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Court of Queen's Bench of Alberta

Citation: **Westridge Utilities Inc v Alberta (Director of Environment, Southern Region),
2012 ABQB 681**

Date:
Docket: 1101 16997
Registry: Calgary

Between:

Westridge Utilities Inc.

Applicant

- and -

**Director, Southern Region, Environmental Management, Alberta Environment and Water,
Rocky View County, and The Environmental Appeals Board**

Respondents

**Reasons for Judgment
of the
Honourable Mr. Justice E.C. Wilson**

Introduction

[1] While access to a guaranteed supply of fresh water flowing down the Elbow River is of vital concern to all who reside in south central Alberta, it also serves as the explanatory backdrop to this review and what might be viewed, otherwise, as but a rather mundane inquiry regarding who can properly bring an appeal before the Alberta Environmental Appeals Board.

[2] The drawing of water from the Elbow River for human, agricultural or industrial consumption is only permitted by licence issued under the Alberta *Water Act*. Water allocation, as between the individual licence holders, is based on the principle of "first in time, first in right". When a licence is applied for, it is given a priority number corresponding to the application date. The earlier the date of application, the higher the priority. (s.30(1) of the *Act*) If there is a water shortage and there is not enough water to meet the needs of all users, higher

priority (senior) users have the right to take their entire water allocation before lower priority (junior) users. (s.30(2) of the *Act*)

[3] The principal users identified in the application before me are licenced to draw water from the Elbow River or a tributary of Lott Creek, which flows into the Elbow River. Flowing downstream, roughly west to east they are:

- a) Rocky View County (Rocky View) which operates a municipal water system in the Bragg Creek area drawing water from the Elbow at a point upstream of Westridge Utilities Ltd.;
- b) Westridge Utilities Ltd. (Westridge) which is a business operating a municipal water system in the Springbank area drawing water downstream of Rocky View;
- c) Allen's Trout Farm holds a licence to draw water from a spring, which feeds the nearby Lott Creek which, then flows into the Elbow River downstream of Westridge's withdrawal point.

[4] To help manage the demands placed upon the water flowing in the Elbow River there has been a moratorium preventing the issue of any new water licences for a number of years.

[5] Licence holders who have need for more water at their point of diversion have apparently only one recourse - to seek a licence transferring water from another licence holder's allocation.

[6] Rocky View negotiated with Allen's Trout Farm and applied to the appropriate Director of Alberta Environment for a Transfer Licence to allow part of Allen's Trout Farms's water allocation to be transferred to Rocky View. The Allen's Trout Farm licence is senior to the Westridge licences.

[7] Westridge was concerned that the effect of the Transfer Licence would put Rocky View in the position of a senior licence holder to Westridge on the Elbow and, in times of shortage, could result in Westridge not being permitted to withdraw all of its licenced water allocation. This prompted Westridge to submit to the Director, a statement of concern under s. 109(1)(a) of the *Act* which in its pertinent terms reads as follows:

“... any person who is directly affected by the application ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application”

The Director ultimately issued the licence to Rocky View authorizing the operation of a works along with the transfer of a portion of the water allocation of Allen's Trout Farm.

[8] Feeling that its concerns had not been addressed, Westridge appealed the Director's decision to the Environmental Appeals Board pursuant to s. 115(1)(r) of the *Water Act* which provides:

115(1) A notice of appeal under the *Act* may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

(r) if the Director approves or refuses a request for a transfer of an allocation of water, the applicant and any person who submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision.

[9] Rocky View requested a preliminary motions hearing to determine if Westridge had standing to appeal. Written and oral submissions by the parties were made to the Board.

[10] The Board found that Westridge was not "directly affected by the Director's decision" to issue the Transfer Licence and, accordingly, dismissed the appeal.

[11] Westridge now applies for judicial review of the Board's decision.

Standard Of Review

[12] All the parties now take the position that the applicable standard is the deferential standard of reasonableness. For the reasons expressed in *Court v Alberta Environment Appeals Board* [2003] ABQB 456, paras 58-59; *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, paras 8-11; and the various Supreme Court authorities referred to in the latter - I agree.

[13] Certain remarks contained in *Dunsmuir v New Brunswick* 2008 SCC 9, recently repeated in *Newfoundland and Labrador Nurses Union v Newfoundland and Labrador (Treasury Board)* [2011] SRC 708, para 11, help inform this review:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[14] Westridge however cautions that the reasonableness standard will not easily apply to the Board's decision on standing since the "range of possible, acceptable outcomes" are only two - either one does or does not have standing. I disagree. One may just as simply assert the same holds true for a full blown appeal hearing - either the appeal is or is not allowed. However, the reasonableness standard remain the same and is to be applied in the same manner. There can not be some sort of sliding or qualified reasonableness standard of review depending upon the number of available outcomes.

The Applicant's First Position on Standing

[15] I understand that Westridge continues to hold to the view that if the Director accepts a person's concern submitted pursuant to s. 109(1)(a) of the *Act* (as occurred here), that person will automatically qualify for appellant status before the Board pursuant to s. 115(1)(r) of the *Act*.

[16] A closer consideration of the legislation points out the fallacy of such a claim. Section 109 (1)(a) speaks of:

“... any person who is directly affected by the application ...”

But s. 115(1)(r) refers to any person:

“... who submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision.”

[17] Westridge's argument was made to the Board and was rejected. Board counsel in her written submission accurately described the Board's decision in these words:

“ 39 The Board concluded that being directly affected by a proposal is, or at least can be, different than being directly affected by a Director's decision. Its reasons for this are set out at paragraph 21-26 of the decision. In particular, the Director's decision may have alleviated or eliminated the affect the original proposal might otherwise have had on the Applicant.”

[18] Westridge contends that the Director's recognition that Westridge was directly affected by Rocky View's application means that Westridge was also directly affected by the Director's subsequent decision to issue the licence to Rocky View. With respect, that is simply erroneous.

[19] Clearly one can not be a s. 115 appellant without first having been a s. 109 complainant. But the s. 109 complainant is taking issue solely with the application. The s. 115 appellant is not. He is concerned only with the subsequent development - the decision of the Director to issue a licence. Westridge would conflate s. 115 such that the Director in effect, would be deciding who could appeal his decision - not the Board who is to hear the appeals.

[20] Westridge's statutory interpretation ignores the plain language of the statute. Westridge's submission would require a rewriting of the legislation for its interpretation to make sense.

[21] I find that the Board's interpretation of its home statute and its reasons therefore easily meet the requirement of reasonableness. The Board's comments reveal “the existence of justification, transparency and intelligibility within the decision making process” (*Dunsmuir*, supra). Judicial deference is therefore warranted.

The Applicant's Second Argument for Standing

[22] Westridge agrees that the Board correctly stated the test for standing when it said at paragraph 61 of its decision:

“Therefore the Board considers it appropriate that an appellant show, on a *prima facie* basis there is a reasonable possibility they are directly affected by the Director's decision”.

[23] Westridge submits that it fulfills this “directly affected” criteria by being a licensee who will run the future risk of losing all or some of its entire water allocation in favour of the now more senior licence Rock View in times of low water, now that Rocky View stands in the shoes of Allen's Trout Farm.

[24] That same contention was put before the Board who rejected it for the following reasons:

66 The Board has stated in many of its previous decisions on standing that there must be a direct connection between the Director's decision and the effect on the appellant. The closer the nexus, the greater the likelihood of being found directly affected. In this case, the Licence requires “no net loss” to the Elbow River. The total volume of water diverted from the Elbow River must be returned to the river. Any deficit from what Rocky View takes out and what is returned must be compensated for from external water sources. The Licence is not a new licence but is a transfer of a portion of an existing licence. No water, over and above what is allowed under the Trout Farm licence, may be withdrawn from the Elbow River. Therefore, there will be no effect on the water levels in the Elbow River from what currently occurs under the Trout Farm licence, except for the 10 percent holdback, which has the effect of increasing the amount of water in the river.

67 Westridge holds *Water Act* licences on the Elbow River downstream from where Rocky View will withdraw water under the Licence. Westridge's licences are junior to Rocky View's Licence, which would be, in most circumstances, an issue if Rocky View called a priority. However, both the priority number of the Trout Farm licence and the location of the water diversion of the Trout Farm licence apply to the Licence. Therefore, if Rocky View called a priority, it would be applied to upstream users on Lott Creek only, not those on the Elbow River. It is not possible for Rocky View to call priority on Westridge. Rocky View cannot make a priority call on any other licensee on the Elbow River based on the administration of the Licence on Lott Creek. If the priority applied to the site where the water will be withdrawn, then the circumstances would be different. A priority could be called against Westridge, and it could be directly affected by the Licence. However, given the conditions of the Licence and the location where priority could be called, Westridge has not demonstrated there is a reasonable possibility that it is directly affected. Therefore, the Board finds Westridge is not directly affected. (footnote omitted)

[25] Regarding the “no net loss” condition referred by the Board at paragraph 66 of its decision, the licence issued to Rocky View requires that it provide a Water Balance Implementation Plan (W.B.I.P.) which will set out, *inter alia*, how Rocky View will achieve the no net loss. (See Clauses 3.17 and 3.19)

[26] Clause 3.18 directs Rocky View as follows:

“3.18 The licensee shall submit the Water Balance Implementation Plan to the Director at least 60 days prior to the water treatment plant being operational”

[27] Westridge inaccurately describes Clause 3.19 as a statement of intent when it is, in fact, a condition of the licence issued.

[28] Westridge complains that without knowing what is contained in the W.B.I.P., one would not know if it will be effective in meeting the “no net loss” condition. Thus Westridge argues that it may yet be directly affected if the ‘no net loss’ condition is not met. The self - same argument was made before the Board and rejected for the following reasons:

69 Westridge referred to Condition 3.19 of the Licence and the Water Balance and Implementation Plan and argued that statements of intent by the project proponent are not determinative. Rocky View must provide the Water Balance and Implementation Plan and it must meet the no net loss requirement of the Licence. The Water Balance and Implementation Plan will set out the manner in which Rocky View intends to meet the no net loss requirement of the Licence. If Rocky View cannot meet that requirement, the Director can take enforcement action or revoke the Licence. Westridge is speculating the Water Balance and Implementation Plan will not address the no net loss condition. The Board cannot base standing on speculation.”

[29] The Board’s reasoning is compelling. The licence’s language is clear. (See Return page 308). The licence was issued “subject to the attached terms and conditions”. A W.B.I.P. is required to ensure to the Director’s satisfaction that there is “no net loss”. This can be reduced essentially to a mathematical equation: “water going out must be equal to water being returned”. Quantifiable measurements and the methodology for same ensuring this occurs are neither inexact sciences nor difficult to implement.

[30] But should Rocky View be unable to meet its requirements then it would seem inescapable that the licence would have to be suspended or be revoked. Thus, no “direct affect” would be felt by anyone except Rocky View who would be unable to draw any water.

[31] The Board’s conclusion that Westridge failed to show that it could possibly be directly affected by this licence was a rational and reasonable decision open to the Board to reach and reflected the principles of justification, transparency and intelligibility requiring deference from a reviewing court.

[32] I turn now to the issue of the administration of priorities referenced by the Board at paragraph 67 of its decision (see paragraph 24 above of these reasons).

[33] The following condition in the licence is the target of Westridge's concern:

“4.1 In the event of administration of priority, priority will be administered at the original point of diversion located on a spring tributary of Lott Creek ...”

[34] Westridge's argument before the Board, and repeated before me, was that clause 4.1 of the licence is invalid; that the Director has no authority to direct such a condition because it is in conflict with s.30(2) of the *Water Act* - the first in time; first in right provision.

[35] The Board detailed the responses of Rocky View and the Director at paragraph 53 of its Reasons which parallel their submissions before me:

“The status quo is maintained in regards to priority so Westridge's licences will not be impacted. The Licence moved the point of diversion further upstream on the main stem of the Elbow River. Section 87(7)(b)(i) of the *Water Act* requires the Licence to have the same priority number as the licence from which the allocation was transferred. If Rocky View could call priority at the new point of diversion, this would “reorder” the priority call list on the Elbow River and cause impacts to the other priority holders. The terms of the Licence require that, in the event of an administration of priority, priority of the Licence will be at the original point of diversion at SE 5-24-2-W5M, which is a tributary of Lott Creek. Lott Creek flows into the Elbow River downstream of Westridge's licences. If there is an administration of priority, the Licence requires Rocky View to stop all diversion on the Elbow River until water demands are met downstream. Rocky View will not be able to call priority at the new upstream point of diversion or on the Elbow River. Therefore, there is no change in how priority will be administered in the sub-basin and the status quo is maintained.

[36] As was earlier seen at paragraph 24 of these reasons, the Board adopted this interpretation of the legislation - one of its two home statutes - and found that the purpose of Clause 4.1 was to maintain the status quo because it ensures that priority will be administered at the original downstream point of diversion - Allen's Trout Farm - as opposed to the new upstream point of diversion.

[37] The Board's interpretation is both sensible and compelling. It gives assurances to other Licensees, including Westridge, that the issue of Transfer Licences does not presume that a reordering of priorities will be a consequence.

[38] Westridge fears that Rocky View might argue at some future point that clause 4.1 is unlawful and may choose to simply ignore it and claim a priority over Westridge. Such speculative views alleging improper motives to another licensee do not assist in any claim of being “directly affected”.

[39] Rocky View, not surprisingly, eschews any such possibility. Indeed Rocky View's counsel was particularly adamant on this point. Before the Board and now before me, Rocky View's position remains the same. It accepts the validity of clause 4.1 and agrees that it can claim no priority on the Elbow *vis-a-vis* Westridge.

[40] Thus any attempt by Rocky View at reversing field at some unknown point in the future may undoubtedly be thwarted by the simple assertion of estoppel. But, more importantly, how could it be in Rocky Views self-interest to claim that clause 4.1 is invalid without immediately causing significantly more serious problems for itself?

[41] Westridge appears not to appreciate that a licensee cannot simply make a unilateral declaration that it will ignore a significant condition of its license imposed by the Director (and now ratified by the Board) without accepting the risk that its license might be immediately revoked by the Director which would result in Rocky View not getting any water at all. Simply put - the Director decides the terms and conditions; not the licensee.

[42] I agree with the Board's view that clause 4.1 merely clarifies the management of priorities - it does not reorder priorities.

[43] Ms. Graham on behalf of the Director advised that Clause 4.1 regularly appears in Transfer Licences. If Westridge's interpretation was correct it would mean that the Director has repeatedly acted unlawfully, all other parties to those transfers have each overlooked this transgression and the Board - when called upon - chose to uphold unlawful activity. Respectfully, the more rational view must surely be that Westridge has got it wrong.

[44] The Court is satisfied that this expert Board's handling of the Clause 4.1 issue reveals that it was fully aware of and understood the arguments made before it and that justification, transparency and intelligibility are present in its reasons which led it to select a reasonable result which lay amongst the available options.

[45] Again, having made these findings, the Court is obliged to accord deference to the Board's decision.

A FINAL POINT

[46] Westridge argued before the Board and before me that standing should be automatically granted to it based upon the *Kelly #1* decision of the Court of Appeal [(2009) ABCA 349] and that *Kelly #1* has overtaken the 2003 decision of *Court* (see above, para 12) which otherwise had set the test for standing before the Environmental Appeals Board.

[47] The Board gave its reasons why it concluded that *Kelly #1* did not apply:

- 45 Westridge argued the Board should consider the Court of Appeal decision in *Kelly*, not *Court*, to determine standing and the onus of finding an appellant directly affected. The *Kelly* decision considered the issue of standing before the

ERCB while *Court* gave guidance regarding standing before this Board. There are differences between the ERCB and this Board. This Board is an appellate Board that hears appeals of certain decisions made by the Director who is the initial decision-maker under the *Water Act* in this case. The ERCB is the initial decision maker under its legislation. Although there is a reconsideration mechanism at the ERCB, the decision in *Kelly* was with respect to standing before the ERCB as part of the initial decision making. If compared to the approval process in this case, it would be similar to the Director making a decision on whether a Statement of Concern filer is directly affected.

- 46 The *Kelly* decision is not inconsistent with the *Court* decision. In both types of cases considered by the courts, the onus is on the appellant to demonstrate, on a *prima facie* basis, they are directly affected by the decision made. If the appellant meets the onus, the onus then switches to the project proponent to rebut the argument.
- 47 In *Kelly*, it is important to note the determination of who is directly affected is prescribed in the ERBC directives. In the directives, the ERCB identifies those who are considered directly affected by a proposed project. The issue came before the Courts when, at the hearing, the ERCB did not apply its own policy and narrowly interpreted its policy to limit those who could appear before it. These directives are not relevant to this Board. This Board does not have a policy or directive to determine who is directly affected. Although the Board has developed guidelines within its decisions regarding the issue of directly affected, the actual determination is based upon case specific circumstances and the legislation.
- 48 The Board does not accept Westridge's argument that *Kelly* should apply to this Board. The Board will apply the test as described in the *Court* decision to determine whether Westridge has standing." (Footnote omitted)

[48] Westridge boldly states "that the reach of *Kelly #1* on the issue of standing extends beyond the ERCB to any administrative body where the concept of *direct affect* is relevant.(Applicant's Reply Brief, para 7) Westridge argues that this is a result of the principle of *stare decisis* (Applicant's Brief, para 39). No authority is cited.

[49] With respect, a decision interpreting the provisions of one statute does not automatically translate into the self same interpretation for a different statute, even when there may be some identical language at play.

[50] At best, *Kelly#1* could be argued to be persuasive - but it is not determinative of the matter.

[51] The Board was aware of some significant distinctions in the legislation governing the ERCB and itself which, in turn, helps explain the Board's decision that *Kelly #1* was not intended by the Court of Appeal to apply in the broad fashion argued by Westridge.

[52] If Westridge is correct it would mean that the Court of Appeal chose to stay silent on the application of its judgment to other Boards involving similar legislation even when they may possibly be governed by their own case law, as is the situation here.

[53] Why the Court would choose to remain silent about what it was actually doing when allegedly deciding such a fundamental reordering of the work of various regulatory tribunals is unfathomable. It would serve no useful purpose to do so. That is not how the Court of Appeal goes about its business.

[54] The Board's interpretation of its home statute is to be reviewed on the deferential standard of reasonableness (see *Alberta (Information and Privacy Commissioner v Alberta Teachers' Association*, 2011 SCC 61, para 39).

[55] It is clear that the Board was fully aware of Westridge's argument. The Board's decision distinguishing *Kelly #1* is clear and rational. Deciding how it would proceed and determining which case law was applicable to its home legislation is an essential part of its role. The Board's decision to reject Westridge's argument is articulated in clearly expressed reasons and the outcome rationally flows from those reasons. It is a reasonably arrived at decision reflecting the principles of justification, transparency and intelligibility requiring deference from a reviewing Court.


Conclusion

[56] For these reasons the application to set aside the Board's decision on standing is dismissed.

[57] Rocky View alone is entitled to its costs from the Applicant.

Heard on the 25th day of October, 2012.

Dated at the City of Calgary, Alberta this 1st day of November, 2012.



E.C. Wilson
J.C.Q.B.A.

Appearances:

John Gruber
For the Applicant

Dennis K Yasui, QC
Brownlee LLP
for the Respondent
Rocky View County

Andrew C.L. Sims, Q.C.
Sims Group
for the Respondent
Environmental Appeals Board

Charlene Graham
Alberta Justice Environmental Law Section
for the Respondent