



ALBERTA  
ENVIRONMENTAL APPEALS BOARD

2021 ABEAB 25

October 26, 2021

Via E-Mail

**To Distribution List**

Dear Ladies and Gentlemen:

**Re: Decision Letter\* – Town of High River/*Water Act* Approval No. 00419723-00-00  
Our File Nos.: EAB 19-089, 093, & 094**

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These are the Board's reasons for its November 9, 2020, decision respecting the intervenor applications submitted by Mr. Peter and Ms. Sheila Macklin, Ms. Shirley Pickering on behalf of the Upper Little Bow Water Users Association, and Mr. Doug and Ms. Anne Bourque. Ms. Anjum Mullick, Board Member and Panel Chair, made this decision.

Intervenor Applications

The Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks (the "Director"), issued Approval No. 00419723-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c. W-3 to the Town of High River (the "Approval Holder") on January 28, 2020, allowing the construction and placement of a berm and swale approximately 2.6 kilometres long within the floodplain of the Highwood River, which will result in the permanent alteration of the direction of flow and water levels of the Highwood River during a flood event. The Board received and accepted appeals from Mr. Delbert and Ms. Helen Edey, Mr. James and Ms. Lillian Howie, and Mr. Rod and Ms. Nicole Macklin (collectively, the "Appellants"), appealing the issuance of the Approval.

The Board scheduled a hearing of the appeals on October 6 and 7, 2020.<sup>1</sup> In response to the Board's advertisement notifying the public about the hearing, the Board received requests to intervene in the appeals from Mr. Peter and Ms. Sheila Macklin, Ms. Shirley Pickering on behalf of the Upper Little Bow Water Users Association, and Mr. Doug and Ms. Anne Bourque (collectively, the "Applicants").

In a letter dated October 23, 2020, the Board set the process for receiving comments from the Appellants, Approval Holder, and Director on whether the Board should grant intervenor status to the Applicants and the level of the Applicants' participation at the hearing if they were allowed to intervene.

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\* Cite as: *Edey et al. v. Director, South Saskatchewan Region, Regulatory Assurance Division, Alberta Environment and Parks* (26 October 2021), Appeal Nos. 19-089, 093-094-ID1 (A.E.A.B.), 2021 ABEAB 25.

<sup>1</sup> The hearing was adjourned and rescheduled to January 12 and 13, 2021.

## Issues

The questions before the Board are:

Should the Applicants be permitted to intervene in the appeals? If the Applicants are permitted to intervene, what level of participation should the Applicants have in the appeals?

## Legislation and Analysis

Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), the Board determines 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 at the hearing should be allowed to do so. 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 parties; and
- if the intervention request is late, there are documented and sound reasons why the intervenor did not file earlier for such status.”

Applications to intervene in appeal proceedings in the courts have given rise to case law, to which the Board can look for guidance when considering an intervenor application. While 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. The courts’ interpretation of their rules can provide some measure of guidance to the Board.

In *R. v. Morgentaler*,<sup>2</sup> the Supreme Court of Canada commented “[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.”<sup>3</sup> This is similar to the Board’s requirement that an applicant requesting to intervene must have a tangible interest in the appeal and can offer an argument that will materially assist the Board in deciding the appeal.<sup>4</sup>

Similarly, the following factors enumerated by the Alberta Court of Appeal in *Pedersen v. Alberta*<sup>5</sup> 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;

<sup>2</sup> *R. v. Morgentaler*, [1993] 1 S.C.R. 462.

<sup>3</sup> *R. v. Morgentaler*, [1993] 1 S.C.R. 462, at paragraph 1.

<sup>4</sup> Environmental Appeals Board, Rules of Practice, at Rule 14.

<sup>5</sup> *Pedersen v. Alberta*, 2008 ABCA 192 (“*Pedersen*”).

7. Will intervention widen the *lis* between the parties; and
8. Will the intervention transform the court into a political arena?"<sup>6</sup>

The Court of Appeal commented it is insufficient for an applicant to establish, as the sole basis for allowing leave to intervene, they will be directly affected by the outcome of the hearing, since the potential for numerous intervenors and undue delays to the hearing is significant with no corresponding benefits to the hearing.<sup>7</sup> An intervenor must, therefore, add something to the hearing through their participation.

Further discussion regarding the application of the *Pedersen* factors is found in *Suncor Energy v. Unifor Local 707A*,<sup>8</sup> 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."<sup>9</sup>

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

More recently, in *JH v. Alberta Health Services*,<sup>10</sup> the Alberta Court of Appeal discussed the importance of weighing whether an intervenor is directly affected by the appeal by looking at the ability of the intervenor to offer special expertise or insight:

"Whether the proposed intervenor 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 intervenor will be 'specially affected by the decision' or 'has some special expertise or insight' to offer.... 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,

<sup>6</sup> *Pedersen v. Alberta*, 2008 ABCA 192, at paragraph 3.

<sup>7</sup> *Pedersen v. Alberta*, 2008 ABCA 192, at paragraph 10.

<sup>8</sup> *Suncor Energy Inc. v. Unifor Local 707A*, 2016 ABCA 265 ("*Suncor*").

<sup>9</sup> *Suncor Energy Inc. v. Unifor Local 707A*, 2016 ABCA 265, at paragraph 11.

<sup>10</sup> *JH v. Alberta Health Services*, 2019 ABCA 420 ("*Alberta Health Services*").

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.”<sup>11</sup>

Applying this case law in the context of the Board’s Rule of Practice, Rule 14, an applicant needs to show they had a real interest in the outcome of the appeal. In appropriate circumstances, this factor can be balanced against any special expertise the applicant may have to offer if the applicant is not directly affected by the outcome, such as a representative body. An applicant must also demonstrate their evidence and argument will not be duplicative and will be of assistance to the Board in making its report and recommendations to the Minister. The participation of the applicant should not unnecessarily delay the hearing.

## 1. *The Upper Little Bow Basin Water Users Association*

### 1. Submissions

The Upper Little Bow Basin Water Users Association (the “Association”) explained it represents a group of landowners who live in and along the Upper Little Bow River valley downstream of High River, below 104 Street East, Foothills County, up to, but not including, Twin Valley Reservoir. The Association advised it was formed in 1996 and is involved in local river valley grassroots stewardship programs, community driven water management planning, and related projects. It participated in developing the *Water Management Plan for the Watersheds of the Highwood and Upper Little Bow Rivers*<sup>12</sup> and is recognized as a group with a vested interest in water and watershed management of the interconnected Highwood-Little Bow sub-regional riverine system. The Association stated it participated in a previous Board hearing regarding the Town of High River beachwood dike<sup>13</sup> and at the earlier 1997 and 2008 NRCB/CEAA hearings on the Alberta Environment Little Bow Project/Highwood Diversion Plan Projects.<sup>14</sup>

The Association stated its members want to be informed about the Board’s decision and how it may affect them in follow-up flood mitigation consultation and planning, particularly if the Board recommends the Minister reverse or vary the Approval.

<sup>11</sup> *JH v. Alberta Health Services*, 2019 ABCA 420, at paragraph 14.

<sup>12</sup> *Water Management Plan for the Watersheds of the Highwood and Upper Little Bow Rivers*, June 1, 2008, Alberta Environment and Parks, Volumes 1 and 2.

<sup>13</sup> *Weinacker et al. v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Town of High River* (13 November 2009), Appeal Nos. 05-015- 019, 021, and 033-037-DOP (A.E.A.B.).

<sup>14</sup> NRCB/CEAA, *Report of the NRCB/CEAA Joint Review Panel*, Application #9601 – Alberta Public Works, Supply and Services – May 1998; NRCB Board Decision NR 2008-01 (April 2008).

The Approval Holder commented the Association did not appear to have requested to intervene in the appeals. The Approval Holder noted the Association did not indicate whether it was for or against the appeals, nor did it outline the evidence or arguments it would present. Therefore, according to the Approval Holder, the Association should not be granted intervenor status.

The Director stated the Association did not appear to request to be added as an intervenor, noting it appeared the Association was requesting notice of the Board's Report and Recommendations and the Minister's decision. The Director did not object to these documents being provided to the Association.

## 2. Discussion

The Board agrees with the comments and observations of the Approval Holder and Director. The Association did not request to be added as an intervenor and did not provide the required information to meet the tests contained in Rule 14 of the Board's Rules of Practice. The Association appears to have only requested information regarding the outcome of the appeals, which will be available to the public when the Minister issues his decision.

Therefore, the Association will not be granted intervenor status for the hearing of the appeals.

## 2. *Mr. Doug and Ms. Anne Bourque* (the "Bourques")

### 1. Submissions

The Bourques expressed concern that "... any upstream work could have a potential impact on the downstream channel and rip rap embankments."<sup>15</sup> Their concerns focused on a specific area, west on Riverside Green NW to the end of the single family residences and where the rip rap ends, on the left bank of the Highwood River. The Bourques stated there is visible erosion to the berm upstream of the rip rap "... and a substantial shift in the gravel beds creating the thalweg of the river up against the toe of the unprotected earth berm and the toe of the rip rap."<sup>16</sup> They stated this area of the river is susceptible to further erosion at this point because of the river's deflection angle, particularly if the river flows beyond the designed protection in greater volume with prolonged flows, as has occurred during the spring runoff periods.

The Approval Holder argued against the Bourques being granted intervenor status in the appeals. The Approval Holder observed the concerns raised by the Bourques related to infrastructure that is part of the NW dike and not the infrastructure that is the subject matter of the Approval under appeal which relates to the SW dike. The Approval Holder commented the

<sup>15</sup> Bourques' Letter, September 14, 2020, at page 1.

<sup>16</sup> Bourques' Letter, September 14, 2020, at page 1.

Bourques did not specifically request to intervene in the appeals, and they did not provide their position relative to the appeals. The Approval Holder argued the Bourques did not meet the tests under Rule 14 of the Board's Rules of Practice.

The Director believed the Bourques' concerns were related to the NW dike project previously approved by Alberta Environment and Parks ("AEP"). The Director confirmed no work was currently authorized under the *Water Act* that might impact a downstream channel or rip rap embankments.<sup>17</sup> The Director argued the Bourques' application did not meet the tests under Rule 14 of the Board's Rules of Practice,<sup>18</sup> as it did not appear their intervention would materially assist the Board in deciding the appeal or that the Bourques had a tangible interest in the subject matter of the appeal.

## 2. Discussion

The Bourques did not specifically state they wanted to intervene in the appeals. The concerns raised by the Bourques appear to relate to a different project, the NW dike. It does not appear the Bourques have a tangible interest in the appeals. Moreover, the Bourques have not provided information regarding the evidence or arguments they would present to the Board or whether they are for or against the appeals. They have not demonstrated to the Board their participation in the hearing would materially assist the Board in making its recommendations to the Minister. Consequently, the Bourques have not satisfied the tests contained in Rule 14 of the Board's Rules of Practice, and their application to intervene at the hearing of the appeals is denied.

## 3. *Mr. Peter and Ms. Sheila Macklin (the "Macklins")*

### 1. Submissions

The Macklins stated they are one of a group of four landowners downstream of the project on the Little Bow River and are affected by the Approval in the same way as the Appellants, as confirmed by the Approval Holder's flood modelling. Their property is directly adjacent to Mr. Rod and Ms. Nicole Macklin, two appellants in the appeals. The Macklins stated they are concerned with the impact of the redirected floodwaters on the Little Bow River, which runs through their land, and what those redirected floodwaters will do to their land. They further stated there did not appear to be any plans to mitigate the effects of redirected floodwaters.

The Macklins argued their participation would materially assist the Board in

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<sup>17</sup> Director's Letter, November 2, 2020, at page 1.

<sup>18</sup> Rule 14 of the Board's Rules of Practice 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...."

deciding the appeals. They explained that, as landowners affected by the project in the same manner as the Appellants, they have a tangible interest in the appeals and would provide evidence directly relevant to the appeals. The Macklins substantially supported the appeals and would not unnecessarily delay the appeals or duplicate the evidence since the same legal counsel represents them as the Appellants. They concluded by stating they would have been appellants but for an inadvertent error in misdirecting their statement of concern.

The Approval Holder argued against the Macklins intervening in the appeal. The Approval Holder stated they had submitted a Notice of Appeal, which the Board dismissed in a decision letter dated April 1, 2020, due to their failure to submit a statement of concern. The Approval Holder relied on *Gill et al. v. Director, Regional Compliance, South Saskatchewan Region*<sup>19</sup> and argued the Macklins did not meet the test for intervenors as their evidence would be duplicative of evidence presented by the Appellants and would not materially assist the Board in making its recommendations. The Approval Holder noted the Macklins confirmed they were impacted in the same way as the Appellants. The Approval Holder argued in the alternative, if the Macklins were allowed to intervene, their participation should be limited to a brief statement to the Board at the hearing.

The Director consented to the Macklins' intervenor application, commenting that "... if the Board accepts their intervention request, we assume that they will be given the typical time for intervenors [sic] to present their evidence (usually about 10 minutes), be subject to a brief cross-examination, and [B]oard questions."<sup>20</sup>

## 2. Discussion

In looking to Rule 14 of the Board's Rules of Practice and the case law previously noted, for the Board to permit the Macklins to be intervenors, it is not sufficient for the Macklins to simply show they are interested in the outcome of the appeals. They need to indicate the type of evidence and arguments they intend to present to the Board, and it should not be duplicative of the evidence and arguments presented by the other parties. Their evidence and arguments should assist the Board in deciding the appeal and making its recommendations to the Minister.

The Macklins explained why they wanted to participate in the appeals, stating they were affected by the Approval and were concerned by the potential impacts to their land. The Macklins argued they would have been appellants in the appeals, but for an error which resulted in their statement of concern going astray. The Macklins did not provide statements regarding the evidence and arguments they would present to the Board if they were allowed to intervene. However, they argued there was little chance of duplicating evidence as their counsel is the same as the Appellants to the appeals.

<sup>19</sup> Approval Holder's Letter, November 2, 2020, at page 1, citing: *Gill et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks*, (22 May 2020), Appeal Nos. 16-057, 061-063-DL1 (A.E.A.B.), 2020 ABEAB 19, at paragraph 20.

<sup>20</sup> Director's Letter, November 2, 2020, at page 1.



The Board notes the Director consented to the Macklins' application to intervene, but the Approval Holder argued against it. The Approval Holder argued the Macklins would be duplicating the evidence and arguments of the Appellants, having noted the Macklins argued the Approval impacts them in the same manner as the Appellants. With respect, the Board disagrees with the Approval Holder's arguments regarding the potential for duplication of evidence and arguments. The Macklins applied to be intervenors based on being affected by the Approval, and the degree and extent to which the Macklins would experience the effects caused by the dike is likely to be different from the Appellants, as the impacts would be based on the location and features of their land. The Board also recognizes the same counsel represents the Macklins and the Appellants, suggesting their legal counsel will be able to coordinate evidence and arguments to avoid duplication in the presentations. The Macklins expressly stated they support the appeals.

The Board is of the opinion the Macklins will provide evidence specific to their concerns and will not be repetitive of the Appellants' submissions. The Board accepts the Macklins' application for intervenor status.

The Board has set aside two days for the hearing of the appeals and believes there is no issue with the Macklins' participation as intervenors causing a delay or requiring an extension of the hearing.

### Decision

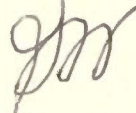
The Association is not granted intervenor status. The Board will provide the Association with the information it has requested regarding the outcome of the appeals. The Board will provide a copy of its Report and Recommendations and the Minister's Order to the Association when they are issued.

The Bourques are denied intervenor status. The Bourques do not appear to have a tangible interest in the outcome of the appeals, nor will their participation in the hearing materially assist the Board in deciding the appeals. The Board will provide the Bourques with a copy of its Report and Recommendations and the Minister's Order when they are issued.

The Board accepts the intervenor application of Mr. Peter and Ms. Sheila Macklin. The Macklins will be permitted to file written submissions and file expert reports. The Macklins will have 10 minutes at the beginning of the hearing, after the parties' opening comments, to make their presentation to the Board. They will be subject to cross-examination by the Director and Approval Holder and may be questioned by the Board.

Please do not hesitate to contact the Board if you have any questions. I can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 or by email at [gilbert.vannes@gov.ab.ca](mailto:gilbert.vannes@gov.ab.ca).

Yours truly,



Gilbert Van Nes  
General Counsel  
and Settlement Officer

cc: Ms. Shirley Pickering, Upper Little Bow Water Users Association  
Mr. Doug and Ms. Anne Bourque

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 these appeals. The information you provide will be considered a public record.

**Distribution List  
Town of High River  
(EAB 19-089, 093 & 094)**

**Appellants**

Mr. Delbert and Ms. Helen Edey (19-089)

Mr. James and Ms. Lillian Howie (19-093)

Mr. Rod and Ms. Nicole Macklin (19-094)

**Director, Alberta Environment and Parks**

Ms. Jodie Hierlmeier  
Ms. Jade Vo  
Alberta Justice and Solicitor General  
Environmental Law Section  
8<sup>th</sup> Floor, Oxbridge Place  
9820 – 106 Street  
Edmonton, AB T5K 2J6  
(jodie.hierlmeier@gov.ab.ca, jade.vo@gov.ab.ca and  
aep.environmental.law@gov.ab.ca)  
*(Representing the Director, AEP)*

Mr. Gavin Fitch  
McLennan Ross LLP  
#1900 Eau Claire Tower  
600 – 3 Avenue SW  
Calgary, AB T2P 0G5  
(gfitch@mross.com)  
*(Representing Appellants 19-089, 093 & 094)*

**Approval Holder**

Mr. Chris Prosser  
Chief Administrative Officer  
Town of High River  
309B Macleod Trail SW  
High River, AB T1V 1Z5  
(cprosser@hrmdf.net, lalbert@hrmdf.net &  
tgilliss@hrmdf.net)

**Intervenor**

Mr. Peter and Ms. Sheila Macklin (19-091)  
(appeal dismissed)

Mr. John Gruber  
Ms. Sydney Thomson  
MLT Aikins LLP  
#2100, 222 – 3 Avenue SW  
Calgary, AB T2P 0B4  
(jgruber@mltaikins.com & sthompson@mltaikins.com)  
*(Representing the Town of High River)*