Court of King's Bench of Alberta

Citation: Gill v Alberta Environmental Appeals Board, 2025 ABKB 373

2025 ABKB 373 (CanLII)

Date: 20250619
Docket: 2201 09176
Registry: Calgary

Between:

Mohinder Singh Gill and Five Pillar Holdings Ltd.

Applicants

- and -

Alberta Environmental Appeals Board; Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks; The Minister of Environment and Parks; and, His Majesty the King in Right of Alberta

Respondents

Reasons for Decision
of the
Honourable Justice D.J. Reed

Introduction

[1] At the centre of this judicial review application is a private groundwater well ("**Well**") that is on property situated in the Town of Strathmore ("**Town**"). That property is adjacent to the Trans-Canada Highway. On the property is a hotel ("**Hotel**"). The land and hotel are owned by the Applicant Five Pillar Holdings Ltd. ("**Five Pillar**").

[2] The Applicants, Mohinder Singh Gill ("**Gill**") and Five Pillar (collectively, the "**Applicants**") ask this Court to judicially review the report and recommendations[1] (I refer to the report and recommendations collectively as "**Recommendations**") made by the Respondent Environmental Appeals Board ("**Board**") to the Respondent Minister of Environment and Parks ("**Minister**"), as well as the decision of the Minister[2] based upon the recommendations made by the Board ("**Ministerial Order**").

[3] I note that in addition to the Applicants and the Director, the Board and the Minister were also represented by counsel in this application, filed briefs, and made very brief submissions.

[4] The Board's Recommendations to the Minister were based upon the Board's review of the decisions of the Respondent Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks ("**Director**") under the *Water Act*, RSA 2000 c W-3 (*Water Act*) and associated regulations to:

(a) Cancel License No. 11738 ("**License**") regarding the Well; and

(b) Issue Water Management Order No. WMO-2017/01-SSR which directed the Applicants to reclaim the Well as it had been declared a "problem water well" ("**WMO**") (collectively the "**Director's Decisions**").

[5] During the proceedings before the Board, the Town was granted intervenor status by the Board. It was permitted to present evidence to the Board. It was not permitted to make submissions or participate in the proceedings before the Board in any other way.

[6] The Applicants appealed the Director's Decisions to the Board. As a result of that appeal, the Board upheld the Director's Decisions and issued the Recommendations to the Minister. The Minister accepted them, save for making a minor variation that is not in dispute, resulting in the Ministerial Order.

[7] The Applicants allege that the Recommendations are unreasonable (and as a result the Ministerial Order is also unreasonable) due to the fact that the Board misapprehended the evidence, considered irrelevant evidence or evidence not advanced by the Director at the time the WMO was issued and the License cancelled, misinterpreted the *Water Act* and associated regulations, and did not take into account certain submissions made by the Applicants that at the material times the Well was no longer connected to the hotel water supply.

[8] In addition, the Director has applied to strike the Originating Application of the Applicants because the Town was not served with the application and supporting materials in accordance with the requirements set out in Rule 3.15 of the *Rules of Court*.

[9] This decision first outlines the brief factual background taken from the record. It then addresses the application to strike, then goes on to address the merits of the application.

Summary Conclusion

[10] For the reasons set out below:

[1] *Gill and Five Pillar Holdings Ltd. v Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks* (26 November 2021), Appeal Nos. 16-057 and 16-061-063-R (A.E.A.B.), 2021 ABEAB 36
[2] Ministerial Order 03/2022 dated February 6, 2022.

2025 ABKB 373 (CanLII)

(a) The Originating Application is struck for failure to serve the Town in accordance with the requirements of Rule 3.15 of the *Rules of Court*;

(b) In the alternative, the Originating Application is dismissed on the merits, as there was no error committed by the Board or the Minister that warrants reconsideration or intervention by this Court.

2025 ABKB 373 (CanLII)

Basic Factual Background

[11] A Certified Record of Proceedings was filed by both the Board and the Minister (collectively the "**Record**"). No additional evidence was submitted on this judicial review. The below brief recitation of facts is taken from the Record.

[12] The Hotel was built in or around 1978. The Well was drilled around the time of construction of the Hotel. Around the same time, municipal water and sewer lines were installed adjacent to the land and the Hotel was connected to the Town's main water and sewer lines. The Town and thus the Hotel are situated within the South Saskatchewan River Basin and are part of the Bow River watershed. The Hotel is approximately 776 metres above sea level.

[13] The prior owner of the Lands and the Hotel was a corporation named White Wezel Enterprises Ltd. ("**White Wezel**"). The License was issued to and in the name of White Wezel on or around July 29, 1982. At that time, it was an interim license. It was converted to a full license on March 25, 1993. All parties are agreed the License runs with the land, notwithstanding the fact that the name on the License, at all material times for this case, remained White Wezel rather than Five Pillar.

[14] Five Pillar became the owner of the Hotel and Land on March 4, 1998, and thereby became the owner of the Well and the holder of the License.

[15] The stated use of the License was to permit the diversion and use of water from the Well for "Hotel Water Supply". This is not a defined term.

[16] Historically, the plumbing system of the Hotel had interconnections between the Well and the Town's water supply. It appears that the Hotel was utilizing water from the Well for a significant period for a variety of purposes related to the operation of the Hotel, including potable and non-potable uses.

[17] However, on or around April 4, 2012, the Town passed Bylaw No. 12-07, *Being a Bylaw of the Municipality of Strathmore for the Regulation, Supply and Management Respecting Water Utility Services* (the "**Bylaw**"). The Bylaw prohibits any entity connected to the Town's water supply to also have a water system that is interconnected with any other water source.

[18] The Hotel was thus in violation of the Bylaw at the time of its enactment. Five Pillar sought an exemption from the Town which was not granted. The Town instituted enforcement proceedings against Five Pillar in this Court in August 2014. The Court understands that those proceedings were ultimately withdrawn.

[19] During this period, due to the cross connection of the Hotel's water supply between the Town and the Well, on November 7, 2014 the Alberta Safety Codes Council ("**ASSC**") issued a Safety Codes Order directing Five Pillar to disconnect the Well from the Hotel water system. I pause here to note that despite this Order being issued in 2014, the evidence suggests that Five

Pillar did not disconnect the Well from its Town supplied water system until 2016, after the ASSC issued a further Order to Five Pillar.

[20] On November 17, 2014 Alberta Environment and Parks ("**AEP**") conducted a site visit of the Hotel and Land, confirming the presence of the Well, and that the well was accessible to the public and there were no protective measures in place to prevent tampering. I note that it is undisputed that the Well head has been at all times located just outside the front entrance to the Hotel, and that at no time prior to the Recommendations or the Ministerial Order had any protection of the wellhead been installed by anyone, including the Applicants.

[21] In March of 2015, apparently because the License was still in the name of White Wezel, the Director issued an enforcement Order (WA-EO-2015/03-SSR) that directed Five Pillar to cease diverting water from the Well immediately. This Order was later withdrawn April 17, 2015 once the Director realized that the License was still valid.

[22] On the same date (April 17, 2015), the Town wrote the Board stating its concerns and asked the Board to consider cancelling Five Pillar's License.

[23] A letter from AEP was sent to Five Pillar on April 22, 2015 ("**April AEP Letter**"). That letter, among other things, requested a meeting, and set out the requirement for testing and ground water analysis under the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 ("*EPEA*"); noted the requirements of the *EPEA* for the operation of a waterworks system that does not use high quality groundwater, should the Well fall within those parameters; noted that the License appeared to be held by someone else other than the Applicants; and noted the possibility of amending the license.

[24] The request by the AEP was in part to determine whether the Well water was "high quality ground water" within the meaning of then section 2(4)(b) of the *Activities Designation Regulation*, AR 276/2003 ("*ADR*"). If it was not, Five Pillar was put on notice it would be required to obtain approval under the *EPEA* for the construction, operation and reclamation of a waterworks system.

[25] Five Pillar did not respond to the April AEP Letter at all. Further follow up was sent to Five Pillar on May 14, 2015. Five Pillar did not respond to this correspondence either.

[26] Between May and June of 2015 there is correspondence on the record that the Applicants say shows regulatory confusion between the AEP, the Environment and Sustainable Resource Development ("**ESRD**"), the Board and the Director. The Director indicates that this was a transition period between the change in name of the AEP to ESRD, as well as a discussion of the fact that the interconnection issue was properly a Bylaw issue and not something the regulatory bodies would deal with. Despite the arguments advanced by the Applicants, I find not much turns on this correspondence for the purposes of a review of the Recommendations, and the Ministerial Order. The reality is that the Applicants failed at every turn to respond to the AER prior to the Director's Decisions.

[27] On June 17, 2015, Alberta Health Services ("**AHS**") collected a water sample from the Well. Just over one month later, on July 13, 2015, the AHS provided a chemical analysis that showed the fluoride concentration of the water from the Well was 3.5 Mg/L ("**AHS Results**").

[28] On July 29, 2015 AEP sent a letter to Five Pillar requesting treatment of the water in the Well to control the concentration of fluoride to below 1.5 Mg/L which is the maximum

2025 ABKB 373 (CanLII)

acceptable amount under *Health Canada's Guidelines for Drinking Water Quality* and that *EPEA* approval was required for the Well due to elevated fluoride levels.

[29] The Applicants did not comply with this request.

[30] On December 18, 2015, the ASCC issued Order No. 0015456 ("**ASCC Order**") that held that no private water supply system shall be interconnected with a public water supply system and directed Five Pillar to disconnect the well from the hotel as of February 5, 2016 to reduce the risk of contamination of the Town's water supply. The ASCC Order found that there was a risk that groundwater and the Town's water system could be contaminated if the Well were not properly sealed. The ASCC also found that there was a potential for overland flooding in the area that could contaminate the Well and groundwater. The ASCC Order was not reviewed or otherwise appealed.

[31] On January 6, 2016 AEP wrote Five Pillar. It advised that AHS had provided AEP with the AHS Results and put Five Pillar on notice again that the fluoride concentration exceeded the Health Canada Guidelines, as well as the acceptable fluoride concentration in high quality groundwater set out in section 2(4)(b)(ii) of the *Activities Designation Regulation*. It outlined other issues and requested a response by February 6, 2016. Again, the Applicants did not respond.

[32] Five Pillar does submit it complied with the ASCC Order in February of 2016. The evidence shows that a piece of pipe connecting the Well supply to the Hotel water system that is shared with the Town water supply to the hotel was removed, and that a dual backflow prevention valve was installed. This was confirmed by an AHS site visit on February 9, 2016. It seems clear that as of this date the physical interconnection with the Town's water supply had ceased. Five Pillar also seems to have continued to use water from the Well for laundry after the disconnection, as the well remained connected to some internal Hotel systems that were not interconnected with the Town water supply.

[33] The record shows that Five Pillar did not comply with any of AEP's requests, as indicated. A year later, on January 12, 2017, the Director wrote to Five Pillar and declared the well to be a "problem water well" pursuant to the *Water (Ministerial) Regulation*, Alta Reg 205/98 ("*WMR*") section 40 ("**Problem Well Designation**"). The grounds listed for the declaration were that the well was interconnected to the town's water supply that the Well was in a location that put the groundwater at risk in the event of overland flooding or tampering and could cause an adverse effect on the environment, human health, property or public safety.

[34] On the same date, flowing from the Problem Well Designation, the Director issued the Water Management Order. This Order required Five Pillar to Reclaim the Well in accordance with the *WMR* and cancelled the License due to the potential adverse effects on public health and/or public safety.

[35] Also on January 12, 2017, the Director wrote Five Pillar advising that the Director had cancelled the License ("**License Cancellation**"). The Director noted that a situation where a significant adverse effect on human health or public safety may occur and that this situation was not reasonably foreseeable at the time the License was issued. In doing so, the Director relied in part on findings made in the ASSC Order. The License Cancellation refers only to the risk of overland flooding as well as tampering as the reasons for the cancellation. It does not refer to the fluoride content/water quality issues that were also extant at the time.

2025 ABKB 373 (CanLII)

[36] As noted, the Applicants appealed these January 12, 2017 actions by the Director to the Board. It was after this that the Board added the Town as an intervenor in the proceedings before it.

The Town Becomes an Intervenor in the Appeal before the Board

[37] Further to an application made by the Town, the Board, on April 1, 2020 decided to permit the Town to participate in the appeal before the Board as an intervenor. Reasons for that decision were released by the Board on May 22, 2020, at 2020 ABEAB 19 ("**Board's Intervenor Decision**").

[38] Part of the test applied by the Board in consideration whether the Town would be granted leave to intervene was that from ***Pedersen v Alberta***, 2008 ABCA 192. One consideration made by the Board in so doing was whether the Town would be directly affected by the Appeal. At page 6 of the Board's Intervenor Decision, the Board finds that "The Town has established it has a tangible interest in the outcome of the appeals as the Appellant's Well [the Well] has the potential to impact the water supply managed by the Town." This was based upon submissions made by the Town that the Well was interconnected to the Town's municipal water supply. The Board's Intervenor Decision states at page 7, in summarizing that decision that:

> As stated in its April 1, 2020 letter, the Board has decided to permit the Town to participate in the hearing. The Town is required to file a written submission, permitted to file expert reports if they wish, present evidence on the alleged interconnection between the Town's water supply system and the Appellants' Well, and on the safety codes. The Appellants may cross-examine the Town and the Town will be subject to questioning by the Board. As the Board is only looking for information from the Town, the Town will not be permitted to cross-examine or to make opening and closing comments at the hearing. The Board will not deal with the Town's bylaws, as these are not within the Board's jurisdiction.

[39] The Applicants did not appeal the Board's Intervenor Decision, nor is this decision challenged by the Applicants in their Originating Application for Judicial Review. While the Applicants did make arguments that the Board's Intervenor Decision was incorrect, it is not reviewable on this application, not having been raised as a ground of review.

The Recommendations by the Board

[40] The Recommendations consist of a 55 page document that contains an executive summary, background and facts, evidence and arguments, analysis, conclusion and recommendations.

[41] The substantive issues addressed in the Recommendations are:

1. Was the Director's decision to cancel the Licence appropriate?
2. Was the Director's decision to issue the Order appropriate?
3. Are the terms and conditions of the Order appropriate?

[42] A summary of the crux of the Board's reasons and decisions are set out at paras. 3-6 of the Recommendations:

2025 ABKB 373 (CanLII)

> [3] Based on the evidence and arguments presented at the hearing, the Board concluded the Director's decision to cancel the Licence and issue the Order were appropriate. The Director had the legal and factual basis to cancel the Licence and issue the Order. The Well poses a significant risk of having an adverse effect on the environment, human health, and public safety.
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> [4] The Board also concluded the terms and conditions of the Order were appropriate. The Director had the authority under section 97(1)(f) the *Water Act* to order the reclamation of the Well. It was reasonable for the Director to order the Well be reclaimed given the significant risk of adverse effects the Well posed to the environment, human health, and public safety, and for the Director to hold the Appellants to the reclamation requirements for abandoned water wells. Moreover, without the Licence, the Well could no longer be used to divert water to the Hotel, and no other use could be made of the Well without the Appellants applying for and receiving the requisite approvals from Alberta Environment and Parks ("AEP"). The Board was concerned that the Appellants did not provide any evidence to show that they did regular testing such as water sampling over the last 30 years to demonstrate that the Well complied with the applicable regulatory requirements and was potable. The Appellants also failed to demonstrate that they had taken steps to secure the Well or put protective measures in place. Without either, the Well was at risk of contamination caused by tampering, damage caused by motor vehicle accident, or inland flooding. Given the risks posed by the Well, the only reasonable course of action remaining was for the Director to require the Appellants to reclaim the Well. The Board recommended the Director's decision to cancel the Licence be confirmed.
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> [5] In the Board's view, the Order should be changed to amend the date by which the Appellants complete the reclamation work required under the Order. The Board recommended the Appellants be given six months to complete the work, with the option of the Director having the ability to extend the timelines in the Minister's Order, should the Director view it necessary.
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> [6] The Board further recommended the Appellants be required to submit a plan and schedule for the reclamation work to the Director, for the Director's approval, within two months of the date of the Minister's Order in this matter.

The Ministerial Order

[43] The Ministerial Order accepted the primary recommendations made by the Board in the Recommendations, in reliance upon the Recommendations. All parties agree that the key piece of analysis in this judicial review is the substance and outcome of the Recommendations.

The Director's Application to Strike the Originating Application

[44] The Director filed an application in March of this year, seeking to strike the Originating Application for failure to serve the Town as a directly affected party pursuant to Rule 3.15(3)(c) of the *Rules of Court*, Alta Reg 124/2010 ("*Rules*"). The Applicants oppose this application.

2025 ABKB 373 (CanLII)

[45] The crux of the application is whether the Town was a directly affected person or body within the meaning of the Rule. The Director says it was, the Applicants say it was not.

[46] The Director argues that the Town, by virtue of being the municipality tasked with the provision of water to the residents of the Town, including the enforcement of the Bylaw, stands to be directly affected by the potential outcome of this judicial review application. Further, the Director argues that the Town's status as an intervenor before the Board must also be considered. The Director also notes the Town is directly affected for the purposes of service under the Rule, due to the nature and fact of its participation in the proceedings before the Board.

[47] The Applicants, on the other hand, argue first that the Town should not have been granted intervenor status in the proceedings before the Board. They did concede in argument that they have not previously challenged the Board's Intervenor Decision nor did they seek review of that decision in this judicial review. The Applicants also argue that since the Well was disconnected from the Town's municipal water system in 2016, there is no direct affect to the Town. The Applicants assert that to find the Town is directly affected is to interpret the Rule too broadly, because, in the Applicant's assertion the Town stands to be less directly affected than residents of the Town if it is the safety of the water supply that is the driving concern.

The Law Respecting Rule 3.15(3)(c)

[48] Rule 3.15 states in part:

> (2) Subject to rule 3.16, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and rule 13.5 does not apply to this time period.
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> (3) An originating application for judicial review must be served on
>
> > (c) every person or body directly affected by the application.
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> (4) The Court may require an originating application for judicial review to be served on any person or body not otherwise required to be served.
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> (5) An affidavit or other evidence to be used to support the originating application for judicial review, other than an originating application for an order in the nature of habeas corpus, must be filed and served on every other party one month or more before the date scheduled for hearing the application.

[49] The Court of Appeal, in ***Julien v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2023 ABCA 81 at para 13 stated in part that "As recognized by the chambers judge, Rule 3.15 is a harsh and inflexible rule, but self-represented litigants are presumed to know the law and the Rules of Court. It is incumbent upon every applicant, or litigant, to ensure they are compliant with all filing and service requirements, and if there is any doubt whether a person or body is "directly affected", they should be served with notice of the Originating Application."

[50] The parties agree with the operation of the Rule. If the Court finds the Town was directly affected by the application for judicial review, the application must be struck as the Town was not served at all, let alone within the time deadline in the Rule. See for example, ***Kainaiwa/Blood Tribe v Alberta***, 2024 ABKB 401 at paras 12-19 and the cases cited therein; ***Perry v Alberta (Seniors, Community and Social Services)***, 2025 ABKB 68 at paras. 23-30.

2025 ABKB 373 (CanLII)

[51] In ***Julien***, the Court of Appeal found that the words "directly affected" for the purposes of Rule 3.15(3(c) must be given their ordinary meaning, applied to the particular facts of each case: para 8. Decisions of this Court have subsequently confirmed this: see, ***Tartal v Alberta (Human Rights Commission)***, 2023 ABKB 381 at para 63; ***Mikisew Cree First Nation v Alberta***, 2024 ABKB 578 at para 130.

[52] Although it predates ***Julien***, I have also had regard to the analysis of this Court in ***Hazkar Developments Inc v Cochrane (Town)***, 2019 ABQB 552. In that case, Justice McCarthy took guidance from the decision in ***Enmax Corporation v Alberta (Labour Relations Board)***, 2018 ABQB 431, finding that if a party is directly affected by the original decision, they will likely be directly affected by the outcome of a subsequent judicial review application: ***Hazkar*** at para 44.

[53] The Court in ***Hazkar*** also found that the words "directly affected" must be interpreted restrictively. This is because the legislature clearly intended to limit the number of persons who must be notified of judicial review applications. The adverb "directly" excludes everyone who has been indirectly affected and who has a mere general or community interest. However, this does not mean that the Court requires "proof of substantive rights that would be directly affected": ***Hazkar***, at para 45.

[54] ***Kainaiwa/Blood Tribe*** summarized these and other decisions. In addressing the difference between the test for standing versus service under Rule 3.15(3), Campbell, J. stated at paras 52-54:

> [52] However, there is an important distinction between the requirements for standing or for party or intervenor status and the requirement for service under Rule 3.15. To be added as a party or granted standing or intervenor status in a judicial review application, a party must make application to the Court. Therefore, it is logical that such addition, standing or status would be granted only to a party who can demonstrate a potential adverse effect on its rights or interests.
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> [53] By contrast, Rule 3.15(3) speaks only to service. In my view, to interpret "directly affected" for purposes of service as requiring an adverse effect would compel courts and parties to predetermine the presence or absence of such an adverse effect without giving the party in question an opportunity to address it. While it will often be the case that a party will be adversely affected, an adverse effect is not necessary to be directly affected for purposes of service under Rule 3.15. There are other relevant considerations, such as contractual and economic relationships or ownership.
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> [54] Once served with the application, a directly affected party who does not consider itself "aggrieved" or "adversely affected" can simply decline to participate in the proceedings or, if they believe they will be adversely affected or will derive some benefit, may choose to participate to address those issues that directly affect them as identified for them in the application for judicial review. As discussed in ***ENMAX*** at para 13, service does not depend on a directly affected party's position on an application.

[55] ***Kainaiwa/Blood Tribe*** was recently considered and applied by Ho, J. in ***Bow Valley Engage Society v Alberta (Environmental Protection and Enhancement Act, Designated Director)***, 2025 ABKB 158 at paras 11-13.

2025 ABKB 373 (CanLII)

Analysis

[56] Here, based upon the law set out above and the facts before the Court, I have no hesitation in concluding the Town was directly affected for the purposes of Rule 3.15(3) and as such ought to have been served in accordance with that Rule. It was not. The operation of the Rule is strict, and as a result this application is struck.

[57] The Town was admitted by the Board as an intervenor. While that is not in and of itself conclusive, it is a factor that certainly weighs in favour of finding a party to be directly affected within the meaning of Rule 3.15(3). The Board, in finding so, went through the more thorough analysis referred to in ***Kainaiwa/Blood Tribe*** that is not required under the Rule (but is required for intervenor status before the Board) and found that the Town met the test for intervenor status. As I noted above, the Board found a tangible interest held by the town, which interest continues to this day. That decision was not appealed, nor was it brought forward for review before me. To the extent the Applicants have tried to re-argue the Town's intervenor status before the Board, and to rely upon case law at the Board level regarding same, I reject those arguments. Further, the law relating for intervenor status before the Board is not the same as the law interpreting "directly affected" under Rule 3.15(3), as I have discussed.

[58] As an intervenor in the proceedings before the Board, and in circumstances where the integrity of its water systems, the enforcement of the Bylaw, and its contractual commitments to others related to the Town's water supply were engaged in the potential outcome of the matters before the Board, the Town clearly fell within the meaning of directly affected under Rule 3.15(3). I do not agree with the arguments put forward by the Applicants that the Town somehow stands subordinate to the individual users of the Town's water. That is simply incorrect. It is the Town that is responsible to the residents for the safety and security of the municipal water systems under its purview. There is no slope to slip on in finding the Town to be directly affected here.

[59] By not serving the Town, the Town was deprived of notice and the opportunity to make the election noted in ***Kainaiwa/Blood Tribe*** – whether to participate in this hearing, or not. The Applicants assumed the risk this finding would be made, and their application would be struck. That risk has realized.

[60] I also put no weight on the timing of the Director's application, which was filed this year. There seems to have been no litigation misconduct in filing the application at that time, and the application proceeded along with the merits hearing, as has occurred in other cases recently before this Court.

[61] The Court was specifically asked, as has been the case in other decisions, to consider the merits of the application in the alternative: See for example, ***Bow Valley Engage Society***. Given the length of time it takes to obtain hearings for judicial review and given the fact that the Court has heard full argument on the merits, I proceed to do so.

Judicial Review of the Recommendations and the Ministerial Order

[62] In the event I am wrong in my decision to strike the application, for the reasons set out below, the application is also dismissed on its merits.

2025 ABKB 373 (CanLII)

Standard of Review

[63] I note that section 102 of the *EPEA* contains a privative clause, which states:

> **102** Where this Part empowers or compels the Minister or the Board to do anything, the Minister or the Board has exclusive and final jurisdiction to do that thing and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the Board shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the Board or any of its proceedings.

[64] Of course, notwithstanding this, the Parties are all agreed that the standard of review is reasonableness, referring largely to ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65.

[65] In ***Christian v Alberta Environmental Appeals Board***, 2024 ABKB 586, I stated at paras 39-43:

> [39] In ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 [***Vavilov***], the Supreme Court of Canada established reasonableness as the presumptive standard of review. There are, however, two situations where the presumption of reasonableness can be rebutted. The first is where the legislature has indicated that it intends a different standard to apply. For example, where it explicitly prescribes the applicable standard of review or where it provides a statutory appeal mechanism signalling the legislature's intent that appellate standards apply. The second is where the rule of law requires that the standard of correctness be applied, including constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding the jurisdictional boundaries between two or more administrative bodies: Vavilov at paras 17, 53.
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> [40] The Supreme Court stated at paragraph 15 of ***Vavilov***:
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>> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.
>
> [41] The Court emphasized that a "reasons first" approach should be taken when conducting a reasonableness review. When a written decision is provided, the court's starting point in assessing reasonableness is to examine the reasons "with respectful attention" and to seek "to understand the reasoning process followed by the decision maker": ***Vavilov*** at para 84. Reasonableness review "is not a line-by-line treasure hunt for error." But a reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws in its

2025 ABKB 373 (CanLII)

overarching logic" and be satisfied that there is a path of analysis in the reasons "that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": ***Vavilov*** at para 102.

[42] For a decision to be reasonable, it must be both rational and logical as well as "justified in relation to the constellation of law and facts that are relevant to the decision": ***Vavilov*** at para 105. It is unnecessary for a reviewing court to catalogue all potential legal or factual considerations which could constrain a decision maker: ***Vavilov*** at para 106.

[43] The party challenging the decision bears the burden of demonstrating that it is unreasonable. Before a reviewing court can set aside a decision, they must be satisfied that the decision does not "exhibit the requisite degree of justification, intelligibility and transparency": ***Vavilov*** at para 100. Any alleged shortcomings must be more that merely superficial or peripheral, the court must be satisfied they are sufficiently central or significant as to render the decision unreasonable: ***Vavilov*** at para 100.

[66] As noted by the Court of Appeal in ***Normtek Radiation Services Ltd v Alberta Environmental Appeal Board***, 2020 ABCA 456 the starting point is one of restraint. See also: ***Brookman v Environment and Parks (Director)*****,** 2021 ABQB 249 at para 12. In ***Brookman***, Justice Dilts stated that "Reasonableness includes consistency with the text, context and purpose of the governing legislation, and a clear understanding of the facts."

[67] Next, I outline the applicable statutory regime within which the Board considered the Director's Decisions. Then I go on to conduct a reasonableness review of the Recommendations and the Ministerial Order based upon the arguments put forward by the Applicants. I am mindful that as a part of the review to be undertaken, the Court must review the reasons of the Board in light of the record and with due sensitivity to the administrative regime: ***Vavilov***, at para 103.

The Applicable Statutory Regime

[68] As noted by the Director, AEP is responsible for regulating the allocation and use of water through, among other things, the *Water Act* and *EPEA*. The *Water Act* and its regulations govern the drilling of the Well and the diversion of water from the Well. The *EPEA* and its regulations regulate the operation and required monitoring of water treatment and distribution systems.

[69] The License for the Well does not grant property in the water therein to the Applicants. The property and right to the diversion and use of all water in Alberta is vested in the Crown except as set out in the regulations under the *Water Act*: *Water Act*, s 3(2).

[70] The purpose of the *Water Act* is set out in s 2:

2 The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

(b) the need for Alberta's economic growth and prosperity;

2025 ABKB 373 (CanLII)

> (c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
>
> (d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;
>
> (e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans-boundary water management;
>
> (f) the important role of comprehensive and responsive action in administering this Act.

[71] One key section in issue in this case is the statutory authority of the Director to cancel the License. In this case, the Director purported to rely upon s 55(1)(j) of the *Water Act*. That section states in part that:

> 55(1) The Director may suspend or cancel a licence
>
> ...
>
> (j) if, in the opinion of the Director, a significant adverse effect on human health or public safety occurred, occurs or may occur that was not reasonably foreseeable at the time the licence was issued.

[72] The Director's authority to issue the WMO in this case arises from s 97(1)(f) of the *Water Act*. That section states in part:

> 97(1) An inspector or the Director may issue a water management order
>
> ...
>
> (f) to the person responsible for a water well if, in the opinion of an inspector or the Director, the water well is a problem water well or any actions related to the drilling of a water well caused, causes or may cause an adverse effect on the environment or on human health, property or public safety;

[73] In making the declaration that the Well was a problem water well, thereby engaging s 97(1)(f) of the *Water Act*, the Director relied upon s 40 of the *WMR*:

> 40 The Director may declare a well to be a problem well if the Director is satisfied that the well may cause, is causing or has caused an adverse effect on the environment, human health, property or public safety.

[74] The ability of the Director to require remediation or reclamation of a problem well arises from section 99(1)(a)(xv) of the *Water Act*, as well as section 99(1)(a)(ii)(A) which permits the Director to order the recipient of a WMO to submit "any information on the subject matter of the Order".

[75] The Applicants were granted a right of appeal to the Board from the Director's Decisions pursuant to s 115(g) of the *Water Act*.

2025 ABKB 373 (CanLII)

[76] The parties all agreed in the hearing that the Board could consider new information or evidence on appeals before it, which information was not available to the Director at the time the Director's Decisions were made. Section 95(2)(d) of the *EPEA* states that prior to conducting an appeal hearing, the Board may determine what matters in the notice of appeal will be included in the hearing, and in making that determination, the Board may consider, among other things, whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made.

[77] As a result of the wording of section 95(2)(d), hearings before the Board are *de novo*: ***Chem-Security (Alberta) Ltd v Lesser Slave Lake Indian Regional Council***, 1997 ABCA 241 at paras 11-12 (considering the predecessor section to s 95(2)(d) of the *EPEA*).

[78] Once an appeal was heard by the Board, the Board was required to submit the Report to the Minister. The final decision, however, is made by the Minister, who can:

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make;

(b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b) of the *EPEA*;

(c) make any further order that the Minister considers necessary for the purpose (see *EPEA*, s 100).

Reasonableness Issues Raised by the Applicants

[79] While the Applicants stated the reasonableness issues in varying ways in their Brief and in oral argument, I address them as follows:

(a) Did the Board misapprehend the evidence, consider irrelevant evidence or otherwise ignore the submissions of the Applicants?

(b) Did the Board misinterpret the *Water Act* and associated regulations?

(c) Were the Reasons and the Ministerial Order otherwise unreasonable?

Did the Board Misapprehend the Evidence, Consider Irrelevant Evidence or Fail to Consider Five Pillar's Submissions?

Positions of the Parties

[80] The Applicants assert that the Board inappropriately considered and accepted evidence provided by the Director in the hearing before it that the Director did not rely upon at the time the Director's Decisions were made. They further argue that it was unreasonable for the Board to have relied upon evidence to justify the Director's Decisions even though that evidence was not before the Director at the time of his decisions. Specifically, the Applicants point to evidence relating to water quality, water potability, and fluoride concentrations. The crux of the Applicants arguments seems to be that because the Director's Decisions, and letters relating to those decisions, did not refer to water quality, water potability, and fluoride concentrations, it was unreasonable for the Board to consider that evidence when assessing the reasonableness of the Director's Decisions in the appeal before it. This of course overlooks that this was all information the Director had in hand when the Director's Decisions were made, and that the

2025 ABKB 373 (CanLII)

Director's evidence before the Board was that this information was also considered and relied upon, though not explicitly stated in the written correspondence.

[81] Further, the Applicants argue that the Board did not accept the fact that the Well was disconnected from the Town's water supply and improperly relied upon the Director's evidence, acquired after the Director's Decisions were made, that the Well could be reconnected to the Town's water supply with little effort. This overlooks that the Board was entitled to rely upon subsequent evidence in assessing the Director's Decisions, as I have discussed.

[82] The Applicants argue that it was not reasonable for the Board to place the weight it did on the Director's evidence on these issues, and in doing so the Board failed to address the Applicants' submissions regarding the disconnection of the Well and the lack of use of the water from the Well for potable purposes for some time prior to the Director's Decisions and the appeal to the Board. They state "The Board would not have concluded to uphold the Director's decision if it accepted the facts before it. The ABEAB Decision is therefore unreasonable on the basis that the Board fundamentally misapprehended the evidence before it and failed to appropriately account for and consider the evidence before it."

[83] The Director, on the other hand, argues that this is just the Applicants attempting to re-argue the Appeal. The Director's position is that the Board, in the Recommendations, carefully considered all relevant evidence before it, assessed the arguments of the Applicants, and rejected them, which rejection was reasonable in all the circumstances.

Analysis

[84] With respect to the Applicants' position, after a thorough review of the Record and the Recommendations, I disagree. I agree with the Director that the Board reviewed all evidence on the Record, considered the submissions of the parties, made findings and conclusions that were within its legislated mandate and reasonable in all the circumstances.

[85] While I base my conclusion on this issue based upon a review of the record and the entirety of the reasons in the Recommendations, I note the Board:

(a) Considered not only all pertinent evidence and arguments put forward by the Applicants in this Judicial Review, but all arguments put forward by the Applicants generally before the Board, reviewing them thoroughly;

(b) In assessing the arguments put forward by the Applicants, reviewed the evidence and arguments put forward by the Town and the Director, which it summarized in detail and reviewed thoroughly as well;

(c) Made findings regarding the Director's evidence based upon the above timeline of facts I have recited, including the fact that at the time the Director's Decisions were made, the Director had been personally involved in the issues regarding water quality, water potability, and fluoride concentrations, and had been waiting for nearly a year for responses to his letters from the Applicants regarding these issues, to no avail;

(d) The Board also accepted the evidence of the Director that these circumstances also factored into the decision-making process in determining a concern for human health or public safety might occur if the Applicants used water from the Well in their hotel, which was not foreseeable at the time the License was granted.

2025 ABKB 373 (CanLII)

The Board accepted that this was so notwithstanding the fluoride concentration issue and AHS Results were not expressly mentioned in the Director's correspondence to the Applicants informing them of the Director's Decisions;

(e) Was entitled to, and did consider the evidence that while the Well was disconnected from the Town's water supply at the time the Director's Decisions were made, it nonetheless concluded based upon other evidence that the Well's systems remained intact and that with very little effort the Well could be reconnected to the Town water supply inside the Hotel; and

(f) Was entitled to and did consider the fact that the Applicants were relying upon their own non-responsiveness and the corresponding lack of evidence to challenge the Director's Decisions.

[86] This is not a case where the Recommendations are incomplete, contain logical leaps not made out on the evidence, or where key evidence is not assessed or considered on this issue. The Board did not rely upon irrelevant considerations or evidence as a make weight in reaching its conclusions. The Recommendations contain thorough, detailed reasons. The evidentiary record is carefully canvassed. The arguments of the parties (including all arguments raised in this Judicial Review by the Applicants as being ignored or otherwise not given weight by the Board) are weighed. Conclusions are reached. The Board did not overlook any material argument nor fact in reaching its conclusions on the issues raised by the Applicants.

[87] The Board reviewed the evidence and the arguments of the parties and rejected the position of the Applicants in relation to its arguments. There was adequate evidence to support the conclusions reached by the Board, which, based upon the standard of review from ***Vavilov*** I find to be reasonable, and as such there is no reviewable error on this ground advanced by the Applicants.

Did the Board Misinterpret the *Water Act* and Associated Regulations?

Position of the Parties

[88] The Applicants argue that the Board failed to properly articulate and apply the statutory test required for cancelling the License under section 55(1)(j) of the *Water Act*.

[89] They argue that in confirming that decision, the Board failed to consider the language in section 55(1)(j) (as they argue the Director did) that the risk must be of a significant adverse effect on human health or public safety <u>and</u> that the risk was not reasonably foreseeable at the time the License was issued. The Applicants impugn the Director's decision to cancel the License and the Board's review of that decision. Further, the Applicants assert that the Board failed to provide sufficient reasons and failed to adhere to the modern (or any) approach to statutory interpretation that is confirmed in ***Vavilov*** (at paras 117-118) in applying section 55(1)(j).

[90] The Applicants did not address the fact that the Board also relied upon elevated fluoride levels, a lack of reasonable foreseeability thereof, and the serious risk to human health or the environment posed thereby.

[91] On the other hand, the Director's arguments did not squarely address this issue in relation to overland flooding or tampering. The submissions of the Director were largely reliant upon the fact that elevated fluoride levels were not reasonably foreseeable at the time of issuance of the

2025 ABKB 373 (CanLII)

License, such that section 55(1)(j) was engaged, and that the Board's decision was reasonable in this regard.

Analysis

[92] While again I rely upon the full content of the Recommendations, it is worth noting that the Board found that:

(a) It was reasonable for the Director to rely in part on the information that was before the ASCC when the ASCC Order was issued regarding the risks posed should the Well not be properly sealed, as well as the risk of flooding, although the ASCC Order did not address the foreseeability issue;

(b) The License's purpose of "Hotel Water Supply" necessarily includes both potable and non-potable uses. The Well water is not potable based upon the evidence of fluoride content provided by the Director and accepted by the Board. Due to the Applicants failure to respond or comply with the Director's requests the extent of the issue was unknown;

(c) That the proposed other non-potable uses of the Well water by the Applicants was speculative and would require other regulatory applications and approvals;

(d) That the Applicant's history of lack of co-operation with AEP suggested a limited likelihood of the Applicants' willingness to bring the License into compliance;

(e) That in the absence of testing data showing otherwise, the Applicants insisted before the Board that the Well water was "good";

(f) That because the water was not potable the License could not be used for the purpose for which it was issued, due to fluoride content, as Hotel Water Supply requires that the water from the Well be potable due to both potable and non-potable uses falling under that specified purpose; and

(g) That due to this fact, as well as the risk of overland flooding and vandalism, the Well poses a risk of having an adverse effect on the environment, human health, or public safety, and as a result the Director's decision to issue the License Cancellation was reasonable.

[93] I do not agree with the Applicants that there was an insufficient evidentiary basis for the Board to find that the risk of overland flooding or vandalism, and the fluoride concentrations posed a risk of having an adverse effect on the environment, human health, or public safety. To the contrary, there was a more than sufficient evidentiary basis before the Board to permit it to reach these conclusions.

[94] I do however agree with the Applicants that the Board does not appear to have fully considered, nor give appropriate weight to the wording in section 55(1)(j) of the *Water Act* that requires the circumstances being relied upon to have been "not reasonably foreseeable at the time the licence was issued". It is unreasonable for the Board not to have considered this issue when initially the two main reasons relied upon by the Director in making the decision to cancel the License under section 55(1)(j) of the *Water Act* were overland flooding and risk of tampering, as set out in the ASCC Order. As the Applicants note, there was no evidence before the Board that the issues of flooding, tampering and other surrounding conditions had changed since the License was issued.

2025 ABKB 373 (CanLII)

2025 ABKB 373 (CanLII)

[95] What, if anything, does this do to the Board's conclusion in the Recommendations that it was reasonable for the Director to issue the License Cancellation? In the overall context of the Recommendations, it does not amount to reversible error requiring reconsideration or intervention. This is due to the Board's acceptance of the Director's evidence on potability (including the AHS Results), its analysis on the impact to the License and its purpose, and the ultimate conclusion that the fluoride concentration issues met the test under section 55(1)(j) in full.

[96] This reasoning, and the conclusions reached, were reasonable and gave full force and effect to the statutory wording. The elevated fluoride levels posed a risk of a significant adverse effect on human health or public safety. It was not reasonably foreseeable at the time the License was granted that fluoride exceedances in the water from the Well at some later date would pose such a risk. As a result, the decision of the Board to confirm the Director's Decisions including the License Cancellation was reasonable and fully within their statutory mandate and powers under the *EPEA*.

[97] Further, the Board's conclusion that the License could not be used for the purpose for which it was issued was also reasonable. The Board's interpretation of what "Hotel Water Supply" means was reasonable. It interpreted those words as meaning that the water from the Well had to be suitable for both potable and non-potable uses. This is a reasonable interpretation when placed in the context of the factual matrix of the case. While the Applicants argued otherwise, the reality is that to be suitable for hotel water supply, there must be potable water, which can be used for all potable and non-potable uses. The converse is not true – if the water is not potable, it cannot fulfil the purpose for which the license was granted, the use is far more limited and thus the purpose of the License was frustrated.

[98] In the result, there is no reversible error on this issue.

[99] Also, this issue cannot be reviewed in isolation. As I will discuss below, the Board's conclusions with respect to the declaration of the Well as a problem water well and the issuance of the WMO were reasonable.

Are the Recommendations or the Ministerial Order Otherwise Unreasonable?

Position of the Parties

[100] The Applicants argue, vaguely, that the Recommendations bear all the hallmarks of an unreasonable decision. In doing so, they reargue the points they had already raised.

[101] The Director argues that the Recommendations, overall, are reasonable, and that no reversible error arises on a careful review.

Analysis

[102] The Board accepted the Director's evidence on fluoride content and potability. It also accepted that while the Well was currently disconnected from the Town's water system, with minimal effort it could be restored. This, coupled with the Applicants' established history of non-engagement and lack of co-operation with AEP, as well as the issue of tampering and overland flooding, formed the basis for the Board's conclusion that the Director's decision to declare the Well a "problem water well" under section 97(1)(f) and engage section 99(1)(a)(xv) of the *Water Act* was a reasonable one.

[103] Reinforcing the Board's decision was its finding that the Well, in the circumstances, had no valid purpose as it could not be used for the purpose for which it had been issued as a "Hotel Water Supply".

[104] As a result, the Board found that the Director acted reasonably in declaring the Well to be a problem water well and issuing the WMO.

[105] In analysing the terms of the WMO, the Board reached the conclusion that for the purposes of ordering reclamation, there is not much difference between a water well that has no purpose and a water well that has been abandoned. The Board then went on to find that it was reasonable for the Director to order that the well be reclaimed to the requirements set out in section 66 of the WMR.

[106] The Board ultimately concluded that the cancellation of the License was appropriate, that the decision to issue the WMO was appropriate, and that the terms and conditions of the WMO were in principle, appropriate, with some slight modifications recommended that are not in issue in this judicial review.

[107] On an overall reading, the fact findings, reasoning, and analysis of the Board in the Recommendations is reasonable. The Applicants have failed to show there was any reversible error committed by the Board or the Minister. There is no reason for this court to interfere with the Recommendations, nor the Ministerial Order, nor send the matter back to the Board for any reconsideration.

Conclusion

[108] For all the reasons set out herein:

(a) The application to strike is granted and the Originating Application is dismissed for failure to serve the Town pursuant to Rule 3.15(3(c); and

(b) If I am wrong in my decision to strike the Originating Application, I nonetheless dismiss this application for Judicial Review on its merits, as there is no reviewable error that was committed by either the Board or the Minister.

[109] I thank all counsel for their able written and oral submissions.

2025 ABKB 373 (CanLII)

Costs

[110] The Applicants have not been successful. Neither the Board nor the Minister seek costs. The Director does. If the Parties are unable to agree on costs, they have leave to file, within 45 days of this Decision, 5 page written costs briefs (plus authorities) on dates as agreed between them and send copies directed to my attention, whereupon I will decide the issues of liability for, and quantum of, costs.

2025 ABKB 373 (CanLII)

Heard on the 13th day of May, 2025.
Dated at the City of Calgary, Alberta this 19th day of June, 2025.

D.J. Reed
J.C.K.B.A.

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