

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

Date of Decision – January 5, 2005

**IN THE MATTER OF** sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

**-and-**

**IN THE MATTER OF** appeals filed by Linda Covey, Elin H. Barlem, J. Mark Barlem, Margaret Baycroft, Bill and Linda Biggart, Leo E. Carter, Davina Daly, Judy Hudson, Robert R. Lewis, Ron Macdonald, Laurie Miller, Randy K. Miller, R.C. Sifton, Karen Strong, Larry Strong, Leah Wile, Laurie Zaleschuk, Faye Carter, Ray Cerniuk, Richard Ellingson, G.M. Eirikson, Norman Eirikson, Hendrina Halpin, Ralph Halpin, Kevin Jamieson, Adam Kline, Angus Macleod, Margaret E. Medak, Mike Peckham, Mark Roberts, John Smith, Ed Tchir, Dixie and Kevin Ingram, Robert J. Miller, Larry and Eleanor Brown, Sydney Quartly, William and Doreen Thomsen, Peter and Christa Lamboo, Claudia Descrochers, William Froling, and Len Plummer with respect to Amending Approval No. 00076694-00-01 issued under the *Water Act* to the Town of Innisfail by the Director, Central Region, Regional Services, Alberta Environment.

Cite as: Reconsideration Decision: *Covey et al. v. Director, Central Region, Regional Services, Alberta Environment re: Town of Innisfail* (05 January 2005), Appeal Nos. 03-040-058 and 03-060-081-RD (A.E.A.B.).

**BEFORE:**

Dr. Steve E. Hrudehy, Panel Chair,  
Mr. Ron V. Peiluck, Board Member, and  
Dr. Alan J. Kennedy, Board Member.

**PARTIES:**

**Appellants:**

Linda Covey, Elin H. Barlem, J. Mark Barlem, Margaret Baycroft, Bill and Linda Biggart, Leo E. Carter, Davina Daly, Judy Hudson, Robert R. Lewis, Ron Macdonald, Laurie Miller, Randy K. Miller, R.C. Sifton, Karen Strong, Larry Strong, Leah Wile, Laurie Zaleschuk, Faye Carter, Ray Cerniuk, John Chase, Richard Ellingson, G.M. Eirikson, Norman Eirikson, Hendrina Halpin, Ralph Halpin, Kevin Jamieson, Adam Kline, Angus Macleod, Margaret E. Medak, Mike Peckham, Mark Roberts, John Smith, Ed Tchir, Dixie and Kevin Ingram, Robert J. Miller, Larry and Eleanor Brown, Sydney Quartly, William and Doreen Thomsen, Peter and Christa Lamboo, Claudia Descrochers, William Froling, and Len Plummer.

**Approval Holder:**

Town of Innisfail, represented by Mr. Dale Mather and Tim Ainscough.

**Director:**

Mr. David Helmer, Director, Central Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

## EXECUTIVE SUMMARY

Alberta Environment issued an approval on March 3, 2000, to the Town of Innisfail authorizing the construction of flood control works at Dodd's Lake at NW 28-35-28-W4M in Innisfail, Alberta. The Approval was amended on April 24, 2003, to include plans regarding Dodd's Lake outlet improvements and a water level management plan.

On July 22 and 23, 2003, the Board received a total of 42 Notices of Appeal appealing the amending approval and requesting a stay. The time period in which an appeal may be filed with the Board with respect to an amending approval issued under the *Water Act* is 7 days, unless the Board finds there is sufficient reason for extending this filing period. However, the Board found the Appellants did not present sufficient reasons to demonstrate that special circumstances existed to warrant an extension of the time limit, and therefore, the Board dismissed the appeals.

The appellants requested a reconsideration of the Board's decision on the basis that new information had become available. The Board denied their request as the information was available at the time of the original appeal, and even if the information had been presented at the time, the Board would still have refused extending the filing period. The information did not demonstrate the special circumstances required to reconsider the decision.

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## I. BACKGROUND

[1] On March 3, 2000, the Director, Central Region, Regional Services, Alberta Environment (the “Director”), issued Approval No. 00076694-00-00 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to the Town of Innisfail (the “Approval Holder”), for the purpose of constructing flood control works at NW 28-35-28-W4M at Dodd’s Lake in Innisfail, Alberta. On April 24, 2003, the Director amended the Approval with Approval No. 00076694-00-01 (the “Amending Approval”) by including two plans pertaining to the control structure constructed at the outlet of Dodd’s Lake.

[2] On July 22 and 23, 2003, the Environmental Appeals Board (the “Board”) received Notices of Appeals from Ms. Linda Covey (03-040), Mr. Elin H. Barlem (03-041), Mr. J. Mark Barlem (03-042), Ms. Margaret Baycroft (03-043), Mr. Bill and Ms. Linda Biggart (03-044), Mr. Leo E. Carter (03-045), Ms. Davina Daly (03-046), Ms. Judy Hudson (03-047), Mr. Robert R. Lewis (03-048), Mr. Ron Macdonald (03-049), Ms. Laurie Miller (03-050), Mr. Randy K. Miller (03-051), R.C. Sifton (03-052), Ms. Karen Strong (03-053), Mr. Larry Strong (03-054), Ms. Leah Wile (03-055), Ms. Laurie Zaleschuk (03-056), Ms. Faye Carter (03-057), Mr. Ray Cerniuk (03-058), Mr. John Chase (03-059),<sup>1</sup> Mr. Richard Ellingson (03-060), G.M. Eirikson (03-061), Mr. Norman Eirikson (03-062), Ms. Hendrina Halpin (03-063), Mr. Ralph Halpin (03-064), Mr. Kevin Jamieson (03-065), Mr. Adam Kline (03-066), Mr. Angus Macleod (03-067), Ms. Margaret E. Medak (03-068), Mr. Mike Peckham (03-069), Mr. Mark Roberts (03-070), Mr. John Smith (03-071), Mr. Ed Tchir (03-072), Ms. Dixie and Mr. Kevin Ingram (03-073), Mr. Robert J. Miller (03-074), Mr. Larry and Ms. Eleanor Brown (03-075), Mr. Sydney Quartly (03-076), Mr. William and Ms. Doreen Thomsen (03-077), Mr. Peter and Ms. Christa Lamboo (03-078), Ms. Claudia Descrochers (03-079), Mr. William Froling (03-080), and Mr. Len Plummer (03-081) (collectively the “Appellants”) appealing the Amending Approval. The Appellants also requested a Stay.

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<sup>1</sup> Mr. John Chase withdrew his appeal, and the Board issued a Discontinuance of Proceedings on September 16, 2003. See: *Chase v. Director, Central Region, Regional Services, Alberta Environment*, re: *Town of Innisfail* (16 September 2003), Appeal No. 03-059-D (A.E.A.B.).

[3] On July 25, 2003, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal. The Board requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[5] In the Board’s letter of August 14, 2003, the Board advised the Appellants that it appeared the Notices of Appeal had been filed significantly outside the time limit prescribed in the *Water Act*. The Board’s letter stated:

“The normal time limit prescribed in the *Water Act* for filing such an appeal of an Approval is 7 days. As the Amending Approval was issued on April 24, 2003, the Notices of Appeal filed by the Appellants appears to be significantly outside the time limit prescribed in the *Water Act*. Each Appellant, or their designated representative, is requested to advise the Board if they wish to request an extension of time to appeal? [*sic*] Please indicate to the Board the reasons for the extension of time to appeal and provide an explanation as to why the appeal was filed outside of the 7-day time limit. The granting of the extension of time is at the discretion of the Board and is not routinely granted. You are requested to provide this information in writing to the Environmental Appeal Board by August 26, 2003.” (Emphasis deleted.)

[6] In the same letter, the Board asked the Appellants to answer specific questions regarding the Stay application.<sup>2</sup>

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<sup>2</sup> The Board asked the Appellants to answer the following questions:

- “1. What are the serious concerns of each of the Appellants that should be heard by the Board?
2. Would each of the Appellants suffer irreparable harm if the Stay is refused?
3. Would each of the Appellants suffer greater harm if the Stay was refused pending a decision of the Board than the Town of Innisfail would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Are each of the Appellants directly affected by Alberta Environment’s decision to issue the Amending Approval to the Town of Innisfail? This question is asked because the Board can only grant a Stay where it is requested by someone who is directly affected.”

[7] After reviewing the reasons provided by the Appellants, the Board notified the Parties on September 18, 2003, that it was not prepared to grant an extension of time to appeal and dismissed the appeals for filing the Notices of Appeal late. Therefore, the Board did not consider the Stay applications.

[8] On December 1, 2003, the Appellants submitted a request for the Board to reconsider its decision and allow for an extension of time to file their Notices of Appeal with respect to the Amending Approval. They argued they had received new, relevant information.

[9] The Board received written submissions from the Parties between December 1 and 10, 2003, and heard oral arguments on December 16, 2003.

[10] The Board notified the Parties on January 30, 2004, that it would not grant the reconsideration request. The following is the Board's reasons.

## **II. SUBMISSIONS**

### **A. Appellants**

[11] The Appellants requested a reconsideration of the Board's decision regarding the Amending Approval, stating they had new information that was not available to them at the time of the appeals.

[12] They stated they requested and received *Navigable Waters Protection Act* File 8200-00-6352 (the "File") in October 2003, and according to the Appellants, the File contained crucial information on how the Dodd's Lake water level was established. The Appellants stated the Water Level Management Plan (the "Management Plan") is supposed to consist of two things, specifically the Town of Innisfail's requirement for flood control, and input from adjacent residents. They requested the Amending Approval be rescinded. They argued the Management Plan is invalid because it was premised on ongoing public consultation and monitoring which was not done, and the Approval Holder did not address adjacent landowner's concerns.<sup>3</sup>

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<sup>3</sup> See: Appellants' submission, dated November 26, 2003.

[13] The Appellants compared present lake levels with those permitted under the *Water Act* Approval and the *Navigable Waters Protection Act* approval, and argued the Approval Holder is in non-compliance. The Appellants stated they were unaware of a set water level until they received the Management Plan.

[14] At the Preliminary Meeting, the Appellants reviewed the previous meetings held with the Approval Holder at which the water level was discussed. According to the Appellants, meetings were held in March 2000, December 2001, May 2002, and August and October 2003. They reiterated there were no discussions with area landowners regarding high water levels or frequent flooding, and recreational activities, such as bird watching and canoeing, have been adversely affected by the lower water level.

[15] The Appellants stated they were not aware of the Approval Holder's plan until June 2003, after they made a request in writing. The Appellants made reference to the Approval application and the required notice that was provided concerning the construction of the control structure.

[16] They concluded by stating that if they are not told the truth and are not aware of things until after the project is complete, they could not provide the evidence to the Board until now.<sup>4</sup>

## **B. Approval Holder**

[17] The Approval Holder provided a summary of the application process it undertook leading up to the construction of the control device and the implementation of the Management Plan. The Approval Holder explained the control structure was put into place in response to numerous complaints of flooding from residents surrounding Dodd's Lake. It stated the project was advertised in October 1999 and a public meeting was held in March 2000. The project was further advertised in June 2000 as required under the Fisheries and Oceans application.

[18] According to the Approval Holder, the Management Plan approved by Fisheries and Oceans allows the summer level of the Lake to be increased to alleviate some of the concerns expressed by the residents. The Approval Holder explained that Alberta Environment

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<sup>4</sup> See: Appellants' submission, received December 10, 2003.

gave verbal approval of the Management Plan and had stated an amendment to the Approval would be issued. The Approval Holder applied for the amendment in May 2002 as the verbal consent for the amendment had not been followed up the previous year, and the amendment application was resubmitted in March 2003 because the May 2002 application was misplaced. The Approval Holder stated it considered the Amendment application a mere formality, as the control structure was already constructed and Fisheries and Oceans had previously approved the Management Plan.

[19] The Approval Holder stated it has made many decisions based on the approvals and the Management Plan as they exist, and any changes would have serious impacts to these decisions.

[20] The Approval Holder submitted it made every effort to involve the public in the planning process, and many of the Appellants had attended meetings in March 2000 and December 2001 at which the project was discussed and the concerns of the residents addressed.<sup>5</sup> According to the Approval Holder, a committee was formed to look into the residents' concerns, and two members of the public, including one of the Appellants,<sup>6</sup> were part of the committee as well as two council members and one person from administration. The committee met in March and May 2002 and October 2003.

[21] The Approval Holder stated that some of the Appellants did not live in the area at the time the approval process was undertaken, and if they had, they would have had the opportunity to be involved in the process.

[22] The Approval Holder argued that public consultation was used to establish the final water levels for the Management Plan, and it has adhered to the Management Plan since its inception in 2001. The Approval Holder pointed out that without the Amending Approval, the lake level would be 400 millimetres lower.<sup>7</sup> The Approval Holder submitted the information

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<sup>5</sup> According to the Approval Holder, the following Appellants attended at least one public meeting: Ms. Margaret Baycroft, Ms. Margaret Medak, Mr. Kevin and Ms. Dixie Ingram, Mr. Larry and Ms. Eleanor Brown, Mr. Sydney and Ms. Myrtle Quartly, Mr. William and Ms. Doreen Thomsen, Ms. Christa Lamboo, Mr. J. Mark Barlem, and Mr. Robert Lewis.

<sup>6</sup> According to one of the documents in the Appellant's submission, Mr. Kevin Ingram was a member of the committee.

<sup>7</sup> See: Approval Holder's submission, received December 8, 2003.

brought forward by the Appellants pertains to a federal approval, and therefore, is not relevant to the Approval or the Amending Approval.

[23] The Approval Holder stated many citizens in the Town of Innisfail and Red Deer County are in favour of the project and the reduced risk of flooding.<sup>8</sup> It also stated the "...level of the water has been rising for many years and that traditional water levels were considerably lower than their present state."<sup>9</sup>

[24] The Approval Holder disagreed with the Appellants' statements that the lower water level had resulted in algae becoming quite prolific. The Approval Holder stated the algae growth was a result of fewer motorboats on Dodd's Lake and the dry weather throughout the summer. It also stated the water level may be lower than in recent years, but is higher than the level was before the storm water was added.

[25] The Approval Holder requested the Board dismiss any further appeals of the Amending Approval.

### **C. Director**

[26] The Director submitted the request for reconsideration should be denied, as the Appellants did not demonstrate any exceptional or special circumstances, any new evidence, or any error in law.

[27] The Director submitted the information provided by the Appellants does not contain any information to further explain why the Notices of Appeal were not filed within the statutory time limits. He argued the information does not show any good reason or unusual or exceptional circumstances that warrant an extension. The Director further argued the "...information does not seem to indicate or suggest that there is a reasonable possibility that the decision of the Board, not to extend the time to file an appeal, would have been any different had the Board had this information when it made its September 18, 2003 decision."<sup>10</sup> The Director submitted the Board has no authority to deal with a federal approval under the *Navigable Waters*

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<sup>8</sup> See: Approval Holder's submission, received December 5, 2003.

<sup>9</sup> Approval Holder's submission, received December 5, 2003.

<sup>10</sup> Director's submission, dated December 9, 2003, at paragraph 13.

*Protection Act*, R.S.C. 1985, c. N-22, and therefore, the information could not lead the Board to making a different decision.

[28] The Director submitted the information provided by the Appellants is not the type of new information relevant for the purposes of a reconsideration. The Director stated the information, including the federal information and the approval application material under the *Water Act*, was available and could have been obtained years ago.

### III. DISCUSSION

[29] The Appellants requested a reconsideration of the Board's decision regarding appeals of the Amending Approval, stating they had new information that was not available to them at the time of the appeals. The Approval Holder requested the Board dismiss any further appeals of the Amending Approval, as it has made many decisions based on the approvals and the Management Plan as they exist, and any changes would have serious impacts to these decisions. The Director submitted the request for reconsideration should be denied, as the Appellants did not demonstrate any exceptional or special circumstances, any new evidence, or any error in law.

[30] Under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board can reconsider a decision made by it. Section 101 states: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[31] The Board has stated in previous decisions that its power to reconsider "...is an extraordinary power to be used in situations where there are exceptional and compelling reasons to reconsider."<sup>11</sup> The Board uses its discretion to reconsider a decision with caution. The power to reconsider is the exception to the general rule that decisions of the Board are intended to be final. However, the Board does realize there are specific circumstances that warrant reconsidering a decision, but it is not intended as a tool for parties to reargue the same issues a second time.

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<sup>11</sup> *Whitefish Lake First Nation Request for Reconsideration, re: Whitefish Lake First Nation v. Director, Northwest Boreal Region, Alberta Environment, re: Tri Link Resources Ltd.* (28 September 2000), E.A.B. Appeal No. 99-009-RD.

[32] The onus is on the party making the request to convince the Board there are exceptional and compelling reasons to reconsider the decision.<sup>12</sup> The factors the Board will consider in deciding whether there are exceptional and compelling reasons to reconsider its decision include: the public interest, delays, the need for finality, whether there was a substantial error of law that would change the result, and whether there is new evidence not reasonably available at the time of the previous decision.<sup>13</sup>

[33] The Appellants in this case argued they had new evidence that was not available to them at the time of the initial decision. The evidence does not have to, on the grounds of probability, result in a change of the original decision, but there must be a reasonable possibility that the decision could be altered.<sup>14</sup>

[34] The applicant must differentiate between two types of new evidence. Evidence that has been acquired since the decision was made but was available at the time of the hearing is not relevant for purposes of reconsideration. However, information that was not available at the time the decision was made or was not practically obtainable by the parties would be relevant for purposes of reconsideration.<sup>15</sup>

[35] Many of the arguments provided by the Appellants and the Approval Holder related to the original Approval, not the Amending Approval. The Board notes their concerns, but it can only consider those submissions related to the Amending Approval. The Approval Holder made additional comments regarding the original Approval and what steps it took to deal with the concerns of the Appellants regarding the construction of the control structure. However, these arguments do not relate to the specific issue being reconsidered, the Amending Approval.

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<sup>12</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

<sup>13</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

<sup>14</sup> *Laidlaw Environmental Services (Ryley) Ltd. Request for Reconsideration*, re: *Bernice Kozdrowski v. Director of Chemicals Assessment and Management, Alberta Environmental Protection* (7 April 1998), E.A.B. Appeal No. 96-059.

<sup>15</sup> Preliminary Motions: *Bailey et al. v. Director, Northern East Slopes Region, Environmental Service, Alberta Environment*, re: *TransAlta Utilities Corporation* (17 April 2001), E.A.B. Appeal Nos. 00-074, 077, 078, and 01-001-005-ID.

Also, the Approval Holder discussed the approval granted to Mr. Hal Willis, and these arguments are not relevant to the reconsideration of the Amending Approval.

[36] In its previous decision, the Board dismissed the appeals on the basis the Appellants had filed their Notices of Appeal late, and they did not provide the Board with sufficient reasons or special circumstances to warrant an extension of time. Therefore, any information that would support that special circumstances existed that justify an extension would be the most valuable in this reconsideration request.

[37] The new evidence provided by the Appellants was material and correspondence that was filed by the Approval Holder as part of the approval process for Fisheries and Oceans under the *Navigable Waters Protection Act*. These documents were filed in 2000, and they are considered public documents and are available for the public to scrutinize. Therefore, the Board does not accept these documents as new information that was not obtainable prior to these appeals being filed.

[38] As stated, new evidence that was available at the time of the original decision, but was acquired subsequently, cannot be considered as the type of evidence that warrants a reconsideration. New evidence the Board would consider in a reconsideration request had to be unobtainable, either physically or practically.

[39] The information provided by the Appellants was available to them, and any other interested individual, since 2000. Although the Appellants may not have had the information in front of them at the time of the appeal, the information was available. The rules of natural justice and fairness would be jeopardized if parties did not attempt to get certain information until after the Board made its decision, and then, after the Board's decision does not go in their favour, asking for the information in order to try to justify a reconsideration motion.

[40] Many of the Appellants were involved in the process as far back as 2000. The public was notified of the project through newspaper advertisements and through public meetings. In fact, many of the Appellants stated they had attended the public meetings and were aware of the applications made to Alberta Environment and Fisheries and Oceans. If they had concerns, it was then, in 2000 and 2001, that they should have requested the information from the Director and Fisheries and Oceans. Section 2 of the *Water Act* gives some of the

responsibility of protecting water resources to the citizens of Alberta.<sup>16</sup> Part of this responsibility includes taking the initiative to ask questions and seek out further information. The Appellants had the opportunity to ask for further information and documentation. The Approval Holder was open in submitting its applications and held public hearings to ensure residents knew of the applications. The Appellants had the opportunity during the past three to four years to request for the documents. Therefore, the Board believes the Appellants could have obtained the evidence prior to the appeals being heard.

[41] For the Board to exercise its discretion and allow a reconsideration of a previous decision, the Appellants must present significant information that, had it been available at the time of the hearing, could have resulted in the Board making a different decision. It is only in the most exceptional circumstances will the Board allow a reconsideration. As stated in the previous decision, the Board is reluctant to bring uncertainty into the process, and allowing a reconsideration on information that was already in existence would affect the finality of the Board's decisions and confidence in the Board's process.

[42] The Board also notes the evidence provided does not support the Appellants' arguments that the time limit to file the appeals should be extended. There is nothing in the evidence that would persuade the Board to allow the extension. Most of the arguments used by the Appellants to support the reconsideration request were the same arguments used in the initial appeals. Therefore, the Board does not find a justification to rehear the matter based on the information provided by the Appellants.

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<sup>16</sup> Section 2 of the *Water Act* provides:

“The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing:

- (a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
- (b) the need for Alberta's economic growth and prosperity;
- (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
- (d) the shared responsibility of all Alberta citizens for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
- (e) the importance of working co-operatively with the governments of other jurisdictions with respect to transboundary water management;
- (f) the important role of comprehensive and responsive action in administering this Act.”

#### **IV. CONCLUSION**

[43] The Board finds that the Appellants did not provide any compelling evidence or arguments for a reconsideration of extending the time period to file their Notices of Appeal and thus denies their request for reconsideration.

Dated on January 5, 2005, at Edmonton, Alberta.

*“original signed by”*

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Dr. Steve E. Hrudehy  
Panel Chair and Board Member

*“original signed by”*

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Mr. Ron V. Peiluck  
Board Member

*“original signed by”*

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Dr. Alan J. Kennedy  
Board Member