

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – June 24, 2021

**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 Mohinder Singh Gill and Five Pillar Holdings with respect to the decision of the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, to cancel *Water Act* Interim Licence No. 11738 and issue Water Management Order No. WMO-2017/01-SSR.

Cite as: Reconsideration Decision: *Gill et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (24 June 2021), Appeal Nos. 16-057, 061-063-RD (A.E.A.B.), 2021 ABEAB 18.

**BEFORE:**

Mr. Alex MacWilliam, Board Chair (retired),  
Ms. Tamara Bews, and Dr. Brenda Ballachey.

**SUBMISSIONS BY:**

**Appellants:**

Mr. Mohinder Singh Gill and Five Pillar Holdings Ltd., represented by Mr. Neil Tichkowsky, Scott Venturo Rudakoff, LLP.

**Director:**

Mr. Craig Knaus, Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

The Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the Director) requested the Board reconsider paragraph 58 of its July 5, 2019 decision (the Decision),\* which reads as follows:

The Director argued the Appellants cannot sell the Licence as it cannot be separated from the property. The Licence, theoretically, has market value. Whether the Licence can be sold is a question appropriately determined in a hearing, not as a preliminary motion. By cancelling the Licence, the Director removed the right of the Appellants to obtain value for it. Whether the Director was justified in taking such action is a matter to be argued at the merits hearing.

The Director argues that paragraph 58 contains substantial errors that, once corrected, will change the result of the Decision, including the impacts of the Decision on the future course of the appeals. The Director requests that the Board withdraw its findings relating to the ability to sell a water licence. In their response, the Appellants argue that the Director's position and assertions are incorrect.

After reviewing the Decision and the submissions received, the Board agrees that it could have more clearly stated its intent in paragraph 58. Therefore, the Board restates paragraph 58 of its Decision as follows:

The Appellants' appeal of the cancellation of the water licence is not, on its face, without merit, as it is possible for the holder of a licence to transfer the allocation of water in the water licence to another person, and obtain value from that transfer. In all cases, a transfer is subject to sections 34, 81, 82 and 83 of the *Water Act*, including the requirement to obtain Alberta Environment and Parks' written approval.

In their response, the Appellants argued that the Board has jurisdiction to hear matters or make determinations related to compensation under section 158 of the *Water Act*. However, this is not the case as that jurisdiction rests with the Land Compensation Board.\*\*

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\* *Mohinder Singh Gill and Five Pillar Holdings Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Parks* (5 July 2019), Appeal Nos. 16-057, 061, 062, and 063-ID1 (A.E.A.B.), 2019 ABEAB 24.

\*\* See section 158(2) of the *Water Act*, R.S.A. 2000, c. W-5.

The Director also expressed the concern that the Board raised the possibility of transferring the water licence on its own initiative. This was not something raised by the Appellants in their Notice of Appeal. The Board's discussion of the possibility of transferring the water allocation arose solely on the question of whether the appeals were moot or without merit.

## TABLE OF CONTENTS

I.	INTRODUCTION -----	1
II.	BACKGROUND-----	1
III.	SUBMISSIONS -----	1
A.	Director -----	1
B.	Appellants -----	6
IV.	ISSUES -----	9
V.	ANALYSIS -----	9
VI.	CONCLUSION-----	13

## **I. INTRODUCTION**

[1] This is the decision of the Environmental Appeals Board (the “Board”) on the application by the Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks (the “Director”) to reconsider the Board’s July 5, 2019 decision (the “Decision”)<sup>1</sup> denying the Director’s motion to dismiss the appeals as there may be remedies the Board could recommend to the Minister.

## **II. BACKGROUND**

[2] The background facts of this matter are set out in the Decision giving rise to this reconsideration at paragraphs 3 to 12, and therefore they will not be restated here.

[3] On July 19, 2019, the Director requested the Board reconsider and withdraw the findings contained in paragraph 58 of the Decision based on alleged errors in fact and law.

[4] The Board received the submissions of Mohinder Gill and Five Pillar Holdings Ltd. (the “Appellants”) on September 27, 2019, the Director’s response submission on October 11, 2019, and the Appellants’ rebuttal on October 25, 2019. On November 17, 2019, the Board stated reconsideration is a two-part process, and since the Director met the threshold to undertake reconsideration, the parties may add any further submissions by November 29, 2019. Accordingly, the Board received submissions on November 27, 2019, from the Appellants and on November 29, 2019, from the Director.

## **III. SUBMISSIONS**

### **A. Director**

[5] The Board is asked to reconsider paragraph 58 of the Board’s Decision and withdraw the Board’s findings in that paragraph. The Director submits paragraph 58 contains substantial errors that, once corrected, will change the result of the Decision, including the impacts of the Decision on the future course of the appeals.

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<sup>1</sup> *Mohinder Singh Gill and Five Pillar Holdings Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Parks* (5 July 2019), Appeal Nos. 16-057, 061, 062, and 063-ID1 (A.E.A.B.), 2019 ABEAB 24.

[6] There are sufficient grounds for reconsideration when the Board has erred in the interpretation of the law or where the decision-maker unfairly or unreasonably made an error in fact.<sup>2</sup>

[7] The Board made substantial errors of law when the Board concluded that:

- (a) licences issued under the *Water Act* can be sold, and a licensee has a right to obtain value for a licence when the *Water Act* contains no authority for doing so;
- (b) the sale of a *Water Act* licence can be determined at a hearing when the *Water Act* expressly states that the Minister determines the outcomes; and
- (c) the sale of the Licence<sup>3</sup> is an issue in this appeal when the authority for even the mere transfer of a licence lies outside of the appeal process.

These findings reflect errors of law and are not the result of the Board using its expertise to take judicial notice of specific known facts or facts of common knowledge.

[8] The Director argues the Board unreasonably and unfairly made errors in determining facts. Without any evidence before it, the Board concluded the Licence has a theoretical market value, and the Director's decision removed the Appellants' right to obtain value for the Licence. The Board should correct these errors by removing paragraph 58 from the Decision, which would change the effect of the Decision.

[9] By saying, "[w]hether the Licence can be sold is a question appropriately determined in a hearing, not as a preliminary motion,"<sup>4</sup> the Board assumed that water licences are saleable. However, water licences cannot be sold, as they are statutory instruments. Although the *Water Act* contemplates the possibility of transferring an allocation of water,<sup>5</sup> it does not authorize the sale of a licence.

[10] The Board erred in interpreting and applying the law when finding that the sale of the Licence would be determined at a hearing. The law does not allow for a sale and the Board deciding otherwise is a demonstrable error of law, which affects the outcome of the appeals.

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<sup>2</sup> Director's Response Submission, October 11, 2019, at page 2, citing D.P. Jones, QC & Anne S. de Villars, QC, *Principles of Administrative Law*, 6th ed. (Toronto: Thomson Reuter Canada Limited, 2014) at page 491.

<sup>3</sup> Interim Water Licence No. 11738.

<sup>4</sup> Director's Response Submission, October 11, 2019, at paragraph 12, citing the Decision at paragraph 58.

<sup>5</sup> See Part 5, Division 2 of the *Water Act*, R.S.A. 2000, c W-3.

[11] When the Board stated, “[b]y cancelling the Licence, the Director removed the right of the Appellants to obtain value for it,”<sup>6</sup> the Board implicitly determined that a licensee has the right to sell a licence for value. A licence is a statutory instrument that confers no right other than the limited permission to divert and use groundwater belonging to the Crown, in accordance with the terms and conditions of the licence. A regulatory structure, of which the licence is a part, does not confer to a licence holder any right to obtain monetary value for the licence.

[12] When the Board stated, “[w]hether the Licence can be sold is a question appropriately determined in a hearing...”<sup>7</sup> the Board implied that hearings can determine the possibility of selling a water licence.

[13] The sale of a water licence is not permitted under the *Water Act*, and this issue cannot be determined whether at a hearing on the merits or as a preliminary motion. The Director, the Board, and the Minister have no authority to decide the sale and separation of a licence from the land.

[14] Moreover, section 100(1) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), identifies the Minister as deciding the outcome of the appeals. Therefore, the Board deciding otherwise, as in paragraph 58 of the Decision, is an error of law.<sup>8</sup>

[15] The Board erred in law in concluding the sale of the Licence was an issue for this appeal. “The theoretical value of the Licence and the question of whether or not it could be sold was not a matter included in the Appellants’ Notice of Appeal and therefore should not be included or decided...”<sup>9</sup> and, therefore, should not be included as an issue in the Decision or a hearing of this appeal. It was both unfair and unreasonable for the Board to raise issues of its

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<sup>6</sup> Director’s Response Submission, October 11, 2019, at paragraph 15, citing the Decision, at paragraph 58.

<sup>7</sup> Director’s Response Submission, October 11, 2019, at paragraph 20, citing the Decision, at paragraph 58.

<sup>8</sup> Section 100(1) of EPEA provides:

“On receiving the report of the Board, the Minister may, by order,

- (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,
- (b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and
- (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.”

<sup>9</sup> Director’s Letter, July 19, 2019, page 1.



choosing, which the Appellants did not put forward, and for which no evidence, by any party, was put before the Board.

[16] The Board stated that the Licence has some market value. In the absence of any evidence, this is also an unfair and unreasonable error of fact, which should itself form sufficient grounds for reconsideration.

[17] Contrary to the Appellants' submission, section 158 of the *Water Act* does not apply to this appeal.<sup>10</sup> Section 158 requires the Director to consider compensation when cancelling a licence under section 55(2) of the *Water Act*.<sup>11</sup> The Director cancelled the Licence under section 55(1)(j) of the *Water Act*.<sup>12</sup> This is not a decision for which compensation is payable. Furthermore, the Water Management Order was issued under section 97(1)(f) of the *Water Act*,<sup>13</sup> which refers to problem wells, not section 97(1)(i),<sup>14</sup> which provides for compensation if a licence is cancelled.

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<sup>10</sup> See section 158(1) of the *Water Act*, which states:

"If the Director

- (a) amends a licence under section 54(2), suspends or cancels a licence under section 55(2) or cancels a preliminary certificate under section 71(1)(i), or
- (b) issues a water management order under section 97(1)(i) with respect to a licence issued under this Act,

the Director must, subject to the regulations, authorize the payment of compensation to the licensee for any losses incurred as a result of the amendment, suspension or cancellation or the water management order, in the manner and amount that the Director considers appropriate."

<sup>11</sup> Section 55(2) of the *Water Act* states:

"Subject to the regulations, the Director may suspend or cancel a licence issued under this Act if, in the opinion of the Director, a significant adverse effect on the aquatic environment occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued, and compensation may be payable under section 158."

<sup>12</sup> Section 55(1)(j) of the *Water Act* provides:

"The Director may suspend or cancel a licence ... (j) if, in the opinion of the Director, a significant adverse effect on human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued."

<sup>13</sup> Section 97(1)(f) of the *Water Act* reads:

"An inspector or the Director may issue a water management order ... (f) to the person responsible for a water well if, in the opinion of an inspector or the Director, the water well is a problem water well or any actions related to the drilling of a water well caused, causes or may cause an adverse effect on the environment or on human health, property or public safety..."

<sup>14</sup> Section 97(1)(i) of the *Water Act* reads:

"An inspector or the Director may issue a water management order ... (i) to a household user, approval holder or licensee whose licence has been issued under this Act, if an inspector or the Director is of the opinion that a diversion of water caused, causes or may cause a significant

[18] The Board cannot hear an appeal on compensation as jurisdiction over this matter lies with the Land Compensation Board under section 158(2) of the *Water Act*.<sup>15</sup> Therefore, any argument or decision regarding compensation would be a matter outside the Board's jurisdiction.

[19] The Appellants had no right to obtain monetary value for the Licence. Therefore, the Board's finding that the Appellants had such a right and the finding that such right was eliminated by the Director's decision to cancel the Licence was an error of fact.

[20] The Director rejects the Board's suggestion that the theoretical value must be a prerequisite consideration for the cancellation of a licence. There is no statutory or other obligation for the Director to consider licence value. The question of whether a licence can be sold is not one appropriately determined at a hearing.

[21] If the Board corrects the errors in paragraph 58, the conclusions in that part of the Decision entirely change. Left uncorrected, those errors set an unfair course for the hearing.

[22] While the Court in *Royal Bank of Canada v. Hirsche Herefords*<sup>16</sup> found the *Water Act* licence, in that case, had value, that case cannot be used as evidence that the Licence in this appeal has value. The Court, in that case, was also careful to recognize the jurisdiction of the Director explicitly.<sup>17</sup>

[23] The Appellants have mischaracterized some of the Director's submissions, including:

- (i) the Director's position on water licences not having value, and
- (ii) the Board's ability to determine compensation for suspended and cancelled licences under the *Water Act*.

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adverse effect on the aquatic environment, human health, property or public safety, and compensation may be payable under section 158 with respect to a licence issued under this Act."

<sup>15</sup> Section 158(2) of the *Water Act* provides:

"If the licensee or preliminary certificate holder does not agree with the amount of compensation authorized under subsection (1), the licensee or preliminary certificate holder may in accordance with the regulations, appeal the amount to the Land Compensation Board."

<sup>16</sup> *Royal Bank of Canada v. Hirsche Herefords*, 2012 ABQB 32, at paragraph 34 ("*Royal Bank of Canada v. Hirsche Herefords*").

<sup>17</sup> Director's Letter, November 29, 2019, at page 1, citing *Royal Bank of Canada v. Hirsche Herefords* at paragraph 34.

## B. Appellants

[24] The Appellants submit that the *Water Act* specifically envisions the transfer of licences and sets out the regulatory process to be followed in transferring a licence. However, it does not address private compensation, which may be negotiated between parties and accompany such a process.

[25] The transfer of value between two private entities in exchange for transferring a water licence was authorized in *Royal Bank of Canada v. Hirsche Herefords*.<sup>18</sup> The Court of Queen's Bench held that while the Director's role is to determine whether a transfer of a water licence should be approved, there is nothing to stop two parties from exchanging compensation in return for the Director approving a transfer.

[26] The regulatory structure surrounding licences does not preclude the exchange of compensation between private parties for the transfer of a licence. Therefore, the Director's position that water licences do not or cannot have value is erroneous.

[27] Section 100(1) of EPEA provides the Minister with authority to review an appeal made to the Board, but does not preclude the Board from holding a hearing in the first place.

[28] The Board did not state a decision made at a hearing on the issue of the sale or transfer of the License would be a final decision, and the Director's assertion that it did is incorrect.

[29] This is not an issue of the sale of land where the Appellants are attempting to separate the water licence from the land. Instead, this is a question of whether the Director's decision to cancel the water licence deprived the Appellants of the theoretical value of the Licence. Sections 115(1)(f) and (g) of the *Water Act*<sup>19</sup> provide the ability to appeal if the Director refuses to amend a licence, or suspends, or cancels a licence. Therefore, since the

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<sup>18</sup> *Royal Bank of Canada v. Hirsche Herefords*, at paragraph 34.

<sup>19</sup> Sections 115(1)(f) and (g) of the *Water Act* state:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

(f) the applicant, if the Director refuses to amend an approval, preliminary certificate or licence;

(g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate...."

Appellants' inability to receive value for a potential transfer of all or a part of their Licence is a negative result of the Director's decision to cancel the Licence, this is an issue to be heard at a hearing.

[30] Section 82(1) of the *Water Act* clearly states that the Director may approve the transfer of all or a part of a licence. This is supported in the case of *Canada Finance Corporation Limited v. Hirsche Herefords*, wherein the Court of Appeal stated, "[w]ater licenses are transferred ... by approval of the Director of Water Resources."<sup>20</sup>

[31] The Board's form for Notices of Appeal states, "if you fail to state all of your objections/reasons/solutions here, you **may** be prevented from raising them later in your appeal (emphasis added)."<sup>21</sup> The use of "may" is permissive language, which does not preclude the Board from raising further issues that were not stated in the Notice of Appeal.

[32] The Board was able to decide whether a licence may have a theoretical market value based upon experience and history with similar issues. It did not overstep its ability to come to its decision. The courts in Alberta have considered that licences can be an asset in bankruptcy proceedings and can have some value.

[33] The Director's argument that the Licence itself has no value as it runs with the land ignores the potential value the Licence may bring to a sale of that land. Even if the Licence cannot be sold separately from the land, the ability to access one's own water is worth something when negotiating for the land purchase and sale. Further, the *Water Act* contemplates giving the Board some ability to determine the value of licences under section 158 of the *Water Act*, which allows the Board to compensate those who have their licences suspended or cancelled.

[34] The Board made no statement on the Appellants' "right to obtain monetary value for the license,"<sup>22</sup> but it simply said that, theoretically, the licence had value. That conclusion was a valid finding based on law and the Board's expertise, skill, and specialized knowledge. Therefore, the Director's cancellation of the licence is a valid issue to be discussed at the hearing as it denied the Appellants the ability to explore that value.

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<sup>20</sup> *Canada Finance Corporation Limited v. Hirsche Herefords*, 2012 ABCA 315, at paragraph 18. The Appellants had incorrectly cited this case as *Royal Bank v. Hirsche Herefords* in their submissions.

<sup>21</sup> Appellants' Rebuttal Submission, October 25, 2019, page 3, at paragraph 17.

<sup>22</sup> Appellants' Rebuttal Submission, October 25, 2019, page 4, at paragraph 23.

[35] The Board used information available to it as a specialized entity that it is common knowledge that water licences have theoretical value.

[36] As an expert tribunal, the Board can take judicial notice of generally recognized facts within its specialized knowledge. The Court of Queen's Bench in *Alberta Report v. Alberta (Human Rights and Citizenship Commission)*, analysed this ability and found: "[o]n principle, it should be easier for administrative tribunals to take notice of certain facts or circumstances. The rules of evidence do not strictly apply."<sup>23</sup>

[37] Although dealing with the Human Rights Commission, the general principle in *Alberta Report v. Alberta (Human Rights and Citizenship Commission)* is equally applicable to matters dealt with by the Board. The Board does not require strict adherence to the rules of evidence applied by the courts, and the general principle allows broader findings on judicial notice to apply.

[38] In a regime that allows an expert tribunal to make findings based on its own experience and history with similar issues, it is irrelevant whether the Appellants raised the Licence's theoretical value in the Notice of Appeal.

[39] The Director should have some awareness that a licence might have theoretical value. Despite the Director's statement in his letter of July 19, 2019, that "[t]here is no statutory or other obligation for the Director to consider licence value," section 158 of the *Water Act*<sup>24</sup> requires the Director to perform an assessment when considering compensation for the amendment or cancellation of a licence. The *Water Act* "...does not outline what the Director must consider when performing this assessment, only that it is what the 'Director considers appropriate.'"<sup>25</sup> The *Water Act* contains section 158, an explicit acknowledgment by the drafters that water licences have value.

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<sup>23</sup> Appellants' Initial Submission, September 27, 2019, at page 1, citing *Alberta Report v. Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 1081, at paragraph 25.

<sup>24</sup> Appellants' Initial Submission, September 27, 2019, at page 2.

<sup>25</sup> Appellants' Initial Submission, September 27, 2019, at page 2.

#### IV. ISSUES

[40] The reconsideration motion raises three issues:

- (i) Can a water licence be sold?
- (ii) Does section 158 of the *Water Act* apply in this appeal?
- (iii) Did the Board err by raising issues of its own choosing?

#### V. ANALYSIS

[41] The Board's authority to reconsider a decision rests in section 101 of EPEA, which states: "[s]ubject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[42] In this case, it is sufficient to focus on two factors when considering whether it is appropriate for the Board to exercise its power to reconsider the Decision.<sup>26</sup>

[43] First, as the power of reconsideration is an exception to the general rule that decisions are intended to be final, there must be exceptional and compelling reasons to reconsider. Second, a substantial error of law may be a sufficient ground for reconsideration. To justify reconsideration, the decision in question must demonstrate an error of law that, once corrected, would change the original result.

[44] The Director's reconsideration request centres on paragraph 58, which states:

"The Licence, theoretically, has market value. Whether the Licence can be sold is a question appropriately determined in a hearing, not as a preliminary motion. By cancelling the Licence, the Director removed the right of the Appellants to obtain value for it. Whether the Director was justified in taking such action is a matter to be argued at the merits hearing."<sup>27</sup>

[45] On reviewing the Decision and arguments of the parties, the Board has determined it should clarify paragraph 58.

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<sup>26</sup> *Bernice Kozdrowski v. Director, Chemicals Assessment and Management, Alberta Environmental Protection* (12 June 1997), Appeal No. 96-059, 1997 ABEAB 12.

<sup>27</sup> The Decision, at paragraph 58.

*1. Can a water licence be sold?*

[46] The Director states that the *Water Act* sets out a process for transferring an allocation of water,<sup>28</sup> and it does not authorize the sale of a water licence. The Director further argues that the Board erroneously concluded that a water licence can be sold and that the sale of a water licence can be determined at a hearing. The Appellants agree that the *Water Act* governs the transfer of an allocation of water. However, the Appellants argue that parties to a transfer of an allocation can still negotiate and exchange compensation outside of the regulatory regime.

[47] In reviewing the Decision and the arguments of the parties, the Board agrees that it could have more clearly stated its intent in paragraph 58. As indicated by Justice Strekaf in *Royal Bank of Canada v. Hirsche Herefords*,<sup>29</sup> the Board acknowledges there is no inherent “right” to obtain value for a licence under the *Water Act* and the sale of a water licence is not within the Board’s jurisdiction.

[48] The *Water Act* sets out a clear process for the transfer of a water allocation. First, section 81 sets out the requirements for an application for a transfer of a water allocation. Second, section 82 sets out the Director’s authority to approve the transfer and the Director’s considerations. Finally, section 83 provides for a water conservation holdback in appropriate circumstances.

[49] Section 34(1)(c) sets out the Minister of Environment and Parks’ ability to make orders prohibiting the transfer of an allocation of water if the Minister is of the opinion that the proposed transfer is not in the public interest. The *Water Act* does not prohibit obtaining value from the transfer of an allocation of water. Unless an order is made under section 34(1)(c), the Director determines the transfer of an allocation. It may be that the transfer of water allocated under this Licence is not practically possible, or the Director is not prepared to approve the transfer for environmental or water management reasons.

[50] Having regard to the above, the Board, therefore, restates paragraph 58 of the Decision as follows:

The Appellants’ appeal of the cancellation of the water licence is not, on its face, without merit, as it is possible for the holder of a licence to transfer the allocation

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<sup>28</sup> See Part 5, Division 2 of the *Water Act*, R.S.A. 2000, c. W-3.

<sup>29</sup> *Canada Finance Corporation Limited v. Hirsche Herefords*, 2012 ABCA 315.

of water in a water licence to another person, and obtain value from that transfer. In all cases, a transfer is subject to sections 34, 81, 82 and 83 of the Water Act, including the requirement to obtain Alberta Environment and Parks' written approval.

*2. Does section 158 of the Water Act apply in the current appeal?*

[51] The Appellants argue that section 158 of the *Water Act*<sup>30</sup> provides the Board with the ability to determine the value of water licences and compensate those who have had their licences suspended or cancelled. The Director responds that section 158 is not applicable in the current appeal for two reasons: the Director cancelled the Licence under section 55(1)(j) and relied on section 97(1)(f) to issue the Water Management Order,<sup>31</sup> and the Land Compensation Board has jurisdiction over appeals relating to section 158 compensation.

[52] The Board notes the Director has stated that the Water Management Order was issued under section 55(1)(j) and section 97(1)(f). This section pertains to problem wells that, in the opinion of an Inspector or Director, have caused or may cause an adverse effect on the environment or human health, property or public safety. Generally speaking, compensation is not payable for loss of use of a well due to orders issued under these sections.

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<sup>30</sup> See section 158 of the *Water Act*, which states:

- “(1) If the Director
- (a) amends a licence under section 54(2), suspends or cancels a licence under section 55(2) or cancels a preliminary certificate under section 71(1)(i), or
  - (b) issues a water management order under section 97(1)(i) with respect to a licence issued under this Act,
- the Director must, subject to the regulations, authorize the payment of compensation to the licensee for any losses incurred as a result of the amendment, suspension or cancellation or the water management order, in the manner and amount that the Director considers appropriate.
- (2) If the licensee or preliminary certificate holder does not agree with the amount of compensation authorized under subsection (1), the licensee or preliminary certificate holder may in accordance with the regulations, appeal the amount to the Land Compensation Board.”

<sup>31</sup> Section 55(1)(j) of the *Water Act* provides:

“55(1) The Director may suspend or cancel a licence ... (j) if, in the opinion of the Director, a significant adverse effect on human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued.”

Section 97(1)(f) of the *Water Act* reads:

“An inspector or the Director may issue a water management order ... (f) to the person responsible for a water well if, in the opinion of an inspector or the Director, the water well is a problem water well or any actions related to the drilling of a water well caused, causes or may cause an adverse effect on the environment or on human health, property or public safety...”



[53] Appeals related to compensation for actions taken by the Director under section 158 of the *Water Act* are governed by Part 5 of the *Water (Ministerial) Regulation*.<sup>32</sup> Section 19 of the *Water (Ministerial) Regulation* provides that an appeal of the amount of compensation authorized by the Director is to be filed in the form and manner required by the Land Compensation Board.<sup>33</sup>

[54] Consequently, even if the Licence had been cancelled by the Director under the sections to which section 158 applies and the payment of compensation authorized, section 158(2) gives jurisdiction over an appeal on the amount of such compensation to the Land Compensation Board.

[55] As a result, section 158 does not apply to this appeal, regardless of the sections the Director relied upon in cancelling the Licence or issuing the Water Management Order.

### *3. Did the Board err by raising issues of its own choosing?*

[56] The Director expressed concern that the Board raised the issue of transfer of water allocation on its own initiative and potential value of the Licence and that this was not something raised by the Appellants in their Notice of Appeal. The Appellants have argued that this is permissible based on the permissive language in the Notice of Appeal form. Additionally, the Appellants argue that the Board can take judicial notice of generally recognized facts within its specialized knowledge as an expert tribunal.

[57] The Board wishes to make it clear that its decision was focussed solely on the question of whether the appeals were moot or without merit. Matters were raised in consideration of and in response to the Director's motion that the appeals should be dismissed as moot and without merit.

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<sup>32</sup> *Water (Ministerial) Regulation*, Alta. Reg. 205/98 ("*Water (Ministerial) Regulation*").

<sup>33</sup> Section 19(1) of the *Water (Ministerial) Regulation* provides:

"A licensee or preliminary certificate holder may appeal the amount of compensation authorized by the Director under section 158(1) of the Act by filing a notice of appeal in the form and manner required by the Land Compensation Board."

## VI. CONCLUSION

[58] For the reasons set out above, the Board has determined that paragraph 58 of the Decision is amended as follows:

The Appellants' appeal of the cancellation of the water licence is not, on its face, without merit, as it is possible for the holder of a licence to transfer the allocation of water in the water licence to another person, and obtain value from that transfer. In all cases, a transfer is subject to sections 34, 81, 82 and 83 of the *Water Act*, including the requirement to obtain Alberta Environment and Parks' written approval.

Dated on June 24, 2021, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam  
Board Chair (retired)

"original signed by"

Tamara Bews  
Panel Member

"original signed by"

Brenda Ballachey  
Panel Member