ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – August 5, 2021

IN THE MATTER OF sections 121 and 123 of the *Public Lands* Act, R.S.A. 2000, c. P-40, and sections 211, 212, 213, and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Linda and Charles McKenna, with respect to the decision of the Director, Compliance Boreal North Region, Regulatory Assurance Division, Alberta Environment and Parks, to issue Enforcement Order No. EO-PLA-32219 to Linda McKenna and Charles McKenna.

Cite as: Stay Decision: *McKenna* v. *Director, Compliance, Boreal North Region, Regulatory Assurance Division, Alberta Environment and Parks* (5 August 2021), Appeal No. 20-0028-ID1 (A.P.L.A.B.), 2021 ABPLAB 16.

BEFORE: Mr. Gordon McClure, Board Chair.

SUBMISSIONS BY:

Appellants: Ms. Linda and Mr. Charles McKenna.

Director: Ms. Heather Dent, Director, Compliance, Boreal North Region, Regulatory Assurance Division, Alberta Environment and Parks.

EXECUTIVE SUMMARY

Ms. Linda McKenna and Mr. Charles McKenna (the Appellants) have a residence next to public land, which borders Gregoire Lake, near Anzac, Alberta. Alberta Environment and Parks (AEP) issued an Enforcement Order to the Appellants ordering them to remove a flag pole, a fence, and a wooden staircase, located on public land. The Appellants appealed the Enforcement Order to the Public Lands Appeal Board (the Board). The Appellants also asked for a stay of the Enforcement Order.

The Board asked the Appellants and AEP to provide written submissions on the Board's stay test:

(a) whether there is a serious concern;
(b) whether the applicant would suffer irreparable harm;
(c) the balance of convenience; and
(d) the public interest.

The Board considered the legislation, written submissions, and relevant case law, and determined the Appellants met the test for a stay. The Board granted the Appellants' application for a stay of AEP's decision to issue the Enforcement Order. The stay remains in effect until the Board lifts the stay or until the Minister issues an order regarding the appeal.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding an application by Ms. Linda McKenna and Mr. Charles McKenna (the "Appellants") to stay the decision of the Director, Compliance, Boreal North Region, Regulatory Assurance Division, Alberta Environment and Parks (the "Director") to issue Enforcement Order No. EO-PLA-32219 (the "Enforcement Order"). The Enforcement Order was issued under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act").

[2] The Appellants have a residence next to public land which borders Gregoire Lake. Gregoire Lake is a popular recreational lake located west of the hamlet of Anzac and south east of the Urban Service Area of Fort McMurray, in the Regional Municipality of Wood Buffalo. On the north shore of the lake is the Gregoire Lake Provincial Park and on the west shore is Gregoire Lake Estates, a small residential hamlet with a population of approximately 204 people.[1] The Appellants live in this subdivision.

[3] There is a strip of public land (the "Crown Lands")[2] between some of the residences and the lake. Staff from Alberta Environment and Parks ("AEP") have observed that a flag pole, a fence, and a set of wooden steps leading down the lakeshore (the "Unauthorized Structures"), are located on the Crown Land without authorization from AEP. AEP alleged the Appellants are responsible for the Unauthorized Structures and issued the Enforcement Order requiring the Appellants to remove them.

[4] The Appellants appealed the Enforcement Order to the Board and asked the Board for a stay of the Enforcement Order.

[5] The Board, after considering the legislation, the written submissions of the Appellants and the Director (the "Parties"), and relevant caselaw, have granted the stay of the Director's decision to issue the Enforcement Order, pending the resolution of the appeal or a further order from the Board or the Minister of Environment and Parks (the "Minister").

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1 <https://www.rmwb.ca/en/indigenous-and-rural-relations/gregoire-lake-estates.aspx>.

2 The Crown Lands are legally described as SW 22-86-8 W4M.

II. BACKGROUND

[6] On July 13, 2018, AEP inspected the Crown Lands and observed a garden, flower beds, fire pit, deck, shed, stairway, flagpole, fence, dock storage platform, watercraft, dock, trailer, and other personal property, extending past the property boundary from the Appellants' private property onto the Crown Lands. On March 2, 2019 AEP issued an Order to Vacate to the Appellants, which required the Appellants to immediately remove all personal property, chattels, buildings or other improvements from the Crown Lands.

[7] AEP inspected the Crown Lands on February 16, 2021, and found the Unauthorized Structures still remained on the Crown Lands. On March 2, 2021, the Director issued the Enforcement Order, which alleged the Appellants are the persons responsible under section 1(o.1) of the Act,[3] and ordered the Appellants to:

(a) vacate the Crown Lands;

(b) immediately remove the Unauthorized Structures, regardless of ownership, on the Crown Lands, including, but not limited to the flagpole, fencing, wooden steps and all waste and debris;

(c) re-seed the disturbed areas with native vegetation;

(d) provide a schedule for the remedial work with a completion date by July 30, 2021; and

(e) advise the Director that the work is completed no later than August 30, 2021.

[8] The Appellants filed a Notice of Appeal with the Board, which the Board acknowledged on March 25, 2021. The Appellant's Notice of Appeal alleged the Director erred

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[3] Section 1(o.1) of the Act states:

> "'person responsible'", when referring to an activity or use on public land, means
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> (i) the holder of a disposition issued for the public land,
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> (ii) the holder of an authorization issued under section 20,
>
> (iii) any person who has, or had, charge, management or control of the activity or use,
>
> (iv) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i), (ii) or (iii), or
>
> (v) a principal or agent of a person referred to in subclause (i), (ii), (iii) or (iv) concerning the activity or use;"

in the determination of a material fact on the face of the record, erred in law, exceeded the Directors jurisdiction or legal authority, did not comply with a regional plan approved under the *Alberta Land Stewardship Act*, and that the decision was expressly subject to an appeal under section 15 of the *Public Lands Administration Regulation* ("PLAR")[4] or section 59.2(3) of the *Act*.[5]

[9] On March 25, 2021, the Board requested the Director provide the Board with a copy of all documents available to the Director related to the issuance of the Enforcement Order including policies, guidelines and directives (the "Director's Record"). The Board received the Director's Record from the Director on May 28, 2021, and provided a copy to the Appellants on May 31, 2021.

[10] The Board held a mediation meeting with the Parties on June 16, 2021, but the Parties did not reach an agreement.

[11] On June 16, 2021, the Appellants requested the Board grant a stay of the Director's decision to issue the Enforcement Order. The Board set a schedule for the Parties to provide written submissions on the stay, which were received between June 28 and July 14, 2021.

III. ISSUES

[12] When considering a stay application, the Board asks the parties to answer the

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[4] Section 15 of PLAR states:

> "(1) Subject to this section, an application under section 9, 11 or 13 is deemed to have been rejected if the director does not register a notice under section 9(6), 11(5) or 13(5) within the 30-day period provided by those sections.
>
> (2) The director may, by written notice to the applicant, extend the 30-day period referred to in subsection (1) for a further period not exceeding 90 days if the director considers it appropriate to do so in the circumstances.
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> (3) If an applicant requires regulatory approval for a development on land that is the subject of a disposition for which the applicant has applied, the director may, by written notice to the applicant, extend the period referred to in subsection (1) for an indefinite period pending the outcome of any proceedings related to the regulatory approval.
>
> (4) A deemed rejection under this section is appealable under Part 10."

[5] Section 59.2(3) of the *Public Lands Act* provides: "A person who receives a notice referred to in subsection (2) may appeal to an appeal body in accordance with the regulations."

following questions, based on the Supreme Court of Canada decision in *RJR MacDonald Inc*. v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR MacDonald*"):

1. what are the serious concerns of the Appellants that should be heard by the Board;
2. would the Appellants suffer irreparable harm if the stay is refused;
3. would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay; and
4. would the overall public interest warrant a stay?[6]

(i) Submissions

[13] The Appellants submitted the following:

(a) if the stay was refused the Appellants would be in default of the Enforcement Order, which has timelines for the removal of the Unauthorized Structures that would become due before the hearing was finished;

(b) removal of the Unauthorized Structures by the date listed in the Enforcement Order would create financial hardship for the Appellants;

(c) if the appeal was successful, it would not be financially possible to put the Unauthorized Structures back once removed;

(d) if the Board did not grant the stay and the Appellants removed the Unauthorized Structures, then the appeal would become moot;

(e) if the Unauthorized Structures were removed during the appeal process, the AEP would have no incentive to proceed with the appeal in a fair manner;

(f) AEP would suffer no harm from a stay;

(g) the Appellants would suffer financially, physically and mentally; and

(h) the flag pole is a matter of public safety and has no financial or personal benefit to the Appellants.

[14] The Director took no position on the stay application, but submitted the Appellants have the onus to establish they meet the legal test for a stay, but did not do so.

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[6] See *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 43.

(ii) Analysis

[15] The Board has authority to grant a stay under section 123(1) of the *Public Lands Act*, which states: "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."

[16] As discussed above, the Board's test for determining a stay request is based on the Supreme Court of Canada's decision in *RJR MacDonald*.[7] There are four aspects the Board considers when considering a stay: (1) whether there is a serious concern; (2) whether the applicant would suffer irreparable harm; (3) the balance of convenience; and (4) the public interest. All four parts of the test must be met for the Board to grant a stay.

[17] The first part of the test is whether there is a serious concern that should be heard by the Board. The Courts have stated the threshold for this part of the test is relatively low.[8] An applicant for a stay must show there is a serious question to be considered, and the request is not frivolous or vexatious.[9]

[18] The Appellants submitted they would be in default of the Enforcement Order if the stay was not granted, as they would not be able to meet the timelines set out in the Enforcement Order before the appeal process is completed.

[19] The Director did not make detailed submissions or arguments, other than to submit the Appellants did not meet the onus that was on them to prove they met the legal test for a stay of the Enforcement Order.

[20] Section 216(1)(e) of PLAR requires an appellant to "set out the grounds on which the appeal is made" in their Notice of Appeal. The Appellants marked all the grounds from section 213 of PLAR[10] in their Notice of Appeal. The Board finds the grounds of appeal to be a serious

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7 See: *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 43:

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

8 *RJR MacDonald Inc*. v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 54.

9 *American Cyanamid Co.* v. *Ethicon Ltd.,* [1975] A.C. 396.

10 Section 213 of PLAR provides:

concern for the Board to consider in an appeal. Therefore, the Appellants have satisfied the first part of the test for a stay.

[21] The second part of the test is whether the Appellants will suffer irreparable harm without a stay of the Enforcement Order. Irreparable harm is when, without a stay, significant harm would occur to the person requesting the stay that could not be remedied, even if that person succeeded at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the person cannot be fairly dealt with by the payment of money. In *Ominayak* v. *Norcen Energy Resources*,[11] the Alberta Court of Appeal defined irreparable harm by stating:

> "By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be [a] denial of justice."[12]

The party claiming that financial compensation would be inadequate to remedy the harm, has the onus to show there is a real risk that harm will occur. It cannot be mere conjecture.[13]

[22] The Appellants submitted they would suffer financial hardship if the stay was not granted.

"A decision is appealable only on the grounds that

(a) the director or officer who made the decision

(i) erred in the determination of a material fact on the face of the record,

(ii) erred in law,

(iii) exceeded the director's or officer's jurisdiction or authority, or

(iv) did not comply with an ALSA regional plan,

or

(b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4)."

11 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

12 *Ominayak* v. *Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

13 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

[23] The *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, limits civil action for damages against AEP and the Director except in specific circumstances. The Appellants would have virtually no realistic chance of recovering damages for losses related to the Enforcement Order if they were successful in the appeal.

[24] Although the Appellants' evidence must not be speculative and without foundation, it is not required to be conclusive or beyond doubt. In *Matrix Photocatalytic Inc.* v. *Purifics Environmental Technologies Inc.*,[14] the Court found the applicant "does not have to demonstrate irreparable loss beyond doubt or even, at this stage, on a balance of probabilities. All that must be done, as it seems to me, is to show a real risk of disastrous consequences for which damages will be of little or no comfort."[15] In *Alberta Treasury Branches* v. *Ghermezian*,[16] the Court stated: "The threshold which the applicant must meet is to demonstrate that there is some doubt that the potential harm could be adequately compensated by an award for damages…"[17] However, the Court also cautioned there the evidence must demonstrate a real risk of the harm occurring.

[25] The Director did not make detailed submissions or arguments, other than to submit the Appellants did not meet the onus that was on them to prove they met the legal test for a stay of the Enforcement Order.

[26] After reviewing the limited evidence provided by the Parties, the Board finds that without a stay, the Appellants would most likely suffer irreparable harm for which they could not receive adequate compensation. The Board finds the Appellants have met the second part of the stay test.

[27] The third part of the stay test is referred to as the "balance of convenience," a determination of which party would suffer greater harm from granting or refusing a stay, pending a decision on the merits of the appeal. The Board must weigh the burden the stay would impose on the Director against the benefit the Appellants would receive. The Board considers the harm

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[14] *Matrix Photocatalytic Inc.* v. *Purifics Environmental Technologies Inc.*, 1994 CarswellOnt 176.

[15] *Matrix Photocatalytic Inc.* v. *Purifics Environmental Technologies Inc.*, 1994 CarswellOnt 176, at paragraph 77.

[16] *Alberta Treasury Branches* v. *Ghermezian*, 1999 CarswellAlta 330.

[17] *Alberta Treasury Branches* v. *Ghermezian*, 1999 CarswellAlta 330, at paragraph 36.

the parties allege they would suffer, the nature of the relief requested, the relevant legislation, and the impact on the regulatory authority of AEP.[18] Weighing the burden is not strictly a cost-benefit analysis but rather a balancing of significant factors.

[28] The Appellants submitted they would suffer financially, physically and mentally without a stay, while the Director and AEP would suffer no harm. The Director made no submissions on what harm AEP might suffer if a stay is granted.

[29] Under section 236(1)(b) of PLAR,[19] the appeal must be resolved within one year from the date a notice of appeal is filed. Within that short timeframe, a stay of the Enforcement Order will cause no damage to the Director's and AEP's regulatory authority.[20] A stay of the Enforcement Order will not cause financial hardship for the Government of Alberta, and it will not result in additional damage to public land or the environment.

[30] Although the Appellants did not provide significant detail of the harm they alleged they would suffer, the Director, by not making any submissions on the balance of convenience, has indicated she does not think the harm to AEP will be significant. The Board finds the balance of convenience favours the Appellants.

[31] The fourth part of the test, the effect of a stay on the public interest, is also decided in the Appellants' favour. The Appellants submitted the flagpole is a safety measure for users of the lake. With no arguments to rebut the Appellants' evidence, the Board, for the purposes of this stay decision only, finds the Appellants have met the test that staying the Enforcement Order until the appeal is resolved would be in the public interest.

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[18] *Algonquin Wildlands League* v. *Ontario (Minister of Natural Resources)*, 1996 CarswellOnt 3634, at paragraph 12.

[19] Section 236(1)(b) of PLAR states:

> "An order under section 124 of the Act must be made in respect of an appeal
>
> (b) on the appeals co-ordinator, in the case of a complex appeal,"

[20] The Board notes that the alleged contravention of the Act was discovered in 2018 and not acted upon in the first instance until 2019.

IV. DECISION

[32] The Board finds the Appellants have met the required elements of the stay test. The Board grants the Appellants' application for a stay of the Director's decision to issue the Enforcement Order. The stay will remain in effect until the Board lifts the stay or until the Minister issues an order regarding this appeal.

Dated on August 5, 2021, at Edmonton, Alberta.

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Gordon McClure
Board Chair