



Environmental Appeal Board

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DECISION NO. EAB-WSA-20-A007(a)

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

BETWEEN:	Stanley and Wendy Nichol	APPELLANTS
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 October 20, 2020	
APPEARING:	For the Appellant: Self-represented	
	For the Respondent: Lee Mauro, Counsel Meghan Butler, Counsel	

STAY APPLICATION DECISION

BACKGROUND

[1] On July 16, 2020, the Assistant Water Manager (the "Water Manager"), a decision-maker with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), issued an order (the "Order") to Stanley and Wendy Nichol (the "Appellants") requiring them to decommission a dug-out structure located on their property between Highway 97C and Monte Creek.

[2] The Order requires the Appellants to hire a qualified professional to develop a plan for decommissioning or modifying the dug-out structure. An environmental management plan must also be completed by a professional biologist to manage and mitigate construction impacts to the environment. The Water Manager is to approve these plans prior to any works commencing.

[3] The plans were to be submitted for approval by September 30, 2020, and any works to be completed on or before February 28, 2021.

[4] The Water Manager's Order was issued under section 93(2)(d) of the *Water Sustainability Act* (the "WSA").

[5] The Appellants filed a notice of appeal of the Order with the Environmental Appeal Board (the "Board") on August 25, 2020, and subsequently requested a stay of the Order pending the outcome of their appeal. This application for a stay was conducted by written submissions, and both parties were also provided further opportunity to speak to the stay application during a pre-hearing conference held on January 5, 2021.

The Appeal of the Order

[6] The Appellants' notice of appeal explains that, in 2003, they and staff from the water office discussed ways to improve drainage in their hay fields. The Appellants say that they could not properly farm in the area due to the water in the field which caused poor production and caused their vehicles to become stuck.

[7] The Appellants state in their notice of appeal:

Then in 2003 [we] went to the water office and asked about improving drainage and [we] were told to stay 30 [meters] back from the creek bank, so [we] dug the old ditch wider to build up the surrounding ground.

[8] The Appellants state the original ditch to assist water to drain from the fields was constructed in 1940 and they improved the existing ditch in 2003. The Appellants' notice of appeal states that a water licence dated December 4, 1903, authorized the construction of diversion structures, and "the work [they] did was maintenance."

[9] In addition, the Appellants' notice of appeal lists several times when they spoke with Ministry staff about the dug-out, and they were either told there was no issue, or they never heard back from the Ministry staff.

APPLICATION

[10] The Appellants' September 28, 2020 submissions address their reasons for requesting a stay of the Order:

There is no serious issue. In fall of 2003. Talked to water board and they viewed water licensing and then [we] used material from ditch to raise low ground to prevent flooding and grow better hay. As you can see in picture the creek only varies 30 inches from low flow (measured Oct 1/20) to flood level. The water is very slow to drain because of the Volcanic ash layer. The water in the ditch is not used for cattle or irrigation and is not restricted to outflow in any way. 2). What do you want done? 3). If ditch is blocked. It will damage [our] hay field. [We] request an on-site viewing so [we] can show you.

[11] The Water Manager provided a response on October 13, 2020, which states it takes no position regarding the stay application. The Water Manager submits that if the stay application is granted, it should be on the condition that the Water Manager approve the time of and plans for any works which might be required following the outcome of the Appellants' appeal of the Order. The Water Manager states that because of the risk to fish and the environment due to siltation or

debris, any work must be authorized to minimize impact to downstream water rights holders.

[12] At the January 5, 2021 pre-hearing conference, the Appellants added they would suffer harm if the stay is not granted because decommissioning the dug-out structure results in poor crop production.

ISSUE

Should the Board grant a stay of the Order pending a final decision on this appeal?

RELEVANT LEGISLATION

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

25 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.

[14] 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.

[15] The test requires the Appellants, 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.

[16] The onus is on the applicant for a stay to demonstrate good and sufficient reasons why a stay should be granted under this test. A stay is considered an "extraordinary remedy".

DISCUSSION AND ANALYSIS

[17] The Appellants have the onus for satisfying the three-part test set out in *RJR-MacDonald*.

Serious Issue to Be Tried

[18] In *RJR MacDonald*, the Court stated as follows:

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[19] The Court also stated that, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

[20] The Appellants submitted that the issue is not a serious one; however, my understanding is their comment is directed to the Order rather than their appeal of the Order. They seem to be saying it would not be a serious thing if the Order was not followed.

[21] Given the Court's direction that the first part of the test has a low threshold, and that the Water Manager has taken no position on the issue, I find there is a serious issue to be decided on appeal, particularly as the appeal involves questions related to the Appellants' use of their land and their livelihoods. The issues raised in the Appellants' notice of appeal are neither frivolous nor vexatious, and are not pure questions of law.

Irreparable Harm

[22] The second part of the *RJR MacDonald* test requires the Appellants to demonstrate their interests are likely to suffer irreparable harm if the stay application is not granted. "Irreparable harm" involves consideration of how a party is 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.

[23] The Appellants submit that they will suffer harm if the stay is not granted because their farming operation will be impacted due to flooding and crop loss. I accept that this is likely to occur if a stay is denied for the purposes of this preliminary application. I also find the Appellants would likely incur additional financial loss by hiring the qualified professionals required by the order and carrying out the required construction. I am satisfied that these costs are not likely to be recoverable.

[24] In consideration of the information available to me in this application, I am satisfied the Appellants have demonstrated their interests are likely to suffer irreparable harm if the stay application is not granted. I have enough evidence to conclude the Appellants could incur costs which may not be recoverable, and the potential loss of productive use of a hay field, especially since a successful outcome on the appeal would result in the Order being varied or rescinded and the costs of complying with the Order would not be incurred if the stay is granted.

Balance of Convenience

[25] The third part of the *RJR MacDonald* test involves determining which party will suffer the greatest harm from either granting or denying the stay application.

[26] The Appellants submit that if the "ditch is blocked" it will damage their hay field. Since the Water Manager took no position, I have no evidence of any harm to the Water Manager should the stay application be granted. The Water Manager only sought that a condition be placed on the Appellants to seek approval from the Water Manager on plans for subsequent works and approval for when those works take place, so potential impacts to fish habitat and environment are minimized.

[27] I am satisfied that the balance of convenience supports granting the Appellants' stay application. In this appeal, the Appellants dispute the finding that the works completed in 2003 were unauthorized. If successful on appeal, the result

could be that the Appellants would not be required to decommission the dug-out structure, or there might be some modifications to the requirements involved in developing a plan and carrying out any works to modify or decommission the dug-out structure.

[28] If the stay application is granted, then the Appellants would not incur the cost of hiring qualified professionals and possibly having a portion of their hay fields become flooded until the issues raised by the appeal have been resolved by the Board. In addition, if not successful on the appeal, then the requirements in the Order could still be carried out after the appeal concludes.

[29] I am aware that the Court in *RJR MacDonald* also requires consideration of the role of the public interest when evaluating the balance of convenience test. This was discussed in an October 13, 2016 Board decision *Kulwinder Singh Gill; Avninderjit Kaur Gill v. Assistant Regional Water Manager* (Environmental Appeal Board, 2016-WAT-006(a)), at paragraphs 87 and 88, as follows:

The Panel has also considered the fact that the Order was issued under section 93 of the *Act*, which gives engineers (including the Regional Manager) broad powers to make orders regarding changes in and about a stream, the diversion and use of water, and any "works" (as defined in the *Act*), whether authorized or not. On its face, the appealed decision was properly issued by a statutory decision-maker exercising remedial powers to address unauthorized works and changes in and about a stream. In *RJR-MacDonald*, the Court stated as follows regarding the role of the public interest in weighing the balance of convenience:

... When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. ...

Given this statement in *RJR-MacDonald*, and given the remedial purposes for which orders may be issued under section 93 of the *Act*, there is a presumption that the Order is in the public interest, and is aimed at protecting riparian and aquatic species and their habitat, as well as addressing risks associated with flooding, erosion, and channel instability in an area that has a documented history of such events occurring during winter storms and spring freshet.

[30] Therefore, I have also considered the potential harm to the public interest resulting from a stay of the Order. I find there is insufficient evidence of harm to the public interest if the stay application is granted. The general facts currently before the Board indicate that the existing dug-out structure has been in its current state for approximately 17 years. According to the Order, the dug-out diverts and stores surface water from Monte Creek during freshet, and it intercepts and stores spring water at other times of the year. However, there is no evidence of what harm the dugout may be causing, if any, to the environment, water resources, or other public interests that may be protected or furthered by the *WSA*.

[31] In my view, the potential harm to the Appellants resulting from denying the stay application outweighs potential harm to the public interest. I also infer from

the Water Manager's submission that its concern is for fish habitat and environmental impacts is related to when and how the existing dug-out structure is decommissioned, and not its current existence.

DECISION

[32] For the reasons provided above, I grant the Appellants' stay application of the Order until the Board issues its final decision on this appeal.

[33] I have considered whether it is necessary to place a condition on the stay of the Order. I find the Water Manager's requested conditions on the stay are not relevant given that the stay suspends the requirement that the Appellants hire the qualified professionals and begin works approved by the Water Manager during specific time periods until the appeal is resolved.

[34] The Order is now suspended for the duration of the appeal. If the appeal is ultimately successful and the Order is rescinded, there will be no need to address the timing of any works. Alternatively, if the appeal is unsuccessful or is otherwise resolved in a way that results in the Appellant having to carry out works in the Order, the timing of and nature of any works can be addressed between the parties at that time.

"David Bird"

David Bird, Panel Chair
Environmental Appeal Board

February 5, 2021