appeal No. 03-120), and Mr. Kelly Smith (Appeal No. 03-121) (collectively the “Appellants”).¹

[3] The Board wrote to the Certificate Holder and the Director notifying them of the appeals and wrote to the Appellants acknowledging receipt of the Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals. The Board received the Record on August 22, 2003, and additional documents were provided on September 2, 2003.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board (the “AEUB”) asking whether

¹ The Board also received Notices of Appeal from the Butte Action Committee (Appeal No. 03-122), Mr. Mike Gallie (Appeal No. 03-123), and Ms. Dorene Rew (Appeal No. 03-138). The Board dismissed the appeal of Mr. Mike Gallie, but the Board was of the view Mr. Gallie had personal knowledge regarding the Red Deer River that may be of assistance to the Board, and therefore, he was granted full party status. With respect to the appeal regarding the Director’s decision to reject the Statement of Concern, the Board did not have to consider the issue as the Notice of Appeal had been dismissed. The Butte Action Committee withdrew its request to be included as a formal appellant, and instead decided to act as Mr. Gallie’s agent. See: Preliminary Motions: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (11 February 2004), Appeal Nos. 03-116 and 03-118-123-ID1 (A.E.A.B.). The Board dismissed the appeal of Ms. Dorene Rew as her Notice of Appeal was filed late. See: *Rew v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (30 October 2003), Appeal No. 03-138-D (A.E.A.B.).

this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] Between August 26 and September 2, 2003, the Board received Stay requests from the Mountain View Regional Water Services, Mr. Gerald Oxtoby, the City of Red Deer, and the Butte Action Committee on behalf of itself and Mr. Mike Gallie, Mr. Kelly Smith, and Mr. Terry Little.

[6] On September 18, 2003, the Board notified the Parties that it would not grant a Stay as the requests were premature.

[7] On October 6, 2003, the Board received a request for interim costs on behalf of the Butte Action Committee, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith.

[8] On November 14, 2003, the Board held a Preliminary Meeting to hear oral arguments.²

[9] On December 1, 2003, the Board notified the Parties that the Mountain View Regional Water Services, the City of Red Deer, Mr. Gerald Oxtoby, Mr. Terry Little, and Mr. Kelly Smith were determined to be directly affected and their appeals would be heard.

[10] In its December 1, 2003 letter, the Board notified the Parties that it would not provide interim costs based on the information presented, but the Board may consider a more detailed application for interim costs.

[11] On November 27, 2003, the Board received a letter from counsel for the City of Red Deer, expressing concern regarding the perception of bias that arose from the Preliminary

² The issues heard at the Preliminary Meeting were:

- “1. whether the Appellants (the Mountain View Regional Water Services Commission, the City of Red Deer, the Butte Action Committee, Mr. Gallie, Mr. Oxtoby, Mr. Little and Mr. Smith) are directly affected by Alberta Environment’s decision to issue Preliminary Certificate No. 00198509-00-00 to Capstone Energy Ltd.;
2. what are the issues to be heard at a potential hearing;
3. Mr. Bester’s request for interim costs; and
4. whether the Notice of Appeal filed by Mr. Bester in appeal No. EAB 03-122 is complete or properly before the Board because it appears to only appeal the Director’s decision to reject Mr. Bester’s Statement of Concern.”

Meeting because of a previous business relationship with counsel for the Certificate Holder. He requested the Chair of the panel step aside.

[12] On November 28, 2003, the Board received a response from counsel for the Certificate Holder, in which he denied the allegations of the City of Red Deer's counsel and requested the Board dismiss the allegation of bias and the request to have the Chair step aside. On February 12, 2004, the Board notified the Parties that it was denying the request to have the Chair step aside.

[13] On December 3, 2003, the Board received an interim costs application, totaling \$8,854.00, on behalf of Mr. Terry Little, Mr. Gerald Oxtoby, Mr. Kelly Smith, and Mr. Mike Gallie. The Board received comments from the other Parties between December 5 and 8, 2003, regarding the interim costs application. The Board notified the Parties on December 18, 2003, that interim costs for a total amount of \$5,979.00 would be awarded to Mr. Terry Little, Mr. Gerald Oxtoby, and Mr. Kelly Smith (collectively the "Landowners"), payable by the Certificate Holder in two installments.³

[14] On January 7, 2004, the Board notified the Parties of the issues that would be heard at the Hearing.⁴ The Board scheduled the process for the Parties to provide affidavits, rebuttal affidavits, and submissions.

³ See: Interim Costs Decision: *Oxtoby et al. Director, Central Region, Regional Services, Alberta Environment* re: Capstone Energy (29 December 2004), Appeal Nos. 03-118, 120, 121 and 123-IC (A.E.A.B.).

⁴ The issues identified for the Hearing were:

- “1. Purpose
 - a. What role does purpose for which the water will be used have with respect to the allocation of water under the *Water Act*?
 - b. Is the use of water for oilfield injection a valid reason to refuse to grant an allocation of water under the *Water Act*?
 - c. Has the Director adequately balanced the economic benefits and environmental impacts of this project?
 - d. Has the Director adequately considered alternatives to the use of water for this project, including the economics of those alternatives?
 - e. Has the Director adequately considered the removal of the allocated water from the hydrological cycle?
2. Protection
 - a. Does the Preliminary Certificate and Proposed Licence provide adequate protection for: (1) other water users, (2) recreational users, (3) fish and wildlife, and (4) the aquatic environment, including instream flow needs?

[15] On February 6, 2004, the Board received a letter from the Director expressing concern regarding the affidavits filed by Mr. Mike Gallie and a witness for the City of Red Deer, Dr. David Schindler. He also objected to the letter submitted by the City of Red Deer from the Chief Administrative Officer of the Town of Ponoka. In this same letter, the Director objected to the production of two witnesses requested by the Mountain View Regional Water Services.

[16] On February 9, 2004, the Board received a letter from the Certificate Holder concurring with the Director's comments regarding the affidavits of Mr. Mike Gallie and Dr. David Schindler and the letter filed by the City of Red Deer. The City of Red Deer responded on February 10, 2004.

[17] On February 11, 2004, the Board provided the Parties with its decision in relation to the Preliminary Meeting.⁵

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- b. Are the terms and conditions of the Preliminary Certificate and Proposed Licence adequate with respect to: (1) monitoring, (2) reporting, (3) minimum flow rates, and (4) maximum pump rates.
 - c. Is the term of the Proposed Licence appropriate?
 - d. Are the renewal mechanisms relating to the Proposed Licence appropriate?
3. Volume
- a. Is the volume of water allocated appropriate, including taking into account the proposed length of the project and the availability of water in the Red Deer River?
 - b. Has the Director adequately considered the impact of this allocation on future water users, including the future needs of municipalities?
 - c. Should the volumes of water be allocated in some staged manner?
4. Immediate Neighbours
- a. Has the Director adequately considered the potential impacts of the project on the immediate neighbours to the project, being Mr. Oxtoby, Mr. Little, and Mr. Smith?
 - b. Was the testing undertaken sufficient and adequate to predict the long-term impacts of the project on the immediate neighbours?
 - c. Do the immediate neighbours to the project have adequate protection in the event that there is an impact on them?
5. Policy Considerations
- a. Has the Director properly taken into account all the applicable policies of the Government of Alberta?
 - b. Do the Preliminary Certificate and Proposed Licence adequately allow for any changes regarding the policy directions on oilfield injection?
 - c. Has the Director adequately taken into account the sustainability of the Red Deer River Basin and the South Saskatchewan River Basin?"

⁵ See: Preliminary Motions: *Mountain View Regional Water Services Commission et al. v. Director, Central*

[18] Between January 30 and February 2, 2004, the Board received intervenor requests from the Red Deer County Ratepayer Association, Ms. Dorene Rew, the Council of Canadians Red Deer Chapter, the Normandeau Cultural and Natural History Society, and Trout Unlimited (collectively, the “Intervenors”). The Board provided the Parties with an opportunity to respond to the intervenor requests.

[19] On February 9, 2004, the Board notified the Parties and the Intervenors that each of the Intervenors could participate by written submissions only. Some of the Intervenors advised the Board that the deadline for providing written submissions was unreasonable and requested further time to prepare their submissions. On February 12, 2004, the Board notified the Parties and the Intervenors that it would grant the Intervenors an extension to the filing deadline, and each Intervenor would be allotted ten minutes to speak at the Hearing.

[20] The Hearing was held on February 23 to 25, 2004, and closing arguments were received between March 5 and 25, 2004. The Board’s Report and Recommendations was provided to the Minister on April 26, 2004,⁶ and the Minister’s decision was released on May 18, 2004.

II. DISCUSSION

[21] During the appeal process, the Parties raised a number of preliminary matters. The Board responded to the matters as they arose or at the start of the Hearing. Since time was of the essence in providing responses to the Parties, the Board gave its decision with reasons to follow. These are those reasons.

A. Recusal of the Chair

[22] In a letter to the Board dated November 27, 2003, counsel for the City of Red Deer expressed concern regarding the perception of bias that arose from the Preliminary

Region, Regional Services, Alberta Environment re: Capstone Energy (11 February 2004), Appeal Nos. 03-116 and 03-118-123-ID1 (A.E.A.B.).

⁶ See: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (26 April 2004), Appeal Nos. 03-116 and 03-118-123-R (A.E.A.B.).

Meeting. He stated the Chair had openly acknowledged he had a prior association with the law firm representing the Certificate Holder, and they had engaged in a public visit during the Preliminary Meeting. He requested the Chair of the panel be recused.

[23] Counsel for the Certificate Holder responded on November 28, 2004, stating that although he was a member of the firm at the time the Chair was completing his articles, he had no recollection of associating with the Chair during that time. With respect to the allegations of a public visit between the Chair and counsel, counsel stated categorically that he had no recollection of any exchange with the Chair except on the public record. Counsel for the Certificate Holder submitted the City of Red Deer's counsel failed to establish a reasonable apprehension of bias, and a mere concern falls short of what is required.

[24] The Board considered the allegations set out by counsel for the City of Red Deer and the response provided by counsel for the Certificate Holder. The Board's recollection of the matter suggests the facts are far closer to those stated by counsel for the Certificate Holder. Neither memory nor the transcript revealed any long personal public visit. The Chair was merely illustrating a point by a cursory observation that about 20 years ago he had been a student at a firm where the Certificate Holder's counsel was employed.

[25] In considering its position, the Board considered a number of authorities. Several of these authorities are canvassed in *L.M.B. v. I.J.B.*, [2000] A.J. 1542, a case where Madame Justice Veit considered a request that she recuse herself due to an apprehension of bias. The Board notes particularly the following passages, all from that case.

“13 There are a great many situations in which a judge becomes disqualified from acting. These are summarized in the Ethical Principles for Judges as follows:

1. Judges should disqualify themselves in any case in which they believe they will be unable to judge impartially.
2. Judges should disqualify themselves in any case in which they believe that a reasonable, fair minded and informed person would have a reasoned suspicion of conflict between a judge's personal interest (or that of a judge's immediate family or close friends or associates) and a judge's duty.
3. Disqualification is not appropriate if: (a) the matter giving

rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification, or (b) no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a miscarriage of justice. ...

- 19 As broad as the concept of bias may be, it does not extend to include every slight, as the British Columbia Court of Appeal noted in *Middelkamp*:

... bias does not mean that the judge is less than unfailingly polite or less than unfailingly considerate. Bias means a partiality to one side of the cause or the other. It does not mean an opinion as to the case founded on the evidence, nor does it mean a partiality or preference or even a displayed special respect for one counsel or another, nor does it mean an obvious lack of respect for another counsel, if that counsel displays in the judge's mind a lack of professionalism.

- 20 In *S.(R.D.)*, the Supreme Court of Canada also approved the test found in *Middelkamp* for deciding if there is a reasonable apprehension of bias. Referring to that decision, and to the existing case law, Cory J. said:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case ... Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'.

- 21 This test has been described as having established a 'high' threshold for a finding of perceived bias: *Sorger*. Bastarache J., declining to recuse himself from a case stated: 'The test for apprehension of bias takes into account the presumption of impartiality. A real likelihood or probability of bias must be demonstrated.' ...

- 24 See also the comments of Mason J. in *Re J.R.L.*:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favour."

[26] The Board found the objection from counsel for the City of Red Deer fell well short of the standards set out in the case law. Therefore, the Hearing was held as scheduled and the Chair was not recused.

B. Oral Closing Arguments Instead of Written

[27] The City of Red Deer requested the Board reconsider its hearing process to allow for oral closing arguments or at least a brief oral summary at the end of the Hearing. It argued this would allow members of the public without ready access to the written material to hear a brief summary of the arguments presented over the previous three days. It stated it did not have to be full arguments and a five to ten minute summation would suffice. Mr. Gallie supported the City of Red Deer's request to have oral arguments or at least a brief summary at the end of the day.

[28] The Landowners did not oppose the motion to present oral closing arguments, and stated that, given the Parties had received the submissions earlier, they should be able to give oral closings unless the Board thinks written closings were still necessary. They stated they would like to be finished on Wednesday but were opposed to staying late.

[29] The Certificate Holder stated it would prefer to wait to see what time the Hearing finished, but at the end of the third day, it was unsure if it would want to give oral closing arguments. The Mountain View Regional Water Services suggested waiting to see if time permitted oral closing arguments on the last day.

[30] The Director was opposed to presenting oral closing arguments. He stated the Board set the process, including written closing arguments, and that process should be followed particularly given the extensive nature of the issues. In the alternative, he stated it would depend on the time the Hearing finished on the last day.

[31] At the Hearing, the Board informed the Parties that it might allow brief oral closing comments, subject to the time available on the last day. However, it still wanted to receive written closing arguments.

[32] The issues presented in these appeals were important, not only to the Parties involved, but also for the public interest. The Board had no doubt the Parties were capable of providing strong closing oral arguments. However, given the complexity and number of issues to be heard, the Board considered written closing arguments as a way to ensure all Parties had the opportunity to present their arguments clearly and distinctly, and providing the closing comments in writing allowed the Parties to perfect their arguments. The Parties agreed to a 30-page limit, and the Board considered this as reasonable. The Board would have placed time limits on the oral closing arguments, and therefore it was appropriate to establish a limit for the written arguments.

[33] At the close of the Hearing on February 25, 2004, the Board provided the Parties with a schedule for receiving closing and rebuttal arguments.

C. Application for Costs

[34] The City of Red Deer stated that it would be seeking legal costs at the close of the Hearing.

[35] The Mountain View Regional Water Services Commission made no representations on the matter of costs. The Landowners supported using the Board's normal procedures for costs requests. Mr. Gallie stated he would see at the end of the day, and he would accept whatever the Board decides. The Certificate Holder agreed the costs issue should wait until the end of the Hearing. It stated it would oppose any costs application. The Director stated the Board has an established practice, and the Parties should wait until the end of the Hearing to make their submissions.

[36] The Board, pursuant to section 96 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), can award costs to parties to an appeal.⁷ Final costs are based on whether the costs sought are "...directly and primarily related to...(a) the matters contained in the notice of appeal and (b) the preparation and presentation of the

⁷ Section 96 provides:

"The Board may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to

party's submission.”⁸ The Board's normal practice is to allow parties seeking costs to notify the Board by the end of the hearing of their intentions to do so. After the hearing is completed, if parties have requested costs, the Board will set the schedule to receive submissions after the Minister issues his order. Based on these submissions, the evidence presented during the hearing, and the criteria stated in the Regulation, the Board will make its determination regarding final costs.

[37] The Board notes the City of Red Deer has reserved its right to claim costs, and the Board will follow its usual process for dealing with costs requests. Before the close of the Hearing, the Board also received notice from the Appellants that they may wish to make an application for costs.

D. Attendance of Mr. Vance Buchwald

[38] Mr. Bester, on behalf of Mr. Gallie, requested the Hearing not be closed or a decision made until after Mr. Vance Buchwald⁹ had been heard. He argued his submission would be prejudiced if he does not have the opportunity to cross-examine Mr. Buchwald. He stated he was not notified until February 17, 2004, that Mr. Buchwald would not be attending the Hearing, even though he was assured at the Preliminary Meeting that he would be there and despite the Board requesting that he attend.

[39] The Landowners and the Mountain View Regional Water Services had no objections to Mr. Bester's request and questioned whether there was another method of having the information brought before the Board such as by teleconferencing. The City of Red Deer had no comments regarding the attendance of Mr. Buchwald.

[40] The Certificate Holder argued a party can call any witnesses it wants, and the Director had provided reasons why Mr. Buchwald was unable to attend. The Certificate Holder

be paid.”

⁸ See: Section 18 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”).

⁹ Mr. Vance Buchwald is a fisheries biologist with Alberta Sustainable Resource Development. At the Preliminary Meeting, the Board granted Mr. Bester's request to have Mr. Buchwald attend the Hearing to provide evidence on the potential effect on water levels and the impact on wildlife. See: *Mountain View Regional Water Services Commission et al. v. Director, Central Region, Regional Services, Alberta Environment re: Capstone Energy* (11 February 2004), Appeal Nos. 03-116 and 03-118-123-ID1 (A.E.A.B.).

stated that time was of the essence, as it had been a long time since the Certificate was issued and now the Appellants were asking for more time.

[41] The Director explained that Mr. Buchwald was out of the country for a pre-planned vacation. The Director stated the Board had requested a fisheries biologist be provided, and therefore, he was calling Mr. Trevor Rhodes, Mr. Buchwald's supervisor, to be available for cross-examination. The Director stated there was no need to adjourn the Hearing or delay the process.

[42] At the Hearing, the Board stated it would not leave the Hearing open until Mr. Buchwald returned. The Director provided Mr. Rhodes, a fisheries biologist, to attend and be available for cross-examination by the Appellants. As Mr. Buchwald's supervisor, the Board was confident he would be able to respond to the questions of the Appellants and the Board.

[43] Parties do have the right to bring in the witnesses they consider will be able to provide the evidence necessary to support their position and answer questions by opponents and the Board. As one of the issues included in these appeals was the effect of the project on fish and the aquatic environment, the Board considered it was appropriate to have someone familiar with the Red Deer River and its fish populations attend the Hearing.

[44] Although Mr. Bester had intended to ask Mr. Buchwald questions regarding specific statements he had made, the Board did not view that particular line of questioning as being beneficial to the issues at hand. The Board had no doubt Mr. Rhodes was qualified to respond to the issues as identified by the Board and, therefore, the Board denied Mr. Bester's request to leave the Hearing open until Mr. Buchwald could attend.

E. Additional Documents and Testimony from Ms. Judy Winter

[45] Mr. Bester requested that Ms. Judy Winter be allowed to present evidence regarding a conversation she had on November 14, 2003, with an employee of the Certificate Holder regarding alternative sources to fresh water. Mr. Bester also had two pages of additional evidence he asked to bring in related to the intention of other oil companies to use alternatives

for oilfield flooding. The first was a letter dated November 28, 2001, and the second was an article dated September 24, 2003.¹⁰

[46] The Landowners stated Mr. Bester could cross-examine the Certificate Holder's witnesses to get the information, and if he does not agree with the statements, Mr. Bester could bring Ms. Winter's information in on rebuttal. The Landowners stated it was possible the Certificate Holder would want Ms. Winter to present her evidence in order to hear her version of the events before it deals with the comments during its direct evidence.

[47] The Mountain View Regional Water Services and the City of Red Deer had no comments regarding these matters.

[48] The Director and Certificate Holder opposed Mr. Bester's request to have Ms. Winter and him testify, and they opposed the production of the additional information. They argued the letters go back in time, and the same applies to the conversation referred to by Ms. Winter. They stated Mr. Bester is no stranger to the Board's rules, and he did not provide a reason why he could not have brought the information in at an earlier date.

[49] The Director submitted the information contained in the letters was clearly in Mr. Bester's knowledge and possession prior to the Preliminary Meeting and he was aware of the Board's procedures. According to the Director, Mr. Bester had the opportunity to swear an affidavit. The same applied to Ms. Winter and the information she had regarding a conversation held in November 2003. The Director submitted that, since Mr. Bester did not follow the Board's rules, the additional information should not be allowed in.

[50] The Board noted the letters were dated in 2001 and 2003, and therefore were in existence and obtainable by Mr. Bester well before the submission deadlines for the Hearing. He was aware of the Board's expectations in the submission process, and he did not provide a convincing reason as to why the information was not brought forward earlier. He had the opportunity to introduce the material through affidavits but he chose not to.

[51] As part of procedural fairness in the Board's process, the parties must know the case against them. Withholding evidence until the last moment could be prejudicial to the

¹⁰ See: Letter from Mr. Don Bester dated February 19, 2003, and attachments.

opponents as they would not have a fair opportunity to respond, and this would offend the rules of natural justice and procedural fairness. Unless the party bringing the new evidence forward can justify the delay, the Board will be cautious in allowing information filed at the last moment to be brought into the hearing.

[52] Mr. Bester failed to provide sufficient reasons why the information was not provided until such a late date. Therefore, the Board did not allow the letters. The same arguments can be used for Ms. Winter's testimony. Ms. Winter could have sworn an affidavit outlining the conversation she had with the Certificate Holder's employee. This would have provided the Certificate Holder the opportunity to prepare rebuttal evidence or prepare for cross-examination. Thus, the Board did not allow Ms. Winter to testify.

F. Return of Part of the Interim Costs

[53] At the start of the Hearing, Mr. Bester, on behalf of the Landowners, explained to the Board they were willing to return to the Certificate Holder part of the interim costs that had been awarded to them. In particular, they offered to return \$129.00, the amount allotted by the Board to cover the expense of having Dr. David Schindler attend the Hearing.

[54] At the time submissions were made regarding interim costs, the Landowners had expressed their intent of acquiring the services of Dr. Schindler to present as an expert witness at the Hearing. The Board granted interim costs to cover some of their expenses, including a portion of the costs for Dr. Schindler. However, at the Hearing, Dr. Schindler was retained as a witness for the City of Red Deer. As such, the Landowners were not required to pay Dr. Schindler's costs.

[55] The Board appreciated the forthright offer of the Landowners to reimburse the Certificate Holder for the costs claimed for Dr. Schindler's attendance and notes that it was the right step to take. The Certificate Holder was allowed to pay the interim costs in two installments, and a portion of the costs owing were still outstanding. As the Board stated in its April 1, 2004 letter, the Certificate Holder was entitled to deduct \$129.00 from its second installment, due April 26, 2004, and the final payment for interim costs was \$2,246.00.

G. Testimony of Dr. David Schindler

[56] The Certificate Holder and the Director made an application to disallow the testimony of Dr. David Schindler, witness for the City of Red Deer. They argued the information provided in Dr. Schindler's unsigned affidavit did not provide sufficient information on which they could prepare for cross-examination, and therefore, it would be prejudicial to them for the Board to hear the evidence.

[57] In its February 19, 2004 letter to the Board, the Certificate Holder stated it would listen to the evidence presented by Dr. Schindler and then determine if the testimony should be struck. In the alternative, if it decided to cross-examine the witness, it might request a delay in order to consider what had been said. However, at the Hearing the Certificate Holder moved to disallow Dr. Schindler from testifying. It argued the City of Red Deer had two chances to meet the requirements, and in the February 11, 2004 letter addressing the concerns, it appeared the City of Red Deer was stating that Dr. Schindler was different and therefore the rules did not apply.

[58] The Mountain View Regional Water Services argued the Certificate Holder and Director were trying to curtail evidence if Dr. Schindler was not allowed to speak, and it was a pre-emptive strike to prevent evidence. Mr. Bester argued the Certificate Holder and Director would be given the opportunity to cross-examine Dr. Schindler, and if his testimony was disallowed, along with the Intervenor, the public participation process would be discredited. The Landowners stated Dr. Schindler is well regarded in presenting the big picture, and the Board was dealing with the big picture, as there were policy issues to be heard. They submitted the Certificate Holder could decide if it needed more time to consider Dr. Schindler's evidence.

[59] The City of Red Deer stated it would be nice to hear Dr. Schindler's testimony. According to the City of Red Deer, the affidavit provided, in point form, what Dr. Schindler intended to talk about. It explained it was opinion evidence, and pursuant to the Rules of Court, opinion evidence cannot be given in an affidavit. The City of Red Deer stated the evidence would not surprise the other Parties, and considering the experienced counsel of the Certificate Holder and the Director, they would be able to cross-examine Dr. Schindler.

[60] In his initial affidavit, Dr. Schindler listed broad topics he intended to speak on.¹¹ When asked to provide sufficient substance to enable the Parties opposite in interest to understand the nature of the evidence to be provided, the City of Red Deer stated Dr. Schindler “...will testify about environmental and climatological factors as they bear on fresh water supplies, increased temperatures and glacial recessions as they relate to higher evaporation rates, a consistency of deep well flooding with sound ecological management, the economical viable alternatives to the use of fresh water and the declining flows in the South Saskatchewan River and its tributaries.”¹²

[61] Although the information provided in the affidavit was limited from the Board’s perspective and expectation, the Board believed the more information it acquired during the course of the Hearing, the better its recommendations would be to the Minister. It was unclear from the affidavit how Dr. Schindler’s evidence would be relevant to this particular application. However, as the Board was assessing broad policy issues, and if the evidence provided by Dr. Schindler was linked to the specific issues as identified for the Hearing, his evidence could assist the Board in making its recommendations. After hearing the evidence, the Board gave it the weight it considered appropriate.

[62] Before the evidence was actually presented, the Board was not in a position to determine how relevant the testimony would be, but considering the policy issues that had to be dealt with in these appeals and the recommendations the Board had to make to the Minister, the Board wanted to hear as much relevant information as possible. Therefore, the Board allowed

¹¹ Dr. Schindler’s affidavit stated he would provide opinion evidence on the following:

- “A. A variety of environmental and climatological factors are ensuring that there is less freshwater generally available for all purposes in the Province of Alberta, and it is likely that water supplies will decline further in the years ahead.
- B. Increased temperatures, glacial recession, higher evaporation rates and increased use of water have stressed the South Saskatchewan River basin which basin incorporates the Red Deer River.
- C. Deep well flooding through diversion of surface water from the Red Deer River is not consistent with ecologically sound management policy of rivers and streams.
- D. There are economically viable alternatives to the use of fresh water for deep well recover purposes and such economically viable methods have been used by many companies elsewhere.
- E. Declining flows in the South Saskatchewan River and its tributaries are likely to cause increasing problems with water quality in downstream lakes and reservoirs.”

¹² City of Red Deer’s letter, dated February 10, 2004.

Dr. Schindler to testify. The Board was prepared to grant the Certificate Holder and the Director additional time to prepare for cross-examination if required, but neither required extra preparation time.

H. Affidavit of Ms. Leanne Staldeker

[63] The Certificate Holder and the Director requested the affidavit of Ms. Leanne Staldeker be struck from the record. They argued the document is pure hearsay and is based on a conversation she had with an employee of PennWest Petroleum Ltd. They submitted she can only speak to what she was told, and it does not provide those adverse in interest an opportunity to cross-examine in any meaningful way. Therefore, according to the Certificate Holder and Director, the evidence is prejudicial and offends the best evidence rule. They stated there was no reason why the employee from PennWest Petroleum could not be called as a witness.

[64] The City of Red Deer argued it was submitted as a rebuttal affidavit simply to state other resources are available, and it was up to the Certificate Holder to provide an expert to show that information was wrong. It stated it did not have the experts on staff or know the technology involved in oilfield flooding, and it attempted to provide the information it found on the issue in the affidavit. The City of Red Deer stated the information might be wrong, if the Certificate Holder can show it was wrong. According to the City of Red Deer, the affidavit was provided to show what was said, not for the truth of what was said. It argued it did have probative value since it did state that CO₂ was available and was being used in oilfield flooding. It submitted the affidavit should be allowed in and the Board could determine how much value to place on it.

[65] The Landowners submitted that the Board should allow some leeway, as the affidavit was filed in time and it is not in the spirit of the *Water Act* to disallow an affidavit. The Landowners stated the affidavit should be allowed in, as the Certificate Holder and the Director can cross-examine Ms. Staldeker, and if the information was inaccurate, they could deal with it when they produced their own panels.

[66] Evidence presented needs to be relevant and probative. The evidence included in the affidavit may be relevant as to the issue of available alternatives, however, the probative

value is limited. The Certificate Holder and Director acknowledged that alternatives do exist, including the use of CO₂, and they did not question whether PennWest Petroleum Limited was using CO₂ as an alternative. Therefore, there was limited value in bringing the affidavit before the Board.

[67] If an employee from PennWest Petroleum Limited who had experience and knowledge of the process had appeared, it would have provided the Parties and the Board an opportunity to cross-examine on the actual process being used, including the pros and cons of the process and whether it was a feasible alternative at this particular site.

[68] The Certificate Holder and the Director conceded the major points the affidavit was intended to advance, namely other companies are using CO₂ for oilfield injection and CO₂ is available in the area. Alternatives were an issue at the Hearing, and it was an important policy consideration. On that basis, the affidavit might have some limited merit.

[69] Although the Board saw little value in submitting the affidavit, the Board left it to the discretion of the City of Red Deer as to whether it still wanted to bring the witness forward.

[70] It is noted the City of Red Deer withdrew the affidavit at the Hearing given that the Certificate Holder and the Director accepted the basic points the affidavit was intended to show.

I. Weight of Intervenors' Testimony

[71] The Certificate Holder expressed concern regarding the testimony of the Intervenors. It stated there were inaccuracies in the information provided in some of the Intervenors' written statements, and as it was unable to cross-examine the Intervenors, it argued their testimony would prejudice the Certificate Holder.

[72] The Mountain View Regional Water Services argued the Certificate Holder and Director could rebut any of the evidence given by the Intervenors in their closing arguments.

[73] The Landowners submitted the Board ought to permit the Intervenors to speak and questioned the message that would be sent to these people, who took the time to come and speak at the Hearing, if they were now told they would not be allowed to present their testimony. The Landowners submitted it would move the Intervenors to second or third class status. The Landowners submitted the Intervenors should be allowed to give their presentations and the Board could assess the weight it felt the evidence merited. They also argued the Certificate Holder and Director could deal with any inconsistencies at the appropriate time. Mr. Bester argued if the Intervenors' testimony was disallowed, it would discredit the public participation process.

[74] By allowing oral evidence and cross-examination, the Board was able to hear the opinions of the general public. Although the Board does not usually quote the evidence of Intervenors to support its decision, the Board, and ultimately the Minister, needs to know what are the concerns of the public. One of the purposes of the *Water Act* is to ensure the citizens of Alberta have the opportunity to participate in decisions that affect the environment and the management and conservation of water resources. One way to accomplish this is to allow intervenors to participate in the hearing process. The amount of weight that was actually given to their evidence would depend on what was actually presented, and until their presentations were heard, the Board could not determine the weight the evidence would be given.

[75] Therefore, the Board allowed the Intervenors to provide their evidence under oath. This was intended to address the concerns of the Certificate Holder and Director, as they were afforded the opportunity to cross-examine the Intervenors on their submissions and to clarify any misconceptions. The Intervenors provided written submissions prior to the Hearing, and therefore, the Parties were forewarned of the arguments the Intervenors intended to present before the Board. If the Parties had concerns regarding the arguments, they had the opportunity to address these concerns during their direct evidence and cross-examination.

J. Affidavit Filed by Mr. Mike Gallie

[76] The Director and Certificate Holder expressed concerns regarding the affidavit filed by Mr. Mike Gallie, stating the affidavit was received on February 5, 2004, even though the

deadline was January 30, 2004. They also had concerns regarding the attachments to the affidavit, since there was no indication as to the context they would be relied on or how they tied into the identified issues. Mr. Gallie explained in a letter dated February 11, 2004, that he was unable to forward his affidavit earlier due to weather conditions, and the rural roads were not accessible until February 3, 2004. The Board was notified on January 30, 2004, that the roads in the area were not passable. The Board accepted these reasons for filing the affidavit late. Although the Board recommends that parties not wait until the last moment to provide their submissions, there is little the Board can do when dealing with human nature to wait until the last possible moment. The Board was notified of the difficulties Mr. Gallie was having in providing his submission, and weather conditions are not something that can be controlled.

[77] The Board is also aware of the difficulties Mr. Bester, as representative for Mr. Gallie, encountered in receiving the Director's affidavits. Mr. Bester explained the Director's office contacted him on February 2, 2004, because the Director had been unable to fax the documents to Mr. Bester. As a result, Mr. Bester instructed the Director to courier the documents to him. However, according to Mr. Bester, as of February 11, 2004, he still had not received the complete affidavits. This was 13 days after the due date. The Board did not consider it proper to condemn one party, Mr. Gallie, for failing to provide the document exactly on time when the Director had not been able to deliver all of the documents until 13 days after the due date. In both cases, there were unforeseen difficulties that hindered the exchange of documents.

[78] When the Board specifies submissions, affidavits, and other documents are to be received by the other parties and the Board by a certain date, this does not mean the documents cannot be forwarded before that time. In fact, the Board would prefer documents be provided earlier to ensure all parties actually receive the documents and that all parties have the requisite time to review and respond. This would benefit all parties, including the sender of the documents.

[79] The documents attached to Mr. Gallie's affidavit included excerpts from Alberta Environment documents, such as the Water Supply Outlook March 2003, Water for Life Advisory Committee Water Use Practice, Alberta Government news releases, Alberta's Water

Resources, and the Dickson Dam Inflow and Outflow Data. He also included documents from the Canadian Association of Petroleum Producers and Alberta Fish and Game. Additional documents, such as surface and groundwater allocations in the Red Deer River Basin were not cited as to source. Although Mr. Gallie did not specifically refer to each of these documents in his affidavit, all of this information and these documents are part of the public domain, and as most of these documents were produced by Alberta Environment, the Director should have been aware of the contents and, in most instances, been able to cross-examine the witness on points raised from the documents. Therefore, the Board was willing to provide some leeway and allowed the documents to remain as part of Mr. Gallie's evidence. The Board assessed the weight that would be given to the evidence after the Hearing, taking into consideration, any evidence presented at the Hearing had to be relevant to the issues as identified.

K. Appearance of Mr. Tom Tang and Mr. Doug Ohrn

[80] The Director opposed the request of the Water Services Commission to have Mr. Tom Tang and Mr. Doug Ohrn to appear as witnesses. The Director explained these individuals are currently involved with the South Saskatchewan River Basin Water Management Plan Phase 2 (the "Management Plan"), and according to the Director, their work is not related to the current requirements of the Certificate and proposed licence. The Water Services Commission stated it would be willing to make available 30 minutes of the time allocated to it for its direct evidence in order to hear from these witnesses. After receiving submissions from the Parties, the Board granted the request and requested the Director arrange to have Mr. Ohrn and Mr. Tang attend at the Hearing. Although their work may not be directly related to the specific terms and conditions of this Certificate and proposed licence, the Management Plan was relevant to determine whether the Director took into consideration the appropriate policies and legislation. The water conservation objectives being considered in Phase 2 of the Management Plan were also very relevant to the evidence being presented and would provide a better understanding of the government's directions in these areas. The Management Plan applies to the Red Deer River, the site of the proposed project, and was therefore relevant to the issues of this Hearing. The Board wanted as much information as possible to provide the most relevant and technically sound recommendation to the Minister.

L. Letter from the Chief Administrative Officer of the Town of Ponoka

[81] The Director and Certificate Holder objected to the City of Red Deer providing a letter on February 2, 2004, from the Chief Administrative Officer of the Town of Ponoka. The Director and Certificate Holder argued the Administrator would have to be present at the Hearing to adopt his letter as evidence and to be available for cross-examination by parties adverse in interest. The City of Red Deer responded on February 10, 2004, stating it would be prepared to convert the letter to an affidavit or have the Administrator attend the Hearing and adopt the letter under oath. It argued the comments included in the letter were similar to those of the other Mayors who swore affidavits and were part of the City of Red Deer's submission, and therefore, there was nothing in the letter that would prejudice the other Parties or take them by surprise.

[82] As the Board has stated previously, little weight can be placed on information provided in a document that is not sworn or affirmed. Therefore, before his evidence could be accepted, the Administrator would have to provide a sworn affidavit and appear before the Board to allow those adverse in interest to cross-examine him. As to the lateness of the letter, the Board noted it was three days past the deadline, and although the Board does not appreciate documents being received after the deadline, the Board accepted the letter, as it was properly sworn at the Hearing. The information provided in the letter was not significantly different from that provided in previous letters submitted by the City of Red Deer. The Board determined the Director and Certificate Holder would not be adversely impacted by the Board allowing the Administrator to testify.

M. Director's Closing Arguments

[83] The Landowners and Mr. Gallie objected to the Director including as part of his final submission an appendix that included portions of a hydrology textbook entitled *Applied Hydrogeology*, 3rd edition, by C.W. Fetter.¹³ The Landowners and Mr. Gallie argued this was new evidence obtained outside of the Hearing. They further argued no one at the Hearing established the editor of the textbook as an authority in applied hydrology or that the text was in

¹³ See: Mr. Terry Little, Mr. Gerald Oxtoby, and Mr. Kelly Smith letter, dated March 17, 2004, and Mr. Gallie's e-mail, dated March 19, 2004.

the minds of the legislators when they enacted the *Water Act*. They stated the Director did not call anyone to speak on the distinction between groundwater and surface water and the zone of saturation and the water table, and no one was given the opportunity to cross-examine on the information provided in the appendix. They requested the Board strike the document from the record of the proceedings.

[84] In addition, Mr. Gallie requested the Board strike the second appendix of the Director's closing submission on the basis it contained new evidence. He also expressed concerns regarding the length of the Director's closing arguments, arguing it exceeded the 30 page limit agreed to by the Parties and as set out in the Board's February 25, 2004 letter.

[85] With respect to the first appendix, excerpts from a hydrology textbook, the Board found the information provided in these excerpts were common hydrology explanations and definitions. Therefore, the Board determined it was not necessary to consider the information in Appendix A. The Board compared the information provided by the Director with the textbook entitled *Groundwater*,¹⁴ by R. Allan Freeze and John A. Cherry. The Board noted the textbook *Groundwater* was referred to by the Certificate Holder during cross-examination.¹⁵ Similar definitions and explanations were provided in this textbook. *Groundwater* is a textbook that is readily available in the public domain, and as such, the Board can refer to it. Therefore, the Board did not need to consider the excerpts included as Appendix A in the Director's closing arguments. Thus, the Board granted the request of the Landowners and Mr. Gallie, and Appendix A was excluded from the Record.

[86] With respect to Appendix B, entitled South Saskatchewan River Basin Water Allocation, dated May 2003, the Board noted the document was already part of the Board's record. It was provided to the Board in its entirety by the City of Red Deer as an appendix to its submission for the Preliminary Meeting as Tab 8. Therefore, the information provided in Appendix B was not new information and the application to exclude it was denied.

[87] Mr. Gallie expressed concerns regarding the length of the Director's closing arguments. In its instructions to the Parties regarding closing arguments, the Board stated there

¹⁴ R. Allan Freeze and John A. Cherry, *Groundwater* (Englewood Cliffs: Prentice Hall, 1979).

¹⁵ See: Transcript, February 23-25, 2004, at page 700, line 9.

was a 30-page limit on the submissions, a condition agreed to by the Parties. The Director's submission included 24 pages of arguments and two appendices, Appendix A consisting of 8 pages and Appendix B consisting of 43 pages, for a total of 75 pages.

[88] The Board had excluded Appendix A and therefore, it was no longer included as part of the submission. Appendix B was already part of the Board's record, and if the Director had so chosen, he could have simply referred to the document by name. Instead it was included as an appendix for ease of reference for all Parties and the Board. The Board did not consider this as part of the total pages of the Director's submission. Therefore, the Board found the 24 pages of actual argument was within the 30-page limit agreed to by the Parties. As a result, the application to exclude the Director's submission based on the argument of exceeding the page limit was denied.

III. CONCLUSIONS

[89] The Board did not grant the City of Red Deer's request to have the Chair of the Board recused.

[90] The Parties agreed to have written closing submissions only, and the Board provided a schedule to receive closing and final arguments.

[91] The Board determined costs would be dealt with at the close of the Hearing, using its regular process.

[92] The Board did not grant Mr. Gallie's request to postpone the Hearing until such time that Mr. Vance Buchwald could attend. The Director provided Mr. Trevor Rhodes, who was in a position to respond to the Parties' and Board's questions.

[93] The Board did not allow Mr. Don Bester and Ms. Judy Winter to testify, and the documents Mr. Bester intended to submit, dated November 28, 2001, and September 24, 2003, were not accepted by the Board.

[94] The Board agreed with the Landowners that a portion of the interim costs that had been awarded to them should be returned to the Certificate Holder. The amount returned,

\$129.00, was intended to defray costs associated with having Dr. David Schindler appear as a witness for them.

[95] The Board allowed Dr. David Schindler to present evidence for the City of Red Deer, and the Director and Certificate Holder were provided the opportunity for additional preparation time for cross-examination, but neither Party availed themselves of the offer.

[96] The City of Red Deer voluntarily withdrew the affidavit of Ms. Leanne Staldeker, as the Director and Certificate Holder conceded the issues it had intended to present.

[97] The weight of the Intervenors' testimony was dependent on the relevancy and probative value of the evidence.

[98] The affidavit of Mr. Mike Gallie was accepted, because unforeseen and uncontrollable circumstances prevented him from submitting the documents on the day specified.

[99] Mr. Tom Tang and Mr. Doug Ohrn were requested to appear and testify at the Hearing. Their experience with the South Saskatchewan River Basin Water Management Plan Phase 2 was relevant to the issues identified for the Hearing.

[100] The Chief Administrative Officer for the Town of Ponoka appeared at the Hearing to provide sworn evidence and was subject to cross-examination by Parties adverse in interest and the Board.

[101] The Director's closing arguments were accepted and were within the specified page limits as Appendix A was stricken from the record and Appendix B was already part of the Board's record.

[102] The Hearing was held as scheduled on February 23 to 25, 2004.

Dated on December 16, 2005, at Edmonton, Alberta.

“original signed by”

Al Schulz
Board Member for the Panel