



Environmental Appeal Board

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DECISION NOS. EAB-WSA-20-A009(a) & EAB-WSA-20-A012(a) [Group File: EAB-WSA-20-G001]

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

BETWEEN: Kenneth and Dawn Olynyk **APPELLANTS**

AND: Winfried and Astrid Reuter **APPLICANTS/APPELLANTS**
(Estate of)

AND: Assistant Water Manager **RESPONDENT**

BEFORE: A Panel of the Environmental
Appeal Board
David Bird, Panel Chair

DATE: Conducted by way of written
submissions concluding on April
16, 2021

APPEARING: For the Appellants,
Kenneth and Dawn Olynyk: Self-represented

For the Applicants/
Appellants,
Winfried and Astrid
Reuter (Estate of): Erica Reuter and Rob Johnson

For the
Respondent: Livia Meret, Counsel
Ben Naylor, Counsel

STAY APPLICATION DECISION

BACKGROUND

[1] This decision considers the application of Erica Reuter and Rob Johnson, representatives of the Estate of Winfried and Astrid Reuter (the "Reuters"), for a stay of Conditional Water Licence #502279 (the "Water Licence"), issued to Kenneth and Dawn Olynyk (the "Olynyks") on November 4, 2020.

[2] The Water Licence is a recent development in a series of disputes that have lasted for more than 30 years, between some users of water from McGillivray Creek and other local water sources. The water that is allocated under water licenses is used for irrigation and domestic purposes.

[3] In 1988, the Olynyks diverted water from McGillivray Creek for domestic, gardening, and lawn care purposes, as authorized by a previous Conditional Water Licence (#61055). The licence was valid for one year, and the Olynyks continued their use of water after the expiry of that licence.

[4] The Olynyks applied for another conditional water licence in 1993, and that application was denied. The Olynyks eventually appealed that decision to the Board, but withdrew their appeal before the matter was heard.

[5] According to the Reuters, the Olynyks reportedly continued to use water from McGillivray Creek by means of an unauthorized pipeline, which was poorly maintained, and which the Olynyks were forced to remove in 2019.

[6] The current Water Licence was issued after the Olynyks applied to use water from McGillivray Creek. The Water Licence was issued by Patrick Farmer, Assistant Water Manager (the "Respondent") with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, under the *Water Sustainability Act*, S.B.C. 2014, c. 15 (the "WSA"). The Water Licence grants rights to use water for "lawn, fairway, and garden" purposes, and authorizes works to be built to divert water from McGillivray Creek to the Olynyk's property.

[7] The authorized works are planned to cross Crown land and private land not belonging to the Olynyks. Construction of those works is subject to several conditions (those relevant to the appeal are described below).

[8] The Water Licence expires on December 31, 2025, although the licence allows that "... the licensee may apply to the Comptroller of Water Rights or the Water Manager in accordance with the provisions of the WSA to amend this licence to extend its term."

[9] Both the Olynyks and the Reuters have filed appeals of the Water Licence to the Environmental Appeal Board (the "Board").

[10] The Olynyks dispute three conditions of the Water Licence:

1. the requirement that they hire and submit plans of a registered professional engineer to the Assistant Water Manager and that the engineer supervises any works carried out under the Licence;
2. the requirement that any construction that may impact other private property requires written permission of the owners of that property; and,
3. the December 2025 expiry date of the Water Licence with the option to apply for an amendment to extend the Water licence.

[11] The Reuters appeal the Water Licence on the basis that it should not have been granted to the Olynyks. The Reuters state in their notice of appeal that the Olynyks' application for a conditional water licence in 1993 was refused and never overturned. In addition, they are concerned there is insufficient water to add an additional licence to McGillivray Creek, and the proposed intake for the Olynyks'

water pipeline is above their intake meaning the Olynyks would draw their share of water before they can, despite the fact that the Reuters' water licence predates the Olynyks' Water Licence. They allege that several years ago, the Olynyks illegally installed a two-inch water intake pipeline diverting water from McGillivray Creek, and these unauthorized works posed a substantial risk to their authorized water intake and pipeline. The Reuters also submit that increased water metering and monitoring should be required if the Water Licence is upheld.

[12] In support of their appeal, the Reuters say that, on December 15, 2020, the Olynyks started building the works for the diversion of water authorized in their Water Licence, but without satisfying the requirements of the Water Licence. The Olynyks deny this, saying they were doing road maintenance.

[13] The Reuters' application for a stay was disclosed to the Olynyks and the Respondent for comment, in accordance with the Board's practices and procedures. Both provided submissions, which were disclosed to the Reuters, who provided a final reply.

[14] There is also a participant in these appeals, Joanne Warren. Ms. Warren has been granted limited participatory rights, as she holds a licence for the diversion and use of water from McGillivray Creek. Ms. Warren's limited rights of participation did not allow her to make submissions with respect to this stay application.

[15] The Board heard this preliminary application by written submissions from the parties.

ISSUE

[16] Should the Board grant a stay of the Water Licence pending a final decision on this appeal?

SUMMARY OF THE PARTIES' SUBMISSIONS

Submissions by the Reuters

[17] The Reuters' application for a stay of the Water Licence expresses concern that their eight-inch water pipeline is located within the same Crown land to be crossed by the Olynyks' works authorized under the Water Licence. The Reuters submit that construction related to the Water Licence could result in significant damage to their existing water pipeline. They submit that damage to their water pipeline can cause crop loss, loss of income, stress, and repair costs. The Reuters also submit that the Olynyks risk losing the time and costs involved in constructing the authorized works related to the Water Licence if it is cancelled on appeal, and this is a reason to grant their stay application.

Submissions by the Olynyks

[18] The Olynyks submit that without the Water Licence, they will not have access to water to support the intended use of their property. In their view, the Reuters will not experience any impact to their property or operations regardless of the outcome of the stay application. However, if the stay is granted, the Olynyks will be denied the use of water which is needed for the intended use of their property.

[19] The Olynyks submit that they have not started any construction related to the Water Licence. The Olynyks submit the false allegations about construction works related to the Water Licence resulted in them receiving a warning letter from Ms. DeRose, Water Manager, Cascades Natural Resources Operations, outlining fines that could be levied if they did not comply with the Water Licence.

[20] The Olynyks submit that they have always respected the Crown land where the Reuters' pipeline and water intake are located. Their goal is to ensure that the Reuters' water line is not harmed. In consideration of the balance of convenience test, the Olynyks submit the application for a stay should be denied.

Submissions by the Respondent

[21] The Respondent notes that clause (n) in the Water Licence requires the Olynyks to submit signed and sealed plans from a registered professional engineer outlining any works to be completed related to the Water Licence. In response to reports that work was being conducted contrary to the requirements of clause (n) of the Water Licence, a Stop-Work Order was issued on January 14, 2021.

[22] To the Respondent's knowledge, the Stop-Work Order has not been appealed and the Olynyks have complied with it. The Respondent submits that any works or activities at the site prior to the Stop-Work Order were "minor in nature". The Respondent submits that the Olynyks use and diversion of water from McGillivray Creek to date has been unauthorized.

[23] The Respondent submits that the Olynyks could potentially start works related to the Water Licence if the conditions in clause (n) of the Water Licence are received and approved but, at the time of his submission to the Board, no signed and sealed plans from a registered engineer have been submitted for review and consideration.

[24] The Respondent submits that the January 14, 2021 Stop-Work Order remains in effect, and he takes no position on the Reuters' application for a stay of the Water Licence.

Reuters' Final Reply Submissions

[25] In reply to the other parties' submissions, the Reuters submit that, in considering the work required for the Olynyks' proposed works associated with the Water Licence, it would be "virtually inconceivable that such excavation could be carried out in a manner that will avoid serious damage to our buried 8" PCV pipeline". The Reuters submit that their pipeline was laid in 1985 and they are uncertain where within the Crown land their pipeline lies. They also note that it is unclear what impact construction activities might have on the creek slope and how that might impact the costs of any future construction work to run a pipeline along the same path. The Reuters are very concerned that the Water Licence grants the Olynyks the right to the same area of Crown land already occupied by the Reuters' pipeline.

[26] The Reuters submit that construction of a pipeline running 1.8 kilometers (the length of their existing pipeline) cost approximately \$199,000.00 in 1998, implying that it would be very expensive to fix any damage that might result if the Olynyks commence works within the same area. The Reuters maintain that any damage to their water pipeline will result in significant harm including loss of farm

income and loss of domestic water supply for six people, in addition to the time and cost associated with any repairs.

[27] Considering the balance of convenience, the Reuters submit that the Olynyks purchased their property in 1998 and knew that no water licence was attached to the property. In addition, the Reuters submit that all water licence holders on McGillivray Creek objected to the Olynyks' applications for a water licence in the past. The Reuters disagree with the Olynyks' submission that they will experience harm if the stay application is granted. They note evidence that the Olynyks' ground well produces more cubic meters of water per day than what is authorized by the Water Licence. In addition, the Olynyks have operated without any water from McGillivray Creek since 2019, when they were forced to remove their unauthorized water line.

[28] The Reuters submit that it is in the best interest of all parties that the Board grant a stay of the Water Licence because if the Water Licence is cancelled on appeal, the Olynyks would have no authorization to install authorized works within Crown land.

[29] The Reuters acknowledge that the Stop-Work Order issued by the Respondent effectively stops the Olynyks from engaging in any construction activities related to the Water Licence.

[30] However, the Reuters submit that no matter how unlikely it is that the Olynyks will provide the required documents under clause (n) of the Water Licence, they do not trust this will protect their interests. They submit that the Olynyks have a history of acting without proper authorizations. Therefore, a stay order provides an added level of assurance that there will be no unauthorized activities related to McGillivray Creek and Crown land.

DISCUSSION AND ANALYSIS

[31] The Board has the authority to order a stay under section 25 of the *Administrative Tribunals Act*, which states:

The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[32] In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997)(unreported)), the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.J. No. 17 (*RJR-MacDonald*) applies to applications for stays before the Board, as set out in section 7 of the Board's Practice and Procedure Manual and Board Rule 7.

[33] The test requires the Reuters, as the applicants for a stay, to demonstrate:

1. there is a serious issue to be tried;
2. irreparable harm will likely result if the stay is not granted; and
3. the balance of convenience favours granting the stay.

[34] The onus is on the Reuters to demonstrate why a stay should be granted under this test.

Serious Issue to Be Tried

[35] In *RJR-MacDonald*, the Court said there are no specific requirements related to this part of the test, and the threshold to meet this part of the test is low. While none of the parties specifically commented on this part of the test in *RJR-MacDonald*, I am satisfied that the Reuters' appeal raises serious issues related to shared water use and water sustainability. In addition, I am satisfied the issues raised in the appeal are not purely questions of law and are not vexatious or frivolous.

[36] I find there are serious issues to resolve in the Reuters' appeal.

Irreparable harm will likely result if the stay is not granted

[37] The second part of the *RJR-MacDonald* test requires the Reuters to demonstrate their interests are likely to suffer irreparable harm, pending a decision on the merits of the appeal if the stay application is not granted. "Irreparable harm" involves consideration of how the applicants' interests are likely to be harmed, and not necessarily just from loss of income or profit. Irreparable harm can include loss of natural resources or reputation and/or monetary loss that cannot be recovered. "Irreparable" refers to the nature of the harm suffered rather than its magnitude.

[38] The Reuters expanded on their estimates of the potential irreparable harm which could be caused due to construction activities related to the Water Licence or to degradation of the creek slopes, affecting their licenced pipeline. The Reuters provide some estimates based on past experiences and costs to contextualize the potential harm.

[39] While I acknowledge the Reuters believe they could experience irreparable harm if a stay is denied and the works authorized by the Water Licence proceed before the Board decides the merits of their appeal, I am not satisfied they have established a likelihood of irreparable harm as contemplated in *RJR-MacDonald*. The Reuters' concerns are speculative in nature given their concern that the Olynyks attempted to begin constructing works on Crown land that were related to, but contrary to, the conditions of the Water Licence.

[40] While not binding on me, analysis from previous decisions of the Board can provide guidance and help bring consistency to adjudication. In *GFL Environmental Inc. v District Director, Environmental Management Act* (Decision No. 2018-EMA-021(a), December 10, 2018), at para. 92, the Board stated:

As stated by the Board in *Harvest [Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act* (Decision No. 2016-EMA-175(a), April 4, 2017)], an applicant need not conclusively prove that their interests will suffer irreparable harm if a stay is denied. However, a stay is an extraordinary remedy and the applicant must provide sufficient evidence to establish its interests are likely to suffer harm. Speculative claims, and assertions that are not supported by adequate evidence, are insufficient to establish that an applicant's interests are likely to suffer irreparable harm.

[41] I agree with the Board's analysis and find it is relevant to my analysis of the Reuters' evidence and arguments.

[42] While I am not adjudicating whether the Olynyks breached the conditions of the Water Licence, I am satisfied from the evidence that the Respondent considered it necessary to issue a Stop-Work Order to the Olynyks on January 14, 2021. This evidence also supports the conclusion that no further authorized works appear to have occurred. I find that the Stop-Work Order prevents unauthorized works from occurring until the appeal is resolved.

[43] In addition, I am satisfied that it is more likely than not that the Reuters are unlikely to suffer irreparable harm even if the works are authorized subject to clause (n) of the Water Licence and construction begins before this appeal is resolved. I make this finding on the basis that clause (n) requires the registered professional engineer to also supervise the approved works and these measures provide safeguards of protection around the potential causes of harm raised by the Reuters.

[44] For these reasons, I am not satisfied that the Reuters' interests are likely to suffer irreparable harm if the stay is not granted.

Balance of Conveniences

[45] Since the Reuters' have not established they are likely to suffer irreparable harm if the stay is not granted, I find it is unnecessary to continue my analysis on the balance of convenience.

DECISION

[46] In reaching my decision on this appeal, I have read and considered all the submissions of the parties even if not specifically referenced in my findings. I have decided that the Board should not grant a stay of the Water Licence pending a final decision on this appeal.

"David Bird"

David Bird, Panel Chair
Environmental Appeal Board

April 30, 2021