



Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2002-PES-003(a)

In the matter of an appeal under section 15 of the *Pesticide Control Act*, R.S.B.C. 1996, c. 360.

BETWEEN:	Ingmar Lee	APPELLANT
AND:	Deputy Administrator, Pesticide Control Act	RESPONDENT
AND:	University of Victoria	THIRD PARTY
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE OF HEARING:	Conducted by written submissions concluding on May 2, 2002	
APPEARING:	For the Appellant: Ingmar Lee For the Respondent: Conrad Bérubé For the Third Party : R.A. Chappell	

STAY DECISION

APPLICATION

Ingmar Lee appealed the March 15, 2002, decision of Conrad Bérubé, Deputy Administrator, *Pesticide Control Act*, (the "Deputy Administrator") to issue Pesticide Control Service Licence No. 1601 (the "Licence") to the University of Victoria ("UVic") for the period from April 1, 2002, to April 1, 2003. In his Notice of Appeal, Mr. Lee requested a stay of the Licence, pending a decision on the merits of the appeal. This decision addresses Mr. Lee's application for a stay.

BACKGROUND

On February 21, 2002, the Ministry of Water, Land and Air Protection (the "Ministry") received an application for a pest control service licence from UVic for the provision of landscape pest control services on campus grounds. The licence application was sought to allow annual pesticide treatments under UVic's existing Pest Management Plans for the purpose of controlling broadleaf weeds, fungi and insects on turf and ornamentals, general vegetation, and molluscs such as slugs. The application indicated that UVic required a public land endorsement, which allows pesticide use for landscape control on public lands.

On March 14, 2002, the Deputy Administrator completed a Pesticide Service Licence Endorsement Technical Report which concluded that an "endorsement" of the licence should be approved. The Ministry has an "Endorsement Policy," which directs that a regional manager may authorize pesticide use on public lands by annually "endorsing" (issuing) certain service licences, if the total public land area to be treated annually is less than 20 hectares for the purpose of landscape and garden maintenance. On March 15, 2002, the licence was issued, subject to a number of conditions:

1. All treatments carried out on public land must be done under a Pest Management Plan (PMP) complying to the attached "IPM [Integrated Pest Management] Standards for Landscapes on Public Land." The endorsement is restricted to the following locales: Sites described in the University of Victoria's PMPs.
2. A working copy of the PMP(s) under which you are working should be kept with your application records and should be consulted before any pesticide applications occur to ensure that prospective applications are done in accordance with the PMP. **Please be advised that, on public lands, any pesticide treatments not approved under provincial authority or made in violation of the protocols outlined in an approved PMP, may result in fines, revocation of Service Licences and Applicators certificates and/or imprisonment.**
3. The licensee shall adhere to the February 28, 2001 version of "*Guidelines for Pesticide Treatments in Public Use Areas*" produced by the Ministry of Water, Land and Air Protection...
4. Unless written authorization has been received from a representative of the Integrated Pest Management department in Nanaimo, application of non-exempted pesticides are restricted to the following compounds:

Safer's Slug Bait [ferric phosphate], dormant oil, methoxychlor, Malathion 50% EC [malathion], Orthene [acephate], Roundup or Wrangler or equivalent [glyphosate], Amitrol T [Amitrol, simazine], Casoron [dichlobenyl], methoxone amine 500 [MCPA], TriKill or Trillion or equivalent [dicamba, 2, 4 D, mecoprop], Funginex [triforine], Dipel WP or equivalent [*Bacillus thuringiensis*], and Bravo [chlorothalonil]

[bold in original]

On April 10, 2002, Mr. Lee filed his Notice of Appeal of the Licence, and requested a stay pending the decision on the merits. It should be noted that Mr. Lee has objected to the use of rodenticides. The use of rodenticides by UVic is not dealt with by the Licence, and, therefore, the Panel has no jurisdiction over this matter.

UVic did not expressly oppose or agree with the application for a stay. The Deputy Administrator took no position on the stay application, but stated that he has received no further information that would alter his decision to issue the Licence.

ISSUE

The sole issue before the Panel on this preliminary application is whether a stay should be issued. The request to rescind the Licence will be addressed in the hearing on the merits, not in this application.

Section 15(8) of the *Pesticide Control Act* grants the Board the authority to order a stay. Section 15(8) states:

An appeal does not act as a stay or suspend the operation of the decision 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), 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 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.

DISCUSSION AND ANALYSIS

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 on to the next stage of the test.

In his Notice of Appeal, Mr. Lee refers to risks to health and the environment associated with exposure to pesticides as one of his reasons for requesting a stay. He is concerned that as many as 20,000 people on campus may be subjected to these "toxic" products. These concerns are echoed in Mr. Lee's submission with respect to the stay. Mr. Lee submits that there is sufficient evidence that pesticides pose an unacceptable risk to human health and the environment, and that, based on the "precautionary principle," such products are unacceptable for use at UVic.

Neither the Deputy Administrator nor UVic provided submissions regarding the seriousness of the issue to be tried.

In this case, the Panel is satisfied that a serious issue exists. Neither the protection of the environment, nor the health and safety of people on the UVic campus, are frivolous or vexatious issues. Further, this is not a pure question of law.

Irreparable Harm

At this stage of the *RJR- MacDonald* test, the party requesting a stay must demonstrate that she or 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 applicant'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. Lee submits that pesticides being used for the purpose of poisoning unwanted species on the UVic campus are unacceptable. He also submits that herbicides are being sprayed at random throughout the campus for crack and crevice treatment of weeds, and on sports-fields, without notice and during class periods. He submits that such products pose an unnecessary risk to human health and the environment. Mr. Lee is especially concerned with the use of pesticides for "cosmetic" or "ornamental" purposes. Mr. Lee referred to a report of the House of Commons Standing Committee on Environment and Sustainable Development, which stated that "[w]ith pesticides, we have good reasons to worry about public health, safety, and the special vulnerability of children." Mr. Lee also quoted from a letter sent by Julie White, Chief Executive Officer of the Canadian Cancer Society, to the Guelph Mercury newspaper, which stated that "if an activity such as the ornamental use of pesticides raises even the threat of harm to human health or the environment, precautionary measures should be taken, even if some cause-and-effect relationships are not fully established scientifically." Mr. Lee did not provide the Board copies of the documents from which the quotes were derived.

Mr. Lee also objects to the use of insecticides applied to rhododendrons and other plants susceptible to local insect infestations. He submits that it is unacceptable to introduce a foreign species on campus that is dependent on pesticides.

Mr. Lee submits that there is increasing pressure to ban the use of pesticides for "cosmetic" purposes on private as well as public property. He alleges that UVic refuses to debate the issue, and continues to apply toxic pesticides without notice on public campus grounds. Mr. Lee submits that given the outpouring of public debate, it is reasonable, based on the "precautionary principle," for the Panel to grant a stay of the Licence.

The Deputy Administrator did not address the issue of irreparable harm. However, the Deputy Administrator provided documents supporting UVic's application for the Licence (Pest Management Plans in various categories, technical reports used to support the decision of the Respondent regarding the issuance of the endorsement, and pesticide labels representative of those pesticides authorized for use under the terms of the permit). In his Pesticide Service Licence Endorsement Report, the Deputy Administrator found that:

It appeared that UVic did follow a strategy that helps minimize pesticide use. UVic provided pest management plans that they follow to minimize pest problems and the need to use pesticides.

While there were a few non-compliance issues in the past inspections have indicated that the licence holder is complying with the regulations regarding storage and handling of pesticides.

There was no solid scientific evidence put forward that would challenge the long-term safety of the products proposed, when used according to provincial restrictions.

The products authorized under the terms of the endorsement are the same as those which could be purchased over-the-counter by homeowners. There is a greater margin of confidence in applications conducted by service licensee personnel than there would be for treatments conducted by members of the general public because work crews must include certified pesticide applicators, trained in the proper use, handling and disposal of pesticides.

There appears to be no site-specific features that would prevent the safe applications of the proposed pesticides when used under the terms of the endorsement.

There are no indications that these pesticides would be used in a manner contrary to the intent or restrictions of either the labels or registration.

There is no evidence that the applicant would not be able to apply the pesticides in a safe manner and in accordance with other authorization requirements.

UVic submits that it uses pesticides in strict conformance with the requirements of the *Pesticide Control Act* and the Pest Management Plans specific to the Licence. It submits that it has reduced pesticide use dramatically in recent years, and continues to use pesticides on problem areas only. It also claims that it does not intend to use herbicides for cosmetic purposes in the future. It submits that no herbicides were used on sports fields in 2001, and it has yet to use pesticides in 2002.

Mr. Lee has provided submissions regarding general health concerns with the use of pesticides. He has not provided evidence of any specific health or environmental concerns that would arise from the use of pesticides at UVic under the terms of the Licence, if a stay is not granted. Further, the Panel has considered the Deputy Administrator's conclusions in the Pesticide Service Licence Endorsement Report, which indicates that the proposed pesticides can be safely applied at UVic, if used in accordance with the product label and Licence restrictions. In addition, the Panel notes that only certified pesticide applicators may use the pesticides under the terms of the Licence. Having considered the parties' submissions, the Panel is not satisfied that Mr. Lee has established that a refusal to grant a stay would cause irreparable harm to Mr. Lee's interest in respect of human health or the environment.

Balance of Convenience

At this stage of the test, the Panel determines which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application. Any harm to Mr. Lee's interests, if a stay is denied, must be balanced against the harm that would be suffered by UVic if a stay is granted.

Mr. Lee does not directly address the issue of the balance of convenience. However, he submits that there is widespread debate about whether the benefits of pesticides are outweighed by health and environmental risks. He also submits that UVic refuses to explore alternatives to pesticides. Mr. Lee submits that alternative non-toxic products and processes such as "steam machines" could be used.

UVic and the Deputy Administrator also do not specifically address the issue of the balance of convenience. However, UVic submits that it continues to use pesticides on a limited basis for specific localized problem areas only.

The Panel has already found that Mr. Lee has failed to establish that there will be any irreparable harm to his interests if a stay is refused. While Mr. Lee indicates that alternatives to pesticides are available to UVic, he provides no evidence concerning whether these alternatives are practical, cost-effective, or safe for use at UVic.

With respect to the potential harm to UVic's interests if a stay is granted, the Panel notes that a stay would result in UVic being unable to apply pesticides in accordance with the Licence during the period before the appeal is decided. Given that an appeal hearing has not yet been scheduled, and that pesticides are normally applied in the summer or early fall when weather conditions are dry, a stay could result in UVic being unable to apply pesticides for landscaping purposes in 2002.

Having regard to all the evidence and arguments presented, the Panel finds that Mr. Lee has not established that the potential for harm to human health and the environment if a stay is not granted, outweighs the potential harm to UVic's interests in applying pesticides for landscaping purposes, if a stay is granted.

DECISION

The Panel has considered all the submissions and arguments made, whether or not they have been specifically referenced herein. For the above reasons, the Panel finds that UVic may proceed with the pesticide use under the Licence prior to the issuance of a final decision on the appeal.

The application for a stay is denied.

Alan Andison, Chair
Environmental Appeal Board
May 17, 2002