

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – July 5, 2019

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

**-and-**

**IN THE MATTER OF** appeals filed by Mohinder Singh Gill and Five Pillar Holdings Ltd. with respect to the decision of the Director, South Saskatchewan Region, Alberta Environment and Parks, to cancel *Water Act* Interim Licence No. 11738 and issue Water Management Order No. WMO-2017/01-SSR.

Cite as: *Mohinder Singh Gill and Five Pillar Holdings Ltd. v. Director, South Saskatchewan Region, Alberta Environment and Parks* (5 July 2019), Appeal Nos. 16-057, 061, 062, and 063-ID1 (A.E.A.B.), 2019 AEAB 24.

**PRELIMINARY MOTIONS HEARING**

**BEFORE:**

Mr. Alex MacWilliam, Board Chair

**SUBMISSIONS BY:**

**Appellants:**

Mr. Mohinder Singh Gill and Five Pillar Holdings Ltd.

**Director:**

Mr. Craig Knaus, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Shannon Keehn, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued a Water Management Order under the *Water Act* to Five Pillar Holdings Ltd. and Mr. Mohinder Gill (the Appellants) requiring the groundwater well used by the Appellants to provide water to their hotel located in Strathmore, Alberta, be reclaimed. AEP also cancelled the Interim Licence related to the groundwater well.

The Appellants appealed AEP's decision to issue the Water Management Order and cancel the Interim Licence. AEP requested the Environmental Appeals Board (the Board) dismiss the Appellants' appeals on the grounds they were without merit and any recommendations by the Board or any decision by the Minister in this matter would be moot.

The Board received written submissions from AEP and the Appellants on AEP's preliminary motion. After reviewing the evidence and arguments submitted by the Appellants and AEP, and reviewing the record, the Board found the appeals were not without merit or moot. The Board dismissed AEP's preliminary motion as there may be appropriate remedies the Board could recommend to the Minister.

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## **I. INTRODUCTION**

[1] This decision relates to preliminary matters raised in respect to Water Management Order No. WM0-2017/01-SSR (the “Water Management Order”), issued by the Director, Alberta Environment and Parks (the “Director”), on January 12, 2017, and the cancellation of Interim Licence No. 11738 (the “Licence”) on the same date. The Water Management Order and the Licence relate to a groundwater well (the “Well”) used by Five Pillar Holdings Ltd. and Mr. Mohinder Gill (the “Appellants”) to supply water for the Wheatland County Inn (the “Hotel”), located in Strathmore, Alberta.

[2] The Appellants appealed the Water Management Order and the cancellation of the Licence to the Environmental Appeals Board (the “Board”). The Director filed a preliminary motion to dismiss the Appellants’ appeals on grounds the appeals were without merit, and any recommendation from the Board and decision from the Minister in this matter would be moot. The Board held a written preliminary motions hearing and received submissions from the Appellants and the Director (collectively, the “Parties”).

## **II. BACKGROUND**

[3] On July 29, 1982, the Director issued the Licence under the *Water Act*, R.S.A. 2000, c. W-3, to White Wezel Enterprises Ltd., for the purpose of using a groundwater well to supply water for the Hotel. The Hotel was built in 1978, and later that year water and sewer lines from the Town of Strathmore (the “Town”) were connected to the Hotel. Despite access to the Town’s water supply, the Hotel continued to use groundwater from the Well as its primary water source until February 2016.

[4] The Appellants purchased the Hotel on March 4, 1998. The Appellants did not apply to Alberta Environment and Parks (“AEP”) to transfer the Licence from White Wezel Enterprises Ltd. to them.

[5] On April 4, 2012 the Town passed the Water Utilities Bylaw (the “Bylaw”) prohibiting anyone connected to the Town’s water supply from using water from any groundwater well.

[6] On December 18, 2015, the Alberta Safety Codes Council, a provincial agency responsible for water safety standards, ordered the Appellants to disconnect the well water system from the Hotel's water system, noting there was a risk of the Town's water supply being contaminated by water from the Well if well water entered the Town's water supply.

[7] On January 6, 2016, the Director wrote to the Appellants to advise of the test results of a groundwater sample taken from the Well. The test results showed water from the Well exceeded the maximum acceptable concentration for fluoride in drinking water, as determined by Health Canada's Guidelines for Canadian Drinking Water Quality.<sup>1</sup> The concentration of fluoride also exceeded the amounts allowed in the *Activities Designation Regulation*, Alta. Reg. 276/2003.

[8] The Director sent three letters dated April 22, 2015, May 14, 2015, and January 6, 2016, to the Appellants regarding the use of the Well. The Appellants did not respond to any of these letters.

[9] On January 12, 2017, the Director:

1. declared the groundwater well to be a "Problem Water Well," pursuant to section 40 of the *Water (Ministerial) Regulation*, Alta. Reg. 205/1998, noting the Well: (1) was interconnected with the public water supply; (2) was in a location that puts the groundwater at risk in the event of a flood or tampering with the Well; and (3) could possibly cause an adverse effect on the environment, human health, property, or public safety;
2. issued the Water Management Order requiring the Appellants to reclaim the well in accordance with the *Water (Ministerial) Regulation* and other legislative requirements; and
3. canceled the Licence due to the potential adverse impact on human health or public safety.

[10] On February 7, 2017, the Board received Notices of Appeal from the Appellants appealing the Director's decision to cancel the Licence and issue the Water Management Order.

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<sup>1</sup> "Guidelines for Canadian Drinking Water Quality", online: <<https://www.canada.ca/en/health-canada/services/environmental-workplace-health/water-quality/drinking-water/canadian-drinking-water-guidelines.html>>.

[11] On May 10, 2017, a mediation meeting was held between the Parties and an agreement was reached. However, on May 17, 2017, the Appellants withdrew from the agreement.

[12] On September 25, 2017, the Director submitted a motion to the Board requesting the Appellants' appeals be dismissed on the grounds the appeals are without merit and any recommendations from the Board, and any decision by the Minister, will be moot. The Board received written submissions from the Appellants and the Director between October 11, 2017, and November 24, 2017.

### **III. SUBMISSIONS**

#### **A. Appellants**

[13] The Appellants said when the Hotel was purchased in 1998, the Appellants were told the Well was legal and approved by the Town.

[14] The Appellants stated Alberta Health tested the water and found the water was healthy.

[15] The Appellants submitted the Hotel is not subject to the Bylaw on which the Town based the order to the Hotel to disconnect the Well, arguing the Bylaw did not apply to buildings which were built under the previous bylaw. As an example, the Appellants noted new laws require all buildings to have a sprinkler system, but older buildings are exempted.

[16] The Appellants stated the Water Management Order was posted in the newspapers, which damaged the Hotel's reputation.

[17] The Appellants said a meeting with the Director and other AEP staff, emails, and phone calls were not productive.

[18] The Appellants acknowledged the order from the Alberta Safety Codes Council required the Appellants to disconnect the Well from the Hotel system, but argued the order does not prevent the use of the Well water. The Appellants proposed to use two separate water

systems – one for human consumption for the restaurant and Hotel guests, and another for purposes such as laundry and washrooms.

[19] The Appellants stated high fluoride levels only have impact if the water is used over a lifetime. The Appellants argued Hotel guests are only staying for a short period of time and, therefore, there would be no impact on their health from high fluoride levels in the water.

[20] The Appellants submitted not all public water systems require approval under the *Environmental Protection and Enhancement Act* (“EPEA”), R.S.A. 2000 c. E-12, including the Hotel.

[21] The Appellants submitted the Director’s map of flood hazard areas shows the Town and the Well are not at risk from a flood. The Appellants argued there is no chance the Well could be flooded as there had not been a flood at the Hotel site in 20 years, and the Well pipe casing is three feet above ground. The Appellants noted the Well was drilled and serviced by a Class A Approval driller.

[22] The Appellants argued the Well complies with sections 44(1)<sup>2</sup> and 68(1) and (2)<sup>3</sup> of the *Water (Ministerial) Regulation*.

[23] The Appellants argued the Well is protected from tampering by tall building walls, and is in a high visibility area where it is noticeable by Hotel patrons who come in and out

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<sup>2</sup> Section 44(1) of the *Water (Ministerial) Regulation* provides:  
“The driller and the owner of a water well must locate the water well site so that  
(a) the water well is accessible for cleaning, treatment, repair, testing, maintenance and inspection,  
(b) the area immediately surrounding the water well may be kept in a sanitary condition,  
(c) surface water does not collect or form a pond in the vicinity of the water well, and  
(d) the water well is at least 3.25 metres away from the nearest building.”

<sup>3</sup> Sections 68(1) and (2) of the *Water (Ministerial) Regulation* provides:  
“(1) After a water well is completed, the owner of the water well must  
(a) maintain the water well and the water well site in a manner that will prevent the entry of surface water or other foreign materials into the water well,  
(b) maintain the area immediately surrounding the water well in a sanitary condition,  
(c) if non-metallic pipe is used as casing, ensure that the water well is protected at ground surface by steel casing firmly anchored in the ground, and  
(d) protect the water well at ground surface from any physical damage.  
(2) If saline groundwater enters a water well after completion, the owner of the water well must ensure that the saline groundwater is sealed off to prevent any adverse effect on the environment, human health, property or public safety.”

of the Hotel almost 24 hours a day. Additionally, the Well is within the area scanned by a security camera.

[24] The Appellants submitted there has not been an incident or risk to the environment, human health, property, or public safety in the 39 year history of the Hotel.

**B. The Director**

[25] The Director submitted that the Appellants' appeals were without merit and any recommendation by the Board or any decision by the Minister in this matter would be moot.

[26] The Director stated the Well was interconnected with the public water supply. As a result, if there was flooding, or if the Well was tampered with, an adverse effect on the environment, human health, property, or public safety could occur.

[27] The Director advised the water from the Well had a fluoride concentration greater than the threshold set out in the *Activities Designation Regulation*, and an approval would be required under EPEA, before groundwater from the Well could be used at the Hotel.

[28] The Director noted section 8 of the *Water (Ministerial) Regulation* prohibits the use of groundwater for household purposes where municipal water is available for use.<sup>4</sup> The Director confirmed the Appellants have access to the Town's water system.

[29] The Director submitted section 58 of the *Water Act* prevents the Appellants from separating the Licence from the land on which the Well is located<sup>5</sup> and, therefore, the Licence cannot be sold.

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<sup>4</sup> Section 8 of the *Water (Ministerial) Regulation* provides:  
"A person who is entitled to receive or receives water under a licence that has been issued to another person for municipal purposes, including community water supply purposes, does not have the right to commence and continue the diversion of water under section 21 of the Act."

<sup>5</sup> Section 58 of the *Water Act* provides:  
(1) When issuing a licence, including licences issued under Part 5, Division 2, the Director must specify in the licence the land or undertaking to which the licence is appurtenant.  
(2) Subject to Part 5, Division 2, a licence and all works operated under the licence  
(a) are appurtenant to the land or undertaking specified in the licence,  
(b) are inseparable from the land or undertaking specified in the licence, and

[30] The Director stated the National Plumbing Code prohibits a private water supply from being connected with a public water supply system.<sup>6</sup>

[31] The Director noted section 95(5) of EPEA empowers the Board to dismiss a notice of appeal it considers to be without merit.<sup>7</sup>

[32] The Director said the Well cannot be legally used due to the various prohibitions and required permits and, therefore, any decision reversing the cancellation of the Licence would be moot and without merit. The Director submitted the Notices of Appeal could be dismissed for this reason alone.

[33] The Director argued the declaration of the Well as a problem well is not appealable under the *Water Act*.

[34] The Director submitted once a groundwater well is no longer usable, the most responsible action would be to reclaim the well according to the provisions of the *Water (Ministerial) Regulation*, which the Director states is the action that needs to be taken with the Well. The Director cited section 66(3) of the *Water (Ministerial) Regulation*, which reads:

“[I]f a water well is abandoned after completion, the owner of the water well must reclaim the water well or cause the water well to be reclaimed in accordance with this section.”

[35] The Director argued the Well was “abandoned” as no legal diversion of water can be made from it and, therefore, the Well must be reclaimed as required under the *Water (Ministerial) Regulation*. The Water Management Order issued by the Director restates the reclamation requirements and sets a timeframe for completion of the reclamation work.

[36] The Director submitted any recommendation of the Board or potential decision of the Minister regarding the Well, would be moot due to the various regulatory requirements. As

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(c) run with the land or undertaking on any disposition of the land or undertaking unless the Lieutenant Governor in Council orders otherwise.”

<sup>6</sup> Section 2.6.2.5 of the National Plumbing Code provides:

“No private water supply system shall be interconnected with a public water supply system.”

<sup>7</sup> Section 95(5)(i) of EPEA provides:

“The Board

(a) may dismiss a notice of appeal if

an example, the Director stated even if the Minister were to reverse the Water Management Order to “reinstate” the Licence, EPEA, the *Water Act*, the Town’s Bylaw, and the requirements of the Alberta Safety Codes Council, would prevent the Appellants from legally diverting and using groundwater from the Well.

[37] The Director argued an appeal is moot if the relief requested would have no achievable outcome. The Director referred the Board to *Re: Crestar Energy*, a decision by the Board in 2001, in which the Board stated:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”<sup>8</sup>

[38] The Director cited the Board’s decision in *Re: Ranger Oil Limited*, where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical or would have no real effect.”<sup>9</sup>

[39] The Director argued the remedy requested by the Appellants, to have the Licence reinstated, would have no real effect, and the Board or the Minister could not provide a remedy that would satisfy the Appellants’ request.

[40] The Director argued the submission of the Appellants contained erroneous and irrelevant information which the Board cannot rely on in considering the Director’s motion to dismiss the Appellants’ Notices of Appeal.

[41] The Director submitted the Hotel’s use of groundwater from the Well in the past has no bearing on the Director’s preliminary motion to dismiss the Notices of Appeal.

[42] The Director stated there is nothing in the Appellants’ submission that supports the claim the Well is exempt from EPEA, the *Water Act*, the Town’s Bylaw, and the decision by

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(i) it considers the notice of appeal to be frivolous or vexatious or without merit...”

<sup>8</sup> *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resources Service, Alberta Environment, re: Crestar Energy* (9 January 2001), E.A.B. Appeal Nos. 00-029 and 00-0600, at paragraph 28.

<sup>9</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources, Alberta Environment, re: Ranger Oil*

the Alberta Safety Codes Council. The Director maintained the Town's Bylaw did not contain any provision allowing for previously existing water wells to be used within Town boundaries and, therefore, any use of the Well after April 4, 2012, was not permitted.

[43] The Director stated Alberta Health Services' inspections and laboratory results were only relevant if the Well could be legally used, which it cannot.

[44] The Director noted the Appellants claimed EPEA does not require approval for water systems. The Director attributed this to the Appellants misinterpreting a chart setting out the various water systems in Alberta, some of which do not require an approval. The Director explained the Well is a water system that requires an approval under EPEA.

[45] The Director disagreed with the Appellants' claim the Well is located in accordance with section 44 of the *Water (Ministerial) Regulation*, since section 44(1)(d) required the Well to be located at least 3.25 metres from the nearest building.<sup>10</sup>

[46] The Director disputed the Appellants' argument the Well was protected from tampering due to its publicly visible location, and submitted the ease of public access does not protect the Well. The Director argued the Appellants' submission did not address any measures to protect the groundwater aquifer from contaminants entering through the Well.

[47] The Director submitted the Notices of Appeal have no merit and should be dismissed.

### **C. Appellants' Rebuttal**

[48] The Appellants submitted there were over 60 laboratory test reports that prove the Well water is healthy.

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*Limited* (28 August 2001), E.A.B. Appeal No. 00-055-D, at paragraph 36.

<sup>10</sup> Section 44(1)(d) of the *Water (Ministerial) Regulation* provides:  
"The driller and the owner of a water well must locate the water well site so that...  
(d) the water well is at least 3.25 metres away from the nearest building."

[49] The Appellants submitted all Albertans living on property with groundwater underneath have a statutory right to use the water for drinking, cooking, washing, and sanitation without a licence.

#### IV. ANALYSIS

[50] The Director seeks to have the Appellants' Notices of Appeal dismissed on the grounds the appeals are without merit and any recommendation from the Board and decision from the Minister in this matter will be moot.

[51] Under section 95(5)(a)(i) of EPEA,<sup>11</sup> the Board may dismiss an appeal that is without merit. In *Mis v. Alberta (Human Rights & Citizenship Commission)*, 2001 ABCA 212, the Alberta Court of Appeal addressed the issue of when a case is "without merit." The Court stated:

"The determination whether a complaint should be dismissed as 'without merit' is a screening or gatekeeping function performed as a paper review. We are disinclined to set the specific test as low as 'arguable case' or as high as 'reasonable prospect of success'. In our view, the standard is somewhere in between. The question the Director or Chief Commissioner must ask in deciding whether a complaint is without merit is whether there is a reasonable basis in the evidence for proceeding to the next stage."<sup>12</sup>

[52] The Board must determine if "there is a reasonable basis in the evidence" that the Appellants' Notices of Appeal can proceed to the "next stage" which, in this case, would be a hearing of the matter. At this stage of the appeal process, the Appellants do not have to prove their appeal will be successful at the hearing.

[53] The issue of mootness has been thoroughly analysed by the Courts. The Supreme Court of Canada, in the case of *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342,<sup>13</sup> stated a hypothetical or abstract question may result in the Court declining to decide or

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<sup>11</sup> Section 95(5)(a)(i) of EPEA provides:

"The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit"

<sup>12</sup> *Mis v. Alberta (Human Rights & Citizenship Commission)*, 2001 ABCA 212, at paragraph 8.

<sup>13</sup> *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 ("*Borowski*") at paragraph 15.

hear a case due to the question being moot. The Alberta Court of Appeal, in *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028,<sup>14</sup> stated an appellate court cannot order a remedy which could have no effect, as such a remedy would be moot. The Board also addressed the issue of mootness in *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited*, stating:

“An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect.”<sup>15</sup>

[54] Based on the above decisions, the issues before the Board are whether: (1) the Appellants’ appeals are without merit, having no reasonable basis in the evidence of proceeding to a hearing; and (2) the appeals are moot because the Board cannot grant the remedy requested as it is “impossible, not practical, or would have no real effect.”

[55] The Director argued the Board cannot make a decision or recommendation to the Minister that will enable the Appellants to continue using the Well. The Board is being asked to accept there is no defence to the Director’s argument.

[56] The Board can only look at the issues that are properly within the Board’s jurisdiction under EPEA and the *Water Act*, specifically whether the Director’s decision to issue the Water Management Order and cancel the Licence should be confirmed, reversed, or varied. Matters related to the Town’s bylaws and how changes in the bylaws have impacted the Appellants, are not within the Board’s jurisdiction and, therefore, the Board cannot recommend changes to or overturn the bylaws.

[57] The Appellants argued the Director made an error in interpreting the facts and the legislation. For purposes of discussion, if the Appellants are correct, the Board could recommend the Minister vary the Director’s decision, which could include variation of the terms and conditions of the Water Management Order. Therefore, there is a potential outcome to the appeals that is within the Board’s jurisdiction.

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<sup>14</sup> *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

<sup>15</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.), at paragraph 36.

[58] The Director argued the Appellants cannot sell the Licence as it cannot be separated from the property. The Licence, theoretically, has market value. Whether the Licence can be sold is a question appropriately determined in a hearing, not as a preliminary motion. By cancelling the Licence, the Director removed the right of the Appellants to obtain value for it. Whether the Director was justified in taking such action is a matter to be argued at the merits hearing.

[59] As there are potential recommendations that may be provided to the Minister in relation to those matters within his jurisdiction, the Board finds the Appellants' appeals are not moot or without merit. Therefore, the Board will proceed to a hearing on the merits.

## V. CONCLUSION

[60] The Board finds the appeals are not moot or without merit as there may be appropriate remedies the Board could recommend to the Minister.

[61] Therefore, the Director's preliminary motion is dismissed.

Dated on July 5, 2019, at Edmonton, Alberta.

"original signed by"

Alex MacWilliam  
Board Chair