Appeal No. 07-146-D

ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Preliminary Motions Hearing – August 26, 2008
Date of Decision – October 22, 2008

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 Westridge Utilities Inc. with respect to an application for a *Water Act* Licence filed with the Director, Southern Region, Environmental Management, Alberta Environment.

Cite as: Preliminary Motions: *Westridge Utilities Inc.* v. *Regional Director, Southern Region, Environmental Management, Alberta Environment* (22 October 2008), Appeal No. 07-146-D (A.E.A.B.).

PRELIMINARY MOTIONS HEARING BEFORE:	Dr. Steve E. Hrudey, Chair, Mr. Jim Barlishen, Board Member, and Ms. A.J. Fox, Board Member.
BOARD STAFF:	Mr. Gilbert Van Nes, General Counsel and Settlement Officer; Ms. Denise Black, Board Secretary; and Ms. Marian Fluker, Associate Counsel.
APPEARANCES:	
Appellant:	Westridge Utilities Inc., represented by Mr. John Gruber, President.
Alberta Environment:	Regional Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
WITNESSES:	
Appellant:	Mr. John Gruber, President, Westridge Utilities Inc.; and Mr. Thomas Doran, Doran Engineering Services Ltd.
Alberta Environment:	Mr. Jay Litke, Regional Director, Southern Region, Environmental Management, Alberta Environment, and Mr. Claude Eckert, Water Approvals Team, Southern Region, Environmental Management, Alberta Environment.

EXECUTIVE SUMMARY

Westridge Utilities Inc. did not receive a licence to divert water after filing an application with Alberta Environment in 2004. As a result, Westridge Utilities filed a Notice of Appeal with the Environmental Appeals Board on February 29, 2008.

The Board held a Preliminary Motions Hearing to hear submissions on the issue of whether the Board had jurisdiction to hear the appeal and the issue of document production.

The Board found that no decision had been made regarding the application for the water licence because the application was deemed incomplete by the technical staff of Alberta Environment. As a designated Director under the *Water Act* made no decision regarding the application, there was no decision that could be appealed to the Board. All of the correspondence from Alberta Environment to Westridge from the time the application was received until February 2008 reaffirmed that the application was incomplete. Westridge did not provide the additional information requested by Alberta Environment's technical staff to complete the application.

The Board dismissed the appeal because it did not have jurisdiction. Because the appeal was dismissed on jurisdictional grounds, the Board did not consider the document production motion.

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I. BACKGROUND

[1] On February 1, 2008, Alberta Environment ("AENV") issued a letter (the "Letter") to Westridge Utilities Inc. indicating Westridge Utilities Inc.'s file with respect to its application for a water licence (the "Licence") under the *Water Act*, R.S.A. 2000, c. W-3, was incomplete, and because a Crown Reservation had taken effect, even if the application was completed, it could not be processed and no priority number could be issued.[1] The application for the Licence was for a diversion of water at NE 6-24-2-W5M.

[2] On February 29, 2008, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Westridge Utilities Inc. (the "Appellant" or "Westridge") appealing the Letter.

[3] On March 3, 2008, the Board wrote to the Appellant and AENV (collectively the "Participants") acknowledging receipt of the Notice of Appeal and notifying AENV of the appeal. The Board also requested AENV provide the Board with a copy of the record (the "Record") relating to the appeal, and that the Participants provide available dates for a mediation meeting, preliminary motions hearing, or hearing. The Record was received on March 28, 2008.

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

[5] On March 7, 2008, AENV notified the Board that he did not consider the appeal was properly before the Board, because there is no statutory appeal arising from a decision that

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1 The letter issued on February 1, 2008 was issued by Mr. Jay Litke, Regional Director, for Alberta Environment. Mr. Litke is a senior manager and not a designated Director as defined in section 1(1)(k) and section 163(1) of the *Water Act* ("designated Director"), which states:

> "1(1) In this Act …
> (k) "Director" means an individual designated as a Director for the purposes of all or part of this Act by the Minister under Part 13 …
>
> 163(1) The Minister may, by order, designate employees of the Government under the administration of the Minister as Directors for the purposes of all or a part of this Act."

an application is incomplete and the appeal is time-barred because the decision about the application being incomplete was made in 2004.

[6] On April 1, 2008, the Board set a schedule to receive written submissions from the Participants on whether the appeal is properly before the Board.

[7] On April 2, 2008, the Appellant wrote to the Board, arguing that AENV's motion regarding standing did not meet the requirements of Rule 10 of the Board's Rules of Practice.[2] It argued the motion did not identify the statutory or regulatory provisions being relied on, and it did not explain how the Board lost jurisdiction to hear the appeal. The Appellant also stated AENV's motion did not specify when the appeal period commenced, and AENV did not provide any statutory provision that supported AENV's argument that the appeal was time-barred. The Appellant stated AENV's motion did not explicitly state the relief sought.

[8] In the same letter, the Appellant stated that the Board's process is unfair because the Appellant is expected to provide its arguments before a proper motion is made. The Appellant stated it could not be expected to provide a proper response unless it had been provided a fair disclosure of AENV's position. The Appellant expressed concern that an oral hearing was not scheduled.

[9] On April 11, 2008, the Appellant brought a motion requesting the production of the following documents: all previous drafts and iterations of the groundwater documents; all internal memoranda related to the issuance of the groundwater documents; and all policy papers, and ministerial directives which AENV considered in the formulation and issuance of the groundwater documents. The Appellant also requested the entire file related to the Muirfield Diversion application ("Muirfield"). The Appellant asked that an oral hearing be held if AENV did not consent to the disclosure of the information requested.

[10] On May 6, 2008, the Board notified the Participants that the motion filed by AENV complied with Rule 10 of the Board's Rules of Practice. However, the Board raised its own motion pursuant to section 95(5)(a)(iii) of the *Environmental Protection and Enhancement*

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2 Rule 10 of the Board's Rules of Practice provides:

"All motions shall state the specific relief requested and the basis thereof. Except as provided below, they shall be made in writing."

Act, R.S.A. 2000, c. E-12 ("EPEA") and 115(1) of the *Water Act* on whether it has jurisdiction to accept the appeal.

[11] In this same letter, the Board notified the Participants that an oral preliminary motions hearing would be held to address the following issues:

1. Does the Board have jurisdiction to hear the appeal? In addressing this question the Board would like submissions on, but not limited to:

    a. What is the nature of the decision being appealed?

    b. Is the decision being appealed a decision the Board can review?

    c. When was the decision made by Alberta Environment?

    d. Is the appeal time-barred?

2. Should the Board order the Director to produce the documents requested by Westridge? Specifically:

    a. The Groundwater Evaluation Guideline (issued February 2003) including Appendix "C" entitled "Policy on Water Diversions from Sands and Gravels Adjacent to a Water Body, and from Springs", and all associated documents.

    b. A copy of Alberta Environment's record relating to the Muirfield Diversion application filed on March 27, 2008.

    c. A more complete version of the Alberta Environment Record than has been filed with respect to this appeal, which Westridge argues may be incomplete.

[12] On May 9, 2008, the Appellant sought clarification on whether the Board's motion substituted AENV's motion or whether there were three outstanding motions. The Appellant did not believe AENV's motion was withdrawn. On May 13, 2008, the Board confirmed that the Board's motion substituted AENV's motion to address the concerns the Appellant had with AENV's motion complying with Rule 10 of the Board's Rules of Practice. The Board explained that, to that extent, it was correct to conclude that AENV's motion had been dismissed.

[13] On May 16, 2008, the Appellant wrote to the Board stating that it presumed there would not be a simultaneous filing of the respective motions and that the Participants would be required to file a written submission and then the respondent to each motion would file a reply submission.

[14] On May 16, 2008, the Board notified the Participants that a two step process would be allowed with the Participants providing initial written submissions on the two motions by July 16, 2008, and response submissions by August 6, 2008.

[15] On May 28, 2008, the Board confirmed that the Preliminary Motions Hearing would be held on August 26, 2008, in Calgary.

[16] On July 15, 2008, the Board received the written submission from the Appellant on the issue of document production. AENV provided a written submission on both issues on July 16, 2008.

[17] On July 23, 2008, the Board wrote to the Participants, noting that the Appellant did not address the issue of jurisdiction in its submission. The Board stated:

> "The Board assumes that this is a deliberate choice on Mr. Gruber's part, and therefore he intends to limit his Response Submission on the issue of jurisdiction to a rebuttal of Ms. Graham's Initial Submission only. The Board understands, therefore, that Mr. Gruber's Response Submission will <u>not</u> raise new arguments on the issue of jurisdiction."

The Board asked the Appellant to advise the Board if its understanding was incorrect.

[18] The Appellant responded on July 24, 2008, stating the Board required the Participants to file submissions in support of the specific relief they were requesting and then to file response submissions to the other Participant's motion. The Appellant stated that it was not required to respond to the Board's standing motion until it had been provided with AENV's submission containing the legal and factual basis for the motion. The Appellant argued its response to AENV's submission regarding the Board's motion should not be limited or restricted, and AENV was not limited in their response to the Appellant's submission with respect to document production.

[19] On July 28, 2008, the Board instructed the Appellant to provide its submission on the jurisdictional issue by August 1, 2008, and both Participants were to provide their response submissions by August 13, 2008.

[20] The Appellant provided its written submission to the jurisdictional issue on July 31, 2008. The Appellant filed its response submission on the document production issue on August 12, 2008, and AENV provided a response submission to both issues on August 13, 2008.

[21] The Preliminary Motions Hearing was held on August 26, 2008, in Calgary.

[22] As a result of questions raised at the Preliminary Motions Hearing, Mr. Thomas Doran, Doran Engineering Services Ltd., a witness for the Appellant, was allowed to provide additional information to the Board after the close of the Preliminary Motions Hearing. The Board received the additional information on September 18, 2008.

II. SUBMISSIONS

A. Appellant

[23] The Appellant argued AENV's motion to dismiss the appeal on jurisdictional grounds should be dismissed because: the Board lost jurisdiction to hear the motion because of bias; the motion is not provided for in section 95(5) of EPEA; the Board misdirected itself as to the test to be applied to the issue of whether the Appellant's appeal is properly before the Board; in the alternative, the Board has the jurisdiction to hear the appeal; and the appeal was filed within the period provided for in the *Water Act*.

[24] The Appellant explained AENV brought a motion to summarily dismiss the Appellant's appeal, but the Appellant asserted AENV's motion should be dismissed for failure to comply with the Board's Rules of Practice. The Appellant stated the Board dismissed AENV's motion, and AENV, who was competently represented, could have brought the motion forward again in a manner that complied with the Board's Rules of Practice. The Appellant stated "…the Board, of its own volition, took up the cause advanced in the Directors [*sic*] motion."[3] The Appellant argued that, prior to AENV's motion, the Board had not questioned whether the appeal

was proper or if the Board had jurisdiction to hear the appeal. The Appellant argued that the Board's adoption of AENV's motion contravenes the legal principle that a party cannot advocate the same cause that it is adjudicating. According to the Appellant, if this occurs, then bias exists and there is a loss of jurisdiction. It argued that the principle that one cannot be an advocate and an adjudicator in the same cause is fundamental to the fairness of the process. The Appellant argued there are few circumstances, if any, where it is necessary for the Board, on its own accord, to seek relief against one of the participants, and by doing so, it demonstrates a disposition towards a particular outcome.

[25] The Appellant argued the Board's July 28, 2008 letter demonstrates bias when the Board states:

> "It appears to the Board, that the Notice of Appeal, on the face of it, may not be appealing a decision listed as appealable under the *Water Act* or, for that matter, in section 91(1) of the *Environmental Protection and Enhancement Act*. Further, it appears to the Board that depending on the decision being appealed, the Notice of Appeal may have been filed late."

[26] The Appellant stated the reference to section 91(1) of EPEA was confusing because the application was made under the *Water Act*, and section 115 of the *Water Act* does not list types of decisions that may be appealed, only certain persons and circumstances where an appeal can be filed. The Appellant stated section 115(1)(d) of the *Water Act* provides that a person who applied for a licence and had been refused may appeal. The Appellant argued that if anything is suggested by the face of the appeal is that it is contemplated by section 115 of the *Water Act*. See Appendix A for section 115 of the Water Act.

[27] The Appellant stated that as of July 28, 2008, the Board had not reviewed any submissions from the Appellant with respect to the Board's motion alleging the appeal was not contemplated by the *Water Act* or that the appeal was time-barred. The Appellant argued that the Board only had AENV's submission and the Board had formed the preliminary view that AENV's argument had merit, thereby demonstrating bias.

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3 Appellant's submission, dated July 31, 2008, at page 2.

[28] The Appellant argued the Board's statement in its July 28, 2008 letter that the Board had not made any decision on the issues cannot void the bias. The Appellant argued the motion must be dismissed because the Board panel lost jurisdiction to adjudicate it.

[29] The Appellant referred to section 94 of EPEA[4] and noted that the word "shall" is mandatory. According to the Appellant, the Board must hold a hearing if an appeal is brought regarding a matter that is within the purview of the statutes subject to the Board's jurisdiction. The Appellant stated section 95(5)(a)(iii) of EPEA[5] is an exception to section 94 of EPEA in certain circumstances, but it does not empower the Board to decide the issue of its own jurisdiction on an administrative or summary basis without a hearing.

[30] The Appellant argued the Board's discretion to summarily dismiss an appeal under section 95(5) of EPEA[6] must be read in conjunction with section 94(1) of EPEA that

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4 Section 94 of EPEA states:

> "(1) On receipt of a notice of appeal under this Act or under the *Water Act*, the Board shall conduct a hearing of the appeal.
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> (2) In conducting a hearing of an appeal under this Part, the Board is not bound to hold an oral hearing but may instead, and subject to the principles of natural justice, make its decision on the basis of written submissions.
>
> (3) The Board may, with the consent of the parties to an appeal, make its decision under section 98 or its report to the Minister without conducting a hearing of the appeal."

5 Section 95(5)(a)(iii) states:

> "The Board may dismiss a notice of appeal if for any other reason the Board considers that the notice of appeal is not properly before it…."

6 Section 95(5) of EPEA provides:

> "The Board
>
> (a) may dismiss a notice of appeal if
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> (i) it considers the notice of appeal to be frivolous or vexatious or without merit,
>
> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation,
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it,

requires the Board to hear an appeal. The Appellant stated that only in the rarest of cases should the Board exercise this discretion.

[31] The Appellant stated that section 95(5)(a) of EPEA permits but does not require the Board to dismiss a notice of appeal in certain situations. The Appellant stated that, if the Board lacks jurisdiction to hear an appeal, it must be dismissed. The Appellant argued that section 95(5)(a) of EPEA cannot be used as a basis to decide questions of jurisdiction. The Appellant submitted that the legislation does not provide the foundation for the Board to bring its motion, and therefore the motion should be dismissed.

[32] The Appellant argued the Board misdirected itself as to the test required by section 115 of the *Water Act*. The Appellant stated the right of appeal is based on the persons and the circumstances, not to the nature of the decision. The Appellant argued that, in determining jurisdiction, the legislature intended the Board to look at who was making the appeal and what were the circumstances of the decision. The Appellant stated the Board focused on the nature of the decision, and therefore, the motion brought by the Board should be dismissed because the Board misdirected itself as to the proper question with respect to whether the appeal is properly before it.

(iv) the person who submitted the notice of appeal fails to comply with a written notice under section 92, or

(v) the person who submitted the notice of appeal fails to provide security in accordance with an order under section 97(3)(b),

and

(b) shall dismiss a notice of appeal if in the Board's opinion

(i) the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or any Act administered by the Energy Resources Conservation Board or the Alberta Utilities Commission at which all of the matters included in the notice of appeal were adequately dealt with, or

(ii) the Government has participated in a public review under the *Canadian Environmental Assessment Act* (Canada) in respect of all of the matters included in the notice of appeal."

[33] The Appellant explained it is a water utility that made an application for a water diversion licence in order to be able to provide service to its customers. The Appellant stated it is clearly a person entitled to bring an appeal.

[34] The Appellant stated that, from the February 1, 2008 letter, it is clear AENV refused to issue a licence. The Appellant argued that section 115(1)(d) of the *Water Act* does not require an examination of whether the refusal was based on the completeness of the application or otherwise, and there is nothing in that section that suggests that certain reasons for AENV's refusal to issue a licence are appealable while others are not.

[35] The Appellant stated that section 115(2) of the *Water Act* enumerates specific situations where an appeal may not be brought, and had the legislators chosen, they could have included in section 115(2) of the *Water Act* a provision that AENV's conclusion regarding the completeness of the application was not subject to appeal. The Appellant argued AENV had a statutory obligation to assess the completeness of an application.

[36] The Appellant argued the Board must look at the persons and the circumstances and not examine the "appealable decisions."

[37] The Appellant stated that the lack of completeness of its application is not a clerical omission, but it rests on the legal interpretation of the Groundwater Evaluation Guideline (the "Guideline"), specifically whether the Guideline was applicable to the Appellant's application. The Appellant explained that in order to comply with the Guideline, the Appellant would have had to expend tens of thousands of dollars in the drilling and testing of the well. The Appellant stated that it determined that incurring these expenses was not required in order to comply with the Guideline and be issued a priority number. The Appellant argued that section 76 of the *Water Act* is applicable where priority numbers have been issued, but that is not the case here.

[38] The Appellant stated that section 166 of the *Water Act* requires that any notice with respect to the application must be in writing.[7] The Appellant explained no written notice

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7 Section 166 of the *Water Act* states:

> "(1) For the purposes of this section, "telecopier" means a machine or device that electronically transmits a copy of a document, picture or other printed material by means of a telecommunication system.

was provided in 2004, and because no notice that satisfies the *Water Act* has been given, the appeal period has not started and, therefore, cannot have expired. The Appellant argued that AENV should not be able to rely on its failure to comply with the notice provisions of the legislation to protect itself from appeals.

[39] The Appellant stated AENV's alternative position is that notice was given in 2007 and that correspondence in 2007/08 was a review of the decision that had taken place in 2004. The Appellant argued if that was the case, the "last provision of notice" was the February 1, 2008 letter. The Appellant stated the wording of section 116(1)(b) of the *Water Act* contemplates an iterative process with respect to communication between AENV and applicants for licences.[8] The Appellant argued that the word "last" was included in the provision so that only at the end of such an iterative process would the appeal period start. The Appellant argued that, if AENV is relying on the correspondence in 2007/08 rather than the alleged oral communication in 2004, the limitation period expired 30 days after February 8, 2008, and the Appellant filed its appeal prior to the expiry of that period.

[40] The Appellant sought the production of all the documents and information with respect to the Guideline, including all previous drafts, internal memoranda and policy papers,

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> (2) If a notice, request, order, direction or other document is required to be given under this Act, it is deemed to be sufficiently given if a copy of it is
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> (a) personally given to the person to whom it is directed,
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> (b) sent by mail addressed to the person to whom it is directed at the last known address for that person,
>
> (c) sent by means of a telecopier and received and printed by the receiving telecopier at the last known address for the person to whom it is directed,
>
> (d) in the case of an owner of Metis title in patented land as defined in the *Metis Settlements Act*, sent by mail to the address of the owner shown in the records of the Metis Settlements Land Registry, or
>
> (e) in the case of a registered owner of land that is not patented land as defined in the *Metis Settlements Act*, sent by mail to the address for the registered owner shown on the assessment roll."

8 Section 116(1)(b) of the *Water Act* states:

> "A notice of appeal must be submitted to the Environmental Appeals Board … not later than 30 days after receipt of notice of the decision that is appealed from or the last provision of notice of the decision that is appealed from."

ministerial directives, and other policies related to the Guideline. The Appellant also requested the entire file with respect to Muirfield.

[41] The Appellant stated that it did not know the extent to which such documentation exists in the possession of AENV or the Minister, and therefore, its application cannot be properly adjudicated without such information. The Appellant explained that one of the issues in the appeal is AENV's interpretation of the Guideline. The Appellant stated that it expected to argue that the Guideline was inapplicable to the application, and therefore, AENV's reliance on the Guideline to reach the conclusion that the application was incomplete was an improper fettering of discretion.

[42] The Appellant referred to an Alberta Queen's Bench decision, *Skyline Roofing Ltd*. v. *Alberta (WCB Appeals Commission)* 2001 ABQB 624 ("*Skyline*") in which the Court determined it would be useful to review the history of the particular policy. The Appellant stated that, in order for the Board to correctly understand the context of the Guideline, an historical and contextual review is warranted and cannot be done without the disclosure of the requested documents.

[43] The Appellant also referred to a Court of Appeal decision, *Sarg Oils Ltd.* v. *Environmental Appeal Board*, 2007 ABCA 215. The Appellant argued that based on that decision, when an appellant brings a motion to obtain all the information and documentation, the Board should be slow to second guess what documents the appellant needs to fully and vigorously advance its appeal.

[44] The Appellant explained a diversion application was submitted by Muirfield Village Inc. that was in all respects the same as the Appellant's application, but Muirfield was granted a diversion licence within a relatively short period of time. The Appellant stated that in determining whether an application is complete, AENV cannot improperly exercise its discretion for a particular applicant.

[45] The Appellant argued the basic principles of fairness and natural justice support its disclosure application, because the Guideline was the document relied on by AENV to deny the Appellant its diversion rights.

[46] In response to AENV's submission with respect to the production of documents, the Appellant noted that AENV did not state that the documents do not exist or that the documents are unavailable.

[47] The Appellant argued that, when a policy document is being relied on by a regulator to the detriment of a party, then the context in which the policy was formed is a relevant consideration. The Appellant explained that its alleged failure to adhere to the Guideline was the basis for AENV to refuse to issue a diversion licence. The Appellant argued that in order for the matter to be properly adjudicated, the historical context of the Guideline should be before the Board.

[48] The Appellant submitted that the test for the disclosure of the documents had been met. The Appellant submitted that, because AENV offered no factual or legal basis for their argument that the documents should not be produced, other than the statement that the documents are not relevant, the motion should be granted.

B. Alberta Environment (AENV)

[49] AENV submitted that the Board does not have jurisdiction to hear the appeal. AENV provided documents on the Muirfield application that are considered public information pursuant to the *Water (Ministerial) Regulation*, Alta. Reg. 205/1998, and AENV stated the Board should not order the production of the additional requested documents.

[50] AENV argued the Board does not have jurisdiction to accept the Notice of Appeal because the decision is not statutorily enumerated as an appealable decision and the Board does not have the inherent jurisdiction to create rights of appeal. In the alternative, AENV argued the decision was made in 2004 and is time-barred.

[51] AENV explained that its technical staff made the decision in question. AENV's technical staff determined the application for a *Water Act* licence, sent to AENV on April 8, 2004, by Doran Engineering Services Ltd. on behalf of the Appellant, was not complete. AENV stated its technical staff contacted Mr. Doran on May 12, 2004, and advised him that the application was not complete and explained what further information was required. AENV argued this is the decision being appealed. AENV explained Mr. Doran responded to the

telephone call with a follow-up letter on May 14, 2004, advising that the Appellant would obtain and submit the required information as soon as possible. AENV stated its technical staff met with Mr. Doran in September 2004 and they again advised Mr. Doran that the application was incomplete and explained what information was required. AENV stated Mr. Doran understood the application was not complete.

[52] AENV explained the next communication on the application was a letter from the Appellant sent to its technical staff on May 14, 2007. AENV explained its technical staff responded by letter on May 23, 2007, repeating that the application was incomplete. AENV stated further correspondence was exchanged in 2007 discussing the matter, and in November 2007, AENV met with the Appellant. AENV explained they reviewed the file and the outcome of the review was a letter dated February 1, 2008. AENV stated they did not make a decision on the completeness of the application; they only reviewed the communications that had taken place.

[53] AENV reiterated that its technical staff made the only decision concerning the application. AENV stated that at no time did a designated Director under the *Water Act* decide if the application was complete or not and because that threshold had not been met, assigning a priority number was a non-issue.

[54] AENV argued the decision made is not appealable because: a technical decision on the issue of completeness is not appealable; even if it was a designated Director's decision on the issue of completeness, it is not an appealable decision; and a review by a non-designated Director under the *Water Act* is not appealable. AENV stated that the Board is a statutory tribunal, which can only consider appeals of specifically enumerated decisions made under the *Water Act*. AENV stated the Board does not have the inherent jurisdiction to consider appeals regarding any and all decisions made pursuant to the *Water Act*.

[55] AENV argued section 115 of the *Water Act* is clear and unambiguous, and there is no reference to a non-designated Director's decision being appealable and there is no reference to section 29 of the *Water Act*[9] and the designated Director making a decision on completeness.

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9 Section 29 of the *Water Act* states:

[56] AENV stated there is no enumerated right of appeal of a decision made by AENV technical staff, a non-designated Director (as is Mr. Litke in this case), or a designated Director making a completeness decision in section 115 of the *Water Act*. AENV argued that by not including any type of completeness decision in section 115 of the *Water Act*, there is clear legislative intent that any decisions regarding completeness, no matter who makes them, are not appealable to the Board.

[57] AENV stated section 115 of the *Water Act* addresses the issue of priority if there is a water management order to administer priority or if there is a declaration regarding the super priority right of a household right. AENV explained that, under section 76 of the *Water Act*,[10]

"1) Subject to this section and sections 34, 35 and 82(7)(b), on receiving applications for licences that, in the opinion of the Director, are complete and comply with this Act, the Director must assign numbers to the applications in consecutive order that correspond to the date and time that the Director received the complete applications.

(2) On receiving an application for a licence under section 51(2) that, in the opinion of the Director, is complete and complies with this Act,

(a) with respect to a water conservation objective described in section 1(1)(hhh)(ii), the Director must, subject to section 35(2)(b), assign a number to the application that corresponds to the date and time that the Director received the complete application,

(b) with respect to a water conservation objective described in section 1(1)(hhh)(i) or (iii)

(i) within 5 years after the date this Act comes into force, or

(ii) at any time, with respect to water that has been reserved under section 35, within 5 years after the date this Act comes into force,

the Director must assign a number to the application that corresponds to the date and time this Act comes into force, and

(c) with respect to a water conservation objective described in section 1(1)(hhh)(i) or (iii), but not within the dates described in clause (b), the Director must assign a number to the application that corresponds to the date and time that the Director received the complete application.

(3) The Director may correct an error with respect to a number assigned to a complete application for a licence or with respect to a priority number assigned to a licence.

(4) A number assigned to an application for a licence described in subsection (1) or (2) must be assigned to the licence that is issued under section 51 pursuant to that application, and that number is the priority number of the licence."

10 Section 76 of the *Water Act* states:

the remedy for the issue of priority of a registration is a judicial review. Therefore, according to AENV, the legislators turned their mind to the issue of priority and chose not to include a decision relating to the "completeness" of a licence application as an appealable decision.

[58] AENV stated AENV's technical decision was made in 2004, and the same message was conveyed in 2007. AENV stated there was no new decision in 2007 because no further information was submitted by the applicant so it was continuing status quo from 2004. AENV explained the February 2008 letter was not the statutorily required "decision" so its time frame is irrelevant.

[59] AENV argued that, since the an appeal of an appealable decision must be filed within 30 days, the 2004 decision would be clearly outside the 30 day time limit. AENV stated that even if the 2007 communication was the decision, the appeal was filed past the 30 day appeal period. AENV argued there would be no reason to extend the appeal period by years in this situation because there are no special circumstances. AENV stated that only if the Board found AENV's February 2008 letter to be an appealable decision would the appeal be filed within the statutory deadlines.

[60] AENV stated a copy of the Guideline was provided to the Appellant previously and was, and continues to be, available online at the AENV web page. AENV explained the Guideline was in effect when the application was submitted in 2004 and the contents of the Guideline did not change during the consideration of the application.

[61] AENV argued that no other documents referenced by the Appellant in its submission are relevant and, accordingly, should not be ordered to be produced.

[62] AENV explained the Muirfield application was for the diversion of water from the Bow River through the works of the Western Irrigation District. AENV stated the application was not for Elbow River water and the water source was not from wells. AENV

> "(1) If a person has reasonable and probable grounds to believe that the priority number of a registration is incorrect, the person may by originating notice appeal the validity of the priority number to the Court of Queen's Bench, and the Court may make any order to amend a registration as it considers appropriate.
>
> (2) An appeal to the Court of Queen's Bench under subsection (1) must be made within 5 years after the registration is effected."

argued there were no similarities between the application filed for Muirfield and the Appellant's application except the same consultant filed the applications. AENV provided documents on Muirfield that are considered public information pursuant to the *Water (Ministerial) Regulation*. AENV noted these documents are totally and completely irrelevant to this matter.

[63] AENV stated that it is not clear from the Appellant's motion what is missing from the Record. He explained the Record includes additional information not normally provided to the Board in the Record, including the reporting done by the Appellant on its other licences, copies of the Appellant's other licences, and documents related to a licence being issued based upon a preliminary certificate.

[64] AENV explained that an Appellant can bring whatever case they wish to bring, but there must be an air of reality to an application to compel another party to produce documents. AENV submitted that such an air of reality does not exist in this case.

[65] AENV explained there is no evidence that the drafts of the Guideline were applied to the application for a licence, and the Appellant and its consultant were always referred to the Guideline that was in existence when the application was submitted.

[66] AENV stated that if the Guideline was a draft when the application was submitted and the final version looked different than the draft and it was unclear which version was applicable, then the production of the draft would be relevant. AENV explained that in the *Skyline* case referred to by the Appellant, there were various versions of the policy existing at various times, and some purported to be retroactive. AENV confirmed these situations did not exist with the present application. AENV stated the Appellant has a copy of the Guideline that was relied on its technical staff, and the fairness principle has been met.

[67] AENV requested the appeal be dismissed because the Board lacks jurisdiction. AENV stated that every statutory body has the authority to determine if a matter is within its jurisdiction. AENV stated a statutory body must have the authority because its jurisdiction is defined, compared to a court of inherent jurisdiction. AENV explained that parties themselves cannot agree or disagree if a statutory body has jurisdiction, but sometimes parties are asked to make submissions on the issue.

[68] AENV stated that under sections 95(2) and (5) of EPEA and Rule 9 of the Board's Rules of Practice, the Board has clear statutory authority to determine if a Notice of Appeal is properly before it, and the Board can exercise that authority prior to a full merits hearing.[11] AENV stated the Board can exercise its discretion to dismiss an appeal before or during a full merits hearing.

[69] AENV argued there is nothing in the legislation that requires a party to raise the issue of an appeal being properly before the Board instead of the Board raising the issue itself. AENV argued the plain reading of section 95(2) of EPEA indicates the Board determines what issues in the Notice of Appeal are properly before it, and sections 95(3) and (6) suggest that it would be the Board that would raise the issue and consider if it is appropriate to let others make representations on the issue.[12]

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11 Section 95(2) of EPEA provides:

> "(2) Prior to conducting a hearing of an appeal, the Board may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:
>
> (a) whether the matter was the subject of a public hearing or review under Part 2 of the *Agricultural Operation Practices Act*, under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board or the Alberta Utilities Commission and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;
>
> (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);
>
> (c) whether the Director has complied with section 68(4)(a);
>
> (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
>
> (e) any other criteria specified in the regulations…."

Rule 9 of the Board's Rules of Practice states:

> "The Board shall determine which matters included in the Notice of Appeal will be included in the hearing of the appeal. The Board may consider certain matters before it makes its determination (section 95(2)). Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter (section 95(4))."

12 Sections 95(3) and (6) state:

[70] AENV argued it would not be sensible to argue that the Board must hold a full merits hearing in response to any Notice of Appeal filed with the Board of any decision made by AENV. AENV argued the Board clearly has authority to determine if an appeal is properly before it without holding a full factual merits hearing and, in this case, the Board allowed the Participants the opportunity to make both written and oral submissions on the issues.

[71] AENV stated that he was "…at a loss on how the Board is biased by exercising its authority to determine if a Notice of Appeal is properly before it."[13] AENV stated the Board's letters of May 6 and May 12, 2008, clearly indicate that the Board substituted its motion for AENV's in response to the Appellant raising alleged procedural defects regarding AENV's motion. AENV noted that, at the time, the Appellant did not indicate this demonstrated any type of bias.

[72] AENV stated the Board's letter of July 28, 2008, indicates the Board has not made a decision on the points of whether it was a valid appeal because the Board used the phrasing "it appears" and "may." AENV argued that expressing a preliminary view does not indicate bias. AENV noted the Appellant had a further opportunity to make further submissions to convince the Board of the Appellant's position through written and oral submissions.

[73] AENV explained that, in order for an appeal to be properly before the Board, it must be an appeal of a specific type of decision made by a specific decision-maker, and only certain persons can file an appeal. AENV noted that section 115 of the *Water Act* clearly states that the decision-maker needs to be the Director, the Minister, or an inspector. AENV explained that at no time did a designated Director under the *Water Act*, make a decision on this file. AENV explained the communications in 2004 and 2007 were made by their technical staff who

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> "(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal….
>
> (6) Subject to subsections (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."

13 AENV's submission, dated August 13, 2008, at paragraph 19.

are not designated Directors, and the February 2008 letter was signed by the Senior Manager of the Southern Region who is not a designated Director under the *Water Act*.

[74] AENV explained that section 115 of the *Water Act* does not include every decision a designated Director may make, and some decisions are exempt from an appeal and others are not listed.

[75] AENV noted the issue in this file is "completeness," a word that does not exist in section 115 of the *Water Act* nor does it exist in section 29 of the *Water Act*. AENV stated the file in this case did not get to the stage where a determination would be made on the completeness of the application and assign a priority number under section 29. AENV argued that even if they did make a decision under section 29, it would not be appealable because it is not listed in section 115 of the *Water Act*. AENV noted the Appellant's argument that there was a "de facto" refusal. AENV explained a refusal to issue a licence is a decision the designated Director makes under section 51(1) of the *Water Act*, and he must provide notification of that decision to the applicant and if the applicant so chooses, it can then file an appeal under section 115(1)(d) of the *Water Act*.

[76] AENV emphasized that there was no refusal of the application, only communication between their technical staff and the Appellant on what had to be done to complete the application. AENV stated that in 2004, the Appellant initially said it would complete the application, and at no time did the Appellant advise it was refusing to take the steps to complete the application, nor did it ask the Director to make a decision based on the material in the file. AENV explained they kept waiting for the Appellant to complete its application. AENV stated that "…a statutory designated Director never made any decision on this file at all, little alone a refusal decision."[14]

[77] AENV stated that only certain persons can file appeals of certain decisions made by a designated Director, and if it is a refusal decision, section 115(1)(d) of the *Water Act* allows the applicant, in this case the Appellant, to file an appeal.

[78] AENV explained section 166 of the *Water Act* explains when notice is required to be given, and this section relates to sections 108 and 110 of the *Water Act* among others. AENV

14 AENV's submission, dated August 13, 2008, at paragraph 43.

stated there was never a situation where he was required to provide notice with respect to the Appellant's application. AENV stated that technical staff advising that an application is incomplete is not a decision or direction that requires notice. AENV argued that section 166 of the *Water Act* is inapplicable in this appeal.

[79] AENV submitted that the appeal should be dismissed.

III. PRELIMINARY MATTERS

[80] At the start of the Preliminary Motions Hearing, the Appellant sought confirmation that the Record and all correspondence to the date of the Preliminary Motions Hearing was part of the public record. The Board confirmed any documents provided by the Board, including the Record, correspondence since the Notice of Appeal was filed, and the recorded proceedings are part of the Board's record and are public documents.

[81] As a preliminary matter, AENV raised concerns regarding the Appellant bringing an additional witness, Mr. Thomas Doran, to the Preliminary Motions Hearing without advance notification. The Appellant explained Mr. Doran could speak to the letters written to AENV in 2004, and it had anticipated Mr. Doran would be a witness when the Preliminary Motions Hearing was scheduled. The Board allowed Mr. Doran to participate as a witness, and AENV was given additional time to prepare for cross-examination.

IV. DISCUSSION

A. Bias

[82] The Appellant argued the Board does not have the ability to determine whether it has jurisdiction to hear this appeal.

[83] The Appellant argued the Board is biased because it raised the issue of whether the Board has jurisdiction to hear the appeal, replacing the motion filed by AENV. AENV has raised the issue of whether or not the appeal was properly before the Board on the basis that it was not a ground of appeal pursuant to section 115 of the *Water Act*. The Appellant argued the motion did not conform to the requirements under the Board's Rules of Practice. The Board, in

its letter dated May 6, 2008, believed AENV's motion was properly before it, but to alleviate any further concerns of the Appellant, the Board substituted AENV's motion with a motion of its own. When the Board proceeded in this manner, it had not made any determination on the issue. It clearly stated that it "appeared" the appeal "may" not be properly before the Board, and the Participants were given the opportunity through written submissions and oral arguments to argue their perspective of the motion.

[84] The test to determine bias is whether the decision-maker had predetermined an issue, and their mind was not open to listening to varying opinions and persuasion. As long as the decision-maker is able to open their mind to the question, there is no bias. Whether a decision-maker is biased is assessed from the view of:

> "…the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.'"[15]

[85] By presenting the motion, the Board had not made any determination of the issue; it was merely asking the question as to whether it had the jurisdiction to hear the appeal. The courts have found that a statement of preliminary findings is not objectionable providing the tribunal is open to hearing and considering the submissions of all the participants.[16] In this current case, the Board made no statement of preliminary findings; it simply questioned its own jurisdiction, which it has a right and responsibility to do as a statutory decision-maker. Its jurisdiction is defined in the legislation and it cannot expand its jurisdiction; it must stay within the bounds of its jurisdiction.

[86] In its letter to the Participants, the Board did not express any views that would indicate that it had predetermined the issue. The Board questioned whether it had the jurisdiction to hear the appeal. The Board has raised its own motions in many previous appeals, such as when a Notice of Appeal is filed well past the deadline. The Board allows the appellant to

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15 *Committee For Justice and Liberty* v. *National Energy Board* (1978) 1 S.C.R. 369 at 394 (sub nom. Re. Can. Arctic Gas Pipeline Ltd.).

explain the circumstances that prevented the appeal from being filed within the legislated timeframe. The Board took the same approach in the current appeal; it noted there was the possibility that it did not have jurisdiction to hear the matter and it gave the Appellant and AENV the opportunity to respond to the jurisdictional question. The Appellant requested a two step process to receive submissions because it wanted to see AENV's arguments on the issue before it provided any comments. The Board allowed the two step process, but instead of the Appellant providing its arguments on both issues identified, the Appellant chose only to provide arguments on the document production issue. The Board provided the Appellant another opportunity to provide submissions on the jurisdictional issue before requiring the Appellant and AENV to submit their response submissions.

[87] The Board accepted the Appellant's submissions and heard its evidence at the Preliminary Motions Hearing. In fact, the Board allowed the Appellant twice the allotted time to cross-examine AENV.

[88] The Appellant referred to the Board's July 28, 2008 letter in which the Board stated that on the face of the Notice of Appeal, the decision being appealed may not be appealable under the *Water Act* or under section 91(1) of EPEA. The Board also stated that, depending on the decision being appealed, the Notice of Appeal may have been filed late. The Board clearly stated that it had not made any decision on either of these points and requested the Participants to provide submissions on the questions.

[89] In order to be fair to the Participants, the Board had to clearly explain its reasons as to why it was seeking submissions from the Participants. In order to do this, the Board had to point out concerns regarding the Notice of Appeal, and then the Participants, including the Appellant, were asked to provide submissions on those very points of concern. This course of action in no way demonstrates the Board was biased. The Board could not define the questions it needed answered without taking notice of the decision being appealed and the time frames in which the Notice of Appeal was filed, both matters that are defined in the legislation. Also, when looking at the wording of the questions the Board was seeking answers to, the Board noted that, depending on the decision being appealed, the appeal may be time-barred, indicating the

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16 See: *550551 Ontario Ltd.* v. *Framingham*, [1991] O.J. No. 1035, 4 O.R. (3d) 571 (Div. Ct.).

Board was seeking clarity as to whether the Appellant was basing its arguments on the 2004 application date or the letter from AENV in February 2008. The Board had made no pre-determination on the matter.

[90] Under section 95(4) of EPEA,[17] the Board can determine the issues that will be heard at a hearing, whether it be a preliminary motions hearing or a substantive hearing. This is usually conveyed to the participants through a question. The same occurred in this case. The Board provided two issues in question form in response to the motions filed. These questions needed to be addressed by the Participants to ensure the Board was given the information it needed to make a decision on the motions. By asking the questions, the Board had not made a decision on the matters. Asking questions is a method of focusing the Participants to the matters that have to be addressed in the submissions, whether it is for a substantive hearing or a preliminary motions hearing.

[91] The Appellant argued the Board does not have the ability to determine whether it has jurisdiction without first holding a hearing. Under section 94(2) of EPEA, a hearing can be held by written or oral submissions. The Appellant in this case had the opportunity to provide written submissions prior to the Preliminary Motions Hearing and he provided oral evidence at the Preliminary Motions Hearing. The Board must determine preliminary matters before it can proceed to a hearing on the substantive issues, because the Board must ensure that it has jurisdiction to hear the matter. This process was clearly stated in the judicial review of the *Court* decision.[18] In that decision, the Board heard substantive matters as part of its hearing to determine standing of the appellant. The courts returned the matter back to the Board, stating

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17 Sections 95 (3) and (4) of EPEA state:

> "(3) Prior to making a decision under subsection (2), the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.
>
> (4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing."

18 See: *Court* v. *Alberta (Environmental Appeal Board)* (2004), 4 C.E.L.R. (3d) 185, 10 Admin. L.R. (4th) 219 (Alta. Q.B.) ("*Court*").

that the determination of standing is a preliminary issue that must be determined prior to and separate from the substantive matters.

[92] The onus is on the Appellant to demonstrate bias to the Board. It is the Board's decision that the Appellant has not met that onus and accordingly, this aspect of the Appellant's case must fail.

[93] The Board will now consider the jurisdictional motion and the document production motion.

B. Jurisdiction

[94] The Board must determine whether there is a valid appeal and if the Board has jurisdiction to consider the issues raised in the Notice of Appeal.

[95] The Appellant argued that it is a corporate entity that has a right to file an appeal. The Board does not disagree with this position. In law, corporate entities registered under provincial or federal business acts are considered persons. The Appellant has a right to file an appeal, but the Board only has jurisdiction to hear an appealable issue.

[96] The Appellant filed an application for a water licence under the *Water Act* in 2004. AENV received the application and reviewed it to ensure all of the required information had been provided.

[97] The Appellant appealed the fact that it did not receive a water licence in 2004 when it filed its application. It was explained at the Preliminary Motions Hearing that technical staff of AENV review the applications to ensure all of the requirements have been met and all of the information required has been properly provided. When AENV's technical staff believe an application is complete, then it is forwarded to the designated Director who then makes a formal decision that the information is complete and issues a priority number. The priority number is not issued unless the designated Director makes the formal determination that the application is complete and issuing the licence will not be against government policy or adversely affect the environment.

[98] What is clear from the testimony provided, the submissions, and the Record, is that the application submitted by the Appellant in 2004 was never considered complete by AENV's technical staff and, as such, the application would not have been forwarded to the designated Director to make a formal determination. The responses to the Appellant and subsequent telephone calls clearly indicate that the Guideline needed to be followed. In Part 2 of the Guideline, it states that an interpretation of pumping test data is required as well as information and data on the water quality and the possible effects on the aquifer, other users, and the aquatic environment. If the Appellant's consultant had concerns with what was required, he could have contacted AENV's technical staff and received clarification of what exactly was required to make the application complete. However, it was clear from the Record and his testimony that the Appellant's consultant did not disagree that the application was incomplete. However, the Appellant chose not to provide the information required by AENV.

[99] Although it may be preferable to have the AENV contact applicants in writing when an application is deemed incomplete, the Board heard testimony in this case that AENV thought they were dealing with a company that had experience with the Guideline and completing applications, and therefore, they thought it was not necessary to follow up the documented conversations in writing. The Board also understands from the Record and the consultant's testimony that the consultant initially intended to complete the required testing and data collection, so AENV kept the application open.

[100] Essentially, what the Appellant is trying to appeal is a decision that does not exist. The designated Director made no decision on the application, either to accept or refuse the application. The information required was lacking; the application was not forwarded to the designated Director who would make the decision under the *Water Act*. Without that decision being made by the designated Director, there cannot be a valid appeal.

[101] If the Appellant had demanded a designated Director make a decision on whether to accept the application and issue the licence or refuse to issue the licence, then there would have been a right to appeal. If a designated Director refused to issue the licence, then under section 115 (1)(d) of the *Water Act*, there was an appealable decision made by a designated Director. In this case, the Appellant chose not to pursue the matter in 2004 and did not raise it

again until 2007. The application was never reviewed by a designated Director so no decision was made, and without that decision, there cannot be a valid appeal.

[102] The Board has a responsibility to ensure it only hears and adjudicates matters that it is statutorily allowed to consider. The Appellant argued section 115 of the *Water Act* bases the right of appeal on the person and the circumstances, not the type of decision. The Board agrees the legislation states the persons who may appeal. The Board is not able to see how what the Appellant describes as "the circumstances of a decision" are substantially different from the "type of decision." The circumstances will determine the type of decision made by AENV. In this case, the circumstances were that an application was submitted to AENV by the Appellant; the AENV's technical staff determined the application was incomplete; and the Appellant failed to provide the additional information required to complete the application. In this case, the circumstances and the type of decision were synonymous but neither the circumstances nor the decision are an enumerated ground for appeal under the *Water Act*. The Appellant argued for the Board to provide an "expansive" interpretation of the *Water Act* to make the circumstances or the decision appealable when the *Water Act* clearly does not do so.

[103] The designated Director has an obligation to review an application for completeness. This is a final step before a priority number is given and a licence is issued. However, before the application is sent to the designated Director, AENV's technical staff reviews the information and requests additional information if necessary to complete the application before forwarding it the designated Director. This provides an applicant a further opportunity to complete the application, because if it is incomplete when the designated Director assesses it, the application is refused and the applicant would have to reapply.

[104] Because no statutorily required decision was made by the designated Director in this case, and there is no right of appeal of a decision determining the completeness of an application, the Board has no jurisdiction to hear the appeal. Therefore, the appeal must be dismissed.

C. Document Production

[105] The Board has dismissed the appeal due to lack of jurisdiction. Therefore, it cannot consider the document production motion.

V. ADDITIONAL MATTERS

[106] At the close of the Preliminary Motions Hearing, the Appellant asked that Mr. Doran be given an opportunity to clarify on the record his comments regarding the $100,000.00 cost of drilling, pumping, casing, and testing of the well. The request was made because the costs were discussed later in the proceeding during questioning of AENV. Mr. Doran had left the Preliminary Motions Hearing so the Appellant was unable to have Mr. Doran provide rebuttal evidence on the costs issue. The Board provided the Appellant the opportunity to have Mr. Doran provide written statements on the issue.

[107] In response, Mr. Doran provided a breakdown of the associated costs for drilling, equipping, and testing a well suitable for the requested diversion. The total estimated cost of the exploration well was $97,757.50. He also explained he contacted other persons involved in drilling wells who concurred with Mr. Doran's estimates.

[108] The Board appreciates receiving the information provided by Mr. Doran. However, the appeal was dismissed on the basis there has been no decision made that is appealable to the Board. Therefore, the Board does not have to consider the information provided by Mr. Doran.

VI. DECISION

[109] The appeal of Westridge Utilities Inc. is dismissed. The Appellant did not demonstrate how the Board had jurisdiction to hear the appeal because the designated Director, as identified in the legislation, had not made any decision regarding the Appellant's application for a water diversion licence. Because the designated Director had not made a decision on the matter, there is no appealable issue.

[110] Because the Board has determined there is no appealable decision, the Board cannot consider the matter of document production.

Dated on October 22, 2008, at Edmonton, Alberta.

"*original signed by*"

Dr. Steve E. Hrudey, FRSC, PEng
Chair

"*original signed by*"

Mr. Jim Barlishen
Board Member

"*original signed by*"

Ms. A.J. Fox
Board Member

APPENDIX A

Section 115 of the *Water Act* states:

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

(a) if the Director issues or amends an approval, a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or

(ii) by the approval holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;

(b) if the Director issues or amends a preliminary certificate, a notice of appeal may be submitted

(i) by the preliminary certificate holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or

(ii) by the preliminary certificate holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided;

(c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted

(i) by the licensee or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or

(ii) by the licensee or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application or proposed changes was not provided;

(d) subject to clause (e), the applicant for the approval or licence, if the Director refuses to issue an approval or licence;

(e) if the Director issues or refuses to issue a licence to the Government under section 51(2), the applicant for the licence and any directly affected person;

(f) the applicant, if the Director refuses to amend an approval, preliminary certificate or licence;

(g) the approval holder, preliminary certificate holder, licensee or registrant, if the Director suspends or cancels an approval, licence or registration or cancels a preliminary certificate;

(h) the licensee, if the Director refuses to renew a licence;

(i) if the Director renews a licence where there has been a public review, any person who previously submitted a statement of concern in accordance with section 109;

(j) if the Minister takes over any works or undertaking, the approval holder, preliminary certificate holder or licensee or the owner of the works or undertaking;

(k) if the Director provides notice that no further applications for licences are to be accepted, a person who wishes to apply for a licence for any water that was the subject of the notice;

(l) the owner of the works, if the Minister issues an order with respect to the use of another person's works under section 52(3);

(m) if an inspector or the Director issues a water management order or amends a water management order, except an order with respect to administering priority or an order that is only for the purpose of carrying out emergency measures, the person to whom the order is directed;

(n) if an inspector or the Director issues a water management order or amends a water management order with respect to administering priority, the person to whom the order is directed, or any person whose rights to divert water may be affected by the issuance of the order with respect to who has priority;

(o) a person who is entitled to divert water pursuant to section 21 and who is affected by a declaration by the Director that a diversion of water must cease;

(p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing

(i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,

(ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,

(iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking, if the works or undertaking is the subject of an approval, or

(iv) the removal or otherwise rendering ineffective of any works or obstruction;

(q) if the Director requires a person to pay an administrative penalty, the person to whom the notice of the administrative penalty is directed;

(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.

(2) Notwithstanding subsection (1), a notice of appeal may not be submitted

(a) if, pursuant to an order of the Minister under section 34, the Director

(i) refuses to issue an approval, preliminary certificate or licence, or

(ii) refuses to approve a transfer of an allocation of water under a licence;

(b) with respect to any matter relating to a licence for the temporary diversion of water;

(c) with respect to an amendment

(i) to correct a clerical error,

(ii) of a monitoring, reporting or inspection requirement in an approval, preliminary certificate or licence, or

(iii) to extend the expiry date of an approval, preliminary certificate or licence;

(d) with respect to an amendment to reflect a disposition of land or an undertaking to which an approval, preliminary certificate, licence or registration is appurtenant."