



APPEAL NO. 99-WAT-37(a)

In the matter of an appeal to the Environmental Appeal Board under section 40 of the *Water Act*, R.S.B.C. 1996, c. 483.

BETWEEN:	Duncan Devlin	APPELLANT
AND:	Engineer under the <i>Water Act</i>	RESPONDENT
AND:	Earl Devlin	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Toby Vigod, Chair	
DATE OF HEARING:	Conducted by way of written submissions concluding on August 26, 1999	
APPEARING:	For the Appellant: Duncan Devlin	
	For the Respondent: George Bryden	
	For the Third Party: Earl Devlin	

STAY DECISION

APPLICATION

On July 21, 1999, George Bryden, an Engineer under the *Water Act*, issued an Engineer's Order (the "Order") to Duncan Devlin to drain water impounded by a dam that Mr. Devlin constructed on his property and to completely remove the dam. The Order provides that the draining and dam removal shall be completed on or before Tuesday, August 31, 1999.

Mr. Devlin filed an appeal of the Order and requested a stay of execution of the Order under section 40(7) of the *Water Act*.

Earl Devlin was offered full party status in the appeal before the Board, as he is the upstream property owner.

BACKGROUND

Duncan Devlin is the registered owner of District Lot 1565, Sayward District ("Lot 1565"). Mr. Devlin constructed an earthfill dam on an unnamed stream located on Lot 1565. When Mr. Devlin inherited the property in 1988, the creek in question was not in existence as a result of stumps, tress and debris that was left over from previous clearing and bulldozing. Mr. Devlin removed the materials and decided to build a dam in order to pump water to his house well. During this period, Mr.

Devlin's well water was getting noticeably lower in the summer months after the logging of over 30-hectares of Crown forest nearby. Mr. Devlin did not obtain a water licence before beginning the construction of the dam, as is required under the *Water Act*.

Mr. Bryden ordered the removal of the dam. The Order is reproduced in its entirety below.

ENGINEER'S ORDER

SECTION 39 OF THE WATER ACT

WHEREAS Duncan Devlin is the registered owner of District Lot 1565, Sayward District, and

WHEREAS Duncan Devlin has, or permitted to have, constructed an earthfill dam, also defined as works, on an unnamed stream located on District Lot 1565, Sayward District

WHEREAS a person commits an offence:

under Section 41(1)(k) of the Water Act who: constructs, maintains, operates or uses works without authority; and

under Section 41(1)(g) of the Water Act who: places, maintains or makes use of an obstruction in the channel of a stream without authority;

WHEREAS I, George Bryden, Engineer under the Water Act, am empowered:

under section 39(1)(i) of the Water Act to order the release of stored or impounded water that he considers a danger to life [and] property; and

under Section 39(1)(d) order the repair, alteration, improvement, removal of or addition to any works;

I HEREBY ORDER Duncan Devlin to:

Undertake the drainage of impounded water and removal of works in and about District Lot 1565, Sayward District on or before Tuesday, August 31, 1999 and under the following conditions:

1. Drain the water impounded by the dam described above, at a rate not to exceed the safe carrying capacity of the unnamed stream described above, and
2. Immediately upon the completion of draining the impounded water, completely remove the earthfill dam structure.
3. During the draining and removal work, take measure to ensure that no sediment, silt, debris, material or other substance that would

adversely affect the stream flow, water quality or fish is allowed to enter the stream or flow from the work site.

4. The draining and removal work shall be completed on or before Tuesday, August 31, 1999.

Dated at Nanaimo, British Columbia, this 21 day of July, 1999.

Duncan Devlin requests a stay of the Order until such time as he can afford to put in a deeper well, or secure a water licence on the unnamed creek.

The upstream property is owned by Earl Devlin, who had 2 dams located on his property, which are the subject of a separate appeal before this Board.

RELEVANT LEGISLATION

Section 39(1)(d) and (i) Water Act (as above)

Section 41(1)(g) and (k) Water Act (as above)

Section 42 Water Act

Rights to use unrecorded water

42 (2) It is not an offence for a person to divert unrecorded water for domestic purpose or for prospecting for mineral, but in a prosecution under this Act the person diverting the water must prove that the water is unrecorded.

ISSUE

The issue in this application is whether the Board should exercise its discretion under section 40(7) of the *Water Act* to stay the execution of the Order until there is a decision on the merits of the appeal. Section 40(7) states:

An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

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), a case involving a stay application under the provisions of the *Waste Management Act*, the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant for a stay to demonstrate the following:

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

The Panel finds that this test is applicable to a stay application under the *Water Act*.

DISCUSSION

Serious Issue

This branch of the test has the lowest threshold. As stated in *RJR MacDonald* at pages 402-3, unless the case is frivolous or vexatious or is a pure question of law, as a general rule, the inquiry should proceed onto the next stage of the test.

Duncan Devlin did not expressly address whether or not there was a serious issue to be tried. However, he states that the dam is necessary because his family relies on the pond to supply them with water during summer months for all household duties, such as showering, washing clothes, flushing toilets, dish washing, and basic cleaning.

The Respondent submits that there is a serious issue to be tried as the failure of the dam on Mr. Devlin's property may have the consequence of downstream flooding and erosion, the possible siltation of fishbearing streams, and a remote possibility of danger to life.

The Panel finds that the parties have raised issues concerning the potential for harm to Mr. Devlin's family, and to fishbearing streams. The Panel finds that these issues are neither frivolous nor vexatious, and that there are serious issues to be tried in this appeal.

Irreparable Harm

At this stage, Mr. Devlin must show that he will suffer irreparable harm if a stay is not granted. As stated in *RJR MacDonald*, at 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the District's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

Mr. Devlin states that the dam is an advantage to his family in that the pond provides water for the summer household needs of his family.

The Panel finds that Mr. Devlin may suffer irreparable harm if the stay is not granted. The Panel accepts that there may be some financial loss to Mr. Devlin if the stay is not granted, as he will be required to find an alternate source of water to provide for his household needs. The Panel notes that the court in *RJR MacDonald* indicated that financial loss relied upon by an applicant may be considered irreparable harm, so long as it is unclear that such loss could be recovered at the time of a decision on the merits. The Panel notes that it is unlikely that Mr. Devlin would be able to recover the costs associated with providing an alternate water source.

Balance of Convenience

At this stage of the test, the Panel must determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application, pending a determination of the appeal on its merits.

Mr. Devlin contends that there is no evidence that harm will result if the deconstruction was delayed pending the outcome of the hearing before the Board. He submits that the balance of convenience favours the granting of a stay because the risk of negative impact of the downstream resources as a result of the removal of the dam and the costs of carrying out the Order are significantly greater than the risk of downstream flooding and erosion, possible siltation of fishbearing streams, and remote danger to life. In support of this assertion, he retained the services of Todd Wells to provide an opinion on the stability of the earthfill dam.

Mr. Wells indicated that he inspected the dam and reservoir on Duncan Devlin's property. He indicated that:

The dam appears to be soundly constructed, with no signs of instability, and should be more than adequate for the purpose intended. The clay core should continue to provide a solid, impermeable fill. The fir cribbing appears to be well anchored and will continue to provide a stable fill containment. The culvert installed to act as a spillway is sufficient to handle the 100-year flood event.

I would strongly advise against the removal of the existing structure until such a time as it is no longer required as it will likely have an impact on the downstream resource values....

In his report, Mr. Wells recommended that instead of removing the dam, certain modifications be made to enhance its structural integrity. He suggested that the drainpipe be extended approximately 5 feet, and that the downstream side of the dam be covered with geotextile and then "armor with 18 inch minus well graded shot rock below the cribbing." Further, he recommended that Mr. Devlin armor the upstream upper edge of the dam above the cribbing.

Mr. Devlin submits that Mr. Wells' report concluded that the dam is a stable structure and that it should be maintained. Further, he notes that the dam is fitted with a 20-cm water main valve at the base. He notes that he can use this valve to drain the pond when his well fills from the fall rains.

In his submissions, Earl Devlin, the upstream property owner, submits that Mr. Wells is an engineer in training and that his report is without the required stamp of a certified engineer. Earl Devlin submits that the report by Mr. Wells is unprofessional and unreliable. He notes that Mr. Wells certifies the "core of the clay" without coring or drilling, therefore, presumably by viewing it. Earl Devlin contends that if the "core of the clay" is visible, this is an indication that the structure is eroded and unstable. Further, Earl Devlin submits that the 100-year flood event referred to by Mr. Wells is a statement that requires years of background hydrology, water balances and measurements to make.

Earl Devlin had 2 dams located on his property. Earl Devlin's dams were the subject of an order for drainage and removal and subsequent appeal before the Board (*Earl Devlin v. Engineer under the Water Act* (Environmental Appeal Board, Appeal No. 98-WAT-31(a), July 28, 1999) ("Devlin"). The Board denied a stay of the Engineer's Order to Earl Devlin. In that stay application, the Board found that it

"does not believe the financial loss or remote possibility of a fire outweigh the more imminent possibility of loss to life and property should the dam fail."

He notes that the order for the removal of his own dams included directions on how to remove the dams so that there would be no downstream effects. Finally, Earl Devlin submits (as he did in his own appeal) that the creek in question is unnamed and that under section 42(2) of the *Water Act*, the water in question may be unrecorded and in such a case, it would not be an offence for Duncan Devlin (and for himself) to divert the water. Further, he contends that if Duncan Devlin is allowed to keep his dam, then he should also be allowed to keep his dams, which would necessitate a reversal of a previous Board decision (*Devlin*).

The Respondent submits that greater harm will result from granting the stay than the harm that will be suffered by Mr. Devlin if a stay is not granted. He submits that the dam is very poorly constructed and may result in complete failure and washout during the next major storm event. The Respondent notes that the failure of Mr. Devlin's dam may have the consequence of "downstream flooding and erosion and possible siltation of streams frequented by fish." In addition, he notes that there is a remote possibility of danger to life. He indicates that "because of the quantity of water held behind the dam and the height of the dam, life would be at risk only if someone was working on top of the dam or below the dam during the failure. This would be likely if someone was trying to save the dam during the failure event."

Finally, the Respondent submits that the dam in question was washed out previously and Mr. Devlin was advised not to rebuild the dam until he obtained a water licence and provided suitable engineering and design plans. He notes that Mr. Devlin nevertheless rebuilt the dam and that the design and plans of the dam are not acceptable to the Engineer under the *Water Act*. Specifically, he notes that the log crib embankments and the use of a culvert though the dam as a spillway are not acceptable design features. In addition, he contends that in order for the dam to meet the acceptable requirements, Mr. Devlin must supply evidence that the type of soil material, the slope stability and the compaction of the embankment materials are adequate for the hydraulic forces that may act upon the dam.

Duncan Devlin submits that the previous failure of the dam was the result of Lot 1578 being cleared of bush, levelled and ditched. He submits that these ditches resulted in diverting two small creeks into this system plus the fact that the land was turned into a field and therefore there was no water retention. This increased water flow, he submits, was too much for the spillway thus resulting in the failure of the dam. He submits that since that time there has not been any indication of erosion spillage or instability.

The Panel has reviewed all of the submissions and finds, on a balance of convenience, that the dam should be removed. The Panel is not satisfied that the dam does not pose a risk to life and a possibility of downstream flooding, erosion and possible siltation of fishbearing streams. Although Mr. Wells' report recommends against the removal of the dam, the Panel finds that it is not in a position to assess the validity and reliability of that recommendation at this preliminary stage. The Panel notes that the Respondent has advised that the dam does not provide acceptable stability; that the dam has been previously washed

out, it has been constructed illegally and it is subject to an order for removal. Under the circumstances, the Panel is not satisfied that the dam is an adequately stable structure and finds that it may be considered a risk should it fail during a storm event.

The Panel acknowledges that Mr. Devlin will suffer some inconvenience, including financial loss, if he is required to remove the dam. The Panel also notes Mr. Devlin's submission that the dam has been constructed to provide water storage for the summer household needs of his family. The Panel does not believe the financial loss or inconvenience associated with finding an alternate water supply to provide for summer household needs, outweighs the more imminent possibility of downstream damage should the dam fail. Accordingly, the application for a stay of the Order is denied.

The Panel notes that the Order requires Mr. Devlin to remove the dam by Tuesday, August 31, 1999. While the Panel is not prepared to stay the order, it is concerned that the time to drain the impounded water and remove the dam be extended so that Mr. Devlin can take adequate precautionary measures to ensure the dam is removed in accordance with the Order and that downstream disturbance or damage does not result from the removal of the dam.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all the evidence before it, whether or not specifically reiterated here.

The application for a stay is denied.

The time to remove the dam is extended. Mr. Devlin is required to remove the dam in accordance with the terms of the Order by September 15, 1999.

Toby Vigod, Chair
Environmental Appeal Board

August 30, 1999