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The Environmental Appeal Board confirms Alberta Environment's decision to reject the application of municipality to obtain additional water from a well

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Cases Considered:

Municipality of Crowsnest Pass v. Director, Southern Region, Environmental Management, Alberta Environment (23 December 2009), Appeal No. 08-016-R (A.E.A.B.).

The Context

Crowsnest Pass is one of a number of communities in the South Saskatchewan River Basin (SSRB) (another is Okotoks) that face a difficult challenge in acquiring the rights to use additional sources of water to permit municipal expansion.

Such efforts became considerably more difficult for municipalities (and indeed all other potential water users in the basin) with the adoption of the South Saskatchewan Water Management Plan in August 2006. A key recommendation of the Plan was to close the South Saskatchewan Basin (except for the Red Deer) to further allocations under the *Water Act*, RSA 2000, c. W-3. The government gave effect to this part of the plan by adopting the Bow, Oldman and South Saskatchewan River Basin Water Allocation Order, Alta. Reg. 171/2007 (the "Order"). That Order "reserves" (see s.35 of the *Water Act*) all unallocated water to the Crown within the specified Basins. The reservation is framed to include "the water below the ground naturally flowing to" the identified watercourses. The Order permits the Director to issue licences out of the reservation: (1) to First Nations, (2) for water conservation objectives, (3) for storage "if it is for the protection of the aquatic environment and for improving the availability of water to existing licence holders and registrants", or (4) to persons who had filed completed applications with the Director before the Regulation was filed. There is no general exception for licences for municipal purposes.

The Decision

In this case the municipality applied for a licence to use water from a well drilled close to Crowsnest Lake. The Director rejected that application and the municipality appealed that decision to the Environmental Appeal Board (EAB or Board). In this case the Board agreed with the Director that the applicant had not been able to show, on the balance of probabilities, that

there was a barrier between the well and Crowsnest Lake. Absent such proof, Alberta Environment and the Board concluded that the water was water within the meaning of the Order and therefore that there was no authority to issue a licence. The parties all agreed in this case that the application did not fall within one of the exceptional categories listed in the Order (at para. 123).

The Board also made one important jurisdictional decision in the course of its overall decision. Alberta Environment had made the argument that the EAB had no jurisdiction to hear the appeal because the Director had not refused to issue the licence; he had instead refused to accept the application. In effect, Alberta Environment seemed to be arguing that an applicant must demonstrate, to the satisfaction of the Department, that the water in relation to which it is making an application is not reserved water within the meaning of the Order. Until then, the Director is entitled to treat the application as an incomplete application and decline to deal with it. The Board rejected that tendentious argument (at paras 117 – 118) on the basis that as a matter of fact the dealings between the applicant and the Department parties showed that the Director had started to consider the substance of the application. As such, the facts of this case could readily be distinguished from the Board's earlier decision in *Westridge Utilities Inc*. v. *Regional Director, Southern Region, Environmental Management, Alberta Environment* (22 October 2008), Appeal No. 07-146-D (A.E.A.B.) where the facts suggested that the applicant had never filed the necessary information to complete its application. Had that case proceeded (and a judicial review application of the Board decision was filed in December 2008 but has yet to be scheduled) the Director and perhaps the Board would ultimately have had to have decided if the Director had in front of him or her a completed application within the meaning of s.29 of the *Water Act* and therefore potentially an application that fell within exception # 4 (above) of the Order.

But this case was different. There was a complete application (but after the relevant date specified by the Order) and there was a rejection. The Board's decision places the onus firmly on an applicant for a licence within the SSRB to show that the "groundwater" that it proposes to tap into is not hydraulically connected to surface water within the basin. The Board put the point this way (at paras 126 – 128):

> A clear reading of the Allocation Order indicates to the Board that the intent of the legislators is to protect reserved water in the basin, and if any person wants a licence in the area, they must provide compelling evidence to show there will not be any impact to reserved water. In other words, more data collection would need to be undertaken to demonstrate there is no hydrological connection between the water in the Well and the reserved water. Standard data collection is not sufficient in the circumstance of this case. Additional testing would need to be completed, analyzed, and provided in order to create a clear delineation of the aquifer and the barrier the Appellant argued was present.
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> …..

> In other words, the data presented should be substantive, complete, and provide an obvious conclusion on the issue of a barrier between reserved water and water at the [well].

Later, the Board emphasised that the applicant could not succeed by showing that the aquifer was not supplied by the surface feature (at para 132); effectively the applicant must show that the aquifer is not making a contribution to surface flows i.e. the applicant must show that it is separated by some sort of natural geological barrier from the surface water features of the Basin.

If the onus was on the applicant what was the standard? The Supreme Court of Canada tells us in *F.H. v. McDougall*, [2008] 3 S.C.R. 41, 2008 SCC 53 (at para. 40) that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities" and this indeed is the standard that the Board applied here (e.g. at para 127 "preponderance of the evidence") notwithstanding the references to "compelling" at para. 126, and "clearly demonstrates" at para 133, and "not conclusive" at para. 137. Finally, the Board supported its decision by reference to the precautionary principle (at para. 146):

> In this particular case, the precautionary principle needs to apply. There is a significant amount of uncertainty regarding the aquifer and the barrier that might exist. Water is a valuable resource that needs to be protected and preserved, which is the reason the legislators enacted the Allocation Order. Since a great deal of uncertainty still exists regarding the aquifer and its properties, the Board considers it appropriate to recommend to the Minister that he confirm the Director's decision that the application is denied.

It is unclear whether the Board actually makes the precautionary principle do any work (or indeed which version of the principle it is applying) to help it reach its decision. After all, the Board had already put the onus on the applicant and had already reached the conclusion that the applicant had been unable to demonstrate that the proposed source was not hydraulically connected to surface waters; but perhaps the principle does help reinforce the argument that, in this sort of case, the applicant really does have to prove the negative.

This decision confirms that the rules of the game for water in southern Alberta really have changed. Unless a party can identify groundwater that is not hydraulically connected to surface water a party wanting water will need to acquire a source from an existing licensee. This means water rights trading and in this particular case it probably means an existing water right moving upstream, thereby creating possible third party and environmental effects. Water rights trading raises concerns for many parties (I have reviewed some of these issues in Bankes, "The legal framework in Alberta for acquiring water entitlements from existing users" (2006), 44 Alberta Law Review 323 – 376) but there is also the question of whether the market is sufficiently liquid to match potential buyers and sellers of water rights. The town of Okotoks for example has been unable to secure a source of water despite actively looking for such a source over an eighteen month period.

The functioning of the province's nascent water market is an issue that the provincial government is currently examining. The province received three advisory reports from various bodies in November 2009 and expects to engage in public consultation on these issues in spring of this year (2010). The three reports are as follows: the Report of the Minister's Advisory Group, *Recommendations for Improving Alberta's Water Management and Allocation*, dated August 2009 but not released until November 23, 2009, posted online at http://environment.gov.ab.ca/info/library/8239.pdf, the report of the Alberta Water Council, *Recommendations for Improving Alberta's Water Allocation Transfer System*, also dated August 2009 but not released until November and available online at http://www.albertawatercouncil.ca/Portals/0/pdfs/WATSUP_web_FINAL.pdf and the report of the Alberta Water Research Institute entitled, *Towards Sustainability: Phase 1, Ideas and Opportunities for Improving Water Allocation and Management in Alberta*, available online at http://www.waterinstitute.ca/pdf/summary_report_future.pdf.