

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 2, 2008

IN THE MATTER OF sections 91, 92, 95, and 101 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 Westridge Utilities Inc. with respect to *Water Act* Licence No. 00240846-00-00 issued to the Municipal District of Rocky View No. 44 and *Water Act* Licence No. 0024847-00-00 issued to Her Majesty the Queen in Right of Alberta, by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Reconsideration Decision: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of*

Rocky View No. 44 and Her Majesty the Queen in Right of Alberta (2 October 2008), Appeal Nos. 07-131 & 07-132-RD (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair,
Mr. Jim Barlishen, Board Member, and
Mr. Eric O. McAvity, Q.C., Board Member.

SUBMISSIONS BY:

Appellant: Westridge Utilities Inc., represented by Mr. John Gruber.

Licence Holders: Municipal District of Rocky View No. 44, represented by Ms. Joanne Klauer, Brownlee LLP.

Director: Mr. Kevin Wilkinson, Director, Southern Region, Environmental Management, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued a licence to the Municipal District of Rocky View No. 44, authorizing the operation of a works and the diversion of up to 2,220,268 cubic metres of water annually for commercial, municipal, and recreational purposes near Balzac, Alberta. Alberta Environment also issued a licence to Her Majesty the Queen in Right of Alberta allocating a volume of 246,696 cubic metres of water annually in the Bow River for the implementation of a water conservation objective. The licences are the result of a transfer of water from the Western Irrigation District to the Municipal District of Rocky View No. 44 with a 10 percent holdback transferred to Her Majesty the Queen in Right of Alberta.

The Environmental Appeals Board received a Notice of Appeal from Westridge Utilities Inc. The Board held a Preliminary Motions Hearing to hear submissions on the issue of whether Westridge Utilities Inc. was directly affected and should be granted standing. The Board found Westridge Utilities Inc. was not directly affected, because its concerns were not based on any environmental impact that would affect it and its concerns were too speculative in nature to establish the necessary connection to the licences under appeal. As a result, the Board dismissed the appeals.

Westridge Utilities Inc. submitted a reconsideration request based on a Court of Queen's Bench decision, *979899 Alberta Ltd. v. Alberta*, 2008 ABQB 57 (979899), released after the Board notified the participants that the appeal was dismissed. The Court's decision in 979899 was a judicial review of a decision made by Alberta Environment with respect to who should be properly named on a water licence. It did not deal with the issue of standing before the Board.

The Board denied the reconsideration request, because there was no indication how the Court's decision in 979899 would have altered the Board's previous decision, and the need to look at economic matters raised in the Court of Queen's Bench decision was dealt with in the Board's original decision and is not a new consideration for the Board.

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I. BACKGROUND

[1] On September 26, 2007, the Director, Southern Region, Environmental Management, Alberta Environment (the “Director”), issued Licence No. 00240846-00-00 (the “Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Municipal District of Rocky View No. 44 (the “Licence Holder” or the “MD”) authorizing the operation of a works and the diversion of 2,220,268 cubic metres of water annually from the Bow River for commercial, municipal (subdivision water supply), and recreational (entertainment complex) purposes in the Balzac area in the Municipal District of Rocky View No. 44, Alberta. The Director also issued Licence No. 00240847-00-00 under the *Water Act* to Her Majesty the Queen in Right of Alberta for a volume of 246,696 cubic metres of water annually in the Bow River downstream of SE 13-24-01-W5M for the implementation of a water conservation objective.¹ The Licences are the result of a transfer of water from the Western Irrigation District (“WID”) to the Municipal District of Rocky View No. 44 with a 10 percent holdback transferred to Her Majesty the Queen in Right of Alberta.

[2] On October 26, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Westridge Utilities Inc. (the “Appellant” or “Westridge”) appealing the Licences.

[3] On October 31, 2007, the Board wrote to the Appellant, the Licence Holder, and the Director (collectively the “Participants”) acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the record (the “Record”) relating to the Licences, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received on November 20, 2007, and copies were provided to the Participants.

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

¹ The arguments presented to the Board at the Preliminary Motions Hearing were with respect to Licence No. 00240846-00-00 issued to the MD. Therefore, in this decision, this licence will be referred to as the “Licence” and

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

[5] On November 5, 2007, the Appellant indicated its intent to apply to the Court of Queen's Bench for an order of certiorari with respect to the Director's decision to approve the transfer of water allocation from the WID to the Licence Holder and the issuance of the Licences. The Board responded on November 6, 2007, that it "...takes no position on the judicial review and will not participate." The Board has not received any additional information regarding this application.

[6] On November 8, 2007, the Director asked the Board to address the issue of standing, and if a hearing is held, to define the issues under appeal.

[7] On November 14, 2007, the Board notified the Participants that a Preliminary Motions Hearing would be held on December 5, 2007, to determine the standing of the Appellant and determine the issues to be heard at the hearing, should one be held. The Board advised that written submissions for the Preliminary Motions Hearing were due by November 30, 2007.

[8] On November 19, 2007, the Appellant wrote to the Board, arguing that the Director's motion regarding standing did not meet the requirements of Rule 10 of the Board's Rules of Practice.² It argued the motion did not set out the grounds upon which the Director believed the Appellant did not have standing, state the issues the Director believed were not properly before the Board, and provide the disposition sought by the Director.

[9] On November 20, 2007, the Board confirmed to the Participants that it would like to proceed to a Preliminary Motions Hearing as scheduled on December 5, 2007, to determine if the Appellant was directly affected by the Licences and to determine the issues for a hearing, should one be held. The Board indicated the details of the Director's motion would be provided prior to the Preliminary Motions Hearing in his written submission.

[10] The Director provided his written submission on November 23, 2007. On the same date, the Licence Holder advised the Board that it opposed any request by the Appellant to

any reference to both licences issued will be referred to as the "Licences."

² Rule 10 of the Board's Rules of Practice provides: "All motions shall state the specific relief requested and

delay the Preliminary Motions Hearing, as the uncertainty created by the appeal was impacting development projects in the MD.

[11] On November 22, 2007, the Appellant expressed concern that the Preliminary Motions Hearing was proceeding as scheduled, because it believed the Director had not complied with Rule 10 of the Board's Rules of Practice. The Appellant further stated it would have difficulty complying with the submission deadlines because it was preparing an application before the AEUB. The Board provided its response on November 23, 2007, indicating that the motion filed by the Director complied with Rule 10 of the Board's Rules of Practice and that the motion was properly before the Board. The Board indicated the Director had filed his complete written submission in preparation for the Preliminary Motions Hearing, and as a result, any concerns the Appellant may have had about the substance of the Director's motion had been addressed. The Board confirmed the Preliminary Motions Hearing would be held on December 5, 2007, but it would limit the matters to be addressed to the question of whether the Appellant was directly affected.

[12] On November 26, 2007, the WID provided information relating to the water transfer process that had been provided to its water users when the water transfer was being considered.

[13] On November 27, 2007, the Appellant wrote to the Board requesting a reconsideration of the Board's decision not to grant a new date for the Preliminary Motions Hearing. In response, the Board notified the Participants on November 28, 2007, that it had granted the Appellant's request to postpone the Preliminary Motions Hearing. The Board advised the Participants the Preliminary Motions Hearing would now be held on December 17, 2007, and the only matter that would be addressed would be whether the Appellant is directly affected by the Licence under appeal. The Board also extended its deadline for the written submissions to December 12, 2007.

[14] The Licence Holder provided its submission on November 30, 2007, and the Appellant's submission was provided on December 12, 2007.

[15] The Preliminary Motions Hearing was held on December 17, 2007. On December 20, 2007, the Board notified the Participants that the appeals were dismissed and its reasons were provided to the Participants on May 12, 2008.³

[16] On June 6, 2008, the Board received a request from the Appellant to reconsider the Board's decision dismissing the appeals. In response, the Board established a submission process and received submissions from the Appellant, Licence Holder, and the Director.

II. SUBMISSIONS

A. Appellant

[17] The Appellant requested a reconsideration of the Board's decision on the basis of a decision⁴ (the "979899" decision) released by the Alberta Court of Queen's Bench prior to the issuance of the Board's reasons but after it had released its decision. The Appellant noted the 979899 decision was released on January 23, 2008, and could not have been considered by the Board when it made its decision in December 2007 on the preliminary motion regarding the Appellant's standing.

[18] The Appellant argued that it was clear from the 979899 decision that the issue of speculation in water rights is contemplated by the *Water Act*, and therefore the Board cannot decline the responsibility for dealing with it in the appeals. The Appellant referred to the following paragraph of the 979899 decision:

"The objective of the [Water] Act is the regulation and management of the right to use water in Alberta. The idea is to stop speculation and allow for management. The Act gives little guidance as to whose names should be on the licence. In

³ See: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.).

⁴ See: *979899 Alberta Ltd. v. Alberta Ministry of Environment et al.*, 2008 ABQB 57.

terms of amendments, s. 54 is clear that this is only to be done without the consent of the licensee in a limited few enumerated instances.”⁵

[19] The Appellant argued that, based on the 979899 decision, the Board is not restricted to environmental matters. The Appellant submitted that the 979899 decision is significant authority commenting on the relatively new issue of water rights speculation, and the Participants should have the opportunity to provide arguments on its significance.

[20] The Appellant acknowledged the facts in the appeals are not identical to those in 979899, but the Appellant argued the overriding theme in both cases is the same in that they are concerned with the financial implications of the scarcity of water in southern Alberta and the moratorium on water diversions from the South Saskatchewan River Basin.

[21] The Appellant argued section 2 of the *Water Act* contemplates the Director and the Board being concerned with the economic and financial aspects of transfers and not only the environmental aspects.⁶ The Appellant stated the term “comprehensive” in section 2(f) of the *Water Act* suggests that the Board should take “...an expansive interpretation of its jurisdiction as it pertains to water management issues, and not restrict its considerations to those that are strictly environmental.”⁷

⁵ Appellant’s Submission, dated June 6, 2008, at page 2, quoting 979899 *Alberta Ltd. v. Alberta Ministry of Environment et al.*, 2008 ABQB 57 at paragraph 34.

⁶ Section 2 of the *Water Act* states:

“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 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.”

⁷ Appellant’s submission, dated June 23, 2008, at page 2.

[22] The Appellant stated the Board's decision was premised on the conclusion that matters of speculation in water rights are financial and not environmental. Based on this, the Appellant interpreted the Board's decision to say that the *Water Act* does not contemplate the Board assuming jurisdiction with respect to these matters and the Appellant cannot be affected by the transfers. Finally, the Appellant submitted that, based on the 979899 decision combined with an expansive interpretation of section 2 of the *Water Act*, the Board's decision was an error in law, or, at the very least, a full reconsideration of the implications of the 979899 decision within the context of section 2 of the *Water Act* is warranted.

[23] In its rebuttal submission, the Appellant argued the Director and Licence Holder did not resolve the key jurisdictional issue that arises in the Board's decision when the Board stated, "The creation of that market and the ensuing prices are not within the Board's jurisdiction."⁸

[24] The Appellant noted an administrative tribunal must be correct when determining the scope of its jurisdiction.

[25] The Appellant submitted that it was clear the Board's conclusion that the Appellant should not have standing is based on the view that the creation of and speculation in the southern Alberta water market is not a matter that the Board has the jurisdiction to deal with. The Appellant stated this may have been a reasonable conclusion prior to the issuance of the 979899 decision, because there had not been any decision from the Court of Queen's Bench on the recent policy change and its administration of the *Water Act*. The Appellant argued the issuance of the 979899 decision provides guidance to the Board on this issue. The Appellant argued the views of the court in the 979899 decision are directly contrary to the jurisdictional conclusion reached by the Board.

[26] The Appellant stated an administrative body cannot have properly and thoroughly considered a matter that it expressly stated is beyond its jurisdiction, and therefore

⁸ Appellant's submission, dated July 21, 2008, at page 1, quoting Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.) at paragraph 78.

the Licence Holder's and Director's submissions that stated the Appellant's issues were thoroughly considered by the Board must be rejected.

[27] The Appellant argued the possible financial concerns that may arise are quite broad, and the Board specifically rejected, on jurisdictional grounds, the specific financial concern raised by the Appellant. The Appellant submitted this was a wrongful decline of jurisdiction.

[28] The Appellant stated the 979899 decision raises three points:

- “1. Water is a scarce resource in southern Alberta;
2. diversion licences for surface water have significant economic value;
3. the regulatory body charge[d] with administering the Water Act must be concerned with the management of water issues, including speculation in water rights caused by policies created pursuant to the Water Act.”⁹

[29] The Appellant argued the Board's declining of jurisdiction to deal with these issues is properly subject to reconsideration. The Appellant stated the subject of transfers is relatively new and there has not been a full hearing in which its scope and consequences have been considered.

[30] The Appellant submitted that any public interest served by the finality of the Board's decisions must be subservient to the public interest that is served by the Board correctly understanding and exercising its jurisdiction under the *Water Act*.

B. Licence Holder

[31] The Licence Holder noted the Appellant has the onus to demonstrate exceptional and compelling reasons justifying reconsideration, such as a substantial error of law that would change the original decision of the Board. The Licence Holder argued the 979899 decision did not change or alter the applicable law and it did not reveal an error in law in the Board's decision.

[32] The Licence Holder stated that financial concerns are relevant factors in the Board's reasons and decisions. The Licence Holder argued the 979899 decision did not provide

⁹ Appellant's submission, dated July 21, 2008, at page 3.

any new authority which the Board failed to consider given that the Board acknowledged in its decision that it has granted standing on economic grounds in previous decisions.¹⁰ The Licence Holder stated the Board determined the Appellant did not demonstrate it was directly affected by the transfers on any basis, *including* economic grounds.

[33] The Licence Holder argued the Appellant failed to demonstrate a reasonable possibility that the Board's decision would be altered by accepting the authority provided by 979899. The Licence Holder stated the Board considered the financial arguments put forward by the Appellant and concluded that the water licence transfer would not result in even an indirect impact on the Appellant's economic livelihood. The Licence Holder argued the Appellant did not provide any additional evidence to demonstrate a reasonable possibility that the Board's conclusion would change as a result of the 979899 decision. The Licence Holder argued the Appellant failed to demonstrate the general public interest in the finality of Board decisions has been displaced by another general public interest.

[34] The Licence Holder submitted that no exceptional reason for the Board to reconsider its decision to deny standing was provided, and the application for reconsideration should be denied.

[35] The Licence Holder noted the Appellant argued that the 979899 decision provides authority requiring the Board to take financial impacts resulting from market speculation into consideration when deciding the issue of standing. The Licence Holder stated the Board has considered financial concerns as a factor to be considered in determining standing for appeals. The Licence Holder argued the authority that financial concerns may be considered by the Board when determining the issue of standing is not new as a result of the 979899 decision. The Licence Holder further argued that financial concerns and the relative impact of market speculation on the Appellant was argued before the Board and factored into the Board's reasons to deny the Appellant standing. The Licence Holder noted the Board determined the Appellant would not be economically affected by the transfer, and the transfer did not create the water market that the Appellant objects to since the water market existed prior to the transfer.

¹⁰ See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.).

[36] The Licence Holder submitted that the 979899 decision did not change the law or create a situation whereby an error in law is revealed. The Licence Holder argued the Appellant's argument that the authority for the Board to take into consideration economic concerns and impacts of speculation were not available at the time of the Preliminary Motions Hearing is incorrect, and in fact, the Board factored these issues into its reasons for denying standing. The Licence Holder submitted the 979899 decision does not reveal an error in the Board's reasoning or decision.

[37] The Licence Holder argued that effects on future interests are not considered sufficient effects for the purposes of standing before the Board. The Licence Holder noted the Appellant did not challenge the Board's conclusion that any effect on the Appellant's interests would be derived from future expansion. The Licence Holder stated the Appellant did not suggest it had any new evidence that was not reasonably available at the Preliminary Motions Hearing that would demonstrate how impacts of speculation would reasonably impact the Appellant's present interests. According to the Licence Holder, even if the 979899 decision articulated a legal authority already existing, the Appellant did not demonstrate the requisite degree of effect necessary to obtain standing. The Licence Holder argued the Board's decision to deny standing would not change as a result of the 979899 decision, and the Appellant's reconsideration request should also be denied.

[38] The Licence Holder stated the central issue in the 979899 decision was procedural fairness and whether or not the Director made a reviewable error in determining that a water licence was appurtenant to land, not whether the appellant had standing to bring an appeal before the Board. The Licence Holder explained the 979899 decision was between two specific parties and involved the question of who was properly registered as the licence holder. The Licence Holder submitted that the factors considered in the 979899 decision were significantly different than the factors to be considered in a preliminary motions hearing to determine the question of standing.

[39] The Licence Holder submitted that the quotes from the 979899 decision relied on by the Appellant must be taken in the full context of that decision. The Licence Holder explained that while the court in the 979899 decision stated the objective of the *Water Act* is to

regulate the right to use water in Alberta and to stop speculation and allow for management, the statement was made in the context of considering which parties' name should be on the water licence. The Licence Holder stated the 979899 decision made statements that recognized the purpose of the *Water Act* is to manage polycentric issues including managing the private rights of specific water users with those of the general public. The Licence Holder argued the 979899 decision did not address the proper factors to be considered by the Board when determining standing and it did not displace the authorities cited by the Board in its decision.

[40] The Licence Holder submitted that the Appellant failed to demonstrate that a substantial error of law occurred and that, but for that alleged error, the Board would not have denied the Appellant standing. The Licence Holder submitted that the Board considered the Appellant's arguments regarding economic impacts the transfer would have on the Appellant's interests, including that the Appellant would have to compete in the water market. The Licence Holder submitted that the 979899 decision would not impact the Board's decision on the question of the Appellant's standing.

C. Director

[41] The Director submitted that the request for reconsideration be dismissed, because the Appellant did not present exceptional or compelling reasons for the Board to reconsider its December 20, 2007 decision. The Director argued there is nothing in the judgment relied on by the Appellant that suggested the Board erred in law. The Director argued 979899 does not provide any new evidence or alter the test for standing before the Board, and there is no reasonable possibility that the Board's decision could be altered by the 979899 decision.

[42] The Director referred to the Appellant's argument that the Board refused the Appellant standing on the grounds that financial concerns such as speculation are not a concern to the Board under the *Water Act*, and the decision in 979899 would change the outcome of the Board's decision.

[43] The Director submitted the Appellant's reasoning is flawed because it misstated the basis upon which the Board made its decision. The Director stated the Board gave *three* reasons for refusing standing to the Appellant: (1) the Appellant failed to show an effect on the

environment; (2) the Appellant failed to substantiate its concerns and thereby discharge the onus of proof; and (3) that objections to the creation of the water market do not properly belong in an appeal of a licence transfer.

[44] The Director explained the appeal was dismissed on several grounds and the Board's decision did not turn on the ruling of jurisdiction alone. The Director noted the Board expressly considered the Appellant's financial concern and found the Appellant failed to prove any environmental or financial impacts arising from the Licence. The Director argued that even if the Board erred in its ruling on jurisdiction, there is no reasonable possibility that the decision would be altered.

[45] The Director stated the Board's jurisdiction is scoped by legislation. The Director explained he was required to approve the licence transfer to ensure water is managed as a resource in accordance with approved water management plans. The Director stated he "...is not charged by the *Water Act* with regulating the consequences of any associated commercial transactions,"¹¹ and therefore, neither the Board nor the Minister can regulate the general economic consequences of any transfer. The Director argued a disagreement with the water transfer system is not an independent ground for appeal, and a water transfer is not a proper venue to review potential financial consequences of the transfer system. The Director argued none of these points were addressed in the 979899 ruling.

[46] The Director submitted the Appellant's request for reconsideration must fail because it asks the Board to reject the test for standing established in *Court*¹² on the basis of a judgment that does not address standing. The Director stated 979899 does not discuss *Court* and, therefore, 979899 does not and cannot alter the test for standing.

[47] The Director added that 979899 does not change the reality that neither the natural resource nor the Appellant's use of the natural resource has been adversely impacted by the Director's decision. The Director stated the Appellant must be directly affected in order to appeal the transfer.

¹¹ Director's submission, dated July 7, 2008, at paragraph 13.

¹² See: *Court v. Alberta (Environmental Appeal Board)* (2004), 4 C.E.L.R. (3d) 185, 10 Admin. L.R. (4th) 219 (Alta. Q.B.) ("*Court*").

[48] The Director stated the Board considered the alleged economic impacts of the approved transfer and found the Appellant failed to prove a reasonable probability of harm.

[49] The Director requested the Board dismiss the Appellant's reconsideration request because 979899 does not: provide new evidence that has a real possibility of altering the decision; reveal an error of law; alter the test for standing before the Board; or concern an issue that is within the Board's jurisdiction.

III. DISCUSSION

A. Jurisprudence

[50] Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board can reconsider a decision made by it. Section 101 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[51] The Board has stated in previous decisions that its power to reconsider "...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."¹³ The Board uses its discretion to reconsider a decision with caution, as the power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for participants to reargue the same issues a second time.

[52] The onus is on the participant making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.¹⁴ Information that was not

¹³ *Whitefish Lake First Nation Request for Reconsideration re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (28 September 2000), Appeal No. 99-009-RD.

¹⁴ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.¹⁵

[53] The factors the Board will consider in deciding a reconsideration request include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.¹⁶

[54] Essentially, what the party requesting reconsideration must demonstrate is that there was an error in the Board's interpretation of the law, the process was flawed, or there was an error in fact sufficient to undermine the basis of the Board's decision. The evidence does not have to establish that it is more likely than not to result in a change of the original decision, but there must be a reasonable possibility the decision could be altered.¹⁷

B. Analysis

[55] The Appellant in this case wants the Board to reconsider its determination of the Appellant's directly affected status on the basis of an error in law. The Appellant is basing the reconsideration request on a Court of Queen's Bench decision, 979899, that was released after the Board made its ruling but prior to the reasons being issued. The 979899 decision was a judicial review of a decision by Alberta Environment regarding whose name should be properly included on the water licence. The issue arose as a result of a series of financial transactions involving the land to which the subject water licence was appurtenant. It was *not* dealing with standing before this Board or with a matter that this Board has jurisdiction over.

¹⁵ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

¹⁶ Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment* re: *TransAlta Utilities Corporation* (17 April 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

¹⁷ *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration*, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), Appeal No. 96-059 (A.E.A.B.).

[56] In previous Board decisions, the Board has recognized that a new decision from the courts could result in the Board reopening an appeal, if the decision is relevant and could affect the Board's ultimate decision. The Board explained in *Baycroft*:

“A substantial error in law may be a sufficient ground for reconsideration. An example of when a substantial error in law has been made is when a new decision from the courts reveals an error. Generally, a party's failure to cite an existing authority will not be a ground to reopen a matter, but new decisions not reasonably available for the original proceedings can provide an exception. It is important for the parties to realize that to justify a reconsideration, the decision of the courts must demonstrate an error in law that, once corrected, would change the original result. The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility that the decision could be altered.”¹⁸

[57] The Appellant argued that, based on the 979899 decision and section 2 of the *Water Act*, the Board should take an expansive interpretation of its jurisdiction as it pertains to water management issues and the Board should not restrict itself to strictly environmental issues. With respect, the Board cannot agree with this interpretation of the *Water Act*. The jurisdiction of the Board is clearly presented in the *Water Act* and in EPEA. The Board cannot expand its jurisdiction on its own accord. If the jurisdiction is to change, it must be done by the legislators. As the legislation currently stands, the Board must look at the environmental impacts of the Director's decision when determining standing.

[58] As stated in its decision, the Board could not find an environmental impact as a result of the transfers being allowed. The *Court* decision clearly states that, to obtain standing, there needs to be *an effect on the environment*. The Board explained in paragraphs 79 and 80 of its reasons that there is no change in location of water withdrawal or the total amount of the withdrawal, except for a 10 percent reduction that goes to the Queen in Right of Alberta to maintain water levels in the Bow River.¹⁹

¹⁸ Reconsideration Decision: *Baycroft et al. v. Director, Central Region, Regional Services, Alberta Environment* re: *Hal Willis* (20 January 2005), Appeal Nos. 03-017, 024-026, 031, 033, and 03-037-RD (A.E.A.B.) at paragraph 54 (“*Baycroft*”). See also: Request for Reconsideration: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* re: *Laidlaw Environmental Services (Ryley) Ltd.* (April 7, 1998), Appeal No. 96-059 (A.E.A.B.).

¹⁹ See: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.) at paragraphs 79 and 80:

[59] The Board can only confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make.²⁰ The Board cannot go beyond what the Director can do. Overturning the Director's decision would not change what the Appellant objected to, which was the creation of a water market. The Director's decision did not create the water market or alter anything that directly affected the Appellant.

[60] The Appellant argued that, under section 2 of the *Water Act*, the Board needs to be concerned with the economic and financial aspects of transfers. Section 2(b) requires the Board to consider the "...need for Alberta's economic growth and prosperity." This is a general statement that requires the Board to balance the conservation and management of water resources with economic growth in Alberta. It does not require the Board to assess the financial aspects of a water transfer.

"The Licence allows for the transfer of water from the WID to the MD. The diversion point from the Bow River is not changing. In fact, the terms and conditions of the WID licence have been incorporated into the current Licence under appeal. The Appellant was unable to demonstrate that the transfer will change anything about the water diversion except who uses the water at the end. The Board appreciates the Appellant has a lower priority licence than the WID and now the Licence Holder. However, no matter which party calls the priority, whether it is the WID or the MD, the priority does not change, nor any effect of that priority on the Appellant.

The transfer does not change the location of the diversion point. The Appellant holds a licence to divert water from the Elbow River, a tributary to the Bow River. The Licence allows for water to be withdrawn from the Bow River downstream of the confluence of the Elbow and Bow Rivers. If the transfer had allowed for the diversion point to be relocated to the Elbow River, the Appellant may have had stronger grounds to show how it was directly affected because, in that case, a substantially smaller pool of licence holders could have been affected by a priority call limited to the Elbow River. However, that is not the situation in this transfer. The diversion point is still on the Bow River, and the diversion rate is the same whether the withdrawal is completely for the use of the WID or if it is shared between the WID and the MD."

²⁰

Section 98(2) of EPEA states:

"In its decision, the Board may

- (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
- (b) make any further order the Board considers necessary for the purposes of carrying out the decision."

[61] The Board has considered financial impacts when determining standing in previous decisions.²¹ The Board will assess *the financial impacts resulting from an impact on the environment* due to the Director's decision. It is not enough to say the Director's decision will have a financial impact without first demonstrating the financial impact is a result of a change in the environment.²²

[62] The Board heard arguments on economic issues at the Preliminary Motions Hearing and determined the economic concerns raised by the Appellant are the result of the creation of the water market, not the transfers being appealed. The 979899 decision does not change these facts.

[63] In the submissions, the Appellant raised the issue of financial concerns as a result of having to participate in the water market should the Appellant want to expand its operations. The Board heard these arguments and recognized the implications of having to purchase water at the Preliminary Motions Hearing and considered these issues in its decision.²³ The economic aspect of environmental decisions is not a new matter raised in the 979899 decision. Although the concept of water markets in Alberta is relatively new, the market was anticipated when the *Water Act* was enacted in 1998.²⁴ The creation of a water market does not necessarily result in speculation in water.

²¹ See: Preliminary Motions: *Gadd v. Director, Central Region, Regional Services, Alberta Environment re: Cardinal River Coals Ltd.* (8 October 2004), Appeal Nos. 03-150, 03-151 and 03-152-ID1 (A.E.A.B.).

²² See: *Byram Industrial Services Ltd. v. Director, Central Region, Regional Services, Alberta Environment re: Wasteworks Inc.* (28 April 2005), Appeal No. 04-057-D (A.E.A.B.).

²³ See: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.).

²⁴ See: Section 82 of the *Water Act* that states, in part:

- “(1) Subject to this section and sections 34, 81 and 83, on application, the Director may
- (a) approve the transfer of an allocation of water under a licence and, subject to subsections (6) and (7)(b), issue a new licence for the transferred allocation of water subject to any terms and conditions that the Director considers appropriate, including specifying in the licence the land or undertaking to which the licence is appurtenant, or
 - (b) refuse to approve the transfer of an allocation.
- (2) A transfer of an allocation of water under a licence may be made
- (a) with respect to all or part of an allocation of water from a licence, and
 - (b) either permanently or for a specified period of time.

[64] As stated in the Board's decision, the transfers that were the subject of the appeals did not create the market. The Board recognized the economic factors in the Appellant's submissions and the effect of the water market on the Appellant's financial matters. In the decision, the Board found the economic concerns were speculative because the Appellant would not be faced with financial impacts unless it chose to expand its operations. If there was no expansion, then additional water would not be required and the Appellant would not have to buy water through the market.²⁵

[65] The Board heard the economic arguments put forth by the Appellant at the Preliminary Motions Hearing. The issue of economic effects is not a new issue and, in these circumstances, cannot be used as a basis for reconsideration of the decision. In this particular circumstance, the Board could not find an environmental impact. However, this does not mean that an appellant could not be affected by a water transfer, only that in the circumstances of *this* case, the Appellant would not be affected because there is no change in the Appellant's use of the resource or in its priority of use.

[66] In the 979899 decision, the court made reference to the "...objective of the Act is the regulation and management of the right to use water in Alberta. The idea is to stop speculation and allow for management." The Board agrees with these statements. The concept of a water market and the possibility of trading water rights in the market are clearly stated in the *Water Act*. As for persons purchasing additional water rights for the sole purpose of trading in the market, the Director, under section 55(1) of the *Water Act*, has the ability to suspend or

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- (3) The Director may approve a transfer of an allocation of water under a licence only if
- (a) the volume of water to be transferred does not exceed the volume of water under the licence from which the transfer of the allocation is to be made,
 - (b) the transfer of the allocation, in the opinion of the Director, does not impair the exercise of rights of any household user, traditional agriculture user or other licensee other than the household user, traditional agriculture user or other licensee who has agreed in writing that the transfer of the allocation may take place, and
 - (c) the transfer, in the opinion of the Director, will not cause a significant adverse effect on the aquatic environment...."

²⁵ See: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.) at paragraph 75.

cancel a water licence when the allocated water is not being used.²⁶ This is one method the Director can use to prevent speculation in water, should it occur.

[67] The Board dismissed the appeals because the Appellant was unable to demonstrate it was directly affected by the Director's decision. The Board found there would be no different effect on the environment as a result of the transfers and the Appellant's use of the water would not be impacted. The Board stated:

“The appeals of Westridge Utilities Inc. are dismissed. The Appellant is not directly affected by the Director's decision to issue Licence No. 00240846-00-00 to the Municipal District of Rocky View No. 44 because there is no change in the Appellant's priority right and there is no change in the terms and conditions of the diversion, nor the volume, location, time, and rate of water diversion; there is no environmental impact arising from the issuance of the Licences. The Appellant is not directly affected by the issuance of Licence No. 0024847-00-00 issued to Her Majesty the Queen in Right of Alberta, because the intent of this licence is to improve the aquatic environment in the Bow River by increasing the flow that is not allocated to any user.”²⁷

[68] The 979899 decision did not deal with standing, but was a determination of who was properly registered as a licence holder. The comments made by the court regarding the objective of the *Water Act* being to stop speculation and allow for management, are generalized statements. The Appellant provided no evidence or valid argument that these generic statements have any application to the Appellant's standing before the Board, i.e. the Appellant must be directly affected by the Director's decision that is being appealed. The courts did not look at the water market and how it affects other users of water. The decision was a review of a procedural

²⁶ See: Section 55(1) of the Water Act provides:

“55(1) The Director may suspend or cancel a licence ...

- (f) if, subject to the regulations, the Director is of the opinion that
 - (i) there has been no diversion of any of the water allocated in the licence, or there has been a failure or ceasing to exercise the rights granted under the licence, over a period of 3 years, and
 - (ii) there is no reasonable prospect that the licensee will resume diversion of all or part of the water specified in the licence or resume the exercise of the rights granted under the licence....”

²⁷ See: Preliminary Motions: *Westridge Utilities Inc. v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Municipal District of Rocky View No. 44 and the Queen in Right of Alberta* (12 May 2008), Appeal Nos. 07-131 & 07-132-D (A.E.A.B.) at paragraph 91.

matter. Therefore, the 979899 decision is not relevant to the particular circumstances of these appeals, and the reconsideration request is denied.

[69] The public interest would not benefit from a hearing of these appeals based on the circumstances of this case. In these appeals, the finality of the Board's decision needs to be upheld to maintain certainty for future appellants as to the test for standing before this Board. Therefore, the Board will not grant the reconsideration request.

IV. DECISION

[70] There were multiple reasons why the Appellant did not have standing, including no environmental impacts could be shown that would occur from the transfers, and the Appellant's concerns were speculative. The Appellant failed to demonstrate the Court of Queen's Bench decision, *979899 Alberta Ltd. v. Alberta*, could potentially result in a different decision from this Board, because the Queen's Bench Justice did not address any matter relevant to standing before this Board.

[71] The request for reconsideration of the Board's May 12, 2008 decision regarding the appeals filed by Westridge Utilities Inc., is denied.

Dated on October 2, 2008, at Edmonton, Alberta.

Dr. Steve E. Hrudey, FRSC, PEng
Chair

Mr. Jim Barlishen
Board Member

Mr. Eric O. McAvity, Q.C.
Board Member