

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – July 17, 2001

IN THE MATTER OF sections 84, 85, and 87 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 and section 115 of the *Water Act*, S.A. 1996, c. W-3.5.

-and-

IN THE MATTER OF an appeal filed by Mr. Jason Lewyk, President, St. Michael Trade and Water Supply Ltd., with respect to Approval 00147901-00-00 issued on May 16, 2001, under the *Water Act* by the Director, Environmental Service, Parkland Region, Alberta Environment to Cam-A-Lot Holdings.

Cite as: *St. Michael Trade and Water Supply Ltd. v. Director, Environmental Service, Parkland Region, Alberta Environment, re: Cam-A-Lot Holdings.*

EXECUTIVE SUMMARY

This appeal relates to an Approval to explore for groundwater issued under the *Water Act* to Cam-A-Lot Holdings Ltd. Cam-A-Lot Holdings Ltd. applied for both an Approval to explore and a Licence to divert. The Appellant is Mr. Jason Lewyk, President, St. Michael Trade and Water Supply Ltd.

In reviewing the Director's records in relation to this appeal, it appeared that the St. Michael Trade and Water Supply had not filed a Statement of Concern with respect to the application for the Approval to explore for groundwater. Rather, the Statement of Concern filed by St. Michael Trade and Water Supply was received after the Approval to explore for groundwater had been issued, and as a result, had been accepted as a Statement of Concern with respect to the application for the Licence of divert. (A decision with respect to the Licence to divert has not yet been made.)

In this situation, the *Water Act* makes the filing of a Statement of Concern a prerequisite to the filing of a Notice of Appeal. The Board is therefore dismissing the Notice of Appeal filed by Mr. Lewyk and St. Michael Trade and Water Supply. It is still open to them to appeal the Licence to divert should it be issued.

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I. BACKGROUND

[1] On May 16, 2001, the Director, Environmental Service, Parkland Region, Alberta Environment (the “Director”) issued Approval 00147901-00-00 (the “Approval”) to Cam-A-Lot Holdings (the “Approval Holder”) pursuant to the *Water Act*, S.A. 1996, c. W-3.5. The Approval authorizes Cam-A-Lot Holdings to explore for groundwater at SW 17-056-18-W4 near St. Michael, Alberta.

[2] On May 16, 2001, the Director also advised persons, who had previously submitted Statements of Concern in respect of the application for the Approval, of his decision to issue the Approval.

[3] The Environmental Appeal Board (the “Board”) received a Notice of Appeal and a request for a Stay on May 30, 2001 from Mr. Jason Lewyk, President of the St. Michael Trade and Water Supply Ltd. (the “Appellant”). A number of other appeals respecting this Approval were also received.

[4] The Board acknowledged the appeal and request for a Stay on May 30, 2001. The Board also requested that the Director provide the records (the “Records”) related to the appeals. The Board received the Records on June 1, 2001 and subsequently provided copies to the Appellant and the Approval Holder. For reasons stated in the Board’s Decision dated July 9, 2001, the request for a Stay was denied.

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

[6] Upon review of the Records, it appeared to the Board that the Appellant had not filed a Statement of Concern with the Director prior to filing his Notice of Appeal with the Board. Section 115(1)(a)(i) of the *Water Act* provides that a Notice of Appeal may be filed by “any person who previously submitted a statement of concern.” The Board wrote to the Appellant on June 19, 2001, requesting he provide his comments to the Board on this issue.

[7] In response to the Board's June 19, 2001 letter, the Board received a letter from the Appellant which advised:

“...please be advised the letter of concern, copy included, was sent by Elaine Hrycyk the past secretary for the St. Michael Trade and Water Supply via Canada Post. Elections for the board followed and now Jason Lewyk is the president for the Co-op and the contact person...”

[8] The Board acknowledged the letter and forwarded a copy to the Director, requesting the Director's comments regarding the status of the Statement of Concern and the Notice of Appeal filed by the Appellant.

[9] On June 22, 2001, the Director provided the following comments to the Board:

“It is the Director's position that Ms. Hrycyk's letter was submitted to Alberta Environment as a statement of concern in relation to Cam-A-Lot Holdings' application for a licence under the *Water Act* to divert water and not in relation to Cam-A-Lot Holdings' application to explore for groundwater. Consequently, a copy of this correspondence was not included in the package of relevant records sent to the Board since it does not relate to the Director's decision to issue the Approval to explore for groundwater.”

The Director further advised:

“The Director also notes that Ms. Hrycyk's letter was received by Alberta Environment well outside of the 7 day time limit for responding to the Notice of Application to explore for groundwater but within the 30 day time limit for responding to the Notice of Application for a licence to divert, both of which were last published in *The Review*, Redwater, Alberta, on April 30, 2001. The Director further notes that the letter was received from the Department two days after the Approval to explore for groundwater was issued to Cam-A-Lot Holdings on May 16, 2001.”

It was the Director's position that the Appellant had not filed a valid Notice of Appeal pursuant to section 115(1)(a)(i) of the *Water Act*, and therefore this appeal should be dismissed.

[10] On June 29, 2001, the Board requested the parties to the appeal provide their comments with respect to the Director's letter.

[11] In response, letters were received from the Appellant and also from Ms. Evelyn Kucy, another appellant (E.A.B. Appeal No. 01-052), on July 10, 2001.

[12] The Appellant advised that the past secretary did not realize each part of the application needed a separate letter of concern. With respect to the timing of the Statement of Concern, the Ms. Kucy advised that the letter on behalf of the St. Michael Trade and Water

Supply Ltd. was mailed in the conventional method from a hamlet Post Office and not by fax, and maintained that this was most likely the reason it was late. Ms. Kucy stated: “This group should not be refused just because they used the post office instead of the fax machine.”

II. ANALYSIS

[13] Section 115(1)(a)(i) of the *Water Act* provides that:

“A notice of appeal under this Act may be submitted to the Environmental Appeal 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....”

It is the public notice that is referred to in the latter part of this clause that prompted the Appellant to file a Statement of Concern. This clause makes it the filing of Statement of Concern a prerequisite to the filing of a valid Notice of Appeal.

[14] The requirement to file a Statement of Concern as a prerequisite to filing a Notice of Appeal has previously been dealt with by the Board in relation the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (“EPEA”). The Statement of Concern and Notice of Appeal processes under EPEA are virtually identical to those under the *Water Act* and therefore the Board is of the view that the same principles should apply. In the case of *O’Neill*,¹ we held:

“Statements of concern are a legislated part of the appeal process. Though it is seldom seen, circumstances could arise where it may be possible for the Board to process an appeal where a statement of concern was filed *late*. Or perhaps an appeal could be processed even when a statement of concern has *not* been filed-- due to an extremely unusual case (e.g. a directly affected party being hospitalized) where a person's intent to file is otherwise established in advance. But those circumstances are highly fact-specific, exceptionally rare, and they do not apply to the present case. Indeed we cannot imagine a case proceeding to the next step where the appellant, like Mr. O’Neill, refuses to answer Board questions and provide at least *some* evidence of the requisite statement of concern and its proper filing. His appeal cannot proceed.” (Emphasis in the original, footnotes omitted.)

¹ *O’Neill v. Regional Director, Parkland Region, Alberta Environmental Protection*, re: *Town of Olds* (March 12, 1999), E.A.B Appeal No. 98-250-D, paragraph 14.

[15] The Board also dealt with this issue in *Bildson*.² In his appeal, Mr. Bildson filed his Statement of Concern three-weeks late, but the Director accepted it anyway and treated it as a valid Statement of Concern.

[16] In this case, however, despite the Appellant's apparent confusion regarding the joint public notice respecting the application for the Approval to explore for groundwater and the application for the Licence, the Board believes it was likely the Appellant's intent to file a Statement of Concern with respect to both applications. However, it is clear that the Appellant did not actually file a Statement of Concern with respect to the application for the Approval to explore for groundwater.

[17] The Statement of Concern was filed outside the specified time period, and after the decision to issue the Approval to explore had been made. Even if the Board were to apply rules of interpretation that would extend the time for filing because the Statement of Concern was mailed, this would be of no assistance to the Appellant. The Statement of Concern arrived after the Director had made his decision, and therefore, the Director could not have taken the Statement of Concern into account when he made his decision with respect to the Approval to explore. The rules of interpretation regarding filing dates do not change this fact. Therefore, in that the Statement of Concern arrived after he made his decision respecting the Approval to explore, the Director correctly determined that the Statement of Concern was in relation to the application for the Licence to divert only. The Board is of the view that it is the obligation of the Statement of Concern filer to ensure that the Statement of Concern is received by the Director in a timely fashion.

[18] Further, the Board is of the view that there are none of the special circumstances as described in *O'Neill* that would prompt the Board to permit the Appellant to proceed with the appeal despite not having filed a valid Statement of Concern. The exception in *Bildson* also does not apply.

² *Bildson, v. Acting Director, North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Ltd.* (October 19, 1998), E.A.B. Appeal No 98-230-D.

III. DECISION

[19] Mr. Lewyk and the St. Michael Trade and Water Supply Ltd. have not filed a Statement of Concern in relation to the application for the Approval to explore for groundwater. Therefore, their Notice of Appeal is not properly before the Board, and pursuant to section 87(5)(a)(i.2)³ of EPEA, the Board dismisses their appeal.

[20] It should be noted that although this appeal is dismissed, this does not preclude the St. Michael Trade and Water Supply from filing a Notice of Appeal regarding a licence or preliminary certificate, should one be issued, nor does it preclude the St. Michael Trade and Water Supply from *requesting* intervenor status should this matter proceed to a hearing on the other appeals that were filed in this matter.

Dated on July 17, 2001, at Edmonton, Alberta.

William A. Tilleman, Q.C., Chair

³ Section 87(5)(a)(i.2) of EPEA provides:

“The Board (a) may dismiss a notice of appeal if ... (i.2) for any other reason the Board considers that the notice of appeal is not properly before it....”