

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – January 14, 2011

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 an appeal filed by the Town of Okotoks with respect to *Water Act* Preliminary Certificate No. 00250484-00-00 issued to Sandstone Springs Development Corporation by the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: *Town of Okotoks v. Director, Southern Region, Environmental Management, Alberta Environment*, re: *Sandstone Springs Development Corporation* (14 January 2011), Appeal No. 09-051-D (A.E.A.B.).

PANEL MEMBERS:

Justice Delmar W. Perras (ret.), Chair,
Mr. Jim Barlishen, Board Member, and
Mr. Alex G. MacWilliam, Board Member.

SUBMISSIONS BY:

Appellant:

Town of Okotoks, represented by Gilbert J. Ludwig, Wilson Laycraft.

Director:

Mr. Brock Rush, Director, Southern Region,
Environmental Management, Alberta
Environment, represented by Ms. Charlene
Graham, Alberta Justice.

Certificate Holder:

Sandstone Springs Development Corporation,
represented by Mr. Derek King, Brownlee
LLP.

EXECUTIVE SUMMARY

Alberta Environment issued a Preliminary Certificate to Sandstone Springs Development Corporation (Sandstone) under the *Water Act*, for the diversion of 98,550 cubic metres of groundwater annually from production wells located in E½ 24-20-1-W5M near Okotoks, Alberta, for municipal purposes (230-lot country residential subdivision and 70 patio homes).

The Board received a Notice of Appeal from the Town of Okotoks that was challenged by Sandstone. The Board received submissions on the following questions:

1. How is the Town of Okotoks directly affected by the Preliminary Certificate?
2. Was the Notice of Appeal filed on time? and
3. What are the issues to be heard at a hearing, should one be held?

The Board accepted the Town of Okotoks as directly affected. The initial letter filed by the Municipal Manager contained all of the information required to be a valid Notice of Appeal and, therefore, the appeal was filed within the legislated timeframe. Subsequently, Okotoks Town Council ratified its intention to appeal the issuance of the Preliminary Certificate. The Notice of Appeal form filed after the time limit confirmed the Town of Okotoks intended to proceed with its appeal.

The issues that will be heard at the hearing are:

1. Is the water allocated to Sandstone groundwater that naturally flows to and from surface water sources within the South Saskatchewan River Basin and therefore reserved under the Bow, Oldman and South Saskatchewan River Basin Allocation Order?
2. Is the water allocated to Sandstone already licenced to the Town of Okotoks or connected to the Town's water sources?
3. Are the conditions in the Preliminary Certificate sufficient to mitigate any reasonably foreseeable harm that the Town of Okotoks may incur as a result of the Preliminary Certificate and subsequent water licence?

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I. BACKGROUND

[1] On February 9, 2010, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Preliminary Certificate No. 00250484-00-00 (the “Certificate”) to Sandstone Springs Development Corporation (the “Certificate Holder”) under the *Water Act*, R.S.A. 2000, c. W-3, in respect of the diversion of 98,550 cubic metres of groundwater annually from Production Wells located in E½ 24-20-1-W5M near Okotoks, Alberta, for municipal purposes (230-lot country residential subdivision and 70 patio homes).

[2] On March 19, 2010, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from the Town of Okotoks (the “Appellant”). The Board notified the Certificate Holder and the Director of the appeal and requested the Director provide the Board with a copy of the records (the “Record”) relating to the appeal. The Board also asked the Certificate Holder, Appellant, and Director (collectively the “Participants”) to provide available dates for a mediation meeting, preliminary motions hearing, or hearing.

[3] In its April 8, 2010 letter, the Certificate Holder challenged the appeal on the grounds the Appellant was not directly affected and the Notice of Appeal was not filed on time. The Certificate Holder also indicated it was seeking to have a clause in the Certificate amended. On April 14, 2010, the Certificate Holder confirmed it had no issue with the Certificate.

[4] On April 22, 2010, the Board received a copy of the Record from the Director, and on April 28, 2010, forwarded a copy to the Appellant and Certificate Holder.

[5] A mediation meeting was held on June 17, 2010, in Calgary, where an interim agreement was reached, however on August 24, 2010, the Certificate Holder notified the Board that it did not believe continuing the mediation process would be beneficial and asked that a hearing be scheduled.

[6] On September 13, 2010, the Board set the dates for submissions on the following questions:

1. How is the Appellant directly affected by the Certificate?
2. Was the Notice of Appeal filed on time? and
3. What are the issues to be heard at a Hearing, should one be held?

II. SUBMISSIONS

A. Appellant

[7] The Appellant said it submitted a Statement of Concern and the Director accepted the Appellant as directly affected by the application because of the close proximity of the Appellant's water supply wells to the Certificate Holder's proposed wells. The Appellant argued that, based on the *Court* decision,¹ the Appellant only need establish a *prima facie* case that it is directly affected in order to be granted standing. The Appellant submitted that, at the initial stage, issues of standing should be determined by the basic principle of the participatory role of Alberta citizens envisioned by section 2 of the *Water Act*.²

[8] The Appellant said it retained hydrological consultants whose opinions raised concerns about the impact of the proposed development on the Appellant's water supply. The Appellant's concern was that the proposed groundwater utilization will negatively impact groundwater discharge to the Sheep River by intercepting 199.2 m³/day of natural discharge that would otherwise contribute to the Sheep River, thereby negatively impacting the Appellant's water supply wells during the Sheep River's low flow period. In addition, the Appellant stated it was highly likely the local/sub-regional groundwater resources will be insufficient to sustain the proposed development if groundwater is the sole source of water supply.

[9] With respect to monitoring and mitigation, the Appellant stated:

¹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

² 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.”

1. Groundwater monitoring can provide spatio-temporal data regarding water levels and water quality and groundwater data can help informed decision making; and
2. Groundwater monitoring in itself is not mitigation, so a suitable mitigation plan should be filed.

The Appellant also noted the limited availability of water resources in southern Alberta, and that there is little hydrogeological information available for the Sheep River watershed.

[10] The Appellant said the letter notifying it of the Director's decision was dated February 11, 2010, and was received by the Appellant on February 18, 2010. The Appellant said the appeal was filed on March 19, 2010 and, on March 23, 2010, it advised the Board that Town Council intended to proceed with the appeal. The Appellant stated the Board acknowledged receipt of the appeal on March 19, 2010, and requested the Appellant complete a Notice of Appeal form and return the form to the Board by March 30, 2010. The Appellant confirmed the appeal and provided the completed Notice of Appeal form to the Board on March 30, 2010.

[11] The Appellant noted the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), provides the Board discretion to allow a person to perfect its appeal within a specified time period, and the Board has overriding discretion to advance or extend any time period where there are sufficient grounds for doing so.

[12] The Appellant referred to section 22 of the *Interpretation Act*, R.S.A. 2000, c. I-8, for the computation of time.³ The Appellant stated the date it received notice of the Certificate is

³ Section 22 of the *Interpretation Act* provides:

- "(1) If in an enactment the time limited for the doing of a thing expires or falls on a holiday, the thing may be done on the day next following that is not a holiday. ...
- (3) If an enactment contains a reference to a number of days expressed to be clear days or to 'at least' or 'not less than' a number of days between 2 events, in calculating the number of days, the days on which the events happen shall be excluded.
- (4) If an enactment contains a reference to a number of days not expressed to be clear days or 'at least' or 'not less than' a number of days between 2 events, in calculating the number of days, the day on which the first event happens shall be excluded and the day on which the 2nd event happens shall be included.
- (5) If in an enactment a time is expressed to begin or end at, on or with a specified day or to continue to or until a specified day, the time includes that day.
- (6) If in an enactment a time is expressed to begin after or to be from a specified day, the time does not include that day.

excluded, so the first day of computing the time was February 19, 2010. The Appellant argued it filed its Notice of Appeal within the prescribed timeline and perfected its appeal by filing an appeal form on March 30, 2010, as requested by the Board.

[13] The Appellant submitted the issues to be dealt with in the appeal are:

1. Do the terms and conditions of the Preliminary Certificate (including terms, monitoring, complaints process, mitigation and remedial measures, and reclamation) adequately deal with the direct, indirect, and cumulative impacts of the Sandstone project on the water in the Sheep River Basin and the water supply for the Town of Okotoks?
2. Were the assessments completed by the Certificate Holder and the data collected for the application sufficient to represent accurately the quantity and sustainability of the water supply for the Sandstone development and sufficient for the Director to grant the Preliminary Certificate and apply appropriate terms and conditions in the Preliminary Certificate?
3. Was the testing adequate in the circumstances? Are the regulatory or guideline formulas for assessing water supply stringent enough in view of the current conditions facing the Town of Okotoks?
4. Did the Director err in failing to adhere to the precautionary principle, or otherwise assume without inquiry that the application related only to groundwater when there was evidence of a connection between the test wells, natural springs, and the Sheep River?
5. Did the Director commit an error in considering the Sandstone project in isolation of existing water licences and existing water users in the Sheep River Basin and the cumulative effects that would result in the Basin as a result of the added pressure on the resource?
6. Did the Director consider all applicable legislation, policies, approved water management plan, and programs that could have influenced his decision prior to making his decision to issue the Preliminary Certificate?
7. Did the Director commit an error in failing to adequately consider the regulatory moratorium on new surface water licences in the South Saskatchewan River Basin?

B. Certificate Holder

(7) If an enactment provides that anything is to be done within a time after, from, of or before a specified day, the time does not include that day.”

[14] The Certificate Holder acknowledged the Appellant submitted a Statement of Concern. The Certificate Holder stated the Director's finding that the Appellant was directly affected is not binding on the Board, because the Board has unfettered discretion to determine if the Appellant meets the Board's test for standing.

[15] The Certificate Holder stated it is prepared to accept the Appellant meets the threshold for standing and, if the Appellant can substantiate its concerns, there would be a *prima facie* case for standing. The Certificate Holder submitted the Board will make the final determination of whether there is a connection between the water that is the subject of the Certificate and the Appellant's water supply, and finding the Appellant has standing is not determinative of the issue.

[16] The Certificate Holder noted the Appellant received notice of the Director's decision to issue the Certificate on February 18, 2010, and therefore, the deadline for filing the Notice of Appeal was March 19, 2010. The Certificate Holder referred to the Appellant's letter to the Board indicating its intention to object to the Certificate subject to the ratification by Town Council at its Council meeting on March 22, 2010. The Certificate Holder noted the Appellant advised the Board on March 23, 2010, of the Appellant's intent to appeal, and it was not until March 30, 2010, that the Appellant provided a formal Notice of Appeal. The Certificate Holder argued the Appellant's position that it filed its Notice of Appeal on March 19, 2010 and it was perfected on March 30, 2010, is not supported by the applicable legislation. The Certificate Holder noted that section 5(1) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the "Regulation") sets out the required content of a Notice of Appeal,⁴ but the March 19, 2010 letter from the Appellant did not meet the requirements. The Certificate Holder argued the letter was of no force or effect as a Notice of Appeal because it was subject to ratification; it only alerted the Board of a potential appeal. The Certificate Holder noted the Town Council did not

⁴ Section 5(1) of the Regulation states:

"A notice of appeal submitted pursuant to section 91 of the Act shall contain the following:

- (a) the provision of the Act under which the notice of appeal is submitted;
- (b) the name and title of the person whose decision is the subject of the notice of appeal and the details of the decision being appealed;
- (c) a description of the relief requested by the person appealing;
- (d) the signature of the person appealing, or the person's lawyer or other agent;
- (e) an address for service for the person appealing."

pass a resolution to proceed with the appeal until after the expiry of the appeal period. The Certificate Holder argued the Appellant did not perfect the appeal on March 30, 2010, because there was no Notice of Appeal filed by the deadline. The Certificate Holder stated the March 30, 2010 form constitutes the Appellant's Notice of Appeal, and the form was filed out of time.

[17] The Certificate Holder noted the Appellant did not make an application to the Board to extend the appeal period and there were no special circumstances that would justify an extension in this case. The Certificate Holder argued the Appellant had 30 days to determine whether it was proceeding with the appeal and to take the requisite steps to do so, including passing any necessary resolutions. The Certificate Holder stated the Appellant did not provide any reasons why it was unable to file the appeal in time given the technical information on which the Appellant is relying on was available to the Appellant since 2009.

[18] The Certificate Holder argued the appeal is out of time and should be dismissed.

[19] The Certificate Holder submitted that some of the issues raised by the Appellant are not proper issues for the Board to consider. It argued the Appellant's standing impacts the issues that may be properly before the Board. The Certificate Holder stated the Board must first determine whether the water that is subject to the Certificate is naturally flowing to and from surface waters in the South Saskatchewan River Basin, in particular the Sheep River. The Certificate Holder stated that, if the water is connected, it is reserved water and subject to the moratorium on new surface water licences, and the Board may exercise its jurisdiction and recommend the Certificate be revoked. The Certificate Holder submitted that, if the Board determines the water is not naturally flowing to and from surface waters in the South Saskatchewan River Basin, then the Appellant would have to establish that the water is connected to another water source used by the Appellant. If the Appellant failed to establish the connection, then the Board would have no basis to make a decision regarding the other issues raised by the Appellant. The Certificate Holder stated that, if a connection is established, the Board may then consider if the Director had a proper basis to make a decision respecting the Certificate, whether he considered all applicable statutory and regulatory authorities, and whether the conditions in the Certificate address the impacts of the development on the Appellant's water sources.

[20] The Certificate Holder submitted the issues for the hearing should be:

1. Is the water that is the subject of the Certificate reserved under the Bow, Oldman and South Saskatchewan River Basin Allocation Order?
2. If the water that is the subject of the Certificate is not reserved water, is it connected to a water source for which the Appellant has a licence or upon which the Appellant relies for its water supply needs?
3. If yes,
 - a. Was there a sufficient evidentiary basis for the Director to issue the Certificate?
 - b. Do the terms and conditions of the Certificate, including the monitoring, complaints mechanism, mitigation, remedial measures, and reclamation, adequately deal with the direct, indirect, and cumulative impacts of the Sandstone project on the Appellant's water sources?
 - c. Did the Director commit an error in considering the Sandstone project in isolation of existing water licences and existing water users that would be directly impacted by the development?
 - d. Did the Director consider all other applicable legislation, policies, approved water management plans, and programs in making his decision to issue the Certificate?

[21] The Certificate Holder argued the issue of the adequacy of the testing guidelines established by Alberta Environment is not a proper issue for the Board.

C. Director

[22] The Director took no position on the directly affected status of the Appellant. The Director explained the Appellant provided a Statement of Concern, and further correspondence between the Appellant and the Director clarified the Appellant's position. The Director stated he accepted the letters from the Appellant as an official Statement of Concern and found the Appellant was directly affected due to the close proximity of the Appellant's wells to the Certificate Holder's wells.

[23] The Director took no position on whether the Notice of Appeal was filed on time. The Director stated a letter was sent to the Appellant notifying it of the issuance of the

Certificate, and handwritten notes of Alberta Environment staff indicate the Appellant received notice of the Certificate on February 18, 2010.

[24] The Director submitted the issues that should be heard are:

1. Did the Director comply with the *Water Act*, and in particular section 51, and the current applicable policies when considering the application and issuing the Certificate?
2. Did the Director properly apply the Alberta Environment Groundwater Evaluation Guideline in issuing the Certificate?
3. Did the Director properly determine that the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta. Reg. 171/2007 was not applicable to the issuance of the Certificate?
4. Do the terms and conditions of the Certificate address the Appellant's concerns?

D. Rebuttal Submission

[25] The Appellant noted all of the Participants were in agreement that the Appellant had met the initial threshold for standing, subject to the evidence at a merit hearing.

[26] The Appellant argued it demonstrated its intent and did appeal within the 30 day timeline. The Appellant stated there was no suggestion that its right of appeal would be extended for an indefinite period of time. The Appellant stated it acted quickly and in compliance with the requests from the Board to confirm the appeal. The Appellant said it preserved its right to appeal, and if Town Council did not ratify the appeal, the appeal would have been withdrawn. The Appellant said that, as a statutory body under the *Municipal Government Act*, R.S.A. 2000, c. M-26, it must act upon resolutions of council. It explained the earliest date the matter could get onto the Town Council agenda, after receiving notice of the Certificate, was March 22, 2010.

[27] The Appellant noted the Board has a discretionary power under section 93 of EPEA,⁵ to extend the deadline for filing an appeal. The Appellant stated it relied upon and

⁵ Section 93 of EPEA provides:

“The Board may, before or after the expiry of the prescribed time, advance or extend the time prescribed in this Part or the regulations for the doing of anything where the Board is of the opinion that there are sufficient grounds for doing so.”

complied with the request of the Board to provide further information by March 30, 2010. The Appellant argued that, based on its initial notice of March 19, 2010, its confirmation on March 23, 2010, that it would proceed, and complying with the Board's request by March 30, 2010, the Board should exercise its discretion and allow the appeal to proceed.

[28] The Appellant submitted that

“...the Board's very purpose as an advisor to the Minister would entail jurisdiction to provide the Minister with the Board's insight on existing policy or guidelines within the context of hearings that come before the Board. This should particularly be so given the dated nature of the Groundwater Evaluation Guidelines, which may be out of step with changing circumstances.”⁶

[29] The Appellant submitted the questions posed in its initial submission are properly before the Board.

III. ANALYSIS

[30] The Board has discussed the issue of “directly affected” in numerous prior decisions. The Board received guidance on this issue from the Court of Queen's Bench in *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134, 2 Admin L.R. (4d) 71 (Alta. Q. B.) (“*Court*”).

[31] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

“First, the issue of standing is a preliminary issue to be decided before the merits are decided. See *Re: Bildson*, [1998] A.E.A.B. No. 33 at para. 4. ...

Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question. See *Bildson* at paras. 21-24. ...

Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the

⁶ Appellant's submission, dated October 22, 2010, at page 4.

appellant will be able to make the requisite factual showing. See *Bildson* at para. 33:

What is ‘extremely significant’ is that the appellant must show that the approved project will harm a natural resource (e.g. air, water, wildlife) which the appellant uses, or that the project will harm the appellant’s use of a natural resource. The greater the proximity between the location of the appellant’s use of the natural resource at issue and the approved project, the more likely the appellant will be able to make the requisite factual showing. Obviously, if an appellant has a legal right or entitlement to lands adjacent to the project, that legal interest would usually be compelling evidence of proximity. However, having a legal right that is injured by a project is not the only way in which an appellant can show a proximity between its use of resources and the project in question.

Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm. See *Mizera* at para. 26. In *Bildson* at para. 39, the Board stated:

[T]he ‘preponderance of evidence’ standard applies to the appellant’s burden of proving standing. However, for standing purposes, an appellant need not prove, by a preponderance of evidence, that he will in fact be harmed by the project in question. Rather, the Board has stated that an appellant need only prove a ‘potential’ or ‘reasonable probability’ for harm. The Board believes that the Department’s submission to the [A]EUB, together with Mr. Bildson’s own letters to the [A]EUB and to the Department, make a prima facie showing of a potential harm to the area’s wildlife and water resources, both of which Mr. Bildson uses extensively. Neither the Director nor Smoky River Coal sufficiently rebutted Mr. Bildson’s factual proof.

In *Re: Vetsch*, [1996] A.E.A.B.D. No. 10 at para. 20, the Board ruled:

While the burden is on the appellant, and while the standard accepted by the Board is a balance of probabilities, the Board may accept that the standard of proof varies depending on whether it is a preliminary meeting to determine jurisdiction or a full hearing on the merits once jurisdiction exists. If it is the former, and where proof of causation is not possible due to lack of information and proof to a level of scientific certainty must be made, this leads to at least two inequities: first that appellants may have to prove their standing twice (at the preliminary meeting stage and again at the hearing) and second, that in those cases (such as the present) where an Approval has been issued for the first time without an operating

history, it cannot be open to individual appellants to argue causation because there can be no injury where a plant has never operated.”⁷

Justice McIntyre concluded by stating:

“To achieve standing under the Act, an appellant is required to demonstrate, on a *prima facie* basis, that he or she is ‘directly affected’ by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the *prima facie* case put forward by the appellant. By definition, *prima facie* cases can be rebutted....”⁸

[32] The Court of Queen’s Bench in *Court*⁹ stated an appellant only needs to show there is a potential for an effect on that person’s interests. This potential effect must still be within reason, plausible, and relevant to the Board’s jurisdiction for the Board to consider it sufficient to grant standing.

[33] The Director accepted the Appellant’s Statement of Concern but took no position on the issue of directly affected, and the Certificate Holder agreed the Appellant may be impacted by the Certificate subject to the evidence provided at the substantive hearing. The test as described in *Court* requires that the appellant be potentially impacted by the decision to issue the approval or licence. It is a preliminary decision, and the Board may find there is no impact when all of the substantive evidence is provided at a hearing. As the Participants had no issue with finding the Appellant directly affected for the purpose of the hearing, the Board will accept the Appellant as directly affected.

⁷ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134 at paragraphs 67 to 71, 2 Admin. L.R. (4d) 71 (Alta. Q.B.). See: *Bildson v. Acting Director of North Eastern Slopes Region, Alberta Environmental Protection*, re: *Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D (A.E.A.B.) (“*Bildson*”); *Mizera et al. v. Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection*, re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D (A.E.A.B.) (“*Mizera*”); and *Vetsch v. Alberta (Director of Chemicals Assessment & Management Division)* (1997), 22 C.E.L.R. (N.S.) 230 (Alta. Env. App. Bd.), (*sub nom. Lorraine Vetsch et al. v. Director of Chemicals Assessment and Management, Alberta Environmental Protection*) (28 October 1996), Appeal Nos. 96-015 to 96-017, 96-019 to 96-067 (A.E.A.B.).

⁸ *Court v. Director, Bow Region, Regional Services, Alberta Environment* (2003), 1 C.E.L.R. (3d) 134 at paragraph 75 (Alta. Q.B.).

⁹ *Court v. Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

[34] The Certificate Holder argued the Notice of Appeal was filed out of time. Respectfully, the Board does not agree. The Director issued the Certificate on February 9, 2010, and the Appellant received notification of the decision on February 18, 2010. Section 116(1)(b) of the *Water Act* requires a Notice of Appeal to be filed within 30 days of receiving notification of the decision. The Board received a letter from the Appellant on March 19, 2010, in which it stated its intent to file an appeal of the Director's decision to issue the Certificate. The Board acknowledged receipt of the letter and advised the Appellant to return a Notice of Appeal form by March 30, 2010.

[35] The Appellant expressed its intent to file a Notice of Appeal with the Board before the expiry of the time limit. As a municipality, the Appellant had the additional step of seeking ratification by Town Council to proceed with the appeal. The Appellant did not delay bringing the issue before Council and provided confirmation of its intent to proceed with the appeal as soon as the decision was ratified. The Board asked the Appellant to complete the standard Notice of Appeal form and to return it to the Board by March 30, 2010; the Appellant complied with the deadline. Therefore, the Board finds the appeal was filed on time.

[36] Section 5 of the Regulation outlines what is required in a Notice of Appeal.¹⁰ The Appellant's March 19, 2010 letter clearly states it is appealing the issuance of the Certificate. The letter included the Certificate number and attached the letter from the Director notifying the Appellant of his decision to issue the Certificate. Between these two letters, the Appellant satisfied the requirements to: provide the provision of the *Water Act* under which the appeal was

¹⁰ Section 5 of the *Environmental Appeal Board Regulation* states:

- “5(1) A notice of appeal submitted pursuant to section 91 of the Act shall contain the following:
- (a) the provision of the Act under which the notice of appeal is submitted;
 - (b) the name and title of the person whose decision is the subject of the notice of appeal and the details of the decision being appealed;
 - (c) a description of the relief requested by the person appealing;
 - (d) the signature of the person appealing, or the person's lawyer or other agent;
 - (e) an address for service for the person appealing.
- (2) A notice of appeal submitted pursuant to any enactment other than section 91 of the Act shall contain the following:
- (a) the section number and the name of the other enactment pursuant to which the notice of appeal is submitted, and
 - (b) the information referred to in subsection (1)(b), (c), (d) and (e).”

submitted; provide the name and title of the decision maker; and provide the name of the Appellant and an address for service. Although the letter did not include the specific relief the Appellant was requesting, it was clear the Appellant was objecting to the entire Certificate. The Board has held that the validity of a Notice of Appeal is not based on the relief requested. Therefore, the Board accepts the March 19, 2010, letter was a valid Notice of Appeal, and it was filed within the legislated timeframe.

[37] In determining what matters are properly before the Board, the Board must look at the Notice of Appeal, the Certificate, and the submissions of the Participants. The concern of the Appellant is that the water that is allocated under the Certificate is hydraulically connected to the Sheep River, and therefore is caught under the moratorium for issuing surface water licences, or the water is hydraulically connected to the Town's water supply. The Appellant is concerned that, either way, the withdrawal of the water will affect the Town's water supply.

[38] Alberta Environment has placed a reservation on all surface water and groundwater that naturally flows to and from surface water sources throughout most of southern Alberta, the effect of which is to limit the issuance of new water licences from such sources.¹¹ If the water being requested under the Certificate is reserved water, then Alberta Environment may not issue the water licence. If the water is not reserved water then, subject to additional licensing requirements, it may be possible for Alberta Environment to grant the water licence. Therefore, the first issue is whether the water allocated under the Certificate is groundwater that naturally flows to and from surface water sources within the Bow, Oldman and South Saskatchewan River Basin.

[39] If the Board finds the allocated water is not caught in the moratorium, then the next issue is whether the allocated water under the Certificate is already allocated to the Appellant or connected to the Appellant's water source. If the evidence shows the water has been allocated to the Appellant, then the Board will again have to determine whether it should recommend the decision to issue the Certificate be reversed. If there is no hydraulic connection, then the Appellant will have to show how it would be affected by the water withdrawal allowed under the Certificate. Therefore, the second issue that must be determined is the connection, or

lack of connection, between the water allocated under the Certificate and the Appellant's water sources.

[40] The Certificate has been issued for the subsequent granting of a licence if all the conditions are met. To ensure no or minimal impacts to the Appellant as a result of the Certificate being issued, the Board will hear evidence and arguments on whether the terms and conditions included in the Certificate, that will be included in the licence, adequately protect the environment and the Appellant.

IV. DECISION

[41] The Board finds the Appellant is directly affected and the Notice of Appeal was filed within the legislated timeframe. The issues that will be heard at the hearing are:

1. Is the water allocated to the Certificate Holder groundwater that naturally flows to and from surface water sources within the South Saskatchewan River Basin and therefore reserved under the Bow, Oldman and South Saskatchewan River Basin Allocation Order?
2. Is the water allocated to the Certificate Holder already licenced to the Appellant or connected to the Appellant's water sources?
3. Are the conditions in the Certificate sufficient to mitigate any reasonably foreseeable harm that the Appellant may incur as a result of the Certificate and subsequent licence?

Dated on January 14, 2011, at Edmonton, Alberta.

D.W. Perras
Chair

Jim Barlishen
Board Member

¹¹ See: *Bow, Oldman and South Saskatchewan River Basin Water Allocation Order*, Alta. Reg. 171/2007.

Alex G. MacWilliam
Board Member