

# ALBERTA PUBLIC LANDS APPEAL BOARD

## Decision

Date of Decision – April 25, 2018

**IN THE MATTER OF** section 123 of the *Public Lands Act*, R.S.A. 2000, c. P-40; and sections 211, 216, and 217 of the *Public Lands Administration Regulation*, A.R. 187/2011;

- and -

**IN THE MATTER OF** appeals filed by 1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd. with respect to refusals of applications for SMLs 160008, 160009 and 160010 by the Director, Provincial Approvals Section, Alberta Environment and Parks.

*Cite as:* 1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks (25 April 2018), Appeal Nos. 17-0025-0027-ID1 (A.P.L.A.B.).

**BEFORE:**

Ms. A.J. Fox, Panel Chair.

**SUBMISSIONS BY:**

**Appellants:** 1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd., represented by Mr. Tom Owen, Owen Law.

**Director:** Ms. Corinne Kristensen, Director, Provincial Approvals Section, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

## EXECUTIVE SUMMARY

1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd. (collectively the “Appellants”) each applied for surface materials leases from Alberta Environment and Parks (“AEP”).

All three applications were refused by AEP. AEP alleged the Appellants were affiliated and, as a result, the applications did not comply with the *Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land*.

The Appellants appealed the refusals to the Public Lands Appeal Board (the “Board”). The Appellants requested the Board grant stays of AEP’s decisions to refuse the applications until the appeals were decided by the Board.

The Board, after reviewing submissions from the Appellants and AEP, found the relief being sought by the Appellants was an injunction, not a stay, and the Board did not have jurisdiction to grant injunctive relief. Injunctive relief is an order that would require AEP to take action with respect to a matter not before the Board, as opposed to suspending the decision that is before the Board. The Board also determined a stay of the Director’s decisions to refuse the applications would not accomplish the Appellants’ desired outcome.

Therefore, the Board dismissed the Appellants’ applications for stays.

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## **I. INTRODUCTION**

[1] This is the decision of the Public Lands Appeal Board (“Board”) regarding an application by 1657492 Alberta Ltd., 1798471 Alberta Ltd., and Big Easy Ventures Ltd. (collectively the “Appellants”) for stays of the decisions of the Director, Provincial Approvals Section, Alberta Environment and Parks (“Director”), to refuse applications for surface materials leases.

## **II. BACKGROUND**

[2] The Appellants applied for separate Surface Materials Leases (“SMLs”) under the *Public Lands Act*<sup>1</sup> (“Act”), from Alberta Environment and Parks (“AEP”) on February 5, 2016. The Appellants sought the SMLs in order to allow them to extract gravel from certain public lands. All three applications were refused by the Director on November 30, 2017. The Director alleged the Appellants were affiliated and, as a result, the applications did not comply with the *Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land*.

[3] The Board received three Notices of Appeal from the Appellants, on December 5, 2017. The Appellants appealed the decision of the Director to refuse each of the Appellants’ applications for SMLs. The Board wrote to the Appellants and the Director (“Parties”) on December 6, 2017, acknowledging the appeals and requesting the Director provide the records upon which the decisions were based. The Board opened three files, 17-0025, 17-0026, and 17-0027 and, at the request of the Appellants, combined the files for administrative purposes.

[4] On December 22, 2017, the Appellants requested a stay of the Director’s decision until the appeals were decided by the Board.

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<sup>1</sup> R.S.A. c. P-40.

### III. ISSUES

[5] The Board sent a letter to the Parties dated January 23, 2018, which set out the questions the Appellants were required to answer in order for the Board to determine whether stays should be granted. The questions were:

1. What are the serious concerns that the appellants have that should be heard by the board?
2. Would the appellant's suffer irreparable harm if the stay is refused?
3. Would the appellant's suffer greater harm for the refusal of a stay pending decision of the board on the appeal, than the approval holder would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?

[6] The Board also asked the Appellants to answer the following question:

Does the Board have jurisdiction to grant a stay of a refusal to grant an SML and if so, what would be the effect of such a stay?

[7] The letter advised the Parties that in considering the answers to the specific questions for stays, the first question, is there a serious issue to be heard, has a low threshold. Concerning the second part of the test, assessing irreparable harm, the Board looks at whether there is a demonstrated harm that cannot be fixed or compensated for after the appeal process is complete. In answering the third part of the test, the Appellants must explain how the harm they will suffer if the stay is not granted will be greater than the harm the Director or AEP will suffer if the stay is granted. As the public interest is an important part of all of the Board's appeals, the Appellants need to explain how the public interest favours the granting of a stay. The onus is on the Appellants to demonstrate the stay should be granted. The information provided must demonstrate that a stay should be granted under each of the four steps set out above; meeting the requirements under only one or two of the steps will not support a stay.

[8] On February 1, 2018, the Board acknowledged the Appellants' submission, and set the schedule to receive submissions on the stay questions and jurisdictional question from the Director and rebuttal submissions from the Appellants.

## **IV. SUBMISSIONS**

### **A. Appellants**

- [9] The Appellants clarified the stays requested were of the refusal of their applications for SMLs 160009, 160008, and 160010. The Appellants submitted the effect of the stay, if granted, would be that the decision by the Director whether to grant the SMLs would be delayed until after the Board's proceedings. If the stays were not granted, the Director would be able to grant the SMLs to a third-party. Such an action would render the Appellants' appeals meaningless and would deprive the Appellants of any real right to appeal.
- [10] The Appellants claimed it is in the public interest to have an accessible and meaningful appeal process available to those impacted by a Director's decision, and it would be contrary to that public interest if the Director were to grant a disposition to a third-party on the subject lands while the Appellants' appeals were still before the Board. The Appellants submitted the effect of not granting a stay would negate the purpose of the Board, undermine confidence in the appeals system, and bring the administration of justice into disrepute.
- [11] The Appellants also raised a concern that another party was interested in using the subject lands for a pipeline, which would preclude any gravel extraction and render the appeals moot.
- [12] The Appellants submitted that while the government had a business interest in proceeding with applications from other parties interested in the subject lands, the appeal process is relatively timely and any delay to the government's business would not be long. The Appellants submitted that maintaining the integrity of the appeal system outweighs the expediency of disposing the SML lands quickly.
- [13] The Appellants submitted the public interest is best served by granting the stays, which would leave open the possibility of a meaningful outcome for the Appellants.

**B. Director**

- [14] The Director submitted the Board has the narrow authority to grant stays of the Director's decisions to refuse the Appellants' applications for the SMLs, but the Board does not have jurisdiction to prohibit the Director from accepting or reviewing other applications for surface material dispositions for the subject lands.
- [15] The Director submitted the Appellants have in effect asked the Board for an injunction rather than a stay.
- [16] With respect to part one of the test for a stay, the Director agreed there is a serious issue to be tried.
- [17] Under part two of the test, the Director submitted the Appellants would not suffer irreparable harm if the stays were refused. The Director submitted the Appellants have no legal rights in relation to the subject lands and have no rights to the subject lands that were capable of being harmed in any way.
- [18] The Director pointed out that even if a disposition were to be issued on the subject lands, the Appellants would still have a right to appeal the issuance of that disposition to the Board.
- [19] In response to the third part of the test, the Director submitted harm to the public interest if stays or injunctions were granted would be greater than any potential harm to the Appellants should the stays be refused. The Director alleged that a stay or injunction would fetter the "regulatory authority" to administer public lands.
- [20] The Director submitted the Appellants have "exercised the scope of rights afforded to them" under the legislation and a refusal of the stays or injunctions would not impact those rights.
- [21] Regarding the fourth part of the test, the overall public interest, the Director submitted it would not be in the overall public interest to grant the stays. The Director stated:

"The public interest is better served by allowing the lands at issue to remain available for future operations. The public interest would be poorly



served by allowing private parties such as the Appellants to sterilize lands for future dispositions just by submitting an application for a disposition, and appealing its refusal.”<sup>2</sup>

### **C. Appellants' Rebuttal Submission**

[22] In rebuttal, the Appellants argued they were seeking stays and not injunctions. The Appellants submitted if the Board ordered the stays the Director would be unable to grant a disposition to another applicant on the subject lands without breaching the stays. The Appellants also argued that if a disposition for a pipeline is granted on the subject lands before the appeals have been determined by the Board, then the gravel resource would be sterilized, unable to be extracted by any person, and would be effectively lost to the Appellants and to the public.

### **V. ANALYSIS**

[23] The Board’s authority to grant a stay is found in section 123(1) of the Act which reads:

“The appeal body may, on the application of a party to a proceeding before the appeal body, stay a decision in respect of which a notice of appeal has been submitted.”

[24] In determining whether the Board has jurisdiction to grant the stays as requested by the Appellants, the Board found it beneficial to review the definitions of a stay and an injunction.

[25] In *R. v. Jewitt*, the Supreme Court of Canada adopted the following definition of a stay:

“A stay of proceedings is a stopping or arresting of a judicial proceedings by the direction or order of a court. As defined in *Black’s Law Dictionary* (5th ed. 1979), it is a kind of injunction with which a court freezes its proceedings at a particular point, stopping the prosecution of the action altogether, or holding up some phase of it. A stay may imply that the proceedings are suspended to await some action required to be taken by one of the parties as, for example, when a non-resident has been ordered to give security for costs. In certain circumstances, however, a stay may mean the total discontinuance or permanent suspension of the

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<sup>2</sup> Director’s submissions, February 20, 2018, at page 6.

proceedings.”<sup>3</sup>

- [26] An injunction is defined as an equitable remedy pursuant to which one party must perform some act or refrain from some action harmful to the party who seeks relief. A prohibitive injunction “restrains the defendant from committing a specified act.”<sup>4</sup>
- [27] After reviewing the Parties’ submissions and case law related to stays and injunctions, the Board concludes the action the Appellants are requesting is clearly injunctive in nature. The Appellants seek to prevent the Director from assigning the land in question to a third-party while the appeals are being heard. The Appellants seek to prevent the Director from committing a specified act.
- [28] The Board finds the legislation does not grant the Appellants any rights connected to the lands, which are the subject of their applications. As a result, stays of the Director’s decisions would not achieve what the Appellants are trying to accomplish. A stay would only “freeze” the Director’s decisions to refuse the Appellants’ applications. It would not prevent the Director from granting a disposition over the lands to a third-party. The Board does not have the authority to grant the type of injunction sought by the Appellants.
- [29] The Board notes the Director incurs a significant risk if dispositions over the subject lands are granted to a third-party while the appeals are still before the Board. The Board has authority to recommend to the Minister that the Director’s decision be varied, confirmed, or reversed. If the Director’s decisions are reversed or even varied, and the Director has, in the interim, granted dispositions over the lands to a third-party, the Director would be in the difficult position of having to comply with the Minister’s order which could result in a conflict with the rights granted under the dispositions of the third-party. The Board is not advising AEP how to conduct its business, but is simply pointing out potential concerns.

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<sup>3</sup> [1985] 2 SCR 128 at paragraph 27.


<sup>4</sup> *The Dictionary of Canadian Law*, 2d ed s.v. “injunction.”

[30] The Board acknowledges the Appellants' concern is with regards to a potential pipeline disposition which would be under the authority of the Alberta Energy Regulator, and not AEP. The Director did not address this concern in her submissions.

## **VI. DECISION**

[31] The Board finds the relief being sought by the Appellants is in effect injunctive in nature, which the Board does not have the authority to grant. The Board also finds the granting of a stay in this case would be of no benefit to the Appellants as they would not achieve the goal of preventing the Director from issuing other dispositions respecting the lands. Therefore, the Board dismisses the Appellants' stay applications.

Dated April 25, 2018, at Edmonton, Alberta.



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A.J. Fox  
Panel Chair