ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – December 21, 2004

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Gleneagles Investments Ltd. and Louson Investments Ltd. with respect to *Environmental Protection and Enhancement Act* Amending Approval No. 00149007-00-01 issued to AES Calgary ULC by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: *Gleneagles Investments Ltd. and Louson Investments Ltd.* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *AES Calgary ULC* (21 December 2004), Appeal No. 03-156-D (A.E.A.B.).

BEFORE: Dr. Frederick C. Fisher, Q.C., Chair.

PARTIES:

Appellants:	Gleneagles Investments Ltd. and Louson Investments Ltd., represented by Mr. Brian O'Ferrall, Q.C., McLennan Ross LLP.
Approval Holder:	AES Calgary ULC, represented by Mr. Scott Gardner, Project Director, AES Calgary ULC.
Director:	Mr. Alan Pentney, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Erika Gerlock, Alberta Justice.

EXECUTIVE SUMMARY

Alberta Environment issued an Amending Approval to AES Calgary ULC for an extension of time for the construction of the AES Calgary Thermal Electric Power Plant.

The Environmental Appeals Board received a Notice of Appeal from Gleneagles Investments Ltd. and Louson Investments Ltd. appealing the Amending Approval.

The Board scheduled a Hearing of the appeal via written submissions. However, prior to the commencement of the Hearing, Alberta Environment cancelled the Amending Approval at the request of AES Calgary ULC.

Therefore, the Board dismissed the appeal for being moot.

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I. BACKGROUND

[1] On December 23, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Amending Approval No. 00149007-00-01 (the "Amending Approval") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA" or the "Act"), to AES Calgary ULC (the "Approval Holder"). The Amending Approval authorized an extension of time for the construction of the AES Calgary Thermal Electric Power Plant until December 31, 2004. The Amending Approval also allowed the Approval Holder to apply for a further extension if construction had not been completed by December 31, 2004.

[2] On February 6, 2004, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Gleneagles Investments Ltd. and Louson Investments Ltd. (the "Appellants") appealing the Amending Approval.

[3] On February 9, 2004, the Board wrote to the Appellants, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal, and asked the Parties to provide their available dates for a mediation meeting or hearing.

[4] According to standard practice, the Board wrote to the Natural Resources Conservation Board (the "NRCB") and the Alberta Energy and Utilities Board (the "AEUB") asking whether this matter had been the subject of a hearing or review under their respective legislation. The NRCB responded in the negative.

[5] On February 23, 2004, the Board received a copy of the Record from the Director, and on February 24, 2004, it forwarded a copy to the Appellants and the Approval Holder.

[6] On March 4, 2004, the Board received a letter from the AEUB, stating:

> "…I can advise that a public hearing was held…into an application by AES Calgary ULC (AES) to construct a 525 MW power plant on the southwest quarter of Section 5, Township 24, Range 28, west of the 4th Meridian. In Decision 2001-101…the Board approved AES's application with a number of conditions…. No

> approval has been issued to AES, as not all conditions have been met. I can also advise that Gleneagles Investments Ltd. and Louson Investments Ltd. participated in the Board's hearing into AES's application…."

[7] On March 11, 2004, the Board wrote to the Parties, attaching the March 2, 2004 letter from the AEUB, and requesting the Parties to provide their comments to the Board as to whether section 95(5)(b)(i) of EPEA applied in this case.[1]

[8] Based on the information provided by the AEUB and the comments from the Parties, the Board determined that section 95(5)(b)(i) of the Act did not apply in this case, as the extension of time for the construction of the AES Calgary ULC Thermal Electric Power Plant was not considered by the AEUB in its review.

[9] On March 29, 2004, the Board wrote to the parties advising the Hearing would proceed via an agreed statement of facts and written submissions. The Board provided the Parties with the schedule for submitting the agreed statement of facts and the written submissions.

[10] According to standard practice, the Board placed a Notice of Public Hearing in the Calgary Sun, the Crossfield-Irricana Five Village Weekly, and the Calgary Herald advertising the Hearing and advising that any person who wished to make a representation before the Board on this appeal must submit a request in writing to the Board on or before April 23, 2004. The Board subsequently received requests for intervention from the Municipal District of Rocky View No. 44 and Mr. Joseph and Ms. Cecelia Bleile (collectively the "Intervenors").

[11] Upon review of the Intervenors' requests, the Board allowed them to participate in the Hearing via written submission. The Intervenors were advised that each would be permitted to provide a written submission to the Board.

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[1] Section 95(5)(b)(i) of the Act states:

"The Board …

> (b) 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 matters included in the notice of appeal were adequately dealt with."

[12] Prior to the due date for written submissions for the Hearing, the Board received a letter dated May 14, 2004, from the Approval Holder, advising that it had requested the Director cancel the Amending Approval. The Approval Holder's May 14, 2004 letter stated:

> "...AES Calgary has determined that further investment in the Project cannot be justified either now or within the foreseeable future. As a result, AES Calgary will not be proceeding with any further development of the Project. In a separate letter, AES Calgary has notified Alberta Environment of its decision and has requested that Approval No. 149007-00-00 be rescinded…."

[13] On May 21, 2004, the Board received a letter from the Director confirming that the Amending Approval had been rescinded, and on May 27, 2004, the Board wrote to the Parties and the Intervenors stating:

> "…As the Amending Approval, which was the subject of this appeal, has been cancelled, it appears to the Board that this appeal is now moot. The Board therefore intends to close its file in this matter. If any of the parties to this appeal have any objections they are requested to advise the Board in writing by June 4, 2004…."

[14] The Board did not receive any objections, and the Parties were notified on June 8, 2004, that:

> "Since the Amending Approval, which is the subject of this appeal has been cancelled, and as the Board has not received any objections to the dismissal of the appeal, please be advised that the appeal in this matter is therefore dismissed and the Board will be closing its file. Given that the appeal is dismissed, this will confirm that the Hearing via written submissions is cancelled. The Board's written reasons will be provided in due course."

These are the Board's reasons.

II. ANALYSIS

1. Judicial Analyses of Mootness

[15] The Courts have extensively analyzed the issue of mootness. In the leading case, *Borowski* v. *Canada (Attorney General*) *(No. 2)*,[2] the Court stated that "…if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be

moot."[3] In *Borowski* the Court stated that it may decline to decide a case which raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028, the Alberta Court of Appeal stated, "…an appellate court cannot order a remedy which could have no effect."[4]

[16] The Supreme Court of Canada has identified a two-step process in assessing if a moot issue should be heard. The first step is to determine whether the tangible and concrete dispute has disappeared and the issue is now legally or factually moot, thus making the issue academic. If the answer is yes, then it is necessary to determine if the court should exercise its discretion to hear the case. The Court stated that a case is moot when it fails to meet the "live controversy" test. For example, the Court in *Borowski* stated the matter was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.[5]

[17] In *Borowski*, the Court set out a process to determine when, even though the issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical effect on the rights of the parties); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[18] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, also referred to as judicial economy, the Court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

1. where the outcome of the case will have a practical effect on the rights of the parties;

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2 *Borowski* v. *Canada (Attorney General*) *(No. 2)*, [1989] 1 S.C.R. 342 ("*Borowski*").

3 *Borowski* v. *Canada (Attorney General*) *(No. 2)*, [1989] 1 S.C.R. 342 at paragraph 15.

4 *Resurgence Asset Management LLC* v. *Canadian Airlines Corp*., [2000] A.J. No. 1028 at paragraph 30.

5 *Borowski* was asking the court to declare section 251 of the Criminal Code of Canada invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

2. where the circumstances giving rise to the case are of a recurring nature but brief duration, thus rendering a challenge inherently susceptible to becoming moot; and

3. where the case raises an issue of public importance where a resolution is in the public interest.

Not all three situations have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

[19] The third step is for the decision-maker to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

2. The Board's Analysis of Mootness

[20] Section 95(5)(a) of EPEA states:

> "The Board
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> (a) may dismiss a notice of appeal if
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> (i) it considers the notice of appeal to be frivolous or vexatious or without merit …
>
> (iii) for any other reason the Board considers that the notice of appeal is not properly before it …."

[21] The Board has considered when an issue is moot in previous decisions. For example, in the *Butte Action Committee*,[6] the Board stated:

> "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."[7]

[22] The moot issue was also discussed in *Kadutski*,[8] where the Board stated:

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

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

[8] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

> "An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect."[9]

3. Application to These Appeals

[23] None of the Parties to this appeal objected to the Board's determination that the appeal is now moot. The Approval Holder filed a request with the Director to rescind the Amending Approval, and the Director agreed to cancel it. There is no longer an Amending Approval in place, and should the Approval Holder decide to commence development of the project, it would have to resubmit an application for an amendment. It would then be up to the Director to decide if the amendment should be granted and under what conditions. This would start a new appeal process that the Appellants, and anyone directly affected, could participate in, should they decide to do so.

[24] In their Notice of Appeal, the Appellants did not state any form of desired relief, except that "…no extension should have been granted to AES Calgary ULC without having heard from directly and adversely affected parties … including our clients."

[25] In this case, the Amending Approval has been rescinded and therefore, the Director's previous decision to allow the amendment without consulting affected persons is no longer of any consequence. The Board does recommend to the Director that, should the Approval Holder submit another application regarding the Approval, the Appellants should be notified. He is aware the Appellants have concerns with the project, and therefore, any changes to the Approval need to be conveyed to those persons who might be affected by the decision.

[26] The Board's jurisdiction is to recommend to the Minister to confirm, reverse, or vary the decision of the Director.[10] In this instance, the only decision that still exists is the Director's decision to accept the withdrawal of the application and cancel the Amending

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[9] *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment* re: *Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

[10] Section 98(2) of EPEA provides:

> "In its decision, the Board may
>
> (a) confirm, reverse or vary the decision appealed and make any decision that the Director whose decision was appealed could make, and
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> (b) make any further order the Board considers necessary for the purposes of carrying out the

Approval. The Board does not have the authority to reverse something that does not exist. The Director's cancellation of the Amending Approval has essentially achieved the results sought by the Appellants. The Approval Holder cannot commence its project until an amendment is made to the existing Approval for an extension of time.

[27] The issue before the Board is factually moot – circumstances have changed in that the application being appealed has been withdrawn and, essentially, no longer exists. (When assessing the appeal based on the second step as pronounced by the Courts, the Board does not find any grounds on which to hear the appeal.)

[28] In the present case before the Board, there are no other issues that remain outstanding, even though the Parties would, in all probability, argue their positions vigorously. If the Hearing was held, the outcome would have no practical effect on the Parties. The Approval Holder has chosen not to proceed with the project at this time, so whether or not it has the Amending Approval is irrelevant to the Approval Holder. The Appellants were concerned about the Director's failure to hear from directly and adversely affected persons. However, once the application was withdrawn and the Amending Approval cancelled, there is no available remedy for the Appellants' concerns. Nor does this Board have jurisdiction.

[29] Judicial economy also questions whether it is fair to have the Approval Holder be involved in an appeal of a matter that has no reasonable remedy. As the Appellants requested no specific remedy, and it appeared their concerns were more directly related to the actions of the Director than to the Amending Approval itself, the Board would be limited in its recommendations. The Approval Holder withdrew its application, significantly limiting expenses for all Parties concerned, and there does not appear to be a public interest element to justify continuing the Hearing.

[30] The decisions in a case such as this are very fact specific, and even if the Board was to make a determination in this case, it would provide little guidance for future appeals. In most cases before the Board, the issue remains viable for a considerable length of time, and there is sufficient time to conduct a hearing without the issue becoming moot.

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decision."

[31] Therefore, even though the Board recognizes there are cases when a moot issue may be heard, the circumstances in *this* case do not warrant the Board hearing the appeal, and as a result, the Board dismisses the appeal as being moot.

[32] The Board notes the Approval Holder requested the Director rescind Approval No. 149007-00-00. However, according to the Director's May 21, 2004 letter to the Approval Holder, the Director cancelled only the Approval. Therefore, it appears the original approval still exists. The Board is uncertain of the effect of this, and the Director might consider looking into the matter to determine if he accomplished what he intended. The Approval Holder cannot proceed with the project without an amendment to the original approval in any case.

III. CONCLUSION

[33] The Board hereby exercises its discretion under section 95(5)(a) of the *Environmental Protection and Enhancement Act* and dismisses the Notice of Appeal filed by the Appellants, as the appeal is either moot, not properly before the Board or without merit. Regardless, once an approval is cancelled, the Board's jurisdiction ceases. The Board closes its file.

Dated on December 21, 2004, at Edmonton, Alberta.

"*original signed by*"

Dr. Frederick C. Fisher, Q.C.
Chair