Court of Queen's Bench of Alberta

Citation: Water Conservation Trust of Canada v Alberta (Environmental Appeals Board), 2015ABQB 686

Date:
Docket: 1401 02680
Registry: Calgary

Between:

Water Conservation Trust of Canada

Applicant

- and -

The Environmental Appeals Board, Director, Southern Region, Alberta Environment and Sustainable Resource Development and the Minister of Justice and Solicitor General for Alberta

Respondents

Memorandum of Decision of the Honourable Mr. Justice S.D. Hillier

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I. Introduction

[1] The Director, Southern Region, Alberta Environment and Sustainable Resource Development (Director) refused to transfer part of an existing water licence from Conoco Phillips Canada (Conoco) to Water Conservation Trust of Canada (Applicant). The Minister confirmed the decision, as recommended by the Environmental Appeal Board (EAB). The Applicant argues that reviewable errors were committed in refusing to issue the licence transfer. For the reasons which follow, I have concluded that the application for judicial review must be dismissed.

II. Background

[2] The Applicant's transfer from Conoco relates to 100 acre-feet of water allocation instream flow ascribed to the Red Deer River, situated between two designated bridges in the South Saskatchewan River Basin. The stated purpose of the application before the Director was to change the licence from "industrial" to "habitat enhancement, recreation, fish and wildlife management and water management". The Applicant's cover letter dated June 8, 2010 expressly noted:

> We advise that this application if [*sic*] not for a water conservation objective. However, we understand that the Director has discretion to decide whether a holdback will serve the public interest or a water conservation objective. In the cases where the water conservation objective has not been met, it may be argued that it is appropriate for the Director to take the holdback for the purpose of achieving the water conservation objective.

[3] Lengthy discussion ensued. On February 11, 2011, the Director refused the proposed licence transfer on the basis that according to s. 51(2) of the *Water Act*, RSA 2000, c W-3, only the Government may hold a licence to provide or maintain rate of flow or water level. Consequently, the Director determined that the proposed transfer could not be accepted, as it would maintain a rate of flow or water level in support of a water conservation objective without diversion. He added:

> However, our proposal to hold the water allocation by one of Alberta Government's ministries on your behalf to support the established Red Deer River Water Conservation Objective still stands.

[4] The Applicant filed its appeal with the EAB pursuant to s. 115(r) of the *Water Act* on March 14, 2011, after which the parties engaged in further "without prejudice" negotiations, including mediation. On appeal, the Applicant argued that the application was not for a water conservation objective.

[5] The EAB heard oral submissions on February 6, 2013 and issued its Report on March 8, 2013, recommending that the Minister confirm the Director's decision not to accept the application for a water licence transfer. The EAB found that the substance of the application was to support water conservation objectives. Given the wording of the legislation, the licence sought could not be issued

[6] By Order 60/2013 dated September 17, 2013, the Minister confirmed the refusal of a licence as recommended by the EAB, under s. 100 of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (*EPEA*).

[7] The Applicant filed for judicial review on March 12, 2014, and the Certified Record of Board Proceedings was filed in three volumes on June 25, 2014. The judicial review was heard on September 15, 2015.

[8] The parties raise no issue of delay or laches, nor do any objections arise from the various adjournments over the course of the proceedings. The parties are to be commended for their extended efforts to seek a resolution in the best interests of Alberta's environment.

III. Relief Sought

[9] The Applicant seeks a declaration:

1. quashing the Order as invalid based on one or more of the objections raised; and

2. directing reconsideration in accordance with the legislation and regulations based on an interpretation as would entitle the Applicant to consideration of its proposed licence transfer on the merits.

IV. Statutory Scheme

[10] Numerous sections of the *Water Act* and regulations, all of which I have considered, were referenced in the course of written submissions. It is unnecessary to reiterate the full scheme of the *Water Act*, which replaced the *Water Resources Act*, RSA 1980, c W-5. Following are the portions upon which the parties placed the greatest emphasis, and which have most directly informed the Court's review (emphases added).

[11] Section 51(1) of the *Water Act* contemplates differing applications for a licence:

> 51(1) On application for a licence by a person in accordance with this Act, the Director may, subject to subsection (2) … issue or refuse to issue
>
> (a) a preliminary certificate to that person, or
>
> (b) a licence to that person for
>
> (i) a diversion of water, or
>
> (ii) the operation of a works,
>
> for any purpose specified in the regulations.
>
> (2) On application by the Government in accordance with this Act, the Director may issue a licence to the Government but to no other person, or may refuse to issue a licence, for
>
> (a) the diversion of water,
>
> (b) the operation of a works, or
>
> (c) providing or maintaining a rate of flow of water or water level requirements

for the purpose of implementing a water conservation objective.

[12] The Applicant relies on extracts from ss. 81and 82:

81(1) An application for a transfer of an allocation of water under a licence must be made to the Director and

(a) must be made in a form and manner satisfactory to the Director,

(b) must contain or be accompanied with any information required by the Director,

(c) must be accompanied with the required fees, and

(d) may be made with respect to all or part of an allocation of water under a licence.

82(5) In making a decision under subsection (1), the Director

(a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in approving a transfer of an allocation of water under a licence, as specified in an applicable approved water management plan,

...

(b) may consider any existing, potential or cumulative

(i) effects on the aquatic environment and any applicable water conservation objective,

(ii) hydraulic, hydrological and hydrogeological effects, and

(iii) effects on household users, traditional agriculture users and other licensees,

that result or may result from the transfer of the allocation, and

(c) may consider

(i) effects on public safety,

(ii) with respect to irrigation, the suitability of the land to which the allocation of water is to be transferred for irrigated agriculture,

(iii) the allocation of water that the licensee has historically diverted under the licence, and

(iv) any other matters applicable to the transfer of the allocation that the Director considers relevant.

[13] The following definitions are also relevant:

1(1) In this Act,

(m) "diversion of water" means

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

(ii) any other thing defined as a diversion in the regulations for the purposes of this *Act*.

(hh) "operation of a works" means the operation of a works for the diversion of water.

(hhh) "water conservation objective" means the amount and quality of water established by the Director under Part 2, based on information available to the Director, to be necessary for the

(i) protection of a natural water body or its aquatic environment, or any part of them,

(ii) protection of tourism, recreational, transportation or waste assimilation uses of water, or

(iii) management of fish or wildlife,

and may include water necessary for the rate of flow of water or water level requirements.

[14] Section 3(2) provides that the property in, and the right to the diversion and use of, all water in the Province is vested in Her Majesty in right of Alberta except as provided for in the regulations.

[15] Section 15 contemplates public consultation when water conservation objectives are established, whether under a water management plan pursuant to s. 9, or otherwise.

V. Parties' Positions

[16] The parties filed extensive Written Briefs.

[17] The Applicant argues strenuously that of the four exceptions contemplated in ***Dunsmuir v New Brunswick***, 2008 SCC 9 at paras 59-60, [2008] 1 SCR 190 to which a correctness standard applies, two apply here:

1. a question of law of central importance to the legal system as a whole and outside the expertise of the tribunal; and

2. a true question of jurisdiction or *vires*.

[18] The Applicant also asserts that the Court may rely to some extent upon prior cases addressing the applicable standard, depending on the issues to be considered. It argues that the existence of an admittedly strong privative clause, such as the one in s. 102 of the *EPEA* which applies here, does not exclude a correctness standard in appropriate cases.

[19] In the alternative, the Applicant argues that the decision is unreasonable in the face of the scheme of the *Water Act* and regulations. The Applicant agrees that a presumption of a reasonableness standard is applied generally to questions of law involving statutory interpretation by an administrative tribunal of its home statute and related legislation.

[20] Regarding the merits, the Applicant raises four grounds in support of its entitlement to a transfer of licence from Conoco without the Minister acting as holder of the licence (Applicant's Brief, pp. 5-6):

1. The Application, by transfer or otherwise, for a licence to be held by a non-government entity is permissible for habitat enhancement, recreation, fish and wildlife management as well as water management, and should not be re-characterized to a non-permissible purpose;

2. The *Water Act* does not, by its reference to "diversion of water", preclude the Minister from authorizing the licence transfer on the merits of the application, which should have been fully reviewed;

3. The *Water Act* also does not authorize the Director to refuse a transfer prior to doing a review of compliance with the mandatory requirements of ss. 81(1) and 82(5) of the *Water Act*, including public notice under s. 108; and

4. Sections 81(1) and 82(5) of the *Water Act* do not confer power to refuse a transfer application because the Director is of the opinion that the application is not in the public interest.

[21] In oral submissions, the Applicant placed considerable emphasis on the difference between the transfer process (ss. 81-82) as separate and distinct from the licensing process

(ss. 51(1)-(2)). It asserts that there is no limitation on the authority of the Director to accept and process an application for a transfer. Specifically, there is no need for a diversion of water. It was therefore improper to re-characterize the application for the listed purposes of habitat enhancement and water management, as being for the purpose of water conservation to maintain water flow. Alternatively, the Applicant argues that the circumstances of its request do meet the criteria of diversion because, even though the water remains instream, the effect of the licence will constitute a "taking" in the ordinary sense of exerting possession or control.

[22] The various Respondents, represented by separate counsel, made submissions in general accord with the parameters of their differing status and role upon judicial review. These positions were properly advocated as contemplated in ***Imperial Oil Limited v Alberta (Minister of Environment)***, 2003 ABQB 388, 338 AR 1, and as more broadly set out in the cases cited in ***Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94, 502 AR 110.

[23] The Respondents take no issue with the proposed location of the licence sought. However, they take the position that the purpose is unauthorized other than for operation by the Government. They submit that there is no reviewable error having regard to: the scope of the legislation, the nature of the issues, the roles required to be performed, and the reasons upon which the application was rejected.

[24] The Respondents, most stridently counsel for the EAB, urge that the Applicant has not rebutted the presumption that the reasonableness standard of review applies. They emphasize that the four issues, properly framed, raised and taken collectively, should be reviewed on a standard of reasonableness, with deference accorded to bodies in the interpretation of their home statutes as noted in ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association***, 2011 SCC 61, [2011] 3 SCR 654.

[25] The Director and Alberta Justice address the statutory scheme under the *Water Act* including the Director's role, the standard of review, and the basis upon which the Court should affirm the Director's interpretation, particularly of s. 51 of the *Water Act*. These Respondents in particular rely on the polycentric nature of issues raised under the *Water Act*. They submit that a broad discretion has been accorded to the Director, attracting a deferential standard of review. They submit that there is no reviewable error. They assert that all licensing, including transfers, must comply with s. 51. Section 51 differentiates between a licence issued to "a person", and a water conservation objective licence (WCO) that can only issue to "the Government". An application by a person must accord must be for the purpose of diversion of water or operation of a works as contemplated under s. 51(1)(b)(i) and (ii). Therefore, the Director's interpretation of the substance - as distinct from the form - of the proposed transfer, was entirely reasonable.

[26] Without directly arguing the merits, the EAB somewhat re-contextualizes the role of the Director in order to explain the EAB's position on the standard of review of its own reasons. It profiles its role under the *Water Act* - derived from the *EPEA* - as a specialized tribunal with expertise in recognizing competing interests, which cross jurisdictional boundaries and are affected by unpredictable factors. It asserts that the EAB properly considered the Applicant's

four grounds in its decision, and that the refusal of the Director to approve the Application was fully supported under the legislation.

[27] The Respondent Minister argues that her role, the facts and the statutory scheme support a deferential standard of reasonableness to be applied to all issues. She asserts that the Director was acting within its statutory authority in considering the application, and that no general question of law is raised on review. Therefore, the Court should apply deference to the decision if it falls within the range of defensibly acceptable outcomes.

VI. Analysis

A. Standard of Review

[28] Despite the Applicant's various criticisms of the Director's process and decision, the focus in this judicial review is on the EAB's decision as relied upon by the Minister without modification.

[29] Upon careful consideration, and apart altogether from the proper statement of the live issues on review, I find the issues raised all touch on matters of interpretation and application of one of the EAB's "home statutes", namely the *Water Act* and its regulations. I am not persuaded that the situation is exceptional, nor that any of the matters fall outside the expertise of the EAB and are points of central importance to the legal system as contemplated in the ***ATA*** decision at paras 34-46. See also ***Smith v Alliance Pipeline Ltd***, 2011 SCC 7 at para 26, [2011] 1 SCR 160.

[30] This conclusion is unaltered by the argument that the interpretation of the legislation will create a precedent and significantly affect the law regarding this legislation. Precedential value is only one aspect of court decisions and does not alone vault a case onto a status of central importance to the law. Nor will a decision of general public concern or wide interest necessarily fit into this exception. See ***CEPU Local 30 v Irving Pulp and Paper Ltd***, 2013 SCC 34 at para 66, [2013] 2 SCR 458.

[31] I am informed by prior decisions which have considered the scope of review affecting the EAB's decisions dealing with its home statutes. Various cases support a significant level of deference that remains appropriate having regard to the enduring criteria to be applied: ***Court v Alberta (Environment Appeal Board)***, 2003 ABQB 456 at paras 41-51, 333 AR 308; ***McColl-Frontenac Inc v Alberta (Minister of Environment)***, 2003 ABQB 303 at paras 21-34, 336 AR 234; ***Kelly v Alberta (Energy Resources Conservation Board)***, 2012 ABCA 19 at paras 8-10, 519 AR 284; ***Westridge Utilities Inc v Alberta (Director of Environment, Southern Region)***, 2012 ABQB 681 at paras 12-13, 84 Alta LR (5th) 147.

[32] Given this body of case law, it is not necessary to particularize reference to the ***Pushpanathan*** factors. However, I am fully satisfied that the review here deals with interpretation of the enabling legislation and applicable regulations of a tribunal with complex and specialized responsibilities in a public policy context under a strong privative clause. That expertise is not diminished by the fact that other departments and tribunals are obliged to interpret and assess the impact of the legislation. Nor is expertise confined only to considerations

on the merits, particularly as it is the EAB's decision which is the subject of this review, and not that of the Director.

[33] The interpretation and application of the *Water Act* engage variant interests, factors and policy considerations. It would be inappropriate to measure the outcome of an appeal from the EAB in these circumstances by determining whether the Court would have come to the same conclusion. The Court should not interfere so long as the decision is within the range of reasonable disposition of the issues presented.

[34] Accordingly, the decision will be reviewed for reasonableness. Of course, this leaves open the proper consideration of all the circumstances in a probe of the justification, transparency and intelligibility of the decision on the issues presented, standing alone or collectively, as may taint the sustainability of the decision and recommendation of the EAB upon which the Minister relied.

B. *Transfer versus Licence*

[35] I note at the outset that the Applicant's argument to the effect that s. 82 transfers are separate and do not engage s. 51was not argued before the EAB, nor was it included in the Applicant's written submission to the EAB. It was, however, profiled by all three counsel arguing for the Applicant on judicial review as a substantive matter going to the Board's jurisdiction.

[36] It is always preferred that arguments be raised at the earliest opportunity, and the Applicant did not explain how this argument was excluded in earlier proceedings. The argument is not, however, particularly complicated, the omission was inadvertent on its face, it does not rely on any new evidence, and the Respondents were not materially prejudiced. Despite some objection from the EAB's counsel that the Board should have had an opportunity to hear and address this argument, I agreed to allow full argument as it may raise a reviewable error of law.

[37] Although this issue is distinct, it does tie into the objections to the manner in which the Director handled the transfer application, as profiled in the Applicant's four cited grounds. I will deal with the new argument first because in some ways it sheds light on the Applicant's perspective; it seems to have anticipated approval of the transfer in large part assuming it would be viewed as being beneficial to the environment.

[38] The language and structure of the *Water Act* simply cannot sustain the Applicant's argument that s. 51 does not apply to transfers under ss. 81 and 82. The transfer process contemplates that, if approved, a new licence will be issued: ss. 82(1)(a), (6) and (7). The section which empowers the Director to issue any licence is s. 51. The criteria set out in s. 82 are not a free-standing regime for licencing. They are harmonized not only by parallel wording, but also by the same proscriptions imposed on the Director to determine the substance of any sort of licencing according to the authority granted in s. 51.

[39] On a principled basis, it simply makes no sense for transfers to be screened differently from other licensing applications. Nothing in the language of the licensing transfer process

signals any intent to allow an applicant to circumvent the prescribed licensing categories on an application for transfer.

[40] Thus, it was not at all an error, much less a jurisdictional error, for the EAB to examine the nature of the application according to the statutory criteria for actual licensing.

C. *First Ground* - Improper re-characterization of transfer application

[41] The Applicant states that it applied for a licence on transfer for the stated purpose of habitat enhancement, recreation, fish and wildlife management and water management under the *Water (Ministerial) Regulation*, Alta Reg 205/1998. The Director found instead that the application was for the purpose of implementing a water conservation objective, which is also a listed purpose under s. 11 of the same regulation, but one that only the Government may obtain a licence to pursue under s. 51(2) of the *Water Act*. The Applicant takes the position that a licence may support a water conservation objective without implementing it.

[42] A party seeking a licence, whether predicated on a transfer or otherwise, will file the application according to its perspective. That neither binds the Director, nor does it relieve the Director of the responsibility to assess the true nature of the licence sought. In other words, the substance of the application must comply with the Act and regulations taken as a whole. Compliance must be measured on the whole of the application and an invalid component of the transfer cannot be cured by inclusion of other valid objectives.

[43] From the Record, it is apparent that the Director, acting initially through the District Approvals Manager, determined that the substance of the application was to support the water conservation objective for instream flow in the Red Deer River (Record, p. 631). That conclusion was reached following discussion with, and significant input from, the Applicant. The EAB addressed the objection at paragraphs 108 to 119 of its Report. There is nothing unreasonable in the EAB's conclusion upholding the authority of the Director to assess the true purpose of the application.

D. *Second Ground* - Scope and application of diversion of water

[44] The Director took the position in front of the EAB that leaving water passively instream does not meet the definition of "diversion of water". If water is held instream as a rate of flow for a water conservation objective, then the water is not available for other purposes, which are generally economic. The Director opined that the Government is in the best position to consult with the public and weigh the implications of allocation.

[45] The Applicant argues that the EAB erred both in the interpretation of the need for the application to demonstrate a diversion of water and in all events in concluding that the proposed licence would not meet the definition of "diversion of water". The listed purposes in its application can be met while water is instream without the use of physical works, and thus falls within the definition of "diversion of water".

[46] The Record includes a legal opinion dated October 29, 2010 and prepared by Professor Arlene Kwazniak, a director of the Water Conservation Trust of Canada and one of the

Applicant's counsel on this application (pp. 659-665). As a scholar in the specialized area of environmental law, including water law, her opinion is that the *Water Act* authorizes the issuance of an instream flow licence for management of wildlife, habitat enhancement, recreation or water management as contemplated by the regulations. She explains that "diversion of water" can include leaving water instream by impoundment, storage or taking of the water. There is no need for any removal of the water from the source. She relies on definitions from the dictionary and other legislation:

- "impound" means to seize and take legal possession of;
- "storage" means holding of a substance or thing for a temporary period at the end of which it is processed, used, transported, treated or disposed of (*EPEA*, s. 1(kkk));
- "taking" means to lay hold of, to gain or receive into possession, to seize, to deprive one of the use or possession of, to assume ownership.

[47] The Applicant also cited various cases to support a no-physical-removal: ***Osoyoos Indian Band v Oliver (Town)***, 2001 SCC 85 at para 86, [2001] 3 SCR 746 ("taking" of lands); ***Manitoba Fisheries Ltd v Canada***, [1979] 1 SCR 101, [1978] SCJ No 78 at paras 110-111 ("taking" of property), in addition to other citations where the law recognized the concept of "taking" as an exercise of possession or control of land or a stream. The Applicant urges that the term "taking" would be redundant to the word "removal" if a physical relocating was required, and the Court ought to avoid redundant interpretations: ***City of Nanaimo v Rascal Trucking Ltd***, 2000 SCC 13 at para 23, [2000] 1SCR 342; ***John Doe v Ontario (Finance)***, 2014 SCC 36 at para 53, [2014] 2 SCR 3.

[48] Finally the Applicant asserts that the former *Water Resources Act* authorized privately-held instream licences, and relies on a presumption against alteration of law by implication: ***United Taxi Drivers Fellowship of Southern Alberta v Calgary (City)***, 2004 SCC 19 at para 11, [2004] 1 SCR 485.

[49] The EAB addressed the interpretations urged by the Applicant in paragraphs 110 to 126 of its Report. It rejected the passive definition of "taking", declining to read "control" and "possession" into the definition. As to legislative history and prior licensing, it considered the arguments and concluded that legislative changes were made to reflect society's concerns regarding water resources and increasing demands on water supplies.

[50] The EAB concurred with the parties that s. 52(1) could have been better drafted (Report at para. 112, Record at p. 40). But even as written, one legislative message is clear: only the Government may hold a licence which provides or maintains a rate of flow of water or water level requirements for the purpose of implementing a water conservation objective. It is beyond dispute that no other person may hold a licence for such purpose.

[51] As has been clear throughout, the Applicant's proposed transfer would maintain a rate of flow or water level. The water would remain instream and would be overseen by the Applicant

as to the listed management and protective purposes.

[52] There is nothing to indicate any variance whatsoever from the Crown's vested rights in the water under s. 3(2). Licensing, other than to the Government, must engage a diversion of water whether by the operation of a works (such as a dam or canal) or otherwise. Nothing in the words used contemplates a licence to a person under s. 51(1) where the water remains undiverted *in situ.*

[53] The EAB's conclusion that "taking" requires more than possession and control is an interpretation which the words can fully support, particularly applying the *ejusdem generis* principle in the context of the various terms used to define "diversion of water". Control on the volume of diverted water is reinforced by the volume limitations set in s. 51(6).

[54] It is unnecessary for this Court to consider which terms may carry stronger temporal limits, better restore original volumes, or require a "works" structure to accomplish the diversion. It is not unreasonable to conclude that the absence of a diversion of instream water, regardless of the end purposes in support of a water conservation objective, would disqualify the application of any licencee other than the Government under s. 51(2).

[55] This interpretation is not undermined by any presumption of retained rights. The phrase "but to no other person" would otherwise be rendered meaningless. Further, the Applicants could proffer nothing to sustain that phrase's inclusion, if the net result was that persons could nonetheless obtain licences for maintaining a rate of flow or level for instream water. Statutory interpretation seeks to avoid redundancy.

[56] I conclude that the interpretation adopted by the EAB in its Report and Recommendation to the Minister is reasonable.

E. *Third Ground* - Director's obligation to review compliance with the mandatory requirements

[57] The Applicant argues that the Director cannot refuse a transfer licence prior to doing a review to determine whether the application complies with the mandatory requirements set out in ss. 81(1) and 82(5) of the *Water Act*.

[58] The Director's stages to processing an application were set out in the EAB's Report (para 60) as follows:

(1) The Director considers whether it has the authority to issue what has been applied for;

(2) The Director considers whether the application is complete;

(3) Public notice of the application is given, allowing Statements of Concerns to be filed;

(4) A technical review of the application is completed, taking Statements of Concerns into consideration.

[59] The EAB concluded that the review process was not completed. However, this does not really answer the issue as to whether that was a requirement. EAB counsel argues that it was implicit that the EAB determined that the Director was entitled to reject the application at the preliminary stage without going through all the steps. Such a conclusion can only derive from the recommendation that the Minister confirm the Director's decision to not accept the application. I find that it is a reasonable inference in the circumstances.

[60] There can be no perceived efficiency in what the Applicant is advocating here. The circumstances are not the same as a hearing or trial where findings are made on alternative arguments after all the evidence is heard in order to minimize the risks of a further re-hearing. It simply makes no sense that the remaining steps be pursued when it has been determined that a licence as sought simply cannot be issued under the Act. It would not be an effective use of public resources to undertake an analysis which would inevitably lead to the same disposition. Continuation would only frustrate participants, delay judicial review of the decision, and potentially delay consideration of other applications.

[61] There is no suggestion that the application could have been re-formatted to avoid the result. The Record discloses that the Applicants knew of the Director's interpretation of s. 51(2) early on, and nothing indicates an amended proposal for a diversion or operation of a works under s. 51(1). The parties considered at length other means by which the Government could assist in achieving the Applicant's goals. The Director acknowledged those goals as being laudable, and the EAB agreed (Report, para. 130).

[62] The mandatory language in ss. 81(1) and 82(5) does not support the argument that all steps must be completed if the application is destined to fail. The mandatory wording of s. 81(6) is aimed at the requirement for a public review only in the context of a contingent impact on the community interest of an application which the Director is authorized to issue. Absolutely nothing in a public review can alter or enhance that authority.

F. *Fourth Ground* - Director not authorized to consider public interest

[63] The Applicant asserts that its application was really rejected on policy and public interest grounds without notice pursuant to s. 34 of the *Water Act*. Counsel for EAB notes that this point was not raised before the EAB and consequently is not addressed in the Report. Any references to legislative purpose were responsive to arguments made in support of the Applicant's position on the intent of the new legislation. This appears to be confirmed by the Applicant's reference to a portion of its Rebuttal filed with the EAB dealing only with the rights of a private person to hold an instream licence for a purpose authorized by the regulations, subject only to policy reasons.

[64] Again, for completeness I will deal with this argument with the repeated admonition that judicial review should, wherever practicable, deal with points raised in front of the tribunal in the first instance.

[65] I have no difficulty concluding that the powers of the Minister in s. 34 to block the application have not been engaged in this case. That statutory authority does not form any part of the case as determined by the EAB or upon judicial review. Nor by implication is the Court able to discern any such policy considerations - independent of the legislative wording taken as a whole - which taint the EAB's Report or the Minister's decision.

[66] My conclusion in this regard does not ignore that much remains of the topic of private licencing for future consideration by interested parties. In this regard, the Applicant points to the Approved Water Management Plan for the South Saskatchewan River Basin August 2006, filed as part of the Record. Section 2.9 of that Plan sets out some possible amendments for future discussion. Nothing in that regard has been crystalized in the EAB Report. As such, it has not been factored into these reasons for decision.

VII. Conclusion

[67] Overall, I find sufficient transparency and intelligibility in the EAB's reasons upon which the Minister relied. The reasons support an interpretation of the legislation that is within the range of possible, acceptable and defensible outcomes. The Minister's decision to reject the application was within her powers.

[68] Accordingly, the application for judicial review is dismissed.

VIII. Costs

[69] As addressed at the close of argument, all parties shall bear their own costs.

Heard on the 15th day of September, 2015.
Dated at the City of Edmonton, Alberta this 30th day of October, 2015.

S.D. Hillier
J.C.Q.B.A.

Appearances:

Maureen Bell, Davin MacIntosh and Arlene Kwazniak
for the Applicant

A.C.L. Sims, Q.C.
for the Respondent Environmental Appeals Board

Jodie Hierlmeier
for the Respondent Director, Minister of Justice and Solicitor General

Craig W. Neuman, Q.C.
for the Respondent Minister of Environment and Sustainable Resource Development

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Corrected judgment: A corrigendum was issued on November 2, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

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I. Introduction

[1] The Director, Southern Region, Alberta Environment and Sustainable Resource Development (Director) refused to transfer part of an existing water licence from Conoco Phillips Canada (Conoco) to Water Conservation Trust of Canada (Applicant). The Minister confirmed the decision, as recommended by the Environmental Appeal Board (EAB). The Applicant argues that reviewable errors were committed in refusing to issue the licence transfer.

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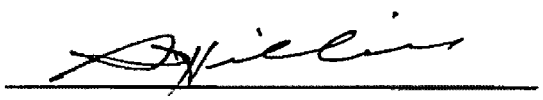
Dated at the City of Edmonton, Alberta this 30th day of October, 2015.



S.D. Hillier
J.C.Q.B.A.

Appearances:

Maureen Bell, Davin MacIntosh and Arlene Kwasniak
for the Applicant

A.C.L. Sims, Q.C.
for the Respondent Environmental Appeals Board

Jodie Hierlmeier
for the Respondent Director, Minister of Justice and Solicitor General

Craig W. Neuman, Q.C.
for the Respondent Minister of Environment and Sustainable Resource Development

Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice S.D. Hillier

Please note that Ms. Kwasniak's name was misspelled on the signature page.