

Action No.: 0901-09830

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

WESTRIDGE UTILITIES INC.

Applicant

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE
MINISTER OF THE ENVIRONMENT, HER MAJESTY THE QUEEN IN RIGHT OF
ALBERTA as represented by THE ATTORNEY GENERAL and the REGIONAL
DIRECTOR, SOUTHERN REGION ALBERTA ENVIRONMENT**

Respondents

ORIGINATING NOTICE
PURSUANT TO PART 56.1 OF THE ALBERTA RULES OF COURT

- TO: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented
by THE MINISTER OF THE ENVIRONMENT**
- AND TO: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented
by the ATTORNEY GENERAL OF ALBERTA**
- AND TO: REGIONAL DIRECTOR, SOUTHERN REGION ALBERTA
ENVIRONMENT**

TAKE NOTICE that an application will be made by Westridge Utilities Inc. ("WUI")
on July 29, 2009 before the presiding Justice in Chambers for judicial review of the
decision dated April 27, 2009 (the "Decision") issued by the Regional Director Southern
Region Alberta Environment (the "Director") with respect to a diversion application filed
with Alberta Environment on April 8, 2004 (the "Diversion Application");

FURTHER TAKE NOTICE that WUI will be requesting the following relief:

1. Setting aside the Decision;
2. A declaration that the Director has lost jurisdiction with respect to the assessing of the April 24, 2004 Application as a result of an abuse of discretion, the particulars of which include without limitation:
 - (a) bad faith and improper intention;
 - (b) reliance on irrelevant considerations;
 - (c) ignoring relevant considerations; and,
 - (d) exercising discretion in a discriminatory and unreasonable manner.
3. A Declaration that the Diversion Application is, and was at all material times, complete within the meaning of the *Water Act*, R.S.A. 2000 c. W-3 (the "Act");
4. A declaration that the Director has failed or neglected to comply with his statutory obligations under the *Act* and that WUI has suffered financial harm and prejudice as a direct result thereof;
5. A declaration that AR 171/2009 is inapplicable to the Diversion Application filed with Alberta Environment by WUI;
6. An order requiring the Director to issue a licence for diversion to WUI pursuant to section 29 of the *Act*; or alternatively an order requiring the Director to issue a priority number to the Diversion Application;
7. An order granting leave to file an affidavit setting out the conduct of the Respondent with respect to the Diversion Application;
8. An order directing that such witnesses as are reasonably named by WUI present themselves for examination for discovery; and,
9. Such further and other relief as is warranted in the circumstances.

FURTHER TAKE NOTICE that the grounds upon which the within application is made are as follows:

10. WUI filed the Diversion Application on April 24, 2004 and which was received by Alberta Environment on or about that date;
11. From April 2004 until November 2008 technical staff at Alberta Environment advised WUI that the Diversion Application was incomplete because it did not meet the requirements of Alberta Environment's Groundwater Evaluation Guideline. This was communicated verbally to WUI on numerous occasions and furthermore, was communicated in writing to WUI in letters from Alberta Environment including those dated May 23, 2007, July 16, 2007 and October 31, 2007.
12. At no time up to April 27, 2009 did Alberta Environment inform WUI that the Diversion Application was incomplete due to the fact that Alberta Environment could not ascertain the source of the diversion.
13. In or about August 2007, the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, being Alta. Reg. 171/2007, was instituted. The effect of this regulation was to purport to put a moratorium on water diversion from the Elbow River and other surface water bodies in the South Saskatchewan River Basin. As a consequence, a utility such as WUI requiring further water diversion to support an expansion of its customer base is potentially required to purchase the water rights that it was entitled to receive under the Diversion Application.
14. From 2004 to November 2008, WUI repeatedly advised Alberta Environment that the Groundwater Evaluation Guideline was inapplicable to the Diversion Application.

15. The Diversion Application was and remains in all respects complete as per the requirements of the *Act* and in all respects met the requirements for the issuance of a license;
16. On February 29, 2008 WUI filed an appeal to the Alberta Environmental Appeal Board (the "EAB") with respect to the Diversion Application. This appeal was given Appeal No. 07-146.
17. By letter dated March 7, 2008 the EAB purported to bring a Preliminary Motion to determine if Application 07-146 was properly before the EAB and whether it was filed beyond the statutory time limit
18. On July 16, 2008 Alberta Environment filed a submission in Appeal No. 07-146 in which it indicated that the Director, Southern Region, had never assessed the Diversion Application to determine whether it was complete pursuant to the provisions of section 29 of the *Act*. The submission includes the following statement:

At no time did a Designated Director under the *Water Act* make a decision, pursuant to section 29 of the *Water Act*, that the application was complete or incomplete. Therefore, there was no decision whether to assign a priority number or not.
19. Prior to July 16, 2008, WUI was unaware that the Director had declined to carry out the statutory obligation under section 29 of the *Act*. In all communications with WUI, Alberta Environment had, directly or by inference, indicated that the required completeness assessment had been carried out.
20. The Preliminary Motion was heard on August 25, 2008 and Decision No. 07-146D (the "EAB Decision") was issued on October 22, 2008. In the EAB Decision the EAB confirmed that the Diversion Application had never been assessed for completeness pursuant to section 29 of the *Act*, stating as follows:

[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.

21. By letters dated October 27, 2008 and November 17, 2008 WUI requested that the Diversion Application be assessed for completeness by the Director, Southern Region as required by Section 29 of the *Act*.
22. Notwithstanding these requests, and the conclusions of the EAB in Decision 07-146D, WUI did not receive a response to these letters.
23. Accordingly, on December 12, 2008 WUI filed Action No. 0801-15719 in the Court of Queens' Bench, seeking an Order in the nature of mandamus requiring the Director Southern Region to carry out his obligation under s. 29 of the *Act* and assess the Diversion Application for completeness.
24. On April 27, 2009, in response to the relief sought by WUI in Action No. 0801-15719, the Director, Southern Region, issued the Decision, stating that the Diversion Application is incomplete.
25. On July 6, 2009 Justice Mahoney granted a Consent Order whereby the Court held that the Decision fulfills the relief sought in Action No. 0801-15179.
26. The basis for the Decision's finding that the Diversion Application is incomplete is *not* WUI's failure to comply with the Groundwater Evaluation Guideline, as had long been stated by Alberta Environment. There is, in fact, no reference to the Groundwater Evaluation Guideline in the Decision. Instead, the Decision is premised on the assertion that the Director could not determine the applicable source that is the proposed subject for diversion, notwithstanding that the Diversion Application explicitly states that the source is the Elbow River.

27. WUI states that Alberta Environment's conduct towards WUI, with respect to the Diversion Application, can only be regarded as the result of an improper motive, as being in bad faith, as unreasonable, as prejudicial and arbitrary, and as discriminatory, the particulars of which include without limitation:
- (a) deliberately and repeatedly misleading WUI as to whether an assessment for completion had been made
 - (b) deliberately and repeatedly misleading WUI as to the reasons Alberta Environment believed the Diversion Application was incomplete; and,
 - (c) allowing 5 years to pass before carrying out the statutory obligation to render a decision as to whether the Diversion Application was complete.
28. As a consequence of the acts and omissions of Alberta Environment as set out herein, the Director has lost jurisdiction with respect to any further dealings with the Diversion Application.

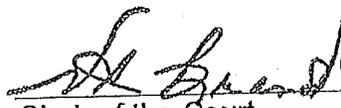
FURTHER TAKE NOTICE that in support of the Application, reference shall be made to the following:

1. Part 56.1 of the Alberta *Rules of Court*;
2. The *Water Act*, R.S.A. 2000 c. W-3 specifically, sections 29, 51, 115 and 166;
3. The Alberta Environment Groundwater Evaluation Guideline;
4. Part 4 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;
5. The Record to be filed in this Action;

6. The pleadings and proceedings as filed in Action No. 0801-15719;
7. The documents, letters and submissions as filed in Application No. 07-146 to the EAB;
8. EAB Decision 07-146-D; and,
9. Such further material as may be advised and permitted by this Court, including any affidavits that are deemed necessary and advisable.

DATED at the City of Calgary, in the Province of Alberta, this 6th day of July, 2009.

ISSUED out of the Office of the Clerk of the Courts of Queen's Bench of Alberta, Judicial District of Calgary, this 6 day of July, 2009.


Clerk of the Court 

This Originating Notice is taken out by McMillan LLP, counsel for the Applicant, whose address for service is 1900, 736 - 6th Avenue S.W., Calgary, Alberta, T2P 3T7.

NOTICE TO THE RESPONDENTS:

- TO: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE MINISTER OF THE ENVIRONMENT;
- TO: HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE ATTORNEY GENERAL.
- TO: REGIONAL DIRECTOR, SOUTHERN REGION ALBERTA ENVIRONMENT

If you do not attend in person or by counsel at the time and place stated in this Originating Notice, the Order(s) asked for may be granted in your absence or such Order(s) may be made or proceedings taken as according to the practice of the Court, without further notice to you.

You are required forthwith after service of this notice to return to the clerk of the Court of Queen's Bench at the Calgary Courts Centre the decision to which this notice refers and reasons, if any, together with the process commencing the proceedings, the evidence and all exhibits filed, if any, and all things touching the matter as fully and entirely as they remain in your custody, together with this notice.

Date: July 6, 2009

To A.B. Queen's Bench Justice at Calgary Courts Centre

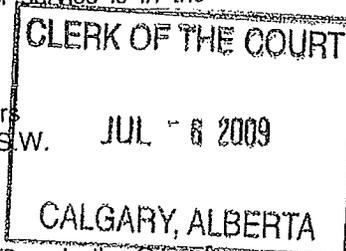
Signed:



A.E. Stead,
Per McMillan LLP
Solicitors for the Applicant

This Originating Notice is issued by McMillan LLP, Counsel for the Applicant, address for service is in the care of the said Counsel at:

McMillan LLP
Barristers and Solicitors
1900, 736 - 6th Avenue S.W.
Calgary, Alberta
T2P 3T7



The Applicant is a corporation with offices in the City of Calgary, in the Province of Alberta.

The Respondents are public officials whose agency has offices throughout Alberta, including the City of Calgary.

Action No.: 0901- 09830

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

WESTRIDGE UTILITIES INC.

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE MINISTER OF THE ENVIRONMENT, HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA as represented by THE ATTORNEY GENERAL and the REGIONAL DIRECTOR, SOUTHERN REGION ALBERTA ENVIRONMENT

Respondents

**ORIGINATING NOTICE
PURSUANT TO PART 56.1 OF THE
ALBERTA RULES OF COURT**

mcmillan

Barristers and Solicitors
1900, 736-6th Avenue, S.W.
CALGARY, AB T2P 3T7

Attention: Andrew E. Stead
Phone: (403) 531-8748
Fax: (403) 531-4720

Case No.: 93500

April 27, 2009

Westridge Utilities Inc.
Attn: Mr. John Gruber
80 Stone Pine Way SW
Calgary, AB T3Z 3E9

Dear Mr. Gruber:

Re: 2004 Diversion Application - Westridge Utilities Inc. ("Westridge")

Your letter to Claude Eckert of November 17, 2008 has been referred to me for a response. You ask that Westridge's April 8, 2004 application for a *Water Act* licence (the "Application") be referred to the Director for a "completeness assessment" pursuant to s. 29 of the *Water Act*.

Westridge has since filed an Originating Notice seeking to compel the Director to make this completeness decision. Rather than resorting to the courts to settle what amounts to a procedural dispute, I have decided to render a decision. This will enable any court, should Westridge choose to challenge my decision, to directly address the merits of Westridge's assertion that the Application was complete in 2004.

I am a designated Director under ss. 1(1)(k) and 163 of the *Water Act*. In making my decision, I have reviewed Westridge's April 8, 2004 application (the "Application"), together with all of Alberta Environment's records touching on this matter, including the subsequent correspondence between Westridge and Alberta Environment, Westridge's appeal to the Environmental Appeals Board (EAB) and the EAB's decision.

I have reviewed the Application in accordance with s. 29 and can advise that the Application is incomplete.

Section 29 of the *Water Act* stipulates that the Director must assign priority numbers to applications for licences that, in the opinion of the Director, are complete and comply with the Act. Thus, completeness is relevant to priority and is left to the discretion of the Director.

Section 50 of the *Water Act*, which informs s. 29, directs that a person who applies for a licence must make an application in a form and manner satisfactory to the Director and submit the information required by the Director.

It is my opinion that in order to be a complete application for the purposes of s. 29, an application must provide *at a bare minimum* satisfactory technical evidence of the source of supply. This is essential. Since water in Alberta is allocated based on a prior allocation system, it is vital in order to assign a priority number to an application, to know **precisely** what water is involved and may be allocated. Until I have technical confirmation of the source, I cannot know whether the priority number applies to a surface or ground water source of supply. I cannot assign a priority number to an application for an unknown source of supply.

The Application indicates that Westridge seeks an additional diversion well in the vicinity of Westridge's existing diversion wells and that the source of supply is to be the Elbow River. However, there is no evidence in the Application to support the assertion that the source of supply will in fact be the Elbow River. No information is provided even as to the proposed depth of the well or what distance it may be from the Elbow River once the well is actually drilled.

The Application specifies the location of the proposed well to be in the NE ¼ 6-24-3 W5. Westridge's existing wells are in the NE ¼ 6-24-2 W5. This would put the wells some six miles apart. Precisely what was intended by indicating the proposed well would be "in the vicinity" of its existing wells is less than clear.

In short, there is nothing whatsoever in the Application that would enable the Director to determine whether the well would be hydraulically connected to the Elbow River. It is impossible to know, based on the Application, whether the well will involve true groundwater, with no connection to a surface water body or surface water, which may include groundwater hydraulically connected to the surface water body source. As a consequence, I am unable to assign a priority number for I do not know whether that priority is as against the Elbow River or an aquifer.

Assignment of a priority number necessarily sets out what water body and what third parties could potentially be affected by an application and identifies possible parties affected by subsequent priority calls (in the event of water shortages).

In the absence of well test data verifying the source of supply, I cannot be certain what water and which parties may be affected and therefore cannot assign a priority number.

The Director needs to be satisfied that the source of supply is indeed what an applicant claims. This approach to licence applications was in place at the time of the Application in 2004 and remains standard protocol in 2009. All *Water Act* licence applications are required to prove source of supply before the assignment of a priority number.

For these reasons, I consider the Application to be incomplete.

Should you choose to complete the Application by providing the well test data if the data demonstrates that the source of supply is groundwater with no hydraulic connection to surface water, then you will be obliged to demonstrate the source of supply can sustain the allocation requested and provide further data as to water quality, aquifer characterization, drawdown effects etc. in order to proceed to a s. 51 review. I refer you to the *Water Act* Fact Sheet and the Groundwater Evaluation Guideline.

If the well test data demonstrates that the source of supply is surface water or ground water hydraulically connected to surface water, please note that Alberta Environment is no longer accepting applications for surface water diversions in the Bow River Basin. By operation of the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order (A.R. 171/2007) all unallocated water in the Bow River Basin has been reserved to protect the health of the Basin.

This decision is made pursuant to s. 29 of the *Water Act* alone. It is not a decision made pursuant to s. 51 of the *Water Act* and cannot be construed as such.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Rush', written in a cursive style.

Brock Rush, M.Eng., P.Eng.
Designated Director Under the *Water Act*