Appeal No. 00-055-D

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – August 28, 2001

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

- and -

IN THE MATTER OF an appeal filed by Mr. Don Kadutski with respect to Approval No. 00082533-00-00/*Water Act*, issued by the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment, to Ranger Oil Limited for the exploration of groundwater at 19-055-06-W4M, 20-055-06-W4M, 29-055-06-W4M and 30-055-06-W4M near Elk Point, Alberta.

Cite as: *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment*, re: *Ranger Oil Limited.*

BEFORE William A. Tilleman, Q.C., Chairman.

PARTIES

Appellant:	Mr. Don Kadutski represented by Mr. Brian O'Ferrall, Q.C., Bennett Jones.
Director:	Mr. Patrick Marriott, Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment represented by Mr. Randy Didrikson, Alberta Justice.
Approval Holder:	Canadian Natural Resources Limited (successor to Ranger Oil Limited) represented by Mr. Brad Braun.

EXECUTIVE SUMMARY

Mr. Don Kadutski has appealed an Approval under the *Water Act* that was issued to Ranger Oil Limited. Ranger Oil Limited was subsequently taken over by Canadian Natural Resources Limited (CNRL). The Approval authorizes CNRL to explore for groundwater on Mr. Kadutski's land near Elk Point, Alberta.

It is apparent that the majority of the concerns that are raised by Mr. Kadutski relate to surface rights matters between him and CNRL. Further, in response to the appeal, CNRL has advised the Board that it no longer needs the wells developed pursuant to the Approval and as a result, CNRL will be abandoning them. Finally, legal counsel for Mr. Kadutski advises that the matter Mr. Kadutski is concerned about, and the wells developed pursuant to this Approval, were included in the hearing before the Energy and Utility Board (EUB) that was held in relation to CNRL's project and that Mr. Kadutski participated in that hearing.

As a result, the Board had determined that this appeal is not properly before the Board; it is moot or without merit; and that the matter has been previously dealt with by the EUB. The Board therefore dismisses the appeal and closes its file.

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I. BACKGROUND

[1] On July 4, 2000, Approval No. 00082533-00-00 was issued under the *Water Act*, S.A. 1996, c.W-3.5, to Ranger Oil Limited (the "Approval Holder"), by the Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment (the "Director"). The Approval authorizes the Approval Holder to explore for groundwater at 19-055-06-W4M, 20-055-06-W4M, 29-055-06-W4M and 30-055-06-W4M near Elk Point, Alberta.

[2] On July 28, 2000, the Environmental Appeal Board (the "Board") received a Notice of Appeal from Mr. Don Kadutski (the "Appellant"), objecting to the Approval.[1]

[3] On August 4, 2000, the Board acknowledged receipt of the Notice of Appeal and requested a copy of the records related to the appeal (the "Records") from the Director. On that same date, the Board also notified the Approval Holder of the appeal.

[4] According to standard practice the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board (the "EUB") asking whether this

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[1] In his Notice of Appeal, the Appellant indicates that he wants the Board to "…cancel [the] approval until *full consultation and negotiations have taken place* by landowner and industry (Ranger/successor)." (Emphasis added.) Further, he indicated that his grounds of appeal were:

> "1. *landowners consent* was not given for change of activity on NW 29-55-6,
>
> 2. *surface lease agreement amendment* was not honored, nor was it reviewed when requested by landowner…,
>
> 3. set back distances from other activities *were not discussed*, e.g. storage tanks, collection ponds, fences, etc.,
>
> 4. was *assured that no activity* would take place on NW 29-55-6,
>
> 5. no assurance that landowner would be *absolved from all liabilities* from the activity,
>
> 6. other possible sources of contamination *were not addressed*,
>
> 7. *no assurance* to landowner that current water works be protected and replaced,
>
> 8. any other matters arising from the activities *would be satisfactorily addressed* by industry." (Emphasis added.)

In a letter dated June 17, 2000, and attached to the Notice of Appeal, the Appellant indicates:

> "I would like to bring to your attention in the way that Ranger Oil has communicated this activity. I was assured by Mr. Carson that <u>no</u> activity would take place on NW 29-55-6-4. *My surface lease agreement states that I would get a review in 1997. This lease was with Amoco which was assigned to Ehan Energy and then Ranger Oil. A notice of review was sent to Ranger Oil. An amendment to this lease in 1993 states that any additional wells on this lease would require further negotiations. This has been brought to the attention of … Ranger's Land Dept. as of June*

matter had been the subject to a hearing or review under their respective legislation. Both replied in the negative. Subsequent to this, the Board was informed by the Appellant's legal counsel that this matter had in fact been the subject of a hearing before the EUB.[2] The Approval authorizes the exploration for groundwater in relation to the Elk Point Project. The Elk Point Project was the subject of a hearing by EUB, and according to the Appellant's legal counsel, certain representations were made regarding the use of groundwater at this hearing.

[5] On August 24, 2000, the Board received the Records from the Director, and subsequently forwarded a copy to the Appellant and the Approval Holder. The Board, in its letters to the parties, on August 30, 2000, also requested the parties provide available dates for a mediation meeting/settlement conference.

[6] The Board received a letter from the Appellant on September 12, 2000, advising that he had a meeting scheduled with Canadian Natural Resources Limited ("CNRL") and the Director's staff. The Appellant advised that CNRL was the successor to Ranger Oil Limited and therefore CNRL was now the Approval Holder. The Appellant further advised that he would be available for a mediation meeting/settlement conference in October 2000 in the event that the matters were not resolved as a result of this meeting.

[7] The Board acknowledged the Appellant's letter on September 13, 2000, and granted an abeyance until September 29, 2000, with status reports due at that time.

[8] On September 13, 2000, the Board received a letter from the Director agreeing to mediation. The September 13, 2000 letter stated:

> "…the Board may wish to consider issues regarding *access by Ranger Oil onto the Appellant's land*, and the present status regarding proper abandonment of any wells that may have been drilled by Ranger Oil Limited on the Appellant's land." (Emphasis added.)

The Director also advised that Ranger Oil Limited had been taken over by CNRL.

16, 2000. I am still waiting a response from Ranger Oil. I ask the Environmental Appeal Board to cancel the above approval until these issues are resolved." (Emphasis added.)

[2] Letter dated October 26, 2000, from the Appellant's legal counsel to the Board.

[9] On September 29, 2000, the Board received a status report from the Director.[3]

[10] The Board received a status report from the Appellant on October 10, 2000.[4]

[11] On October 11, 2000, the Board received a letter from the Director.[5]

[12] On October 26, 2000, letters were received from the Approval Holder and from legal counsel for the Appellant. The Approval Holder advised that they were to review the surface lease documents and correspondence and meet with the Appellant to update and further review the issues. The letter from the Appellant's legal counsel stated:

> "Our view is that while we recognize that AENV [Alberta Environment] is responsible for administering the *Water Act*, *there is a bigger issue here and that has to do with whether CNRL or its predecessors have complied with the EUB's approval of its commercial oil sands project* (the Elk Point Project) in the Lindbergh Sector of the Cold Lake Oil Sands Deposits pursuant to Section 10 of the *Oil Sands Conservation Act*. Pursuant to the EUB approval, Amoco (now CNRL) drilled scores of wells and constructed a cyclic steam and steam-flood stimulation project, including a central processing facility on the quarter section adjacent to the Kadutski's home quarter…." (Emphasis added.)

The Appellant's legal counsel went on to request the Board hold the appeal in further abeyance pending a review by the EUB of CNRL's operations in connection with its Elk Point Project.

[13] The Board granted an abeyance of the appeal on October 27, 2000, and requested the parties provide status reports to the Board by November 15, 2000.

[14] On November 15, 2000, the Board received a status report from the Approval Holder stating:

> "…CNRL has completed its review of the subject wells which were drilled by Ranger. *CNRL has determined that the wells are not required for either*

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[3] The Director advised that the meeting with the Appellant and the Approval Holder had been rescheduled to October 2, 2000. The Director requested a further abeyance until the meeting could take place. The Board granted the abeyance, requesting the parties provide status reports to the Board by October 10, 2000.

[4] The Appellant advised that CNRL was to respond to him as to their position within 2 weeks of the meeting on October 2, 2000. The Board acknowledged the Appellant's letter and extended the time for filing status reports to October 16, 2000.

[5] The Director advised that the parties had "…failed to reach an agreement…" at the meeting on October 2, 2000, and that the Director was prepared to proceed with the appeal. The Board acknowledged the Director's letter and requested the Approval Holder and Appellant provide their comments with respect to the Director's letter by October 16, 2000.

> *remediation purposes or for any other function. As such, CNRL will be abandoning the wells by the end of the year. The wells will remain locked and capped and will not be used for any type of water withdrawal*. Upon completion of the abandonment of these wells, CNRL will request that AENV cancel the Water Act Approval No. 00082533-00-00.…" (Emphasis added.)

[15] On November 27, 2000, the Director wrote to the Board supporting the Appellant's request to hold the appeal in abeyance pending the outcome of the review by the EUB.

[16] At the request of the Appellant, the Board granted a further abeyance of the appeal until April 2, 2001.

[17] On April 2, 2001, the Board received a status report from the Director. The Director advised that the Approval in question was not presently being acted upon and that "…*it is not anticipated that any future work will likely occur under that Approval.*" (Emphasis added.) The Director questioned whether there was any practical reason to continue with the appeal.

[18] On April 6, 2001, the Board received a status report from the Approval Holder, concurring with the Director's letter of April 2, 2001.

[19] The Board responded to the status reports on April 19, 2001 as follows:

> "The Board notes that Mr. Didrikson, in his letter dated April 2, 2001, indicates that *the water wells which are the subject of Water Act Approval 00082533-00-00 will be abandoned* and, according to Mr. Braun in his April 6, 2001 letter, '… *will not be used for any type of water withdrawal*.' In addition, Mr. Didrikson states '[t]herefore the Department must question whether there is any practical reason to continue with this Appeal.'
>
> On April 5, 2001, Mr. Kadutski contacted the Board to indicate that he had received Mr. Didrikson's letter and was unsure what the next steps were with regard to his appeal. In terms of the Board's jurisdiction, *Mr. Kadutski was informed that unless there was a valid Approval in front of the Board, his appeal may be rendered moot*." (Emphasis added.)

The Board requested the Director advise if the Approval had been transferred to CNRL and if he had cancelled the Approval or received a request from the Approval Holder to cancel the Approval.

[20] By letter of April 27, 2001, the Director advised that the Approval had been transferred to CNRL, but that no requests to cancel the Approval had been received.

[21] On May 3, 2001, the Board received a letter from counsel for the Appellant, stating:

> "On the basis that these *water wells will be properly abandoned, will not be used for any type of water withdrawal* by CNRL, its successors and assigns, and that the approval therefore will expire July 3, 2001, *we do not believe that Mr. Kadutski wishes to have his appeal heard* … we would ask the Director [to] satisfy himself that the subject wells were properly drilled and cased and ensure that they are properly abandoned and that he report to Mr. Kadutski how these wells were drilled, case [sic] and abandoned after he has so satisfied himself…by copy of this letter to Mr. Kadutski, we are asking him to confirm to the Environmental Appeal Board that he does not wish to have his appeal heard." (Emphasis added.)

[22] The Board acknowledged the letter of May 3, 2001, and requested the Director provide a report as to whether or not the wells in question were properly drilled and cased and to ensure that they are properly abandoned.

[23] The Director responded to the Board on May 16, 2001, advising that the reclamations had not been completed and that he had not received a drilling report from CNRL. The Director also advised:

> "Mr. George contacted Mr. Brad Braun of CNRL who advised that *the wells will be reclaimed within one or two months according to CNRL's present work schedule*. As well, CNRL will then proceed with reclamation of the third well, which is on Mr. Kadutski's land, when permission to enter the site is granted by Mr. Kadutski….
>
> Mr. George…is satisfied that that the wells were properly drilled and cased including the installation of effective bentonite seals outside the casing of the wells...is satisfied that proper and effective reclamation of these wells is technically feasible." (Emphasis added.)

[24] On May 28, 2001, the Board acknowledged the Director's letter and requested the Appellant advise how he wished to proceed with the appeal.

[25] On June 4, 2001 the Board received a letter from the Appellant, stating:

> "How can an appeal be had to an application or an approval for application when *the activity took place* And [sic] was completed prior to approval being issued and landowner consent being given.
>
> Would this not be *a violation of the Surface Rights Act* Section 12(1)(a)(b)(c)(d)(e) and Water Act Section 36(1) 30(4) and the *landowner contractual agreement* part of which I forwarded to your office? …

> It is my view that not only are the current regulations being broke but also the current approvals that Are [sic] in effect, that is the Amoco Phase 1&2 of the entire progect [sic] area since 1984 under the EUB.and [sic] AEP clean air and water approval which all are under CNRL now. …
>
> In closing I leave the decision up to AEP on should there be an appeal review administrative penalties etc. etc." (Emphasis added.)

[26] On June 6, 2001, the Board acknowledged the Appellant's letter and advised that further correspondence would be forthcoming.

II. ISSUE

[27] The issue before the Board is whether to dismiss the Notice of Appeal in light of information before the it on the basis that the Notice of Appeal is not properly before the Board, is either moot or without merit, or that the forum for the concerns raised by the Appellant is the EUB.

III. ANALYSIS

[28] The Board is of the view that this appeal is not properly before the Board; it is moot or without merit; and that the proper forum for this matter is the EUB.

A. NOT PROPERLY BEFORE THE BOARD

[29] Section 87(2) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the "Act") provides that prior "…to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal…." Further, section 87(5)(a)(i.2) of the Act provides that the Board "…may dismiss a notice of appeal if … for any other reason the Board considers that the notice of appeal is not properly before it…."

[30] The Notice of Appeal indicates that the Appellant has concerns with the Approval Holder's water well drilling program and raises concerns about possible contamination and the location of the proposed diversion.[6]

[31] However, it is clear that the Appellant's primary concern is the lack of discussions that preceded the water well drilling program. In the Notice of Appeal, the Appellant specifically identifies the issue of the lack of negotiations preceding the water exploration program as a main concern. Further, in the letter attached to the Notice of Appeal, dated June 17, 2000, the Appellant indicates that his concerns included:

1. lack of landowner consent to a change of activity;
2. that amendments to the surface lease were not honoured (review of lease arrangement and negotiation respecting other wells);
3. certain design issues were not discussed (setbacks, where activity would take place, other possible sources of contamination, and protection/replacement of water works); and
4. certain contractual terms were not discussed (limiting of liability and addressing other matters arising from the activity).

In addition, the Appellant writes that these issues have "…been brought to the attention of … Ranger's Land Dept. as of June 16, 2000. I am still awaiting a response from Ranger Oil. *I ask the Environmental Appeal Board to cancel the above approval until these issues are resolved.*" (Emphasis added.) All of these concerns are, in substance, surface rights issues and are therefore beyond the jurisdictional remedies of this Board.

[32] The fact that the Appellant's principle concerns are surface rights issues was also acknowledged by the Director when the Board asked the parties about mediation. On September 13, 2000, the Director wrote to the Board and stated that "…the Board may wish to consider issues regarding *access by Ranger Oil onto the Appellant's land*…." (Emphasis added.)

[33] Further, in the Appellant's last letter to the Board, dated June 4, 2001, he again states his concerns as being that no consent was obtained before the wells were drilled, that surface lease amendments were not honoured, and that the activity violated sections 12(a) to (e)

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6 Notice of Appeal, Section III.

of the *Surface Rights Act*, S.A. 1983, c. S-27.1.[7] The Appellant specifically asks: "Would this not be a violation of the Surface Rights Act Section 12(1)(a)(b)(c)(d)(e) … and the landowner contractual agreement part of which I forwarded to your office?" Again, these surface right issues are clearly beyond the jurisdiction of the Environmental Appeal Board. The Surface Rights Board is the proper forum for raising issues under the *Surface Rights Act* because it is empowered to grant operators access across private lands and resolve disputes arising between owners of surface interests and owners of mineral interests.[8]

[34] In short, the Appellant's real concerns are surface rights issues – they were surface rights issues when the appeal was filed and they were surface rights issues when the Appellant wrote his June 4, 2001 letter. The Board does not have the jurisdiction to deal with surface rights issues, and therefore the appeal should be dismissed in accordance with section 87(5)(a)(i.2) of the Act.

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7 Section 12(a) to (e) of the *Surface Rights Act* provides:

"12(1) No operator has a right of entry in respect of the surface of any land

(a) for the removal of minerals contained in or underlying the surface of that land or for or incidental to any mining or drilling operations,

(b) for the construction of tanks, stations and structures for or in connection with a mining or drilling operation, or the production of minerals, or for or incidental to the operation of those tanks, stations and structures,

(c) for or incidental to the construction, operation or removal of a pipeline,

(d) for or incidental to the construction, operation or removal of a power transmission line, or

(e) for or incidental to the construction, operation or removal of a telephone line,

until the operator has obtained the consent of the owner and the occupant of the surface of the land or has become entitled to right of entry by reason of an order of the Board pursuant to this Act."

8 See, for example, section 33(1) of the *Surface Rights Act*, which provides that:

"33(1) Subject to subsections (2) to (4), the Board may hold a hearing and make an order with respect to a dispute between the operator and an owner or occupant who are parties to a surface lease or the operator and an owner or occupant under a right of entry order as to the amount of compensation payable by the operator

(a) for damage caused by or arising out of the operations of the operator to any land of the owner or occupant other than the area granted to the operator,

(b) for any loss or damage to livestock or other personal property of the owner or occupant arising out of the operations of the operator whether or not the land on which the loss or damage occurred is subject to the surface lease or right of entry order, or

(c) for time spent or expense incurred by an owner or occupant in recovering any of his livestock that have strayed due to an act or omission of the operator whether or not the act or omission occurred on the land that is subject to the surface lease or right of entry order."

B. MOOT OR WITHOUT MERIT

[35] The Board is also empowered to dismiss an appeal because it is moot or without merit.[9]

[36] An appeal is moot when an appellant requests a remedy that the Board can not possibly grant because it is impossible, not practical, or would have no real effect. As stated by the Board in *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resources Service, Alberta Environment*:

> "By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants' concerns because the issue found within the Approval appealed from is now abstract or hypothetical."[10]

[37] The remedy requested by the Appellant in his Notice of Appeal "…cancel the above approval until the above issues [- the Appellant's surface rights concerns -] are resolved."[11] Further, in the Appellant's letter of June 4, 2001, concerns are raised over potential violations of the *Water (Ministerial) Regulations*,[12] potential violation of the Approval, and potential administrative penalties. These concerns are rendered moot by the representations of the Appellant's counsel and the Approval Holder.

[38] On May 3, 2001, the Appellant's legal counsel indicated that the Appellant does not wish his appeal to be heard. The Appellant's legal counsel indicates that the basis for this

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9 Section 87(5)(a) provides:

"The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit,…

(i.2) for any other reason the Board considers that the notice of appeal is not properly before it…."

10 *Butte Action Committee and Town of Eckville* v. *Manager, Regional Support, Parkland Region, Natural Resources Service, Alberta Environment*, re: *Crestar Energy* (January 9, 2001), E.A.B. Appeal Nos. 00-029 and 00-060-D at paragraph 28.

11 On November 15, 2000, the Approval Holder indicated that it "… had determined that the wells are not required for either remediation purposes or for any other function." The Approval Holder went on to state that the "…wells will remain locked and capped and will not be used for any type of water withdrawal." The Approval Holder concluded that it intended to abandon the wells and have *Water Act* Approval 00082533-00-00 cancelled. This position was confirmed by the Director on April 2, 2001, when he indicated that the Approval was not being acted upon and that "…it is not anticipated that any future work will likely occur under the Approval." The Approval Holder also reconfirmed this information on April 6, 2001.

position is that the Approval Holder has no further use of the wells, that the wells will be properly abandoned, and that the Approval would expire by July 3, 2001. The Appellant's legal counsel indicates that he will ask his client to confirm that the appeal should be withdrawn.[13]

[39] Further, on May 16, 2001, the Director advised that the Approval Holder had indicated to his staff that "…the wells will be reclaimed within one or two months according to CNRL's present work schedule."

[40] In response to his legal counsel's letter, the Appellant's June 4, 2001 letter closes with the statement that he will "…leave the decision up to the AEP on should there be an appeal…."

[41] As the Approval Holder has indicated its willingness to abandon the wells and allow the Approval to expire, there is no practical way for the Board to grant the relief the Appellant seeks. In his Notice of Appeal, the Appellant indicates that the relief sought is cancellation of the Approval until proper negotiations have occurred. This can not practically occur and as such, the issue is moot and cannot be decided by the Board. Therefore, the appeal should be dismissed.

C. PROPER FORUM

[42] The Act provides in section 87(5)(b)(i) that:

> "The Board … shall dismiss a notice of appeal if in the Board's opinion … the person submitting the notice of appeal received notice of or participated in or had the opportunity to participate in one or more hearings or reviews under … any Act administered by the Energy Resources Conservation Board at which all of the mattes included in the notice of appeal were adequately dealt with…."

[43] The Appellant's Notice of Appeal raises concerns over a water diversion, however, it appears to the Board that this diversion of water was contemplated in the initial

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12 A.R. 205/98.

13 Letter dated May 3, 2001, from the Appellant's legal counsel to the Board.

Energy Conservation Review Board (now EUB) approval for the Elk Point Project, a commercial oil sands.[14]

[44] In the October 26, 2000, letter from legal counsel for the Appellant, the Board was advised that:

> "At the original hearing of Amoco's [(the Approval Holders predecessor)] application, both the Kadutskis and the Elk Point Surface Rights Association called for a prohibition of the use of groundwater for any of Amoco's proposed activities with the exception of domestic water needs for a field office. Amoco responded by committing to restrict its use of groundwater to supplying [sic] its office needs. Water for other purposes would come, via pipeline, from the North Saskatchewan River. The Board, [(the EUB)] in granting Amoco an [EUB] approval, expressly relied on the commitments of Amoco with respect to groundwater usage. On the face of it, the above-captioned *Water Act* approval appears to violate Amoco's commitment and the basis for the EUB's approval."

[45] Further, the letter goes on to state that:

> "Also, at the original EUB hearing, the Kadutskis and the Elk Point Surface Rights Association expressed concerns about possible contamination of groundwater as a result of drilling, inadequate surface casings setting depths, inadequate cementing of production casings and water disposal operations. …
>
> This would appear to be a larger issue than the validity or otherwise of an isolated approval under the new *Water Act*."

[46] It is the Board's view that the EUB is the proper forum to address the Appellant's concerns. As groundwater usage was contemplated within the original EUB approval process, and commitments made by the original Approval Holder regarding groundwater usage and contamination, then any subsequent problems are properly before the EUB, not this Board. Further, as indicated, the *Act* provides that this Board shall dismiss appeals where a person participated, or had opportunity to participate in EUB hearings or review. As is evident in the letter from the Appellant's legal counsel to the EUB, there were hearings on these matters when the predecessor, Amoco, applied for its original approval and the Appellant participated in this hearing. As a result, section 87(5)(b)(i) requires that the appeal be dismissed.

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[14] Letter dated October 26, 2000, from the Appellant's legal counsel to the Board.

IV. DECISION

[47] The Board is of the view that this appeal is not properly before the Board; it is moot or without merit; and that the proper forum for this matter is the EUB. The appeal should be dismissed for each of these concerns on their own. Therefore, the Board dismisses the appeal, and will close its file in this matter.

Dated on August 28, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C.