2020 ABEAB 19

May 22, 2020

Via E-Mail

Mr. Mohinder Singh Gill
Five Pillar Holdings Ltd.
(*Appellants*)

Mr. Mark Hein
Scott Venturo Rudakoff LLP
(*Counsel for the Appellants*)

Ms. Shannon Keehn
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(*Counsel for the Director, AEP*)

Mr. Ryan Roycroft
Director of IDOS
Town of Strathmore
(*Intervenor*)

Dear Gentlemen and Ms. Keehn:

Re: Decision Letter* – Mohinder Singh Gill & Five Pillar Holdings
***Water Act* Water Management Order No. WMO-2017/01-SSR and Cancellation of *Water Act* Interim Licence No. 11738 (AEP File No. 20320)**
Our File Nos.: EAB 16-057, 061-063

These are the Board's reasons for its April 1, 2020 decision respecting the participation of the intervenor, the Town of Strathmore. This decision was made by the Board's Chair, Mr. Alex MacWilliam.

Intervenor Application

The Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the "Director") cancelled Interim *Water Act* Licence No. 11738, originally issued to White Wezel Enterprises Ltd., for a groundwater well (the "Well"), that supplied water to the Wheatland Hotel, and issued Water Management Order No. WMO-2017/01-SSR (the "Order") under the *Water Act,* R.S.A. 2000, c. W-3, to Mr. Mohinder Singh Gill and Five Pillar Holdings Ltd. (the "Appellants"), requiring them to reclaim the Well. The Appellants appealed both decisions.

* Cite as: Intervenor Decision: *Gill et al.* v. *Director*, Regional Compliance, S*outh Saskatchewan Region*, *Alberta Environment and Parks* (22 May 2020), Appeal Nos. 16-057, 061-063-DL1 (A.E.A.B.), 2020 ABEAB 19.

The Board scheduled a hearing with respect to the appeals to be held on April 8, 2020.[1] In response to the Board's advertisement[2] notifying the public about the hearing and setting a due date to receive applications to intervene, the Board received an application to intervene from the Town of Strathmore (the "Town"), on March 6, 2020.

The Well that is the subject matter of the appeals is located within the Town's boundaries. In its intervenor request, the Town advised that it:

> "… is supportive of eliminating the water well for the following reasons:
>
> 1) This water well is not compliant with Town of Strathmore By-Law 12-07, Water Utility Services Bylaw
> 2) To eliminate the potential for cross contamination of the water from the well with the Town's potable water supply; and
> 3) To ensure that the fire sprinkler system on the third floor of the hotel is capable of being supplied by a water source to operate the fire sprinkler system in the event of emergency."[3]

Upon receiving the intervenor application, the Board asked the Director and the Appellants (collectively the "Parties") for their comments on whether the Board should permit the Town to participate in the hearing, and if so, what level of participation should the Town be given.

Parties' Comments

The Director consented to the Town's participation, commenting that the Town "… can likely provide testimony that is relevant and useful to the Board's ultimate report and recommendations to the Minister.[4] The Director further commented that:

> "Given the Town of Strathmore's direct involvement in regulating the use of the Well, it will be valuable to the Board to hear the evidence directly from the Town regarding:
>
> - the relevancy and application of the Town's bylaws;
> - the effect of those bylaws on the use of the Well; and
> - the information surrounding the December 18, 2015 Safety Codes Council Order No. 0015456."[5]

The Appellants opposed the Town's participation. The Appellants argued that the bylaws and regulations of a municipality are *ultra vires* the powers of the Board and should not be considered as a part of the appeal. The Appellants further argued the Board is not in a position, nor does it have the jurisdiction, to determine the relevancy or effect of municipal bylaws. The

---

1 The hearing was adjourned due to the COVID-19 public health emergency.

2 Pursuant to section 7 of the Environmental Appeal Board Regulation, Alta. Reg. 114/93, the hearing notice was placed in the Strathmore Times on February 14, 2020 and a news release was issued by the Public Affairs Bureau to media throughout the Province on February 18, 2020.

3 Town of Strathmore's Letter, March 6, 2020.

4 Director's Letter, March 16, 2020.

5 Director's Letter, March 16, 2020.

Appellants concluded by stating that there were more appropriate avenues for the Town to pursue to enforce its bylaws. [6]

Legislation

Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board may determine who can make representations before it. Section 95(6) of EPEA states:

> "Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matters before the Board to any person who the Board considers should be allowed to make representations."

Section 9 of the *Environmental Appeal Board Regulation,* Alta. Reg. 114/93 (the "Regulation"), requires the Board to determine whether a person submitting a request to make representations should be allowed to do so at the hearing of an appeal. Sections 9(2) and 9(3) of the Regulation provide:

> "(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of appeal and shall give the person written notice of that decision.
>
> (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission."

Rule 14 of the Board's Rules of Practice outlines the factors the Board considers in an intervenor application. Rule 14 provides in part:

> "As a general rule, those persons or groups wishing to intervene must meet the following tests:
>
> - their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
>
> - the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
>
> - the intervention will not repeat or duplicate evidence presented by other

6 Appellants' Letter, March 16, 2020.

parties; and

- if the intervention request is late, there are documented and sound reasons why the intervenor did not file earlier for such status."

Analysis

Applications to intervene in appeal proceedings in the courts have given rise to case law that the Board can look to generally when considering an intervenor application. While this case law deals with court processes, there is a strong similarity in the factors considered by the courts and the tests listed in Rule 14 of the Board's Rules of Practice, noted above. The courts' interpretations of their own rules can provide some measure of guidance to the Board, when interpreting its own tests.

In *R.* v*. Morgentaler*,[7] Justice Sopinka of the Supreme Court of Canada commented that "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."[8] This is akin to the Board's requirement that an applicant to intervene have a tangible interest in the appeal, and be able to offer argument which will materially assist the Board in deciding the appeal.[9]

Similarly, the following factors enumerated by the Alberta Court of Appeal in *Pedersen* v. *Alberta*[10] have some parallels to Rule 14 of the Board's Rules of Practice:

"1. Will the intervener be directly affected by the appeal;
2. Is the presence of the intervener necessary for the court to properly decide the matter;
3. Might the intervener's interest in the proceedings not be fully protected by the parties;
4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. Will the intervention unduly delay the proceedings;
6. Will there possibly be prejudice to the parties if intervention is granted;
7. Will intervention widen the *lis* between the parties; and
8. Will the intervention transform the court into a political arena?"[11]

Of specific interest, is the comment by the Court of Appeal that it is not sufficient for an applicant to establish that they will be directly affected by the outcome of the hearing as the sole basis for allowing leave to intervene, as the potential for numerous intervenors and undue delays to the hearing is significant with no corresponding benefits to the hearing.[12] It follows that an intervenor must add something more to the hearing through their participation.

---

7 *R.* v. *Morgentaler*, [1993] 1 S.C.R. 462.
8 *R.* v. *Morgentaler*, [1993] 1 S.C.R. 462 at paragraph 1.
9 Environmental Appeals Board, Rules of Practice, at Rule 14.
10 *Pedersen* v. *Alberta*, 2008 ABCA. 192 (*Pedersen*).
11 *Pedersen* v. *Alberta*, 2008 ABCA. 192 at paragraph 3.
12 *Pedersen* v. *Alberta*, 2008 ABCA. 192 at paragraph 10.

Further discussion regarding the application of the *Pedersen* factors is found in *Suncor Energy* v. *Unifor Local 707A*,[13] wherein the Alberta Court of Appeal commented:

> "In addition to establishing an interest, a proposed intervenor must demonstrate an ability to provide 'special expertise or fresh perspective,' which brings some benefit to the proceedings, especially where the number of potential interveners is significant. Further, an applicant should articulate where the difference lies in either oral or written submissions: *Pedersen v Alberta*, 2008 ABCA 192, 432 AR 219, at para[graphs] 10-11."[14]

This requirement for special expertise or fresh perspective is similar to the Board's own requirement that the proposed evidence not be duplicative of the evidence expected to be provided by existing parties to the appeal. The purpose of this is practical, to ensure that the intervenor's evidence or argument will assist the Board and that the invervenor's participation will not unnecessarily delay the hearing.

More recently, in *JH* v. *Alberta Health Services*,[15] the Alberta Court of Appeal discussed the importance of weighing whether an intervenor was directly affected by the appeal by looking at the ability of the intervenor to offer special expertise or insight:

> "Whether the proposed intervener will be 'directly affected by the appeal' is one factor among many that can be considered in deciding the core question of whether the proposed intervener will be 'specially affected by the decision' or 'has some special expertise or insight' to offer: *Styles* at para[graph] 15; *Papaschase* at para[graph] 2. This factor should not be interpreted as suggesting that only affected individuals can intervene, or that representative bodies or other organizations cannot: eg *PT* v *Alberta*, 2018 ABCA 312 at paragraph 5. In considering whether an organization will be 'specially affected' or has 'special expertise', a court may have regard to the organization's constituency, mandate, experience, or other relevant features: eg *Johnsson* v *Lymer*, 2019 ABCA 113 at para[graphs] 12, 21. At the same time, courts will guard against granting intervener status to organizations whose interest is 'purely jurisprudential': *North Bank Potato Farm Ltd.* v *The Canadian Food Inspection Agency*, 2019 ABCA 88 at para[graph] 5; *Papachase* at para[graph] 8; *Styles* at para[graph] 28. Interveners must be able to demonstrate a sufficiently tangible connection to the matter before the court."[16]

Although these cases were in the context of applications to intervene in appeals to the courts, there are parallel principles to the Board's Rules of Practice from which the Board can draw guidance, when determining whether to allow an applicant to intervene in a hearing and, if allowed, the nature of that intervention. Applying this case law in the context of Board Rule 14, the Town in its intervenor application, must first be able to demonstrate that it has a tangible interest in these appeals.

---

13 *Suncor Energy Inc* v *Unifor Local 707A*, 2016 ABCA 265 (*Suncor*).
14 *Suncor Energy Inc* v *Unifor Local 707A*, 2016 ABCA 265 at paragraph 11.
15 *JH* v. *Alberta Health Services*, 2019 ABCA 420 (*JH* v. *Alberta Health Services*).
16 *JH* v. *Alberta Health Services*, 2019 ABCA 420, at paragraph 14.

In its intervenor application, the Town has raised the issue of the safety of its water supply. The Town has alleged that the Appellants' Well is interconnected to the municipal water supply. The Town has a responsibility to provide safe, potable water to its residents and it has alleged the Appellants' Well may contaminate the municipal water supply. The Town has established it has a tangible interest in the outcome of the appeals as the Appellants' Well has the potential to impact the water supply managed by the Town.

Having a tangible interest in the outcome of the appeals is not solely determinative of whether the Town will be permitted to intervene in the appeals. In looking to Board Rule 14 and the case law above, in order for the Board to permit the Town to be an intervenor, it is not sufficient for the Town to simply show that it has a tangible connection to the outcome of the appeal. The Town must also provide an indication of the type of evidence and arguments it intends to present to the Board. The evidence and arguments should not be duplicative of the evidence and arguments presented by the other parties and it should assist the Board in determining the best recommendations to make to the Minister on the issues set by the Board for the hearing.

The Town has stated the reasons why it wants to intervene in the appeals. However, the Town has not described the evidence it will provide if allowed to do so. The Director has commented in support of the Town's application, stating that as a regulator of the Well, the Town would be able to provide evidence regarding the relevancy and application of the Town's bylaws, as well as the effect of those bylaws on the Well. The Board notes the Director has also raised the Town's ability to provide direct evidence regarding the December 18, 2015 Safety Codes Council Order No. 0015456. The Appellants have argued the bylaws and regulations are *ultra vires* to the appeals.

Although the Town has provided limited information as to the type of evidence and arguments it will present, the Board agrees with the Director's comments regarding the Town's ability to provide direct evidence regarding the interconnection between the Appellants' Well and the Town's water supply. The Town, as owner of the municipal water supply system, is best positioned to speak to the alleged interconnection between the Town's water supply system and the Appellants' Well. The Town is also best positioned to speak to its safety codes and their intended application. There is sufficient information for the Board to determine that the evidence of the Town will not be duplicative of the other parties.

The Town has not expressly stated that it opposes the appeals. However, it has stated that it supports the elimination of the Well. The Well is required to be reclaimed under the Order. The Board infers from this stated desire that the Town does not support the appeals. The Board had initially set aside one day for the hearing of the appeals, and foresees no issue with the Town's participation as an intervenor that would cause undue delay or require an extension of the hearing.

The Town has raised the issue of cross-contamination of the Town's water supply from the interconnection between the municipal water supply and the Appellants' Well. Given the significant degree of public interest in the protection of the Town's water supply, the Board considers it appropriate to allow the Town to participate as an intervenor in the hearing. The issues of the monitoring and protection of the Town's water supply are both likely to be addressed in the hearing. The evidence of the Town on this point, as well as on the December 18, 2015 Safety Codes Council Order No. 0015456, could provide additional context to these issues and to the other issues before

the Board.

Decision

As stated in its April 1, 2020 letter, the Board has decided to permit the Town to participate in the hearing. The Town is required to file a written submission, permitted to file expert reports if they wish, present evidence on the alleged interconnection between the Town's water supply system and the Appellants' Well, and on the safety codes. The Appellants may cross-examine the Town and the Town will be subject to questioning by the Board. As the Board is only looking for information from the Town, the Town will not be permitted to cross-examine or to make opening and closing comments at the hearing. The Board will not deal with the Town's bylaws, as these are not within the Board's jurisdiction.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6569 for Valerie Myrmo, Registrar of Appeals, 780-427-7002 for Denise Black, Board Secretary, and 780-427-4179 for Gilbert Van Nes. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca, denise.black@gov.ab.ca, and gilbert.vannes@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel
and Settlement Officer

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.

DM:\WPDOCS\APPEALS 2016\16-057 GILL (WMO)\DECISIONS\16-057, 061-063-DL1-INTERVENOR DECISION LETTER MAY 22, 2020.DOC