
ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 1, 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 an appeal filed by Decker Management Ltd. with respect to *Water Act* Temporary Diversion Licence No. 00238211-00-00 issued to Decker Management Ltd. by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Decker Management Ltd. v. Director, Southern Region, Regional Services, Alberta Environment* (01 November 2007), Appeal No. 07-118-D (A.E.A.B.).

BEFORE:

Dr. Steve E. Hrudehy, Chair.

WRITTEN SUBMISSIONS BY:

Appellant:

Decker Management Ltd., represented by Mr. K. Hugh Ham and Ms. Bonnie J. Anderson, Municipal Counsellors Inc.

Director:

Mr. Claude Eckert, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.

EXECUTIVE SUMMARY

On June 27, 2007, the Director suspended Temporary Diversion Licence No. 00238211-00-00 under the *Water Act* which had been issued to Decker Management Ltd. authorizing the temporary diversion of 5000 cubic metres of water from “Horse Shoe Pond” located at NE 20-025-02-W5M in Calgary, Alberta, for water management purposes. The Temporary Diversion Licence expired June 30, 2007.

Decker Management Ltd. filed an appeal of the Director’s decision to suspend the Temporary Diversion Licence. It argued the suspension was unfair as it took away a substantive right without a right of appeal. Decker Management Ltd. asked the Board to renew the Temporary Diversion Licence for one year.

The Director explained the Temporary Diversion Licence was suspended because Decker Management Ltd. failed to comply with the terms and conditions of the Temporary Diversion Licence. The Director argued there is no right of appeal pursuant to section 115(2)(b) of the *Water Act*.

The Board determined the legislation is explicit in that no appeals are allowed with respect to any matter related to a temporary diversion licence, and the suspension of the Temporary Diversion Licence fell within the meaning of “any matter.” Therefore, the Board dismissed the appeal. The Board also noted that even if the appeal was allowed by the legislation, the Board could not extend the Temporary Diversion Licence because the *Water Act* limits the term of a temporary diversion licence to less than one year.

TABLE OF CONTENTS

I. BACKGROUND	1
II. SUBMISSIONS	2
A. Appellant.....	2
B. Director	4
III. ANALYSIS.....	5
IV. DECISION.....	9

I. BACKGROUND

[1] On April 20, 2007, the Director, Southern Region, Regional Services, Alberta Environment (the “Director”), issued Temporary Diversion Licence No. 00238211-00-00 (the “Temporary Licence”) under the *Water Act*, R.S.A. 2000, c. W-3, to Decker Management Ltd. authorizing the temporary diversion of 5000 cubic metres of water from “Horse Shoe Pond” located at NE 20-025-02 W5M in Calgary, Alberta, for water management purposes. The Temporary Licence contained a requirement for Decker Management Ltd. to submit a water use report once per week. The expiry date of the Temporary Licence was June 30, 2007.

[2] By a letter dated June 27, 2007, the Director informed Decker Management Ltd. that pursuant to section 64 of the *Water Act*,¹ the Temporary Licence was suspended until further notice because the volume of water authorized under the Temporary Licence that could be diverted was exceeded and Decker Management Ltd. failed to submit water use reports after May 30, 2007.

[3] On July 3, 2007, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Decker Management Ltd. (the “Appellant”) appealing the June 27, 2007 decision of the Director to suspend the Temporary Licence.

[4] On July 4, 2007, the Board acknowledged the Notice of Appeal and notified the Director of the appeal. The Board noted that it appeared that, under section 115(2)(b) of the *Water Act*,² the Director’s decision to suspend the Temporary Licence may not be appealable. The Board asked the Appellant and the Director (collectively the “Participants”) to provide submissions on whether the Board had jurisdiction to hear the appeal. On July 12, 2007, the Board received the Appellant’s submission, and the Director’s submission was received on July 20, 2007, followed by the Appellant’s rebuttal submission on July 24, 2007.

¹ Section 64 of the *Water Act* provides:

“The Director may, on the Director’s own initiative, amend, suspend or cancel a licence for the temporary diversion of water.”

² Section 115(2)(b) of the *Water Act* states:

“Notwithstanding subsection (1), a notice of appeal may not be submitted with respect to any matter relating to a licence for the temporary diversion of water.”

II. SUBMISSIONS

A. Appellant

[5] The Appellant explained that water from Horse Shoe Pond had to be diverted in order to protect the residence located on the NE 20-025-02 W5M from flooding and, due to the anticipation that within a few years the property would be integrated into the surrounding subdivision, a temporary diversion licence was sought. The Appellant stated that due to heavy rainfall and problems such as vandalism to the pumping station, the diversion took longer than anticipated, and on May 4, 2007, the Appellant and representatives from Alberta Environment visited the site to review the situation. The Appellant further stated that on June 15, 2007, an extension of the Temporary Licence to August 31, 2007, was applied for, but on June 27, 2007, the Director suspended the Temporary Licence without notice.

[6] The Appellant noted that under section 115(2)(b) of the *Water Act*, it appeared the Director's decision may not be appealable. However, the Appellant argued that, although under section 115(2)(b) of the *Water Act* "...there is a denial of an appeal of matters relating to a licence for the temporary diversion of water,"³ the Board should take jurisdiction to hear the appeal. According to the Appellant, this is necessary in order to uphold the purpose of the *Water Act* and to meet the Board's duty of fairness. Alternatively, the Appellant submitted that pursuant to section 59(6) of the *Water Act*⁴ the Temporary Licence was automatically renewed.

[7] The Appellant submitted that one purpose of the *Water Act*, as reflected in section 2 of the *Water Act* and the strict regulatory process of water rights that the *Water Act* establishes, is to create stability and certainty surrounding water rights. The Appellant argued that denying it the ability to appeal the Director's decision and not having the right to be heard prior to the decision being made where substantive rights are affected, is contrary to the purpose of the

³ Appellant's submission, dated July 12, 2007, at page 6.

⁴ Section 59(6) of the *Water Act* states:

"If the Director fails to give notice under subsection (2), the licence is deemed not to have expired on its expiry date and the licence is automatically renewed on the same terms and conditions for a period of one year."

Water Act. The Appellant argued temporary licence holders "...need to know that decisions that are made that affect the way they operate or live will not be susceptible to continuous change."⁵

[8] The Appellant argued the regulatory scheme for temporary diversions "...does not afford [the Appellant] a duty of fairness as is required by the common law."⁶ The Appellant explained that unlike water licences, temporary water licences can be amended, suspended, or cancelled on the Director's own initiative, without the same considerations and without the ability to appeal the decision. The Appellant stated that since the temporary diversion was needed to protect its property from flooding, the decision to suspend the Temporary Licence affected its substantive rights to protect its residence. The Appellant argued notice of the suspension should have been given in order to allow the Appellant the opportunity to respond to the allegations and correct its activities that were in contravention of the Temporary Licence. In the Appellant's view, the inequality in the appeal process between licences and temporary licences under the *Water Act* and the effect on the Appellant's substantive rights required a high duty of fairness, which was not met by the suspension of the Temporary Licence without notice.

[9] Alternatively, the Appellant submitted that the Temporary Licence was automatically renewed for a period of one year under section 59 of the *Water Act*.⁷ The Appellant argued this section requires notice to be given 30 days prior to the expiration of the Temporary Licence, and the failure to do so entitled the Appellant to have the Temporary Licence automatically renewed. The Appellant requested the Board renew the Temporary Licence for one year given that the Director did not provide 30 days notice of the expiration.

[10] In its rebuttal submissions, the Appellant reaffirmed its view that section 59 pertains to temporary diversion licences. According to the Appellant, if temporary diversion licences were to be excluded from the section, then it would clearly state this as is done in other

⁵ Appellant's submission, dated July 12, 2007, at page 5.

⁶ Appellant's submission, dated July 12, 2007, at page 8.

⁷ Section 59 of the *Water Act* provides:

- "(2) At least 30 days prior to the expiry date of a licence the Director must give notice to the licensee that the licence expires on the licence's expiry date.
- (6) If the Director fails to give notice under subsection (2), the licence is deemed not to have expired on its expiry date and the licence is automatically renewed on the same terms and conditions for a period of one year."

places in the *Water Act*. The Appellant also submitted that the removal of water for flood control is specifically excluded from the definition of “diversion of water” and therefore, no licence was required by the Appellant.

B. Director

[11] The Director submitted that the appeal must be dismissed given the wording of section 115(2)(b) of the *Water Act* is clear and unambiguous. The Director argued the suspension of the Temporary Licence falls within the wording of “any matter” and, therefore, is not appealable to the Board. The Director explained that the Board can only consider appeals of specifically listed decisions of the Director as listed in the *Water Act*, and the Board does not have “... inherent jurisdiction to consider appeals regarding any and all decisions made pursuant to the *Water Act*.”⁸

[12] The Director submitted that the “duty of fairness” could not override the wording of section 115(2)(b) of the *Water Act*. The Director argued the Appellant should not be given the opportunity to respond to the suspension given the facts of this case in that the Appellant’s own reporting indicated more water was being diverted than legally entitled to under the Temporary Licence. The Director stated this substantial breach entitled the Director to suspend the Temporary Licence, and no other remedy exists.

[13] The Director submitted the Board has no statutory authority to renew the Temporary Licence for another year. The Director argued that section 63 of the *Water Act*⁹ only

⁸ Director’s submission, dated July 20, 2007.

⁹ Section 63 of the *Water Act* states:

“(1) The Director may issue a licence for the temporary diversion of water to any person subject to any terms and conditions the Director considers appropriate.

(2) A licence for the temporary diversion of water may be issued only for a specified period of time of one year or less.

(3) The Director may extend the expiry date of a licence for the temporary diversion of water, if the total period for which the licence is issued does not exceed one year.

(4) Notwithstanding subsections (2) and (3), the Director may, on application, reissue a licence for a temporary diversion of water.

(5) Sections 18, 29, 30, 33, 50, 51, 52, 54, 55 and 56 and Part 5 are not applicable to a licence for the temporary diversion of water.

allows a temporary licence to be issued for a period of one year or less, and therefore, a temporary licence holder can only apply to have it reissued or apply for a new temporary licence. The Director stated the renewal provisions do not relate to temporary licences because they state the renewed licence will have the same priority as the original licence; however, temporary licences do not have priority numbers as they are “temporary.” The Director explained the renewal provisions state the Director has the same powers and duties as those provided under section 51 of the *Water Act*, however, section 63(5) of the *Water Act* states that section 51 is not applicable to temporary licences.

[14] Finally, the Director argued that since the Temporary Licence is expired, it is not legally possible to renew the Temporary Licence as it no longer exists.

III. ANALYSIS

[15] Section 115 of the *Water Act* specifies who and who may not file an appeal. The legislators clearly turned their minds to whether a temporary licence holder should be allowed to file an appeal, because in section 115(2)(b), the *Water Act* states that “...a notice of appeal may not be submitted with respect to any matter relating to a licence for the temporary diversion of water.” What is at issue in this case is the Director’s decision to suspend the Temporary Licence issued to the Appellant.

[16] It is the Board’s view that the suspension of the Temporary Licence clearly falls within the category of “*any matter* relating to a licence for the temporary diversion of water.” Having a valid temporary licence and operating under the stipulated terms and conditions are the operator’s responsibilities. If the Temporary Licence is suspended, the ability to operate under the Temporary Licence is removed. Therefore, the suspension of the Temporary Licence definitely relates to the licence for the temporary diversion of water. Therefore, the Board does not have the jurisdiction to hear an appeal relating to a temporary licence, and as the appeal presently before the Board deals with the suspension of the Temporary Licence, the Board must dismiss the appeal.

(6) A holder of a licence for the temporary diversion of water may divert water through the use of another person’s works if the holder of the licence for the temporary diversion of water provides the written consent of the owner of the works to the Director.”

[17] In its submissions, the Appellant admitted that there is “...no right of appeal established in the Act [EPEA], in fact there is a denial of an appeal of matters relating to a licence for the temporary diversion of water.”¹⁰ Although the Appellant stated this, it attempted to argue the Board has a duty of fairness to allow the appeal. The Board did not write the legislation, but it is bound by the limitations that are set out in the relevant legislation.

[18] In past decisions, the Board has recognized the importance of adhering to the intent of legislators as provided for in the *Water Act*.¹¹ The legislators did not give the Board jurisdiction to hear matters pertaining to temporary diversions. The Board respects the principles of administrative law and natural justice including the “duty of fairness” which requires an element of certainty for rights holders. To achieve certainty, it is fundamental for the Board to follow the legislation as it is written and not interpret it in a way other than how it is written, especially when it is clearly stated and no ambiguity exists. The Appellant recognized this in its submissions by stating that this appeal is captured by section 115(2)(b) and argued that the Board should consider both the duty of fairness and certainty. The Board finds that all of these considerations support the conclusion that, based on the clear and unambiguous wording of section 115(2)(b), the suspension of the Temporary Licence is not appealable and the Board does not have jurisdiction to hear this matter.

[19] The Director suspended the Temporary Licence as allowed under section 64 of the *Water Act*.¹² The Director provided reasons for the suspension to the Appellant who was in non-compliance with the Temporary Licence, specifically failing to provide the data required and exceeding the amount of water allowed to be diverted under the Temporary Licence. The Appellant did not dispute that it was in non-compliance. The Director can cancel a regular licence for non-compliance with the terms and conditions of the licence,¹³ which is the basis of

¹⁰ Appellant’s submission, dated July 12, 2007, at page 6.

¹¹ *Barlem et al. v. Director, Central Region, Regional services, Alberta Environment re: Hal Willis* (14 December 2005), Appeal Nos. 05-010-012-D (A.E.A.B.).

¹² Section 64 of the *Water Act* states:

“The Director may, on the Director’s own initiative, amend, suspend or cancel a licence for the temporary diversion of water.”

¹³ See section 55(1)(e) of the *Water Act* which states:

“The Director may suspend or cancel a licence if there is non-performance of or in the opinion of the Director there is a serious breach of any term or condition of the licence....”

the Director's decision in this case to suspend the Temporary Licence. Therefore, the Director did not treat the Appellant any differently whether it was a Temporary Licence or a regular licence.

[20] The Oxford Dictionary defines temporary as "lasting for only a limited period." This is reflected in section 63(2) of the *Water Act* where it states that a "...licence for the temporary diversion of water may be issued only for a specified period of time of one year or less." Further, section 63(3) of the *Water Act* clearly states that a temporary diversion licence can be extended, but the total period cannot exceed one year. When there is a clear, unambiguous interpretation of the wording in a specific section of the act, the Board must accept that interpretation. The Board has no doubt the legislators clearly did not intend that temporary diversion licences would be automatically renewed as is done with licences. Section 59, which the Appellant argued requires the Director give 30 days prior notice before the expiration date, clearly applies to licences, not temporary licences. Therefore, the Appellant's argument that, without 30 days prior notice of the expiry of the Temporary Licence the Temporary Licence should be automatically renewed, is not supported by the legislation. The Appellant also asked the Board to renew the Temporary Licence for another year. This would contravene the legislation that limits a temporary licence to less than one year and, under section 98(2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), the Board "...may confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make..." As the Director cannot renew the Temporary Licence to extend beyond one year, the Board does not have the authority to make such a decision or recommendation.

[21] Although the matter is determined based on lack of jurisdiction, the Board feels compelled to address the Appellant's argument that a licence was not needed to divert water for flood control purposes. The Appellant argued in its rebuttal submission that a Temporary Licence is not required in case of flooding, pursuant to section 2(n)(i) of the *Water Act*, which defines a "diversion of water" as:

"...the impoundment, storage, consumption, taking or removal of water for any purpose, except the taking or removal for the sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment...."

[22] The Appellant stated it was diverting water to prevent flooding of its property. The Board believes the definition of “diversion of water” excludes actions that require immediate action in response to a present or imminent emergency situation, and which there would be insufficient time to apply for and obtain the requisite licence or approval. In this case, the Appellant acquired a Temporary Licence in order to avert a potential flooding issue. There was no imminent emergency situation; the Appellant, rightfully, sought a Temporary Licence to deal with, what appears to be, a recurring problem. If the Appellant intends to continually divert water from the Horse Shoe Pond, the Board believes it is necessary for the Appellant to apply for another temporary licence, a regular licence, or depending on the circumstances, an approval. Regardless of whether it is a temporary licence, a regular licence, or an approval, the Appellant must adhere to the terms and conditions of the authorization. Contravention of the authorization could result in the Director taking enforcement action against the Appellant, including the possibility of suspending the authorization, issuing orders, or taking punitive action.

[23] The Board notes that the argument about not requiring a licence for preventing flooding was raised only in the Appellant’s rebuttal submission. The purpose of a rebuttal submission is not to bring in new arguments. An appellant, who has the onus of proving its position, is given the opportunity to provide a rebuttal submission in order to respond to any unanticipated evidence or argument that is brought forward by the other participants in their submissions. In this case, the Director did not raise any matter regarding the requirement of the Temporary Licence. If counsel for the Director had requested an opportunity to respond to the new argument raised in rebuttal by the Appellant, the Board would have had to consider allowing the request in order to maintain fairness to all participants. If the Director had been allowed a response to the rebuttal, the Appellant would have been able to provide an additional response submission regarding the Director’s response. One of the reasons no new arguments can be presented in rebuttal is so that there will be an end to the submission process. If an appellant is allowed to split its evidence and arguments, there is a danger that the submission process would not end.

[24] The Board also notes that the Temporary Licence expired on June 30, 2007. As the Board cannot extend the Temporary Licence and the Board does not have jurisdiction to hear the appeal, it appears the issue of the Temporary Licence is moot.

IV. DECISION

[25] The Appellant failed to provide sufficient reasons to demonstrate that section 115(2)(b) of the *Water Act* should not apply in this circumstance. Therefore, the Board does not have jurisdiction to hear the appeal, and pursuant to section 95(5) of the *Environmental Protection and Enhancement Act*, the Board dismisses the appeal.

Dated on November 1, 2007, at Edmonton, Alberta.

“*original signed by*”

Dr. Steve E. Hruddy, FRSC, PEng
Chair