

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 11, 2007

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 M. G. Slemko and L. L. Slemko with respect to *Water Act* Licence Amendment No. 00153082-00-01 issued to Elkwater Water Co-operative Ltd. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Intervenor Decision: *Slemko v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Elkwater Water Co-operative Ltd.* (11 October 2007), Appeal Nos. 06-086 & 06-087-ID2 (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair.

SUBMISSIONS BY:

Appellants: Mr. Marshall G. Slemko and Ms. Linda L. Slemko.

Director: Mr. Dave McGee, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

Licence Holder: Elkwater Water Co-operative Ltd., represented by Mr. Robert Pender, President.

Intervenor Applicants: Ms. Evelyn Schuler; Elkwater Community Association, represented by Mr. Len Knowles; Dr. David J. Carter; and Intervenor 1.

EXECUTIVE SUMMARY

Alberta Environment issued Licence Amendment No. 00153085-00-01 to Elkwater Water Co-operative Ltd. related to the diversion of water from Elkwater Lake. The Board received Notices of Appeal from Mr. Marshall G. Slemko and Ms. Linda L. Slemko.

In response to the Board's Notice of Hearing published in the local newspaper, the Board received intervenor requests from Ms. Evelyn Schuler, the Elkwater Community Association, Dr. David J. Carter, and Intervenor 1. Intervenor 1 also requested that his personal information be held confidential.

The Board reviewed the submissions and determined that Ms. Evelyn Schuler, the Elkwater Community Association, Dr. David J. Carter, and Intervenor 1 could participate through written submissions only, because it appeared the evidence they intended to bring forward was similar to that of Mr. Slemko and Ms. Slemko.

The Board denied Intervenor 1's request to hold his personal information confidential, because the Board's process must be open and transparent to the parties of an appeal as well as the citizens of Alberta. The information required by the Board is also commonly found in telephone directories and directory web pages.

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I. BACKGROUND

[1] On February 28, 2007, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Licence Amendment No. 00153082-00-01 (the “Licence Amendment”) under the *Water Act*, R.S.A. 2000, c. W-3, to Elkwater Water Co-operative Ltd. (the “Licence Holder”), in relation to the diversion of water from Elkwater Lake near Cypress Hills, Alberta.

[2] On March 26 and 28, 2007, the Environmental Appeals Board (the “Board”) received Notices of Appeal from Mr. Marshall G. Slemko and Ms. Linda L. Slemko (the “Appellants”) appealing the Licence Amendment.

[3] On March 28, 2007, the Board wrote to the Appellants, the Licence Holder, and the Director (collectively the “Parties”) acknowledging receipt of the Notices of Appeal and notifying the Licence Holder and the Director of the appeals. The Board also requested the Director provide the Board with a copy of the records (the “Record”) relating to these appeals, and that the Parties provide available dates for a preliminary meeting, mediation meeting, or hearing.

[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] On April 20, 2007, the Board received a copy of the Record from the Director, and on May 2, 2007, the Board forwarded a copy to the Appellants and the Licence Holder. The Director also requested the Board determine the issues for the appeal before proceeding to a hearing or mediation.

[6] The Board scheduled the written submission process to determine the issues for the appeals. The Parties provided their initial written submissions on June 15 and 18, 2007, and on June 22 and 25, 2007, the Board received response submissions from the Licence Holder and Director. The Appellants did not provide a response submission.

[7] The Board released its decision on the issues on August 7, 2007,¹ noting that the issues at the Hearing would be:

1. What is an appropriate cut off level to allow for the diversion of water from Elkwater Lake?
2. Is additional clarification regarding the term “water conservation measures” required, and if so, how should it be defined?

[8] On August 16, 2007, the Board confirmed that the Hearing would be held on October 18, 2007, in Medicine Hat, Alberta. The Board also set the submission process for the Hearing.

[9] The Board placed a Notice of Hearing in the local newspapers and requested those persons interested in intervening at the Hearing to submit their request to the Board by September 6, 2007. The Board received intervenor requests from Ms. Evelyn Schuler, the Elkwater Community Association, Dr. David J. Carter, and Intervenor 1,² (collectively, the “Intervenors”). Included in the intervenor request from Intervenor 1 was a request that his personal information be held confidential.

[10] The Board received response submissions from the Parties between September 10 and 14, 2007.

II. SUBMISSIONS

A. Intervenors

1. Ms. Evelyn Schuler

[11] Ms. Schuler explained she owns a cabin at Elkwater Lake and she is concerned with the health of the lake, particularly the growth of water weeds. Ms. Schuler questioned who gets the water quality reports and what the readings are for the lake. Ms. Schuler stated that

¹ See: Preliminary Motions: *Slemko v. Director, Southern Region, Regional Services, Alberta Environment*, re: *Elkwater Water Co-operative Ltd.* (07 August 2007), Appeal Nos. 06-086 & 06-087-ID1 (A.E.A.B.).

² As this Intervenor made a request to have his personal information held confidential, the Board will refer to him as “Intervenor 1” in this Decision. If Intervenor 1 decides to participate as an intervenor pursuant to this

ongoing water quality and quantity of Elkwater Lake is important to all stakeholders, including Alberta citizens, cabin owners, tourists, and the Licence Holder.

2. Elkwater Community Association

[12] The Elkwater Community Association noted that Elkwater Lake is in a provincial park and is under the control of the provincial parks department. It explained privately owned cabins, a hotel, condominium complex, restaurant, gas station, and numerous campgrounds at Elkwater rely on a substantial water level for boating and fishing and for use of the beach and campground.

[13] The Elkwater Community Association questioned the purpose of having a lake within the provincial park if the lake is drawn down too low to use the marina or beach. The Elkwater Community Association stated Elkwater Lake should remain as a lake, not a reservoir.

[14] The Elkwater Community Association stated it wanted water meters installed on every outlet that has access to the lake and the meters be monitored by an independent third party.

3. Dr. David J. Carter

[15] Dr. Carter explained he represented the Elkwater Community Association at the time the original licence was put in place, and his past experience/involvement would allow him to speak to the issues.

4. Intervenor 1

[16] Intervenor 1 explained he has had experience in the area through work, sporting activities, and through recreation. He stated he also owns a cabin in the Elkwater Town site. Intervenor 1 submitted that he would materially assist the Board as he would provide

“...original, relevant and necessary information/testimony, cross-examination input and other evidence as required.”³

[17] Intervenor 1 requested that his personal information, specifically his name, address, and telephone and fax numbers, be kept confidential. He requested that the personal information “...as obtained herein and in previous communication to be held confidential and without limitation, not to be referenced or contained in the public record relating to the Hearing, any future Hearings, and decision correspondence or other related documentation in anyway whatsoever.”⁴ Intervenor 1 argued confidentiality of his personal information is paramount due to identity thefts and linking of identification requirements for personal administrative aspects, such as banking and on-line government processes. Intervenor 1 explained identity confirmation of these administrative processes usually involves name, address, and date of birth, and if the Board released his personal information, two-thirds of the identity confirmation would be available. Intervenor 1 submitted that disclosure of the personal information does not add value or assist the Board in determining the appeals.

B. Appellants

[18] The Appellants stated they had no objections to the Intervenors participating in the Hearing. They also stated they had no problem with the confidentiality request of Intervenor 1.

C. Licence Holder

[19] The Licence Holder submitted that anyone appearing before the Board cannot have their personal information kept confidential from a public record or other records, because it would not be fair to the Parties.

³ Intervenor 1’s submission, dated September 2, 2007.

⁴ Intervenor 1’s submission, dated September 2, 2007.

D. Director

[20] The Director noted that the Intervenor requests of Dr. Carter and Ms. Schuler did not contain any information related to the issues that were set by the Board. The Director argued the requests do not indicate that the Intervenor's evidence would be directly relevant to the appeals, and therefore the intervenor requests do not meet the Board's test as required by the Board's Rules of Practice.

[21] In response to the intervenor request of the Elkwater Community Association, the Director stated that the Hearing "...is not a general review to determine if all other licensed or statutory users of this water body should be metering their water use."⁵ The Director further stated that the Alberta Government holds a licence and owns water management infrastructure on the water body, which is managed as a reservoir. The Director argued that issue is not the subject of the appeals.

[22] In reference to Intervenor 1's request for intervenor status, the Director argued the submission does not contain information that would assist the Board in determining if the request meets the Board's general rules for intervention as stated in the Board's Rule of Practice. The Director stated the request only states that Intervenor 1 owns a cabin in the Elkwater Town site, which, the Director explained, is serviced by a different water licence than the one being appealed.

[23] With respect to the confidentiality request, the Director had no concerns with the specific municipal address or phone numbers being ordered confidential. However, the Director expressed concern that the information that Intervenor 1 resides in both Calgary and Elkwater Town site should be public information, because the public may need the information so it can better understand the Board's ruling on the intervention request. The Director added that the places of residence will not compromise the Intervenor 1's concerns with identity theft.

⁵ Director's submission, dated September 14, 2007, at page 1.

III. INTERVENOR DECISION

A. Legislation

[24] Under section 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) the Board can determine who can make representations before it. Section 95(6) states:

“Subject to subsection (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.”

[25] Pursuant to sections 7 and 9 of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/93 (the “Regulation”), the Board must determine whether a person submitting a request to make submissions should be allowed to do so at the Hearing. Section 7 of the Regulation states:

“7(2) A published notice referred to in subsection (1)(a)(ii) or (b)(ii) must contain the following:

- (a) the date, time and place of the hearing, in a case where an oral hearing is to be held;
- (b) a summary of the subject matter of the notice of appeal;
- (c) a statement that any person who is not a party to the appeal and wishes to make representations on the subject matter of the notice of appeal must submit a request in writing to the Board;
- (d) the deadline for submitting a request in writing under clause (c);
- (e) the mailing address of the Board;
- (f) the location and time at which filed material with the Board will be available for examination by interested persons.”

[26] Section 9 of the Regulation provides:

- “(1) A request in writing referred to in section 7(2)(c) shall
- (a) contain the name, address and telephone number of the person submitting the request,
 - (b) indicate whether the person submitting the request intends to be represented by a lawyer or other agent and, if so the name of the lawyer or other agent,

- (c) contain a summary of the nature of the person's interest in the subject matter of the notice of appeal, and
 - (d) be signed by the person submitting the request.
- (2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject of the notice of appeal and shall give the person written notice of that decision.
- (3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.”

[27] In the Regulation, it also states that the Board can determine who will be a party to an appeal. Section 1(f)(iii) of the Regulation states:

“In this Regulation... ‘party’ means any other person the Board decides should be a party to the appeal.”

[28] The test for determining intervenor status is stated in the Board's Rules of Practice. Rule 14 states:

“As a general rule, those persons or groups wishing to intervene must meet the following tests:

- their participation will materially assist the Board in deciding the appeal by providing testimony, cross-examining witnesses, or offering argument or other evidence directly relevant to the appeal; the intervenor has a tangible interest in the subject matter of the appeal; the intervention will not unnecessarily delay the appeal;
- the intervenor in the appeal is substantially supporting or opposing the appeal so that the Board may know the designation of the intervenor as a proposed appellant or respondent;
- the intervention will not repeat or duplicate evidence presented by other parties....”

B. Discussion

[29] One of the important aspects when determining whether a person should be accepted as an intervenor is whether or not the person will be able to bring additional, relevant information to the process that will not duplicate evidence presented by the Parties. The Board must also look at whether the evidence provided by an intervenor will materially assist the Board in preparing its recommendations.

[30] The submissions provided by the Intervenors provide limited information on what evidence the Intervenors intend to bring forward at the Hearing. However, it does appear the Intervenors support the arguments of the Appellants.

[31] Ms. Schuler was primarily concerned with the quantity and quality of water in Elkwater Lake and the reporting of data regarding the lake water. She mentioned she is a cabin owner at Elkwater. She did not, however, indicate how her evidence would be different from that of the Appellants, who are also cabin owners at the lake and are concerned with the quantity of water in Elkwater Lake. Ms. Schuler did not indicate how she could provide additional information regarding the two issues identified by the Board that will be heard at the Hearing. Since the Board does not believe Ms. Schuler will provide different evidence from that of the Appellants, the Board will allow Ms. Schuler to submit a written submission only.

[32] The Elkwater Community Association raised the issue of metering every outlet that has access to the lake water. The current appeals relate to the Licence Amendment issued to the Licence Holder. The appeals do not relate to any other water licence on Elkwater Lake. Therefore, the Board cannot consider evidence or arguments related to other users of the lake water. The Elkwater Community Association also argued Elkwater Lake should remain a lake and not become a reservoir. This argument also does not relate to the issues identified by the Board for the Hearing. Even though the arguments provided by the Elkwater Community Association do not relate to the issues under appeal, the Board recognizes that the community association may have information that may be relevant to the Board. Therefore, the Board will allow the Elkwater Community Association to participate in the appeal process by providing written submissions only. The Board reminds the Elkwater Community Association that the only issues that it will consider are:

1. What is an appropriate cut off level to allow for the diversion of water from Elkwater Lake?
2. Is additional clarification regarding the term “water conservation measures” required, and if so, how should it be defined?

[33] Dr. Carter did not provide any information on the type of evidence he intended to present before the Board. He referred to the original agreement between Alberta Environment,

the Licence Holder, and the Elkwater Community Association. No further explanation of the agreement was provided to the Board. If Dr. Carter was referring to the original Licence, only the Licence Amendment is appealable at this time, not the original Licence, so it is therefore not an issue before the Board in these appeals. The Board appreciates that Dr. Carter may have information related to the identified issues, and therefore, Dr. Carter will be given the opportunity to provide a written submission to the Board on the two issues as stated above.

[34] Intervenor 1 did not provide any indication of the type of evidence he intended to present, and he did not explain how his evidence would be different from that of the Appellants. He stated he had a cabin in the Elkwater Town site, and he used the Elkwater Lake area for work and recreation. Although this information assists the Board in understanding Intervenor 1's interest in the appeals, it does not provide any information on the type of information he intended to present. At this stage of the process, the Board is only asking that the intervenor requests include, at a minimum, an outline of the evidence the intervenor intends to bring forward. Once the applicant has been given intervenor status, then the submission, whether it is written or oral, would then expand on the arguments and evidence. Based on the limited information provided, the Board will grant Intervenor 1 the opportunity to provide a written submission only on the two issues the Board has determined will be heard at the Hearing.

IV. CONFIDENTIALITY DECISION

[35] The Board's Rules of Practice states:

"...the Presiding Board Member may limit introduction of evidence or issue such protective or other orders that in their judgment are required to prevent undue disclosure of classified, confidential or sensitive matters which include, but are not limited to, matters of a national security, business, personal or proprietary nature. Where the Presiding Board Member determines that information in documents containing classified, confidential or sensitive matters should be made available to another Party, the Presiding Board Member may direct the Party to prepare an unclassified or non-sensitive summary or extract of the original. The summary or extract may be admitted as evidence in the record.

If the Presiding Board Member determines the procedure described above is inadequate and classified or otherwise sensitive matters must form part of the record in order to avoid prejudice to a Party, the Presiding Board Member may advise the Parties and

provide opportunity for arrangements to permit a Party or representative to have access to such matters.”

[36] The Board has generally considered the issue of confidentiality in the context of trade secrets or how information may be used in industrial practices, or to protect private information, such as health concerns, that a party does not want released publicly.

[37] The Board takes the issue of protecting private information very seriously. The Board abides by the *Freedom of Information and Privacy Act*, R.S.A. 2000, c. F-25, throughout the appeal process. The Board clearly states on its Notice of Appeal form that the information collected is necessary for the processing of the appeal.⁶ This also applies to intervenor requests.

[38] The information required by the Board include name, address, and telephone number, and depending on how the person prefers documents to be sent, either fax number or email address. The Board does not require any further personal information, such as date of birth, social insurance numbers, or any other type of information. The information the Board requires is commonly found in local telephone books. The Board notes Intervenor 1’s name, address and telephone number are also available on the directory websites, such as MyTelus.com, Directory 411.ca, and WhitePages.ca. Therefore, his information is readily available to the public.

[39] The Board does require the information that it asks for to allow other participants in the appeal to know who is requesting standing either as a party or as an intervenor, and it provides additional information on which the Board can make the best decision possible.

[40] The Board has no intention of distributing personal information of Intervenor 1 or anyone who appears before the Board any more than what is necessary to conduct its appeals and to abide by the applicable legislation and the rules of natural justice.

⁶ See: Board’s Notice of Appeal form:

“The information collected on this form is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of your appeal. The information you provide will be considered a public record. If you have concerns with your information being part of the public record or if you have questions about how the Board deals with your information, please contact ..., General Counsel, Environmental Appeals Board.”

[41] The Board's process needs to be open and transparent for the Parties as well as for the public in general. By providing minimal personal information, the general public will have a better understanding of the Board's reasoning in making its decisions or recommendations.

[42] As the public interest for open and transparent processes is vital to the Board's role as an administrative law body, the Board denies the request of Intervenor 1 to hold his private information confidential. As Intervenor 1's participation in the appeal process was contingent on whether the Board would grant the confidentiality request, Intervenor 1 must notify the Board whether he intends to pursue his intervenor request. If Intervenor 1 does participate as an intervenor in the appeals, his name will be published as part of the report and recommendations provided to the Minister and an addendum will be released for this decision. His address, telephone, and email address will only be available as part of the Board's record in its correspondence.

V. DECISION

[43] The Board will allow Ms. Evelyn Schuler, the Elkwater Community Association, Dr. David J. Carter, and Intervenor 1 to participate through written submissions only. The Board will notify the Intervenors when their submissions are to be provided to the Board.

[44] The Board denies the request filed by Intervenor 1 for confidentiality of his personal information.

Dated on October 11, 2007, at Edmonton, Alberta.

“original signed by”

Dr. Steve E. Hrudey, FRSC, PEng
Chair