



Environmental Appeal Board

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DECISION NO. EAB-WSA-20-A005(a)

In the matter of an appeal under the *Water Sustainability Act*, SBC 2014, c. 15

BETWEEN:	Dario Rossi, Cora Rossi, Rocky Rossi and Samantha Rossi	APPELLANTS
AND:	Assistant Water Manager	RESPONDENT
AND	City of Abbotsford	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board David Bird, Panel Chair	
DATE:	Conducted by way of written submissions concluding on, March 2, 2021	
APPEARING:	For the Appellant: Dario Rossi For the Respondent: Angela Davies, Counsel For the Third Party: Aniz Alani, Counsel	

APPEAL

[1] Dario Rossi, Cora Rossi, Rocky Rossi and Samantha Rossi (the Appellants) appeal an order issued on May 26, 2020 (the "Order"), by the Assistant Water Manager (the "Water Manager") with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"). The Order was issued pursuant to section 93 of the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA").

[2] The Order requires the Appellants to "immediately remove the sandbags and any associated material" from an unnamed stream at 28505 Ranch Avenue, Abbotsford, BC (the "Property"), as the placement of that material amounted to "unauthorized changes in and about a stream."

[3] The Appellants appeal the Order, stating that the sandbags are necessary to protect their "home, property and livestock from unwanted water which is being directed into [their] property by a series of historical and present changes in the landscape, none of which were caused by [them]".

[4] The Appellants ask the Environmental Appeal Board (the "Board") to order "the unconditional withdrawal of the Order" with "the sandbags to remain in the ditch until the flooding is resolved." The Water Manager is the respondent in this appeal (the Respondent) and is represented by legal counsel.

[5] The Board granted the City of Abbotsford (the "Third Party") third party status in this appeal and it is represented by legal counsel.

[6] On September 14, 2020, the Appellants advised the Respondent that they had removed the sandbags. On September 23, 2020, the Water Manager revoked the Order pursuant to section 92(2) of the *WSA*. The Respondent requested that the Appellants withdraw the appeal since the Order had been rescinded. The Appellants requested that the Board continue to hear their appeal.

[7] By a letter dated December 11, 2020, the Board asked the parties to provide submissions on whether the appeal should be dismissed under section 31(a) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [the "ATA"] because the Board now lacks of jurisdiction to hear the appeal, or alternatively, for appeal is now moot because the Order has been rescinded. The Board also asked for submissions on whether, if the appeal was moot, the Board should hear the appeal in any event, explaining what issues remain in dispute and why scarce resources should be expended to make a decision on those issues.

[8] In response to the Board's request, all parties provided written submissions. The Appellants missed the deadline for filing their response to the submissions of the respondent and the Third party but they later provided an email in which they apologized for missing the deadline and provided submissions. The Board accepted that email as the Appellants' submissions.

BACKGROUND

[9] This is the second appeal filed by the Appellants regarding an order to remove sandbags placed on the Property. The first appeal resulted in the decision of the Board in *Rossi et al v. Assistant Water Manager*, Decision No. 2019-WSA-19-A007(a), May 22, 2020 [*Rossi 2019*]. The following facts are from *Rossi 2019* at paras. 14-21.

[10] The Property is located in a rural subdivision developed in the 1970s within an Agricultural Land Reserve in the City of Abbotsford. The Appellants took possession of the Property in August 2016. They live on the Property, on which they operate a small farm.

[11] The Appellants say the Property has been impacted by flooding since they took possession. They say that the water comes from the City of Abbotsford's culvert under Ranch Avenue and two roadside ditches. During certain times of the year, there is so much water flowing through the culvert that it causes severe flooding on the Property. They say that the flooding has impacted the functioning of their septic field and resulted in sewage backing up into their basement.

[12] To protect the Property from the impacts of continuous flooding, the Appellants placed sandbags downgradient from the culvert.

[13] In their submissions in this appeal, the Appellants say that the sandbags were placed “with the sole purpose of preventing continuous catastrophic flooding” of their home and that the sandbags “were never meant to be a permanent solution, rather a quick and only available rapid response to mitigate recurrent and severe flooding.”

[14] In an order dated December 4, 2019, the Water Manager ordered the Appellants to remove the sandbags (the “2019 Order”). Before the hearing related to *Rossi 2019* was heard, the Water Manager rescinded the 2019 Order based on an administrative issue with her delegated authority.

[15] Despite the 2019 Order being rescinded, and after receiving submissions from the parties, the Board concluded that it should proceed to hear and decide the following two issues raised by the Appellants, only the first of which is relevant in this appeal:

- (1) Whether the unnamed watercourse on the Property was properly classified as a “stream” as defined in the *WSA*; and
- (2) Whether the Appellants’ sandbags were causing flooding on a neighbouring property.

[16] After hearing submissions, the Board concluded in *Rossi 2019* that the watercourse on the Property was in fact a stream under the *WSA*. The Appellants filed a petition in the BC Supreme Court seeking a judicial review of this finding. The judicial review is in process.

[17] Shortly after the *Rossi 2019* decision was rendered, the Water Manager issued the Order that is the subject of this appeal.

[18] In September 2020, the Respondent and the Third party agreed to meet with the Appellants to discuss the flooding issues, if the Appellants removed the sandbags prior to the meeting. The Appellants therefore removed the sandbags. The Order was then revoked.

ISSUE(S)

[19] The issues to be decided in this appeal are as follows:

1. Does the Board have jurisdiction to hear the appeal now that the Order has been rescinded?
2. Is the appeal moot and, if so, should the Board hear the appeal in any event?

DISCUSSION AND ANALYSIS

1. Does the Board have jurisdiction to hear the appeal now that the Order has been rescinded

The Respondent’s Submissions

[20] The Respondent submits that this appeal is not within the Board’s jurisdiction for two reasons. First, the Order that is the subject matter of the appeal has been

rescinded, and therefore, the subject matter of the appeal no longer exists. As a result, the Board has no jurisdiction to hear the appeal. Second, even if the Order had not been revoked, the grounds of appeal stated by the Appellants in their Notice of Appeal are not properly within the Board's jurisdiction.

[21] Regarding the second reason, the Respondent summarizes the Appellants' grounds for appeal as follows:

1. the Ministry has not taken the Appellant's flooding problems seriously; and
2. the Ministry continues to assert that the constructed ditch is a "stream", based on the WSA definition, but claims no responsibility for its management.

[22] The Respondent submits that, as the Board has determined that the watercourse is a "stream" under the WSA, the only remaining issues raised by the Appellants relate to the Ministry's action or inaction in resolving the Appellants' flooding issues, which are not matters that are properly within the Board's jurisdiction.

The Third Party's Submissions

[23] The Third Party agrees with the submissions of the Respondent on this issue.

[24] The Third Party further submits that the issues as described in the Appellants' Notice of Appeal establish the Board's lack of jurisdiction, in that the Appellants' appeal stems from what the Appellants describe as the Water Manager's failure to "take our flooding seriously enough to offer a solution."

[25] The Third Party submits that the Board has already stated in *Rossi 2019* that the issue of flooding is not within the Board's jurisdiction, citing para. 100 where the Board stated that this was not a matter it had "any authority to direct".

[26] The Third Party submits that nothing in the statutory framework suggests a legislative intent that property owners ought to be able to commit acts of civil disobedience, resulting in enforcement orders, for the purpose of asking the Board to require others to fund improvements to their land. The Board also has no jurisdiction once the order is revoked. To conclude otherwise would be to invite similarly situated property owners to violate the WSA as a means of obtaining the "ear" of government officials.

The Appellants' Submissions

[27] The Appellants acknowledge that the Board had made it clear that flooding issues were not within its jurisdiction to address in this appeal.

[28] The Appellants state that they placed the sandbags with the sole purpose of preventing continuous catastrophic flooding of their home. The sandbags were never meant to be a permanent solution, but rather a quick and only available rapid response to mitigate recurrent and severe flooding. Placing the sandbags were what reasonable people across the nation would be expected to do in response to serious flooding events.

[29] In addition, the Appellants state that "the prevention of recurrent or irrational flooding should never be interpreted as performing work in or about a stream."

Furthermore, the Appellants state that they did not alter the “ditch”, a reference to the stream.

The Panel’s Findings

[30] The Board’s jurisdiction is set out in section 105 of the *WSA*, and subsection (1) states that “... an order resulting from the exercise of discretion of the comptroller, a water manager or an engineer may be appealed to the appeal board...” by certain persons.

[31] The Board’s legal authority is defined and granted by the statute and, for the Board to have jurisdiction, there must be “an order resulting from the exercise of discretion of the comptroller, a water manager or an engineer.” As the Order has now been rescinded, there is no longer an order of the Water Manager that can be the subject of an appeal.

[32] This same situation arose in *Rossi 2019*. In that case, the rescission of the 2019 Order provided the Appellants with the remedy they were seeking. That is not the case here, as the Appellants reluctantly removed the sandbags as a show of good faith to assist in discussions regarding the flooding on the Property.

[33] While there remains a live issue for the Appellants’ related to the flooding that occurs on their property, there is no longer an Order resulting from the exercise of the discretion of the comptroller, a water manager or an engineer to trigger the Board’s jurisdiction under the legislation.

[34] In my capacity as a Vice-Chair with the Oil and Gas Appeal Tribunal, I recently addressed a similar situation in *Blane and Maryann Meek v. Oil and Gas Commission*, Decision No. 2019-OGA-002(b), March 15, 2021¹ [*Meek*]. In that case, the Meeks appealed a permit that had been issued to Primavera Resources Corp. (“Primavera”) to extend a well pad site and construct, drill, complete, and flare a new well for petrochemical exploration and extraction. Before the hearing of the appeal, Primavera asked that the Respondent to cancel the permit. The Respondent did so. The Tribunal then requested submissions from the parties regarding whether the appeal ought to proceed or be summarily dismissed due to mootness because the Permit had been cancelled. The Respondent and Primavera’s corporate successor argued the appeal should be dismissed, while the Appellants argued that it should not be.

[35] In determining that the Tribunal in that case did not have jurisdiction to hear the appeal, I stated the following at paras. 35-36:

I agree with the Tribunal’s prior analysis in paragraph 38 of *Rodney and Kim Strasky v. Oil and Gas Commission* (Decision No. 2016-OGA-004(b), February 16, 2017), that summarily dismissing an appeal under the *ATA* should only be done in “clear cases”. The reason for this is it ends an appellant’s right to have the matter heard on the merits of their case before the Tribunal. As a result, the threshold for concluding that a matter is not in the Tribunal’s jurisdiction ought to be high, so as to ensure that appellants can exercise their right to have the merits of

¹ This decision is publicly viewable at: <http://www.ogat.gov.bc.ca/>.

their appeal heard if there is any reasonable basis for concluding that the issues are within the Tribunal's scope of authority.

In this case, however, the Tribunal's authority is limited by the [*Oil and Gas Activities*] Act, and the Tribunal has no authority (even authority to dismiss appeals under the ATA) to decide matters that do not fall within the powers provided by the Act. I agree with the submissions of the Respondent and the Third Party that my jurisdiction in this appeal is limited to the Permit appealed, and does not extend to other "determinations" or permits issued at different times, even if those prior "determinations" involve oil and gas activities on the existing well pad.

[36] While I acknowledge that there is a different governing statute considered in *Meek*, I find that the circumstances are similar, and the result is the same in this case as in *Meek*. The Board's jurisdiction is limited to and defined by the WSA and my legal authority to hear this appeal no longer exists absent the Order. Therefore, while I agree that summarily dismissing an appeal should only be done in clear cases, for the reasons provided, I find that the circumstances of this appeal warrant a finding that the appeal should be dismissed. In addition, I lack the authority to decide other issues, such as flooding on the Appellants' land, absent an appealable decision issued under the WSA.

[37] As a result, I find that the Board lost any authority to hear this appeal once the Order was rescinded and I find the appeal should be summarily dismissed pursuant to section 31(a) of the ATA.

2. Is the appeal moot and, if so, are there reasons the Board should hear the appeal in any event?

[38] By letter dated December 11, 2020, the Board asked the parties to make submissions on whether the appeal should be dismissed for either lack of jurisdiction or mootness. Regarding the question of mootness, the Board asked the parties to expressly answer the following questions:

1. Will deciding the appeal have a practical effect on the rights of the parties and/or is there a "live controversy" between the parties regarding the subject matter of the appeal; and
2. If the answer to Question 1 is no, why the Board should hear the appeal in any event explaining what issues remain in dispute and why scarce resources should be expended to make a decision on those issues, when the order under appeal has been revoked.

The Respondent's Submissions

[39] The Respondent submits that since the Order has been revoked there is no longer any live controversy between the parties and determining the appeal would have no practical effect. The Respondent relies on *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 [*Borowski*], as cited in *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 2007 BCCA 507 [*McKenzie*].

[40] The Respondent further submits that this case is “on all fours” with the decision of the Board in *Gibson’s Alliance v. Director, Environmental Management Act*, Decision No. 2017-EMA-010(c), September 24, 2019 [*Gibsons*], in which the Board stated that “any order the Board might make on the appeal would be hollow and serve no practical purpose because it would relate to a remedial plan and schedule that are obsolete” (at para. 39).

[41] Regarding the question of whether the Board, should, in any event, exercise its discretion to hear the appeal, the Respondent submits that the issues raised in the Appellants’ Notice of Appeal (regarding the Ministry’s failure to address flooding on the Property and the Ministry’s alleged lack of responsibility in managing it) were not issues over which the Board had jurisdiction in any event.

[42] Furthermore, the Respondent submits that there are no special circumstances that would warrant hearing this appeal, and it would not have any practical effect on the rights of the parties since the unauthorized works in question have been removed from the stream and the Order has been revoked.

[43] As a result, the Respondent submits that this is not an appropriate case for the Board to expend scarce resources to hear the appeal.

The Third Party Submissions

[44] The Third Party agrees with the submissions of the Respondent on this issue.

[45] Furthermore, the Third Party submits that the two remedies the Appellants are seeking are no longer available to the Appellants, and no longer present “live controversies.” First, the Order has been revoked, so the Board cannot order the “suspension of the current order while this appeal is active.” Second, the Appellants have removed the sandbags, so the Board cannot order that “the sandbags ... remain in the ditch until the flooding is resolved.”

[46] The Third Party submits that, as the Appellants have brought a petition for judicial review of the *Rossi 2019* decision, any attempt by the Board to address the issues raised in this appeal may unnecessarily increase the cost, number and complexity of related judicial review proceedings.

[47] For the foregoing reasons, the Third Party urges the Board not to exercise its discretion to decide on the merits of this appeal.

The Appellants’ Submissions

[48] The Appellants did not deal with the issue of mootness in their submissions.

The Panel’s Findings

[49] The doctrine of mootness is described by the Supreme Court of Canada in *Borowski*, as quoted by the British Columbia Court of Appeal in *McKenzie* at para. 22:

The doctrine of mootness is an aspect of a general policy or a practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects

or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. The essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, 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. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[50] The test is, therefore, twofold, as described in the Board's letter of December 11, 2020.

(a) *Will deciding the appeal have a practical effect on the rights of the parties and/or is there a "live controversy" between the parties regarding the subject matter of the appeal?*

[51] I agree with the Respondent's submission that the Board's decision in *Gibsons* is like the case at hand. In that case, the appellants appealed a decision of the Director relating to his review and approval of a remediation plan for property in Gibsons, BC (the "2017 Remedial Plan"). After amendments were made to the *Contaminated Sites Regulation*, B.C. Reg. 375/96, a new remediation plan was developed which was materially different from the 2017 Remedial Plan, such that the 2017 Remedial Plan was no longer going to be implemented. In *Gibsons*, the Board discussed the issue at para. 38:

The appeal is based on the Appellants' concerns with the Director's analysis of the 2017 Remedial Plan, as well as their concerns with the Director's lack of written reasons for accepting that plan and his failure to provide one of the Appellants with an opportunity to provide input on the plan. All of their concerns with the Director's decision relate to his review and approval of the 2017 Remedial Plan. The Board is not a decision-maker at first instance. To file an appeal under section 100 of the Act, there must be an appealable decision made by a director or the district director. ...

[emphasis added]

[52] Like in *Gibsons*, there is no longer an appealable decision in this case. It was the existence of the Order that granted the Board jurisdiction to hear this appeal under section 105 of the *WSA*. With the cancellation of the Order, there is no longer a live controversy between the parties affecting their legal rights.

[53] I acknowledge, as was the case in *Meek*, that there remains a live issue or controversy from the perspective of the Appellants given their expressed concerns about flooding to their property and their claim of resulting property damage. However, I agree with the submission of the Respondent and the Third party that these are not issues which were within the Board's scope of authority to decide even if the Order had not been rescinded. As a result, any ongoing live controversies between the parties are outside of the jurisdiction of the Board to decide.

[54] I conclude, therefore, that there is no live controversy to be decided.

(b) Should the Board hear the appeal in any event?

[55] The Board in *Rossi 2019* had a similar question before it; i.e., whether it should hear the appeal even though the 2019 Order had been revoked and the appeal was moot. In that case, the Board found that the issues of whether the unnamed watercourse on the Property was properly classified as a "stream", and whether the Appellants' sandbags were causing flooding on the neighbour's property, were issues that justified the expenditure of scarce resources as "deciding these issues could prevent – or limit the scope of – an appeal of any future, similar order by the Water Manager" (at para. 12).

[56] In *Rossi 2019*, the Water Manager had rescinded the 2019 Order due to an administrative issue, and advised that she was considering issuing another order. As a result, it was likely there would be another appeal. In its decision agreeing to hear the issues, the Board stated (March 3, 2020, unpublished):

I find that there are reasonable grounds to exercise my authority to proceed with the appeal in the circumstances. Given the particular circumstances of this case, including that another section 93 order is being considered and that the Respondent's Ministry welcomes the Board's decision as to whether the ditch at issue qualifies as a stream under the *Water Sustainability Act*, I agree that the two main issues identified by the Appellants justify the expenditure of the Board's resources at this time. I also find it significant that an appeal of any subsequent, similar order may be avoided or restricted in scope. Further, the appeal has been conducted in writing and we are part way through the proceedings. The resources required to complete the appeal are not great, compared with the risk of starting afresh on the same ultimate issues with any new section 93 order.

[57] Such is not the case in this appeal. The Appellants raised no issues that are within the Board's jurisdiction that they wish to have considered. The Respondent and the Third party both were of the view that there were no such issues. In the circumstances before me the Order has been rescinded and there remains no ongoing issues relevant to consideration of whether the Board should proceed to hear this appeal.

DECISION

[58] Based on my analysis and reasons above, I summarily dismiss the Appellants' appeal.

[59] In reaching my decision, I considered all the submissions, whether specifically referenced in my reasons or not.

"David Bird"

David Bird, Panel Chair
Environmental Appeal Board

March 31, 2021