Court of Queen's Bench of Alberta

Citation: Olineck v Alberta (Environmental Appeals Board), 2017 ABQB 311

Date:
Docket: 1503 03315
Registry: Edmonton

Between:

George Olineck

Applicant

- and -

The Environmental Appeals Board, Director, Red Deer North Saskatchewan Region, Alberta Environment and Parks

Respondents

Reasons for Decision
of the
Honourable Mr. Justice Peter Michalyshyn

I. Introduction

[1] This is an application for judicial review of a decision of the Alberta Environmental Appeals Board denying the applicant George Olineck's extension of time to file an appeal from an approval of the Director. For reasons which follow, the application is dismissed.

II. Background

[2] The approval in question relates to a drainage ditch. Alberta Environment and Sustainable Resource Development (AESRD) issued the approval under the *Water Act* RSA 2000 c W-3 on July 7, 2014.

[3] The applicant appealed, on July 30, 2014. The *Water Act* however stipulates a 7-day appeal period from receipt of notice of the impugned decision: s. 116(1). Here, the applicant acknowledged receiving the decision on July 14, 2014, giving rise to a July 21, 2014 appeal deadline. The appeal period was therefore exceeded. However, pursuant to the Act, the applicant was invited to make submissions to the Board whether sufficient grounds existed to extend the appeal period. After considering the applicant's submissions, the Board denied the extension. It found no extenuating circumstances, and dismissed the appeal.

[4] The Board's decision was made on September 19, 2014, and reduced to written reasons dated October 28, 2014.

[5] As to its analysis, the Board stated that extenuating or special circumstances must be shown by a late-filing appellant to justify finding "sufficient grounds" to extend the appeal period: s. 116(2); the Board noted that it cannot extend an appeal period for no valid reason. Many authorities are cited in support of these propositions.

[6] The Board found that the applicant's purported "sufficient grounds" were one or both of the following:

> That the applicant relied on a July 31, 2014 deadline to make certain submissions to the compliance area of the AESRD, and believed that notice of appeal from the July 7, 2014 approval decision could be brought at the same time; and
>
> That the AESRD effectively extended the 7-day appeal period by telling the applicant, in a July 24, 2014 letter written in the present tense, that "you have a right to appeal" the impugned decision.

[7] With regard to the first ground, the Board recognized that there might have been some confusion on the applicant's part regarding the actions taken by the Director and the AESRD. The Board decided nevertheless that the matters subject to the July 31, 2014 deadline, if not unrelated, were clearly separate and apart from the decision made on July 7, 2014. The Board recognized the separate enforcement and approval arms of the AESRD; it went on to state:

> However, decisions made by the separate entities are not dependent on each other and do not impact each other's decisions. Timelines set out by the enforcement side do not apply to the approval side. When an approval is issued, the time line for filing an appeal is set by the legislation. (at para 65)

[8] As to the effect of the July 24, 2014 letter, the Board concluded that it was irrelevant as the 7-day appeal period had already passed before the letter was written. Nor was there any evidence before the Board that, before the expiry of the 7-day appeal period, the applicant made any attempt to comply with it.

[9] The Board addressed prejudice as part of its inquiry into whether sufficient grounds existed. It concluded that while no prejudice would result from an extended appeal period, nevertheless the legislated appeal process had to be fair to all parties:

> The appeal period cannot continuously change unless there are extenuating circumstances that warrant extending the time period.
>
> One of the purposes of having deadlines incorporated into legislation is to bring some element of certainty to the regulatory process... The time limit in which an

> appeal must be filed is stipulated in the legislation so that all parties know when the process is complete. (at paras 69-70)

[10] The Board concluded that the applicant did not provide evidence of the extenuating circumstances necessary to extend the appeal period.

[11] Finally, the Board recognized that the time period for filing an appeal is "very short" and that the Director – while giving notice of "strict timelines for filing a notice of appeal" – could easily have given clearer notice by stipulating the actual appeal period and/or referring to s. 116 of the *Act*. The Board stopped short, however, of deciding the matter in question before it based on its own view of what might be, without more, 'best' or 'better' practices on the Director's part.

III. Analysis

The applicant raises three issues in this judicial review application:

1. Did the Board err by failing to exercise its discretion under s. 116(2) of the *Water Act* in a reasonable manner?
2. Did the Board err in the interpretation and application of the legal test set out in s. 116(2)?
3. Did the Board err in selecting the appropriate time period set out in s. 116(2)?

Standard of review

[12] The parties agree the standard is reasonableness. The parties disagree on what 'reasonableness' means in the circumstances of this case. I will discuss this threshold question before turning to the three issues raised in the applicant's original materials.

[13] In the applicant's original materials the question of standard of review is addressed agreeably enough in one paragraph, and citing only ***Alberta (Information and Privacy Commissioner) v Alberta Teachers Association***, [2011] SCJ No 61, 2011 SCC 61, at para 39 (***Alberta Teachers***).

[14] It was striking then, that at the hearing of the application the applicant put standard of review very much into controversy. Counsel submitted extensive further authorities on what the applicant says the reasonableness standard of review actually means. And through counsel the applicant engaged in detailed oral argument on the same point.

[15] Following the hearing of oral argument, and given that the parties remained at odds on what 'reasonableness' means particularly in the circumstances of this case, I asked counsel to comment on Prof. Paul Daly's recent article "The Scope and Meaning of Reasonableness Review" 52 Alberta Law Review 799-827 (July, 2015). I am grateful for the replies of counsel; they have certainly informed this threshold discussion.

[16] One point of clarification: in his reply of July 11, 2016, counsel for the Board uses the expression "smell test" in his commentary on the Daly article. Counsel for the applicant responds to this commentary in his own written submission of July 15, 2016. Counsel for the applicant objects that at no point did *he* use the expression 'smell test'. As will become apparent from what follows, I do not see that the Board's counsel is suggesting otherwise.

[17] That clarification aside, in his supplementary written submission and coming out of the Daly article the applicant emphasizes that applying the standard of reasonableness goes beyond what counsel says is an "unduly formalistic approach to judicial review" and should include "substantial review" and a "somewhat probing contextual analysis" for whether a decision is reasonable. The applicant repeats the many contextual factors it says the Board failed, or failed properly, to take into account. Through counsel he says the parties opposite take the position that:

> ...in essence [...] deference referred to in the jurisprudence on the reasonableness standard should be applied formally so as to effectively insulate the decision from substantial review by preventing a due consideration of context.

[18] The applicant submits that in addition to the many authorities mentioned in his "compendium of documents" provided at the hearing, ***Dunsmuir v New Brunswick,*** [2008] 1 SCR 190, 2008 SCC 9, at para 47, supports his cause. So that while *within* reasonableness "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions", still ***Dunsmuir*** is concerned with "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." To which the applicant adds that it is proper to question whether a decision is *too harsh* to be within the range of possible outcomes that are acceptable within the facts and the law.

[19] For its part, the Director argues that the decision-maker on review in this application *did* take a substantive contextual approach in making his decision; the Director rejects the applicant's submission that the Board engaged in a merely formalistic review of the Director's approval. The Director contends that while the applicant concedes a standard of review of reasonableness, in fact – and based on repeated allegations of 'formalism without substance' – the applicant is arguing for a correctness standard to be applied on this application.

[20] As to the Board's supplementary written submission, I come back to the apparently provocative use of the expression 'smell test'. That came about as part of counsel's commentary on that part of Prof Daly's article headed "Application and Interpretation". Board counsel acknowledges Prof Daly's reference to the prevailing requirement that courts go beyond asking whether a decision falls within a range of statutory interpretations available to the tribunal. There is no disagreement that the court should ask further "Was the decision [nonetheless] unreasonable? As Prof Daly notes:

> The answer to this question does not necessarily turn on the interpretation of the statute, for there may be other considerations at issue such as the rationality or harshness of the resulting decision, or its compatibility with fundamental values of the legal system. (at para 91)

[21] As noted by counsel for the Board, Prof Daly then refers to the idea of "range" in ***Canada (Minister of Transport, Infrastructure and Communities) v Jagjit Singh Farwaha,*** [2015] 2 FCR 1006; 455 NR 157, per Stratas JA, elaborating, Prof Daly suggests, on ***McLean v British Columbia (Securities Commission),*** 2013 SCC 67, [2013] 3 S.C.R. 895:

> There is some attraction to [the *Farwaha*] formulation, which is a sophisticated elaboration of the one set out by Justice Moldaver in *McLean*. On the surface, it would simplify administrative law greatly if the standard was reasonableness most

> or all of the time, subject only to the "range" expanding and narrowing depending on "all relevant factors." (Daly, at para 94)

[22] I pause to note that while not mentioned in the Daly article, Stratas JA has since expanded on his ***Farwaha*** comments in, amongst other places, ***Paradis Honey Ltd. v Canada***, [2015] FCJ No 399, 2015 FCA 89, at paras 135-136:

> [135] The range of acceptability and defensibility in the administrative law sense or, put another way, the margin of appreciation we afford to a public authority, can be narrow or wide depending on the nature of the question and the circumstances: *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5 at paragraphs 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339 at paragraph 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895 at paragraphs 37-41; and see the guiding principles and non-exhaustive list of factors that can affect the margin of appreciation in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 (CanLII), 455 N.R. 157 at paragraphs 90-99 and *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 at paragraph 107.
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> [136] On the one hand, where the decision is clear-cut or constrained by judge-made law or clear statutory standards, the margin of appreciation is narrow: see, e.g., *McLean, above; Canada (Attorney General) v. Abraham*, 2012 FCA 266 (CanLII), 440 N.R. 201; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193 (CanLII), [2011] 4 F.C. 203; *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228 (CanLII), 464 N.R. 112. In such cases, the Court is more likely to reach the remedial stage. On the other hand, where the decision is suffused with subjective judgment calls, policy considerations and regulatory experience or is a matter uniquely within the ken of the executive, the margin of appreciation will be broader: see, e.g., *Farwaha*, above; *Rotherham Metropolitan Borough Council v. Secretary of State for Business Innovation and Skills*, 2015 UKSC 6. In such cases, the Court is less likely to reach the remedial stage.
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> [137] Indeed, where a decision is thoroughly suffused by facts, policies, discretions, subjective appreciations and expertise, the margin of appreciation may be so wide that, absent bad faith, it is hard to see how the remedial stage could ever be reached: see, e.g., Catalyst, above; *Katz Group Canada Inc. v. Ontario (Health and Long Term Care)*, 2013 SCC 64 (CanLII), [2013] 3 S.C.R. 810; *Rotherham*, above. [...]

[23] A further comment on "range" is found in the reasons of Cote and Brown JJ in ***Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd.*** [2016] 2 SCR 293, 2016 SCC 47 ("Capilano") at para 89, though in dissent:

> ...context does not cease to be relevant once the standard of review is selected. Even if the applicable standard of review were reasonableness, it is a contextual analysis – guided by the principles of legislative supremacy and the rule of law – that defines the range of reasonable outcomes in any given case: P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases

> on Standard of Review and Reasonableness" (forthcoming, McGill L.J.), at p. 21. In short, "context simply cannot be eliminated from judicial review" (ibid., at p. 16).

[24] It is likely this kind of discussion of "range" that inspired Board counsel's following comment, in his supplementary written submission of July 11, 2016:

> The Board accepts that what is reasonable goes beyond the mere selection of statutory options. The Court is, to a degree, invited to apply a "smell test". However, that is to be done within the basic parameters of a standard of deference. That has been the thrust of the law since *Baker,* and *Dunsmuir* and subsequent cases expressly say that it was not intended to diminish that standard for inherently discretionary decisions.

[25] The expression 'smell test' then is used by the Board's counsel as an attempt, as I understand it, to offer a threshold test for when it will be necessary if not *clearly* necessary to consider not just the context of a decision, and indeed its outcome, but also to dig deeper into the record. That is, when it will be necessary to engage in what the applicant calls a "probing contextual analysis" of the record to determine the reasonableness of an impugned decision, and particularly an inherently discretionary decision such as whether to extend an appeal period. The need for such a threshold arguably follows from Abella J's comment in ***Newfoundland Nurses Union v Newfoundland and Labrador (Treasury Board)***, 2011 3 SCR 708, 2011 SCC 62 at para 15 and after citing ***Dunsmuir***, that courts "*may, if they find it necessary,* look to the record for the purpose of assessing the reasonableness of the outcome" (emphasis added) – the implication being that in some cases, reviewing courts *may not find it necessary* to look into the record for such purposes.

[26] Though not argued before me, two further authorities are worth mentioning: the Supreme Court of Canada's decision of ***Capilano***, cited just above, and decided on November 4, 2016; and the July 14, 2016 decision of ***Wilson v Atomic Energy of Canada Ltd.***, 2016 SCC 29, [2016] 1 S.C.R. 770.

[27] In the earlier case of ***Wilson***, the majority notes, but did not adopt, Abella J's *obiter* "efforts to stimulate a discussion on how to clarify or simplify our standard of review jurisprudence to better promote certainty and predictability" (at para 70). Abella J's efforts were similarly noted in ***Capilano*** at para 20 wherein Karakatsanis J for a 5:4 majority hints that the day may be approaching for a "recalibration" of the law around standard of review.

[28] Further signs of discontent around standard of review at least since ***Dunsmuir*** are found in yet another paper by Prof Daly entitled "The Signal and the Noise in Administrative Law" (January 2017, Cambridge University Legal Studies Research Paper Series); in Stratas JA's 2016 paper "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (https://papers.ssrn.com); and in Prof Matthew Lewans' 2016 text, Administrative Law and Judicial Deference (Bloomsbury: Hart Studies in Comparative Public Law), itself coming after Prof Lewan's often-cited article "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's LJ 59.

[29] In his own article Stratas JA includes a heading "What does reasonableness mean?" (Rather the same question raised by the parties in the application before me.) He begins to answer his own question in part by commenting that:

> The main effect of *Dunsmuir* has been to subject most administrative decisions to reasonableness review rather than to correctness review. Thus, the proper methodology of reasonableness review and the meaning of reasonableness is very much the core of judicial review and must be doctrinally settled. Unfortunately, the core is a mash of inconsistency and incoherence. (at p 6)

[30] He goes on then to talk about "intensity of review" (at p 14), a concept related to "varying margins of appreciation". Still later, he uses the expression "badges of unreasonableness" (at pp 16-17):

> ...certain indicia, sometimes called "badges of unreasonableness", can help to signal that an administrative law decision might not be acceptable or defensible. Decisions whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well be ones where interference is warranted. So might be decisions containing key factual findings made without logic, without any rational basis, or entirely at odds with the evidence. Those that depart in an unexplained way from administrative or judicial precedent may also be suspect.

[31] It is not lost on me here, and in what follows, that the applicant raises objections in this judicial review application to alleged conflict with the purpose of the *Water Act*, to fact findings (and reasons generally) allegedly made not fully on a rational basis, and to an outcome which allegedly departs inexplicably from administrative precedent.

Conclusion on standard of review

[32] Having considering the authorities and the parties' submissions on the meaning of reasonableness, it may be that in the abstract the differences between them are, ironically, more in form than substance. I suspect they agree more than disagree on this: that in certain cases courts on review of inherently discretionary decisions – whether triggered by 'badges' and 'intensity', or by a kind of 'smell test' – will sometimes find obvious unreasonableness, and/or the need clearly to dig deep into the record to challenge the reasonableness of an administrative law adjudicator's decision. To the extent the parties still differ in the abstract, it is perhaps over the Board counsel's articulation, with which I agree, that contextual factors and a meaningful review of the record must still be assessed squarely "within the basic parameters of a standard for deference".

[33] What follows then is my consideration of the three issues raised by the applicant, and whether on any measure the applicant has identified unreasonableness in the decision under review.

1. Did the Board err by failing to exercise its discretion under s. 116(2) of the *Water Act* in a reasonable manner?

The purposes of the *Act*

[34] The applicant argues that the Board's exercise of discretion was unreasonable in part because it failed to consider as relevant the purposes of the *Water Act*. The applicant relies on ***Pembina Institute v Alberta (Environment and Sustainable Resources Development, Director)***, 2013 ABQB 567, 2013 AJ No 1047, at paras 27-31.

[35] In ***Pembina Institute*** Marceau J considered the purposes of certain environmental legislation in the matter before him. Marceau J stopped short of making any general pronouncement that as argued by the applicant, "the purposes set out in environmental legislation [are] relevant to the exercise of discretion".

[36] On the other hand, no one in this case particularly argued against that *general proposition*. The salient point is the extent to which the Board, in the circumstances of this case, has to deal with these purposes in some sense 'chapter and verse' in its reasons? For that proposition, no authority is cited. A further point is whether there is any purpose articulated in the *Water Act* that is at odds with the application of the appeal period, in the circumstances of this case, leading to any unreasonableness on the Board's part.

[37] The applicant argues that the Board "focused on the issue of certainty" without evidently considering other purposes in s. 2 of the *Act*. It appears to be the suggestion that a consideration of the other purposes of the *Act*, on the facts of this case, would necessarily have led to a different conclusion regarding the appeal period extension.

[38] The Board certainly dealt with the issue of certainty at paras 70-71 of its decision. But it was invoked as a 'purpose' of a limitation on appeals if not of the regulatory process writ large. That purpose is not unique to the *Water Act*. Nor is the 'issue of certainty' specifically set out as one of the purposes of the *Water Act*.

[39] As to the purposes that are set out in s. 2 of the *Act*, the applicant refers specifically to that purpose of the legislation which highlights:

> ...the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, *regulatory actions* and market forces" [emphasis added by the applicant]

[40] Without more, the reference to this purpose in s. 2 of the *Act*, alongside the other many stated purposes and alongside the Board's reference to 'certainty', fails to persuade me that the Board was somehow unreasonable in its decision not to extend the appeal period. There is no merit to the argument that the Board considered certainty to the exclusion of any relevant purposes in the *Act*. There is no good reason to conclude that the Board was unaware or unappreciative of the evidence relevant to those purposes in the *Act*, that is to say, the evidence, and the applicant's position on the evidence, regarding the approval in question, and the involvement of the parties in "a much larger and complex set of drainage issues".

[41] On the whole, it is clear from the record and from the decision (eg, paras 65 and 75) that the Board had extensive facts before it relating to the approval, and to the 'larger and complex' other issues; the Board referred to and applied extensive legal authorities; it considered and interpreted its home statute. That the Board focused on certainty does not mean it failed to take into account other factors relevant to its exercise of discretion to extend an appeal period, and does not make its decision unreasonable. A requirement that a decision-maker must recite in some sense 'chapter-and-verse' the purposes of its home statute, then relate one of more of those purposes to the circumstances of a missed appeal period, invites the kind of formalism so objected to by the applicant, and on any measure is inimical to a reasonableness standard of review rooted by ***Dunsmuir*** in deference.

The adequacy of reasons

[42] The applicant refers to the following excerpt from the Supreme Court of Canada's decision in ***Newfoundland Nurses***, at paras 16-18

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
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> [17] The fact that there may be an alternative interpretation of the agreement to that provided by the arbitrator does not inevitably lead to the conclusion that the arbitrator's decision should be set aside if the decision itself is in the realm of reasonable outcomes. Reviewing judges should pay "respectful attention" to the decision-maker's reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.
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> [18] Evans J.A. in *Canada Post Corp. v. Public Service Alliance of Canada*, 2010 FCA 56 (CanLII), [2011] 2 F.C.R. 221, explained in reasons upheld by this Court (2011 SCC 57 (CanLII), [2011] 3 S.C.R. 572) that *Dunsmuir* seeks to "avoid an unduly formalistic approach to judicial review" (para. 164). He notes that "perfection is not the standard" and suggests that reviewing courts should ask whether "when read in light of the evidence before it and the nature of its statutory task, the Tribunal's reasons adequately explain the bases of its decision" (para. 163). I found the description by the Respondents in their Factum particularly helpful in explaining the nature of the exercise:
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> > When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. [para 44]

[43] I have reproduced these paragraphs to emphasize that in my view they are not frankly helpful to the applicant's cause. If anything, these comments support the conclusion that given the record before the Board – including the evidence, the parties' submissions and the process – the Board's reasons were more than adequate. Administrative tribunals do not have to consider and comment on every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision viewed as a whole in the context of the record, is reasonable: ***Construction Labour Relations v Driver Iron Inc.***, [2012] 3 SCR 405, 2012 SCC 65, at para 3; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, at para 53. The decision here meets that test of reasonableness.

[44] At the end of the day, the attack on the Board's reasons in this case brings to mind Abella J's warning, also in ***Newfoundland Nurses***, at para 21, quoting Prof Bryden, that:

> Courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it.

The harshness of the outcome

[45] As noted, the applicant also argues in his July 15, 2016 written submission that the Board's decision was unreasonable because it is too harsh and cannot therefore be within the range of possible outcomes that are acceptable within the facts and the law. The applicant states:

> In this matter, the Environmental Appeal Board adopted formalism in its reasons explaining why it refused to extend the limitation period despite the harsh result of a right of appeal being denied when there was no evidence before it as to any urgency or overriding interest in disallowing the opportunity to appeal. When a decision has the effect of denying a legal right, in this case the right of appeal, the decision maker has the duty to provide reasons to demonstrate justification, transparency and intelligibility for the decision.

[46] Prof Daly does talk about the implications of harsh outcomes, and discusses ***McLean v. British Columbia (Securities Commission)*** where Moldaver J at para 65 appears to approve of the outcome in ***Lines v. British Columbia (Securities Commission)***, 2012 BCCA 316 (CanLII), 35 B.C.L.R. (5th) 281. In that case the court found a decision-maker's order unreasonable owing to the severity of its consequences.

[47] And so at least arguably a harsh or severe impact of a decision is an aspect of its outcome, and so is a factor going to its reasonableness. But the question cannot be whether 'harshness' or 'severity' without more results in an unreasonable administrative law outcome. Any decision based on a limitation period for example may be harsh or severe. The question has to be whether the outcome is harsh or severe having regard for all of the circumstances.

[48] Viewed this way, I am persuaded that the Board was well aware of and took into account any harsh or severe impact on the applicant in this case. The Board nevertheless gave effect to the short appeal period in the circumstances, and was reasonable in doing so. The Board was well aware of the many contextual factors repeated in the applicant's July 15, 2016 written submission, including the impact of the short appeal period, and of the absence of prejudice, amongst other considerations. In denying the applicant's 'legal right' the Board complied with its duty to provide reasons demonstrating "justification, transparency and intelligibility".

The relevance of prior Board decisions

[49] The applicant argues in his originally-filed brief that two of the decisions footnoted by the Board run counter to its outcome on the question of extending time to appeal. Those cases are ***Blimke v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Blimke and Citizens Power & Gas Ltd.*** (June 7, 2013), Appeal No 12-047-D (AEAB) and ***Borgel v Director, Central Region, Operations Division, Alberta Environment and Sustainable Resource Development re: Prairie Mines and Royalty Ltd.*** (October 11, 2012), Appeal No 12-013-1D1 (AEAB).

[50] The applicant did not refer to any of the other decisions footnoted by the Board.

[51] The applicant argues that in assessing the reasonableness of the Board's decision, I should take into account that the Board failed to explain why it exercised its discretion in favour of ***Blimke*** and ***Borgel*** but against the applicant here, despite very similar facts.

[52] In his further written submission July 15, 2016, through counsel the applicant referred to what he called:

> The tribunal's formalistic citation of cases on the extension of time for appeal without any consideration of how the facts and outcome in *Blimke* and *Borgel* aligned with the facts of this case.

[53] There appears to be an implication that the Board cited authorities without ever having read them and/or without considering their application to the case before it. There is no basis for any such implication.

[54] That being said, I am obliged to review the record; equally, I am obliged to consider reasons which could have been offered by the Board in conducting a reasonableness review, to seek first to supplement the reasons for decision before seeking to subvert them: ***Kolody v Alberta (Environment and Sustainable Resource Development)***, 2016 ABQB 360, at para 95, and authorities cited therein; ***Capilano***, at para 38; but also ***Alberta Teachers***, at para 54, and Rothstein J's admonition that:

> The direction that courts are to give respectful attention to the reasons "which could be offered in support of a decision" is not a "carte blanche to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": *(Petro-Canada v. Workers' Compensation Board (B.C.)*, 2009 BCCA 396 (CanLII), 276 B.C.A.C. 135, at paras. 53 and 56).

[55] With these things in mind, I find that the two cases referred to the applicant – the *only* two cases singled out by the applicant from the impugned footnote – do not support the applicant's position.

[56] As to ***Blimke***, it is a June 7, 2013 decision and in my view arguably distinguishable in that the notice given to the appellant in that case advised him that he "may" have an appeal, and that in the circumstances of the case the Board concluded that it could understand how the appellant might have misconstrued the urgency of filing the notice of appeal. What's more, the Board accepted evidence that within the appeal period the Director knew that the appellant had issues with the order.

[57] As to ***Borgel***, it is an October 11, 2012 decision and the Board is comprised of the same decision maker as in the case now on review. The Board concluded, on what was before it, that the appellant had tried his best to inform himself and comply with what he understood to be the timeline for the appeal – conclusion based, in part, on the fact that the appellant met with the Director 5 days after receipt of the decision appealed – so *within* the appeal period, to express concerns for the impact of the approval on him, and at the same time also *within* the appeal period, scheduled a follow-up meeting with the Director to continue to again regarding the impact on him of the decision.

[58] Clearly the Board in ***Borgel*** took into account the fact that the appellant met with the Director within the appeal period, and agreed to meet further with the Director outside of the appeal period – the Director was aware of his concerns, and indeed unresolved concerns given the follow-up meeting; in those circumstances, the Director could have let the appellant know that between the first and second meetings the appeal period would expire; that the Director did not do so was a factor that the Board took into account in exercising its discretion to extend the appeal period.

[59] I agree with counsel for the Director when she observes that both the ***Blimke*** and ***Borgel*** decisions are obviously distinguishable from the facts in this applicant's case.

[60] As found by the Board at para 68 of the impugned decision, there is no evidence that after receiving the July 7, 2014 decision a week later on July 14, 2014, the applicant objected to any relevant person *within* the 7 day appeal period ending July 21, 2014. The facts and outcome in ***Blimke*** and ***Borgel*** thus do not align with the facts of this applicant's case. If anything, the reverse is true.

[61] In light of this conclusion, as noted the applicant's authorities touching on the relevance of prior tribunal decisions do nothing to strengthen his position.

[62] Nor is there strength in the applicant's reliance on ***Skyline Roofing Ltd. v Alberta (WCB)*** 2001 ABQB 264, 2001 AJ No 985 on the value and importance in administrative tribunals having policies to ensure consistency in decisions. Again, the decisions in ***Blimke*** and ***Borgel*** are not, as argued by the applicant, 'diametrically opposed' to the Board's decision being reviewed here. They are, in fact, distinguishable. There is therefore no merit to the argument that by failing to deal with these decisions the Board exercised its discretion arbitrarily. Equally there is no merit to the argument that the Board's decision is based on other than thoughtful consideration and analysis. The Board's decision is in no sense contrary to s. 3 of the Board's Rules of Practice.

2. Did the Board err in the interpretation and application of the legal test set out in s. 116(2)?

[63] The test in s 116(2) is whether "sufficient grounds" exist in the Board's opinion to extend the appeal period.

[64] The applicant notes that the Board on numerous occasions referred to the need for evidence of "exceptional" or "extenuating" or "special" circumstances.

[65] At paragraph 67 of its decision the Board refers in a footnote to some 20 AEAB decisions in support of its statement that "extenuating circumstances" are required.

[66] Counsel for the Director refers to the decisions in ***Biggart v Alberta (Director, Central Region, Regional Services, Alberta Environment)*** 2003 CarswellAlta 1710; ***Shell Canada Ltd, Re*** 2011 CarswellAlta 2437 and ***Visscher, Re*** 2011 CarswellAlta 672 as consistent with the Board's interpretation and application of the legal test set out in s. 116(2) in this case.

[67] In contrast to the authorities referred to by the Director in her brief, the applicant has not taken me to a single decision that runs contrary to the Board's assertion of the appropriate test. Indeed, the applicant has provided no authority, and has failed to persuade me on first principles, that the Board "raised the legal hurdle [for the applicant] by considering irrelevant factors" and

thus exercised its discretion unreasonably by looking for exceptional or extenuating or special circumstances to meet the test of "sufficient grounds" in s 116(2) of the *Water Act*.

3. Did the Board err in selecting the appropriate time period set out in s. 16(2) of the *Act*?

[68] The applicant notes there are two appeal periods in s. 116(2):

> 116(1) A notice of appeal must be submitted to the Environmental Appeals Board
>
> (a) not later than 7 days after
>
> (i) receipt of a copy of a water management order or enforcement order, or
>
> (ii) in the case of an approval, receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from, or
>
> (b) in any other case, not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from.

[69] The applicant does not argue that on its face the Director's decision falls outside the type of orders or approvals referred to at s. 116(1)(a)(i) or, particularly, s. 116(1)(a)(ii) which refers to "an approval". Rather, the applicant argues that in essence the Director's decision, properly understood, is not an isolated one but part of a larger and complex set of drainage issues.

[70] The applicant argues that a legislated 7-day appeal period should only be applied to specific issues that are not connected to a more complex matter, especially one that has been outstanding for years.

[71] Finally, the applicant argues that the purposes of the *Water Act* and in particular s. 2(c) with its reference to "regulatory actions", supports the conclusion that it is unreasonable to apply a 7-day appeal period to a matter which is not isolated but rather part of a set of complex issues that need further discussion and resolution.

[72] The issue of which appeal period applies is raised for the first time in this application for judicial review. That difficulty aside, the applicant also provides no authority for its suggested interpretation of s. 116(1)(b) of the *Act*. Good authority running against the applicant's cause is the already-mentioned ***McLean v British Columbia (Securities Commission)*** and Moldaver J's comments at paras 38-39, also in the context of a limitations clause, that:

> [38] It will not always be the case that a particular provision permits multiple reasonable interpretations. Where the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance; see, e.g., *Dunsmuir*, at para. 75; *Mowat*, at para. 34. In those cases, the "range of reasonable outcomes" *(Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12* (CanLII), [2009]

> 1 S.C.R. 339, at para. 4) will necessarily be limited to a single reasonable interpretation — and the administrative decision maker must adopt it.
>
> [39] But, as I say, this is not one of those clear cases. As between the two possible interpretations put forward with respect to the meaning of s. 159 as it applies to s. 161(6)(d), both find some support in the text, context, and purpose of the statute. In a word, both interpretations are reasonable.

[73] As in ***McLean***, and mindful of the text, context, and purpose of s. 116(1), I am not persuaded that there is clearly a "single reasonable interpretation" that a 30-day appeal period is applicable. To the contrary, if it is not obvious that the seven day appeal period applies, then at least s. 116(1) permits multiple reasonable interpretations.

[74] Looking past these obstacles facing the applicant, the success of this set of arguments hinges also on the alleged unreasonableness of the Board's conclusion that the Director's approval stood alone, separate and apart from other matters before the AESRD. That alleged unreasonableness has not been established in this application. That is to say, the Board was not unreasonable in concluding that the Director's approval was of a distinct matter, a matter which if not unrelated, is clearly separate from those before the enforcement arm of the AESRD.

[75] Taking the applicant's reading of the applicable appeal period at its strongest – which is not to say that I agree with that reading in whole or in part – the facts before the Board do not support that the Director's approval was so connected to a more complex matter to give rise to the 30-day appeal period. As expressed by counsel for the Board, the Director's approval was not part of a "necessary organic whole" such that a single appeal period should arguably apply. Or framing it in terms of ***McLean***, the Board's reliance on the 7-day appeal period was reasonable in the sense that it clearly falls within the range of available options to a decision maker interpreting its home statute, and given the record before it.

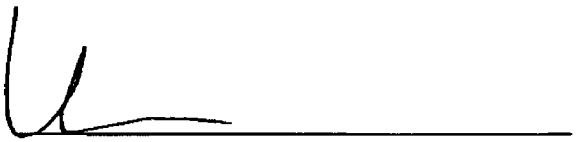
[76] At the end of the day, I agree with counsel for the Board, in his written submissions of July 11, 2016, that on this point the applicant is in fact arguing for little more than a correctness standard:

> What the Applicants are really saying is that the Board's interpretation is incorrect and that the only reasonable interpretation is that Section 116(1)(b) applies.

IV. Conclusion

[77] For the reasons set out above, the application is dismissed. The parties are free to speak to costs should they be unable to agree.

Heard on the 24th day of March, 2016, further written submissions received July 11 & 15, 2016.
Dated at the City of Edmonton, Alberta this 4th day of May, 2017.



Peter Michalyshyn
J.C.Q.B.A.

Appearances:

Kirk N. Lambrecht, QC & Craig D Boyer
Shores Jardine
for the Applicant

Michelle Williamson
Alberta Justice
for the Respondent Director

Andrew C.L. Sims, QC
Andrew C.L. Sims Professional Corporation
for the Alberta Environmental Appeals Board