

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – October 10, 2013

**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** an appeal filed by Yvonne Tomlinson, with respect to *Water Act* Licence No. 00311837-00-00 issued to the Evergreen Regional Waste Management Services Commission by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Evergreen Regional*

*Waste Management Services Commission* (10 October 2013), Appeal No. 12-033-ID2 (A.E.A.B.).

**BEFORE:**

Justice Delmar W. Perras (Ret.), Board Chair.

**BOARD STAFF:**

Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Valerie Myrmo, Registrar of Appeals; and Ms. Marian Fluker, Associate Counsel.

**SUBMISSIONS BY:**

**Appellant:**

Ms. Yvonne Tomlinson.

**Licence Holder:**

Evergreen Regional Waste Management Services Commission, represented by Ms. Daina Young, Reynolds Mirth Richards & Farmer LLP.

**Director:**

Mr. Patrick Marriott, Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Michelle Williamson and Mr. Will Randall, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

Alberta Environment and Sustainable Resource Development (AESRD) issued a Licence to the Evergreen Regional Waste Management Services Commission (ERWMSC), authorizing the operation of works and the diversion of water from an aquifer for municipal purposes (washrooms and equipment washing). The Evergreen Regional Landfill is a Class II landfill, where more than 10,000 tonnes per year of non-hazardous waste is disposed of in the County of St. Paul.

The Board received an appeal from Ms. Yvonne Tomlinson. The Board determined Ms. Tomlinson is directly affected by the Director's decision given her use of properties adjacent to the landfill.

The Board received a request for a reconsideration of the Board's decision finding Ms. Tomlinson directly affected. The Board set the schedule to receive written submissions from the parties, which had Ms. Tomlinson providing her submission, then AESRD and ERWMSC providing their submissions, and then Ms. Tomlinson providing final comments. AESRD objected to the process. The Board held an oral preliminary motions hearing to hear arguments on the reconsideration request, the Board's process to receive submissions on the reconsideration request, when to determine the issues for the hearing, and the issues for the hearing.

The Board accepted the change in the submission process and allowed AESRD and ERWMSC to present their arguments first on the reconsideration request.

The Board denied the reconsideration application because no new evidence was provided. All the evidence brought forward was available at the time of the original decision and could have been brought forward at that time. The Board found no error in law or fact that would have resulted in a change in the Board's decision.

The Board adjourned the preliminary motions hearing to receive written submissions on the issues for the hearing.

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## **I. INTRODUCTION**

[1] This is the decision of the Environmental Appeals Board (the “Board”) of the preliminary matters raised by the parties to the appeal. The appeal is in relation to a water licence issued by the Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”) to the Evergreen Regional Waste Management Services Commission (the “Licence Holder”) do allow for the diversion of water to wash equipment and use in washrooms at its landfill.

[2] Ms. Yvonne Tomlinson (the “Appellant”) appealed the issuance of the Licence. After reviewing submissions from the Appellant, Licence Holder, and the Director (collectively, the “Parties”) the Board determined the Appellant was directly affected and proceeded to process her appeal.

[3] A mediation meeting was held, but the Parties were unable to reach a resolution. The Board proceeded to schedule a hearing of the merits. However, the Director requested a reconsideration of the Board’s decision finding the Appellant directly affected based on new evidence and the Director’s view that the Board’s initial decision was based on incorrect fact and law. The Board set a schedule to receive submissions on the Director’s motion. The schedule allowed the Appellant to provide her submission first, followed by submissions from the Director and Licence Holder, with final comments from the Appellant. The Director argued the Board’s process was flawed, and since he brought the motion forward, he had the right to present final comments.

[4] The Board held an oral preliminary motions hearing to hear arguments on the Board’s process, if the Board should accept the reconsideration request, if the reconsideration must be heard prior to the issues being determined, and the issues for the hearing if one is held.

[5] The Board provided its decision from the bench with reasons to follow. The Board revised its procedure to hear arguments on the reconsideration request to allow the applicant Director to present first followed by the Licence Holder. The Board denied the reconsideration request because no new evidence was presented that was not available at the time of the original decision and there was no error in fact or law.

[6] The Board adjourned the preliminary motions hearing to receive written submissions on the issues for the substantive hearing.

## II. BACKGROUND

[7] On August 20, 2012, the Director, acting under the *Water Act*, R.S.A. 2000, c. W-3, issued Licence No. 00311837-00-00 (the “Licence”) to the Licence Holder authorizing the operation of a works and the diversion of up to 1,500 cubic metres of water annually for municipal purposes (washrooms and equipment washing) at the Evergreen Regional Landfill (Class II), (“Landfill”) in the County of St. Paul.

[8] On October 16, 2012, the Board received a Notice of Appeal from the Appellant.

[9] On October 17, 2012, the Board wrote to the Appellant, the Licence Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notice of Appeal and notifying the Licence Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records relating to the appeal.

[10] On October 26, 2012, the Director requested the Board dismiss the appeal on the basis the Appellant is not directly affected and the matter had been adequately dealt with in the Board’s previous decision in *Tomlinson and Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (10 February 2010), Appeal Nos. 08-036-038-ID1 (A.E.A.B.) (“*Tomlinson and Shapka*”).<sup>1</sup>

[11] The Board received submissions on the motion to dismiss the appeal between November 22, 2012 and January 11, 2013.

[12] On April 3, 2013, the Board provided the Parties with its decision, finding the Appellant is directly affected by the Director’s decision.<sup>2</sup>

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<sup>1</sup> See also: *Shapka v. Director, Northern Region, Environmental Management, Alberta Environment*, re: *Evergreen Regional Waste Management Services Commission* (18 February 2010), Appeal No. 08-037-R (A.E.A.B.) (“*Shapka*”).

<sup>2</sup> *Tomlinson v. Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, re: *Evergreen Regional Waste Management Services Commission* (03 April 2013), Appeal

[13] On April 12, 2013, the Board received a copy of the Record and copies were provided to the Parties.

[14] On May 7, 2013, based on the Parties' availability, the Board scheduled a mediation meeting for June 25, 2013.

[15] On June 10, 2013, the Director requested the Board place the appeal in abeyance pending a decision of the Public Health Appeal Board regarding the location of the well. The Public Health Appeal Board hearing was scheduled for November 2013.

[16] On June 20, 2013, the Board confirmed the Parties were prepared to attend the mediation meeting on June 25, 2013.

[17] The mediation meeting was held on June 25, 2013, in St. Paul. However, no resolution was reached between the Parties.

[18] On June 27, 2013, the Board requested the Parties provide submissions on the issues that could be heard at the substantive hearing and to notify the Board if there were any additional preliminary motions.

[19] On July 2, 2013, the Director notified the Board that he was unable to determine the specific concerns of the Appellant regarding the Licence. On July 5, 2013, the Director filed a reconsideration application of the Board's decision finding the Appellant directly affected.

[20] On July 9, 2013, the Board wrote to the Parties outlining the concerns expressed by the Appellant in her Notice of Appeal that could be potential issues for the hearing. The Board set the schedule to receive submissions from the Parties regarding the issues and the reconsideration request.

[21] On July 10, 2013, the Board received a letter from the Director requesting the Board modify its procedure for receiving submissions on the reconsideration motion.

[22] On July 11, 2013, the Board responded and asked the Director if he wanted the Board to make a formal ruling on his request. The Director responded on July 12, 2013, requesting the Board make a ruling on the procedural question.



[23] On July 17, 2013, the Board notified the Parties that it would hold an oral preliminary motions hearing to address the following:

1. the Director's request to address the appropriate procedure for a written preliminary motion with respect to the reconsideration request;
2. the Director's motion to reconsider the directly affected decision of the Board in this matter (whether the Board should undertake a reconsideration, not the substantive merits of the reconsideration application);
3. the Director's concern that the reconsideration motion must be decided before the issues to be considered at a hearing can be determined; and
4. the issues to be considered at the hearing of this appeal, should one be held.

[24] Submissions for the preliminary motions hearing were received from the Parties on August 9, 2013.

[25] The oral preliminary motions hearing was held on August 20, 2013, in Edmonton.

### **III. RECONSIDERATION PROCEDURE**

#### **A. Submissions**

##### 1. Appellant

[26] The Appellant did not provide any submissions on the procedural questions.

##### 2. Director

[27] The Director argued the submission process proposed by the Board to consider the Director's reconsideration request was flawed, because the party with the onus of proof presents its case first, other parties respond, and the party bearing the onus of proof has final rebuttal. The Director argued that, based on the Federal Court (Trial Division) decision in *Madsen v. Canada (Attorney General)* (1996), CarswellNat 68 (F.C.T.D.), the failure to provide the party that bears the onus the opportunity to respond to new information that arises after it presents its arguments is an error that courts would review as a breach of procedural fairness and

natural justice. The Director stated that, in the substantive hearing, the Appellant has the right to reply to any new evidence presented by the other Parties who are adverse in interest.

[28] The Director stated his reconsideration request on the directly affected status of the Appellant is a preliminary motion in which the Director has the onus of proof, and therefore, he should have the final right of reply.

[29] The Director noted the Board offered him the opportunity to make an application to be able to reply to the Appellant's rebuttal of the Director's motion. The Director submitted this was insufficient because the opportunity to reply to new information is a right, not a privilege, to be given to the party bearing the onus of proof and should not be granted on a discretionary basis.

[30] The Director acknowledged the Board can set its own procedure under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), but the Board cannot set a procedure that is contrary to the principles of natural justice and procedural fairness even if such practices are consistent with prior Board practices.

### 3. Licence Holder

[31] The Licence Holder took no position with respect to the procedural matter, but generally agreed with the Director that the applicant of the motion should have the opportunity to provide a rebuttal.

## **D. Analysis**

[32] The Director raised the issue of the Board's process regarding the order of receiving submissions from the Parties in response to the Director's reconsideration motion of the directly affected standing of the Appellant.

[33] Under section 95(8) of EPEA, the Board has the authority to make its own procedures for dealing with matters before it.<sup>3</sup>

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<sup>3</sup> Section 95(8) of EPEA provides:

"Subject to the regulations, the Board may establish its own rules and procedures for dealing with

[34] In the past the Board has generally allowed the appellant to present their arguments first, those adverse in interest present their arguments, and the appellant is then given the opportunity to provide rebuttal arguments. In most preliminary matters it is the appellant who has the most to lose, because it is the appellant who will lose their appeal right if the motion is successful.

[35] When a reconsideration request is filed, there are two steps in the process. The first step in the process is to determine whether there are grounds sufficient enough to warrant a reconsideration. If the Board has been provided sufficient new evidence or the parties have demonstrated there has been an error in law, then the Board will proceed to the second step, the actual reconsideration of its decision. At the first step in the reconsideration process, the appellant will not lose their right of appeal, even if a reconsideration is granted. It is only at the second step, when the Board hears the actual reconsideration, will there be a possibility of the appellant losing their right of appeal.

[36] What is before the Board is the first step in the reconsideration process: Are there sufficient grounds to warrant a reconsideration of the Board's decision regarding the directly affected status of the Appellant?

[37] In this case, the Board accepts the Director's arguments that the onus is on the party making the request for reconsideration to demonstrate to the Board there are sufficient grounds to proceed to a reconsideration of the previous decision. Therefore, at the preliminary motions hearing the Board notified the Parties it was modifying its procedures as outlined in the Board's letter of July 9, 2013. The Board instructed the Parties that the Director would provide his arguments on the reconsideration request first, followed by the Licence Holder, then the Appellant, and the Director would present final arguments.

[38] Although the Board accepts this procedure for a motion to reconsideration a decision, the process for the second step, the actual reconsideration, may be different.

## **IV. RECONSIDERATION REQUEST**

### **A. Submissions**

#### **1. Appellant**

[39] The Appellant provided a letter from Dr. Amil Shapka indicating the Appellant has actively and continuously farmed lands owned and controlled by him.

[40] The Appellant explained Labreque Ranching Co. Ltd. previously owned some of the lands now owned by Dr. Shapka. The Appellant stated she used the lands for forage or grazing. The Appellant stated she used the Labreque lands for forage in 2011 and intended to remove forage from the lands in 2012, but she was unable to due to weather conditions.

[41] The Appellant stated her well is down gradient from the Licenced well.

#### **2. Director**

[42] The Director acknowledged the power to reconsider is exercised when there are exceptional and compelling reasons to do so. The Director noted the Board has found the following grounds sufficient for reconsideration: (1) an error in the Board's interpretation of the law; (2) the process was flawed; or (3) an error in fact.

[43] The Director asked the Board to review its decision that determined the Appellant was directly affected because of her use of the lands in the vicinity of the Licenced well.

[44] The Director argued the Board made an error of fact. The Director stated the Board concluded the Appellant leases land from Shapka and Labreque to graze her cattle and it is the Appellant's use of the lands that will be harmed by the Licenced well. The Director argued there is no evidence in the Appellant's directly affected submissions that stated she was grazing cattle on these lands. The Director argued the Board either misinterpreted or misunderstood the evidence, but either way the conclusion was incorrect. The Director stated there is little known about how or when the Appellant uses the lands or what the lands are used for, but this does not mean the Board can infer the facts without evidence.

[45] The Director argued the Board drew a wrong conclusion in its decision. The Director referred to a letter the Licence Holder had obtained from Labreque dated July 9, 2013, confirming the Appellant has no interest in any of the Labreque lands at this time and she has no interest in the Labreque lands which would allow her to graze cattle on the lands. The Director argued the Board's finding that the Appellant uses the Labreque lands to farm is an error.

[46] The Director stated that if the Labreque lands are not used by the Appellant, then the only evidence left to determine the Appellant is directly affected is that she somehow uses the lands she leases from Shapka, who is located two kilometres away from the Licenced well.

[47] The Director stated that, even though Labreque's evidence may have been available at the time of the original decision, none of the Parties could have anticipated the need for it since the Appellant's submissions indicated only that she had contracts with Labreque in the past. The Director stated that only after the Board erroneously found a contract existed did it become necessary to obtain the evidence.

[48] The Director argued the Board applied the wrong legal test. The Director argued the Board did not consider the effects of the activity authorized by the Licence, which is the diversion of 1500 m<sup>3</sup> of water annually from an aquifer. The Director stated the Board looked at the harm that could be attributed to the landfilling operation, not the diversion of water. The Director stated the Board assessed the relevant potential harm to the environment from the operation of the landfill in *Shapka*. The Director said the need for finality should have been recognized and applied, and evidence pertaining to the potential harms from the landfilling operations should have been considered irrelevant.

[49] The Director argued the Board drew a conclusion without evidence. The Director stated the Board assumed the location of the Labreque lands used by the Appellant was in the vicinity of the Shapka lands. The Director argued the Board needed evidence to make such a finding of fact, and without the evidence it is a substantial error of law and a breach of natural justice to make such a finding.

[50] The Director argued the Board erred in law by failing to apply the correct standard of proof. The Director stated the Board's approach was inconsistent with previous

decisions by the Board when an appellant's standing cannot be determined based on the location of the appellant's residence. The Director stated that when an appellant's residence is too far from the activity being appealed, the Board expects the appellant to demonstrate a direct causal connection to resources used in the area of the activity and the potential impacts on those resources or the appellant's use of those resources. The Director stated the appellant is required to provide evidence to explain how the lands and other resources near the activity are used by the appellant, the frequency of use, the amount of the resource used, the expected harm to the resource, and how the harm will be passed onto the appellant. The Director argued this approach was not used by the Board in its original decision, and therefore, the burden shifted to the Director and Licence Holder to rebut the Appellant's case. The Director stated it is impossible to rebut that which does not exist.

3. Licence Holder

[51] The Licence Holder supported the Director's motion to reconsider whether the Appellant is directly affected.

[52] The Licence Holder submitted a reconsideration of the Board's standing decision is in the public interest and will clarify and focus, not delay, the proceedings. The Licence Holder stated there are errors in the decision which affected the result and new evidence that was not previously available.

[53] The Licence Holder noted the Board's decision was based on the Appellant's lease of lands owned by Labreque Ranching Co. Ltd., Mr. Alphonse Labreque, Dr. Amil Shapka, and Amil B. Shapka Professional Corporation in the area surrounding the Landfill.

[54] The Licence Holder stated that on July 9, 2013, Mr. Labreque advised the Appellant has no interest in the Labreque lands and has no agreement or contract with him. The Licence Holder argued this contradicts the Board's finding that the Appellant leases the Labreque lands to graze her cattle.

[55] The Licence Holder stated the Board found the Labreque lands were in the vicinity of the Shapka lands, but this does not necessarily accord with the land ownership map.

The Licence Holder noted Mr. Labreque had allowed the Appellant to remove forage from lands he owned, but neither are next to the Shapka lands.

[56] The Licence Holder stated the Board took into consideration that there was a possibility of a hydrogeologic connection between the Landfill and the Shapka lands, based on the *Shapka* decision. The Licence Holder argued the flow of water referred to in the Board's decision is in a shallow zone, but the slow movement rates of the groundwater combined with the intervening topography precludes any meaningful hydraulic connection between the Landfill and Shapka lands.

[57] The Licence Holder said the aquifer on the Shapka lands does not draw from the same aquifer as the Licenced well and there is no connection between the wells.

[58] The Licence Holder argued the Appellant cannot be directly affected unless she is directly affected by the quantity of water drawn from the aquifer which supplies the Licenced well. The Licence Holder noted the diversion is for a small percentage of the capacity of the Licenced well.

[59] The Licence Holder submitted the errors in the Board's decision, along with the new evidence supports reconsideration of the directly affected issue on its merits.

## **B. Analysis**

[60] Under section 101 of EPEA, the Board can reconsider a decision made by it. Section 101 provides: "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."

[61] The Supreme Court of Canada in *Palmer v. The Queen* [1980] 1 S.C.R. 759 at page 775 outlined the following regarding the admittance of new evidence into a trial:

- "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial...
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and

- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.”

[62] Although these principles were stated in the context of a criminal case, the general principles apply when considering a request to provide new evidence before the Board, such as when a party is requesting a reconsideration of the Board’s decision.

[63] 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.”<sup>4</sup> The Board uses its discretion to reconsider a decision with caution. 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 parties to reargue the same issues a second time.

[64] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.<sup>5</sup> The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision 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.<sup>6</sup>

[65] The applicant requesting the reconsideration must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made, but was available at the time of the hearing, is not relevant for the purposes of reconsideration. However,

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<sup>4</sup> *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment re: Tri Link Resources Ltd.* (September 28, 2000), Appeal No. 99-009-RD (A.E.A.B.); Reconsideration Request: *Blodgett v. Director, Northeast Boreal Region, Regional Services, Alberta Environment* (14 June 2002), Appeal No. 01-074-RD (A.E.A.B.).

<sup>5</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).

<sup>6</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment re: TransAlta Utilities Corporation* (April 17, 2001), Appeal Nos. 00-074, 077, 078, and 01-001-005-ID (A.E.A.B.).



information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.<sup>7</sup>

[66] The power to reconsider is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider the decision.<sup>8</sup> The reconsideration power is an exception to the general rule that decisions are intended to be final. It is not to be used just to reargue the same issues a second time. Second, a substantial error of law may be a sufficient ground for reconsideration. Such an error may sometimes be revealed by new decisions from the Courts. 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. To justify the reconsideration the decision in question must demonstrate an error of 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.<sup>9</sup>

[67] In *Alberta (Director, Child, Youth & Family Enhancement Act) v. M. (B.)* 2009 ABCA 258 (Alta. C.A.) at paragraph 11, the Alberta Court of Appeal noted a court should be reluctant to re-open a decision, stating:

“[T]he Courts should be sparing in their reopening of a pronounced decision, and should not do so simply for the asking. This is not an occasion for the losing party to advance new argument which he or she simply did not think of before. Or worse still, one which he or she held back. If parties are not forced to prove fully their whole case once and for all, then endless wrangling and never-ending rehearings will result.”

[68] A reconsideration is not an opportunity for a party to have a second chance to present arguments. The Director recognized the information regarding the Labreque lands was available at the time of the original decision but he did not believe it was necessary to seek the

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<sup>7</sup> 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.).

<sup>8</sup> *Bernice Kozdrowski v. Director, Chemicals Assessment and Management, Alberta Environmental Protection*, EAB Appeal No. 96-059.

<sup>9</sup> 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-

required information. That is not a reasonable argument for a reconsideration. With respect, if the Director had done a more thorough job of presenting the arguments in his original submission, this information could have been brought to the Board's attention and the Appellant would have had the opportunity to respond. To now claim this is new evidence goes against the principles of natural justice.

[69] In order to succeed in a reconsideration request, the new evidence, if accepted, could result in a change in the tribunal's decision. Even if the Board accepted Director's argument that the Appellant did not use the Labreque lands, the Appellant provided evidence she uses the Shapka lands. The Board recognizes the letter provided by the Appellant from Dr. Shapka was evidence that could have been brought forward in the original submission process as was the letter from Labreque. However, it was stated in the Appellant's original submission that she used the Shapka lands, and the Board accepted the evidence as true. It was up to the Director and Licence Holder to rebut the evidence in their response submissions. In the *Tomlinson and Shapka* decision, the Board found Dr. Shapka was directly affected because of the location of his lands in relation to the landfill and the evidence that indicated the hydrogeological flow was towards the Shapka lands. At the time of the *Tomlinson and Shapka* decision, the Board was not aware the Appellant used the Shapka lands for agricultural purposes. If this information had been available at that time, there is a likelihood the Appellant, or her husband, would have been found to be directly affected. Therefore, the evidence the Director and Licence Holder is arguing is new evidence would not have resulted in a change in the Board's decision.

[70] The Director argued the Board used the wrong legal test in its decision. The Director stated the Board, when determining the directly affected status of the Appellant, looked at harm that could be attributed to landfilling operations. With respect, the Board does not agree. When reading the Board's discussion in the decision, it is clear the Board only considered the potential impacts of withdrawing water from the well on neighbouring properties, one of which is the Shapka lands which the Appellant uses for her farming operations.

[71] The Director appears to have looked at one paragraph of the Board's decision in isolation rather than the decision as a whole. The Board reviewed *Tomlinson and Shapka* and

*Shapka* since these decisions were referred to by the Director and Licence Holder in their submissions. *Shapka* identified the Board's concern regarding potential impacts to groundwater sources as a result of the direction of flow of the groundwater from the landfill. In the decision currently being asked to be reconsidered, the Board noted that, based on the information in *Shapka*, there may be a hydraulic connectivity between the landfill, which would include the Licenced well at issue in this appeal, and the *Shapka* lands, which are used by the Appellant for farming operations. The Board is not, by noting the Board's concerns raised in *Shapka*, reassessing the landfill operations as a whole as it did in *Shapka*. The Board merely noted the evidence provided in that decision that indicated the direction of the groundwater flow is towards the *Shapka* lands.

[72] When reading the Board's decision, the Board discusses the possible connection between the Licenced well and the leased land, the potential impacts the decision may have on the water on the leased property, and the ability of the Appellant to use the water on the leased lands. There is no distinction between whether the Appellant uses the lands for cattle grazing or forage since either activity is part of the Appellant's farming operations. What was important to the Board in finding the Appellant directly affected was that she uses the *Shapka* lands for her farming operations. The Board did not discuss the landfill or potential impacts of the landfill on the water supply. The Board only referred to the water flows in relation to the landfill as it applies to the *Shapka* lands. In its discussion in the decision, the Board does not refer to contamination of the Licenced well or other water sources in the area as a result of the landfill operations. The Licenced well is part of the landfill operations so it is inevitable the landfill would be mentioned. However, the Board did not refer or rely on any other aspect of the landfill operation, except the existence of the Licenced well and its intended purpose under the Licence, in finding the Appellant directly affected.

[73] The Licence Holder raised the issue of the hydrogeologic connection between the Landfill and the *Shapka* lands and argued the Appellant could not be directly affected because the Licenced well is completed deeper than the wells on the *Shapka* properties. This is evidence that can be brought forward at the hearing of the substantive issues. It is also evidence that was readily available at the time the Board made its initial decision had the Licence Holder chosen to

obtain the information to support the Licence Holder's response submission to the directly affected issue. It is not "new" evidence that can be considered by the Board as being relevant for a reconsideration request.

[74] The Director argued the Board made an error in fact. The Director stated there was no indication the Appellant currently used the Shapka lands for grazing cattle or any other purpose. Although the Appellant did not detail her use of the Shapka lands, she clearly stated she used the property for her farming operations. Again, at this stage of the process, the Board accepts the evidence as true, and since it is a rebuttal presumption, the Director and Licence Holder can provide evidence in their response submissions to rebut the presumption that the evidence is true. This evidence was not provided in the Director's or the Licence Holder's response submissions in the directly affected determination process.

[75] In her initial submission, the Appellant stated she leased the Labreque and Shapka lands. If the Director or Licence Holder had issue with those statements, their evidence to rebut these statements should have been provided in the response submissions to the directly affected motion. There was nothing in the response submissions that indicated the Director or Licence Holder had concerns with the amount of detail provided in the Appellant's submission. It is too late now to argue there was inadequate evidence provided by the Appellant in her initial submission.

[76] The Director was aware and understood from the Appellant's submission that she leased the Shapka lands. The Director conducted a title search of the Shapka lands to determine whether any interest had been registered on title, but no further effort was taken to establish if a verbal contract existed between the Appellant and Mr. Labreque or Dr. Shapka until the Board issued its directly affected decision and a reconsideration request was filed. As stated in the Board's decision, whether or not the agreement was registered on title is not determinative of the existence of an agreement.

[77] The Director argued the Board should not have assumed the Labreque lands were in the vicinity of the Shapka lands. County maps that show land ownership are easily accessible. When looking at these maps, some of the Labreque lands adjoin the Shapka lands. Even if the Board should not have assumed the Labreque lands were in the vicinity of the Shapka lands, it

would not have changed the Board's conclusions. The Shapka lands are still used by the Appellant and these lands are within two kilometres of the Licenced well, a distance in which impacts on water sources could be impacted.

[78] 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*") clearly states the determination of directly affected is a preliminary matter and must be determined before the substantive evidence is presented. The Appellant needs only to provide a *prima facie* case to demonstrate she is directly affected by the approved project. When the Board makes its decision on whether an appellant is directly affected, it is basing its decision on the information before it at that time and accepts what is said by the Appellant as true. It is up to those parties adverse in interest to rebut the evidence given. This was confirmed in the *Court* decision. The Appellant in this case provided enough information to demonstrate she is directly affected by the issuance of the Licence. Even if the Appellant is found to be directly affected and the appeal proceeds to a substantive hearing, and the Board hears and reviews all of the evidence presented, the Board could determine there will be no actual impact.

[79] The Director argued the Board did not follow its own process in determining the directly affected status of the Appellant. The Director stated the Board requires those appellants who do not live adjacent to a licenced project to provide more details to explain how they are directly affected by the proposed project. The Director argued the Appellant is similar to a "third party" in the use of the Shapka lands. With respect, the Board does not agree. The Director is trying to distinguish between a transient user and those who live adjacent to an activity. An extra level of proof is not required to find the person directly affected. However, it is more difficult to demonstrate the direct affect the farther away the person is from the activity. That is why the Board requires the additional information to form the causal connection. When the person lives adjacent to the activity, the connection is more apparent.

[80] The Appellant demonstrated a connection to the Shapka lands, and the Shapka lands are within two kilometres of the Licenced well. There are also indications of connections of water sources between the area of the Licenced well and the Shapka lands. This indicates the possibility that waters on the Shapka lands, lands which the Appellant uses, could be impacted

by the withdrawal of water from the Licenced well. The Appellant is not a casual user of the property. She has agreements with the landowner to use the lands as part of her agricultural operations. Although the causal connection may be more evident when an appellant lives adjacent to the proposed activity, any appellant is required to demonstrate a causal connection between the potential impacts of the activity and the appellant's use of the natural resource that could be impacted. In this case, the Appellant demonstrated the required causal connection. The Appellant is not a member of the general public when considering her use of the Shapka lands. She uses the lands as if it was her own, recognizing she does not have a full legal interest in the property. As to whether or not there will be an actual impact to the water sources on the lands used by the Appellant will be determined at the substantial hearing. The Board finds it followed its process in determining whether the Appellant is directly affected.

[81] Although the Director and the Licence Holder presented interesting arguments, the Board did not find the arguments persuasive in that they did not present compelling or exceptional reasons to warrant a reconsideration.

[82] Respectfully, in the original submission process on the directly affected issue, the Director and Licence Holder did an inadequate and incomplete job of rebutting the *prima facie* case that the Appellant was directly affected. As stated in Macaulay and Sprague, "A party who is unable to present any new facts capable of resulting in any material or substantive change is essentially merely asking the agency to 'think again'...".<sup>10</sup> The Director and Licence Holder did not meet their onus of demonstrating there was new evidence to consider or that the Board made an error in fact or law. All evidence brought forward on the reconsideration request could have been brought forward when the Board made its decision regarding directly affected. Therefore, the Board denies the reconsideration request.

## V. ISSUES

[83] Although the Board had two additional motions to determine at the preliminary motions hearing, the Board adjourned the hearing to receive additional submissions on the matter

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<sup>10</sup> Robert W. Macaulay and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Carswell, 2004) at page 27A-12.

of the issues. The Director requested the reconsideration motion be dealt with prior to any decisions being made regarding the issues. Since the Board has denied the reconsideration request, this process issue is moot. However, given the concerns presented by the Director regarding the determination of the issues, the Board adjourned the preliminary motions hearing in order to receive additional submissions on the issues that should be heard at the substantive hearing. The Board is granting this request, in part due to the inadequate submissions provided by the Director regarding potential issues for a hearing. The Director was represented by counsel who should be able to present arguments in the alternative. In this case, although the Director may not have agreed with the Board's decision that the Appellant was directly affected, the Director could have, and should have, in response to the Board's questions, provided a more adequate response. As stated in previous decisions, the Board is aware of the limited time and resources available for all Parties to the appeal, and the Board prefers to deal with all preliminary motions at the same time if possible.

[84] To provide an economy of time and resources to the process, the Board routinely asks participants to an appeal to provide submissions on what they consider would be proper issues before the Board should a hearing be held. It is, in essence, arguing in the alternative. By providing what the Parties believe are issues that are found in the Notice of Appeal, are relevant to the approval or licence issued, and are within the Board's jurisdiction, does not concede the appeal is properly before the Board. By having only one submission process, it decreases the time to actually proceed to a hearing and should decrease the time participants need to prepare submissions.

[85] One of the purposes of having the administrative process is to allow unrepresented litigants to present their concerns to the administrative tribunal. As a result, submissions may not be as refined as counsel may desire, but in most cases, as in the appeal currently before the Board, the Appellant's issues can be sorted out. The Board notes the Licence Holder and Appellant submitted issues to be considered by the Board at the substantive hearing.

[86] In this case the Board, by way of a letter dated July 9, 2013, provided a list of issues raised in the Notice of Appeal. The letter listed the issues but did not comment on

whether the issues were properly before the Board. The Board notes the Director chose not to consider the list provided and did not use it as guidance for determining proper issues before the Board.

[87] The Board will set a new schedule to receive written submissions on the issues for the substantive hearing. The issues for the hearing must be issues raised in the Notice of Appeal, relate to the Licence, and are within the Board's jurisdiction. The Board's July 9, 2013 letter may provide a starting ground for potential issues for the substantive hearing.

[88] The Board notes that, even though the Director may still disagree with the Board's decision, counsel should be able to submit meaningful recommendations for issues just as counsel can provide meaningful arguments in the alternative. If the Director does not want to avail himself with the opportunity to provide input regarding the issues, he is free to do so. If the Director wants further and better particulars, he is free to make that request.

## **VI. DECISION**

[89] The Board finds the Director has not provided any new evidence or evidence that was not available at the time of the Board's decision. If there were any errors in fact as argued by the Director, omitting the errors would not change the outcome of the Board's decision. The Board found no error in law. Therefore, the Board denies the reconsideration request. The Board will hear the appeal of Ms. Yvonne Tomlinson.

Dated on October 10, 2013, at Edmonton, Alberta.

"original signed by"

D.W. Perras  
Board Chair