

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – November 23, 2018

IN THE MATTER OF sections 121, 123, and 125 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 216, 217, 219, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by 1218716 Alberta Ltd. with respect to the decision of the Director, Aggregate Inquiries Unit, Alberta Environment and Parks, to refuse an application for Surface Materials Lease SME 120184.

Cite as:

1218716 Alberta Ltd. v. Director, Aggregate Inquiries Unit, Alberta Environment and Parks (1 November 2018), Appeal No. 17-0044-RD (A.P.L.A.B.).

**WRITTEN PRELIMINARY MOTIONS
HEARING BEFORE:**

Ms. Marian Fluker, Acting Appeals
Coordinator.

SUBMISSIONS BY:

Appellant: 1218716 Alberta Ltd., represented by Ms.
Marilynne Heerschop, Land Resource
Consultant, Carbroh Environmental Inc.

Director: Ms. Joanne Sweeny, Director, Aggregate
Inquiries Unit, Alberta Environment and Parks,
represented by Mr. Larry Nelson, Alberta
Justice and Solicitor General.

EXECUTIVE SUMMARY

1218716 Alberta Ltd. (the Appellant) applied to Alberta Environment and Parks (AEP) for a Surface Materials Exploration (SME) permit. Six years later, AEP refused the application and mailed the decision letter to an incorrect address and the Appellant's former agent, despite the Appellant having provided documentation to AEP regarding a change in the agent acting on behalf of the Appellant.

The Appellant, upon receipt of the decision letter, filed a Notice of Appeal with the Public Lands Appeal Board. Based on the information before her, the Appeals Coordinator questioned the service of the decision letter and found the Notice of Appeal was filed on time in accordance with the relevant legislation.

AEP requested the Appeals Coordinator reverse her decision and reject the Appellant's Notice of Appeal as being filed past the legislated timelines. The Board received on this issue submissions from the Appellant and AEP.

Based on the submissions received, which contained information not previously available to the Appeals Coordinator, the Appeals Coordinator found the Appellant filed the Notice of Appeal late; however, the mistakes made by AEP in serving the decision letter on the Appellant created a breach of natural justice and procedural fairness, which the Appeals Coordinator rectified by extending the time for filing the Notice of Appeal.

The Appeals Coordinator denied AEP's application to dismiss the Appellant's appeal.

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I. INTRODUCTION

[1] This is the decision of the Appeals Coordinator regarding the preliminary motion by Alberta Environment and Parks (“AEP”) requesting the Appeals Coordinator reconsider her decision to extend the time for filing a notice of appeal, and dismiss 1218716 Alberta Ltd.’s Notice of Appeal. In making her decision on the request for reconsideration, the Appeals Coordinator reviewed the submissions received from the Appellant and the Director (collectively, the “Parties”).

II. BACKGROUND

[2] On July 20, 2012, 1218716 Alberta Ltd. (the “Appellant”) applied to AEP for Surface Materials Exploration permit SME 120184 (the “SME”).

[3] On November 20, 2012, the Appellant mailed a Change of Client Directive to AEP, changing the Appellant’s agent from Silver Sage Enterprises Ltd. (“Silver Sage”) to Carbroh Environmental Inc. (“Carbroh”).

[4] On February 6, 2018, AEP’s Surface Materials Specialist, Team Lead Aggregate Inquiries Unit (the “Director”) wrote to the Appellant advising the application had been refused (“Decision Letter”). The Decision Letter was mailed to Silver Sage and separately to the Appellant at the address listed on the Appellant’s SME application. The Appellant had previously changed locations and the address on the SME application was no longer correct.

[5] The Decision Letter was received by the Appellant’s former agent, Silver Sage, on February 13, 2018, and Silver Sage emailed the Decision Letter to the Appellant’s current agent, Carbroh, on the same day.

[6] The Appellant received a copy of the Decision Letter on February 28, 2018.

[7] The Appellant filed a Notice of Appeal with the Board on March 15, 2018. The Appeals Coordinator, based on the information before her, determined the appeal had been

submitted to the Board within the legislated timelines pursuant to section 217(1)(a) of the Public Lands Administration Regulation (PLAR) and accepted the appeal as filed on time.

[8] On April 3, 2018, the Director requested the Appeals Coordinator reconsider and reverse her decision to accept the Notice of Appeal.

[9] April 5, 2018, the Board set out a submission schedule regarding whether the Appeals Coordinator should reconsider and reverse her decision to accept the Appellant's Notice of Appeal. Submissions were received from the Parties between April 17 and May 15, 2018.

III. SUBMISSIONS

A. Appellant

[10] The Appellant submitted it had notified AEP of a change in its agent from Silver Sage to Carbroh through a Change of Client Directive dated November 20, 2012 and, therefore, the Decision Letter should have been sent to Carbroh and not Silver Sage.

[11] The Appellant noted Silver Sage received the Decision Letter and emailed the letter to Carbroh on February 13, 2018, but the Appellant did not receive the Decision Letter from AEP by mail until February 28, 2018.

[12] The Appellant requested the Board extend the deadline for filing the appeal due to confusion in interpreting the legislation, specifically whether "days" in the section on time limitations for filing an appeal meant calendar days or business days.

[13] The Appellant noted the Director received the Appellant's application in 2012, but did not make the decision to refuse the application until February 6, 2018. The Appellant submitted the decision to refuse the application was based on grounds not raised by the Director previously, and the reasons for the refusal did not make sense.

[14] The Appellant explained the delay in filing the Notice Appeal was partly a result of the preparation required for home and office moves, which occurred March 28, 2018.

[15] The Appellant requested the Appeals Coordinator exercise her authority under section 217(2)¹ of the *Public Lands Administrative Regulation*, Alta Reg. 187/2001 (“PLAR”) to extend the filing timeline.

B. Director

[16] The Director submitted the Appeals Coordinator erred in determining the Appellant’s Notice of Appeal was filed on time. The Director referenced section 217(1)(a) of PLAR, which provides:

“A notice of appeal must be served on the appeals coordinator within 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to....” (emphasis by the Director)

[17] The Director acknowledged the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”) and PLAR do not contain provisions regarding the service of a decision to refuse to issue an authorization; however, the Director submitted delivery by mail is acceptable.

[18] The Director stated the Decision Letter was mailed to the company on February 6, 2018, at the address listed in the Appellant’s SME application, and notes section 23(1) of the *Interpretation Act*, R.S.A. 2000, c. I-8, allows for service to be presumed complete seven days from the date of mailing.²

¹ Section 217(2) of PLAR provides:
“The appeals co-ordinator may, either before or after the expiry of a period described in subsection (1)(a) or (b), extend the time for service of a notice of appeal if, in the opinion of the appeals co-ordinator, it is not contrary to the public interest to do so.”

² Section 23(1)(a) of the *Interpretation Act* provides:
“If an enactment authorizes or requires a document to be sent, given or served by mail and the document is properly addressed and sent by prepaid mail other than double registered or certified mail, unless the contrary is proved the service shall be presumed to be effected
(a) 7 days from the date of mailing if the document is mailed in Alberta to an address in Alberta...,”

[19] The Director submitted the date by which the Appellant should have “reasonably become aware” of the Director’s decision was February 13, 2018, seven days from the date the Decision Letter was mailed to the Appellant.

[20] The Director submitted it was “improper” for the Board to suggest the Decision Letter was sent to the wrong address by the Director. The Director argued the Decision Letter was mailed to the address provided by the Appellant in its application for the SME. The Director noted a corporate search showed the company located at the address the Decision Letter was mailed to had a common corporate director with the Appellant.

[21] The Director argued the Appellant’s submissions did not indicate any attempt to seek clarification or additional information regarding the limitation period for filing appeals.

[22] The Director requested the Appeals Coordinator reject the Notice of Appeal as being filed late.

IV. ANALYSIS

[23] The issue the Appeals Coordinator must consider is whether to reconsider and reverse her March 19, 2018 decision to accept the Notice of Appeal.

[24] One of the purposes of having deadlines in legislation is to bring a degree of certainty to the regulatory process. In this case, the Act and PLAR require an applicant for a disposition to go through an application process. This process provides for a technical and scientific review of the application. Once a decision is made to issue, or not to issue, the disposition, there is an appeal period in which the applicant, or anyone who is directly affected, may file an appeal. The time limit in which an appeal must be filed is specified in PLAR so all parties – the applicant, the people who are directly affected, and the regulator – know when the process is complete.

[25] Upon receipt of a notice of appeal, the Appeals Coordinator has only five days to decide whether the appeal meets the content and service requirements of PLAR.³ In almost all cases, the only documentation the Appeals Coordinator has before her to base her decision on is the notice of appeal and a decision letter from the Director. With little information and a short timeframe to make the decision, the Appeals Coordinator must make the best decision possible based on the facts available to her. The Appeals Coordinator may reconsider the decision to accept the notice of appeal once the Director's Record is provided or other arguments and facts are presented as part of a preliminary application.

[26] With regard to the Appellant's appeal, the Appeals Coordinator made her decision based on the Appellant's Notice of Appeal and the Director's Decision Letter. The Director provided further information in her request for the Board to dismiss the Appellant's Notice of Appeal. The Board requested and received submissions from the Parties which provided additional information to determine if the decision to accept the Notice of Appeal should be reversed.

[27] The Director's decision to refuse the Appellant's SME application was issued on February 6, 2018. Section 217(1)(a) of PLAR includes the wording "should reasonably have become aware of the decision objected to."⁴ The Appellant's agent, Carbroh, was aware of the Director's decision by February 13, 2018, when Silver Sage forwarded the Decision Letter, sent to it by the Director, to the correct agent, Carbroh. The Notice of Appeal was not received by the Board until March 15, 2018, 30 days after the Appellant's agent, Carbroh, received a copy of the Director's decision.

³ Section 219(1) provides:
"The appeals co-ordinator may, in his or her discretion and within 5 days after being served with a notice of appeal, reject the notice of appeal if it was not served in accordance with section 217 or if, in the opinion of the appeals co-ordinator, it does not meet the requirements of section 216."

⁴ Section 217(1)(a) of PLAR provides:
"A notice of appeal must be served on the appeals co-ordinator within
(a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to...."

[28] The Director refers to section 23 of the *Interpretation Act*, stating it allows for service to be presumed complete seven days from the date of mailing. However, it is noted such service is only a presumption. Presumptions of fact are rebutted by evidence to the contrary. Once the Appellant provided evidence the Decision Letter was received February 28, 2018, the presumption is rebutted and the matter becomes a question of fact, and the Appeals Coordinator can weigh the evidence. No evidence to the contrary was provided.

[29] After receiving the information now in front of the Appeals Coordinator, she finds the Appellant filed the Notice of Appeal past the 20-day time limit when the Appellant became aware, or should have been aware, of the decision by the Director to refuse the application for the SME.

[30] Having found the Appellant's Notice of Appeal was filed late, the Appeals Coordinator must consider whether there are sufficient reasons for her to extend the time limit to file an appeal. The Legislature contemplated there would be instances where the public interest would favour extending the timelines. Section 217(2) of PLAR grants discretionary powers to the Appeals Coordinator to extend the time for service if, in her opinion, it would not be contrary to the public interest to do so. The Appeals Coordinator's ability to extend an appeal period is discretionary and is used only in exceptional circumstances.

[31] As there is great value to the public interest in the certainty that timelines bring to the regulatory process, the Appeals Coordinator cannot extend the timelines without a valid reason to do so. In considering this matter, the Appeals Coordinator does not make her decision based solely on the legislated timelines, but also considers all the relevant legislation, the facts, and the rules of natural justice and procedural fairness.

[32] The Director, in her April 3, 2018 letter, wrote "it was improper for the Appeals Coordinator to insinuate that the Director sent the Decision Letter to the wrong address."⁵ However, the evidence before the Appeals Coordinator at the time she made the decision to accept the Notice of Appeal as being filed on time, was the Director had not sent the Decision

⁵ Director's letter, April 3, 2018, at page 2.

Letter to the Appellant's correct address. Further, evidence in the submissions demonstrates the Appeals Coordinator was correct to reach this conclusion. The Director sent the Decision Letter to the address listed in the Appellant's application for the SME, which was no longer correct. The fact a corporate and internet search (the Director does not indicate if this search was done prior to the Decision Letter or since the appeal was filed) identified the Appellant's corporate director, Mr. Mark Spencer, as a corporate director of a *different* company operating from that address, does not constitute good service and does not justify this serious error. There should be a system in place to allow applicants to update their contact information. This is especially needed where it takes 6 years to make a decision on an application.

[33] Additionally, despite having been notified in writing the Appellant had changed agents from Silver Sage to Carbroh, the Director inexplicably sent the Decision Letter to Silver Sage. The Director had on file a proper address for serving the Appellant, and that was through the Appellant's designated agent, Carbroh. Section 23 of the *Interpretation Act* states the document must be properly addressed for the presumption of service to be effected. The Decision Letter was not properly addressed, but was sent to an incorrect address and an incorrect party. The Decision Letter should have been sent to Carbroh.

[34] The Director benefited from the Director's mistake being fixed by Silver Sage. The Director sent Silver Sage the Decision Letter without confirming who the correct agent was on file. Silver Sage had no responsibilities to the Appellant and could have ignored the Decision Letter or returned it to the Director. Instead, Silver Sage admirably forwarded the Decision Letter to Carbroh. Had Silver Sage not done so, the Appellant may not have received the Decision Letter at all.

[35] The Appeals Coordinator finds the Director erred in sending the Decision Letter to an incorrect address and an agent that was no longer acting on the file. These errors constitute a breach of natural justice and procedural fairness.

[36] The Appellant submitted the six years it has taken for the Director to decide on an SME is sufficient reason to proceed with the appeal. While not considering the substantive


issues of the appeal, the Appeals Coordinator finds the length of time to make a decision is a matter of public interest.

[37] The Appeals Coordinator understands mistakes happen and no system is perfect. For the Director to make these errors, take six years to make a decision on an SME, and then attempt to have the appeal dismissed for being, in her opinion, a few days late, does not reach the standard the Board has come to expect from the Director. It is appropriate, in situations such as this, for the Appeals Coordinator to exercise her discretion and extend the period of time to file the Notice of Appeal, in order to preserve and ensure natural justice and procedural fairness.

V. CONCLUSION

[38] The Appeals Coordinator finds the errors surrounding the service of the Decision Letter on the Appellant is sufficient reason to extend the period of time for filing of the Appellant's Notice of Appeal, and doing so is not contrary to the public interest. Therefore, the Appeals Coordinator denies the Director's motion to dismiss the Appellant's Notice of Appeal. The Board will proceed to hear the appeal of the Appellant.

Dated on November 23, 2018, at Edmonton, Alberta.



Marian Fluker
Acting Appeals Coordinator