



Environmental Appeal Board

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DECISION NO. EAB-WSA-21-A006(b)

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

BETWEEN: Larry Jones **APPELLANT**

AND: Assistant Water Manager **RESPONDENT**
Ministry of Forests, Lands, Natural Resource
Operations and Rural Development

BEFORE: A panel of the Environmental Appeal Board
David Bird, Vice-Chair

DATE: Conducted by way of written submissions
concluding on October 1, 2021

APPEARING: For the Appellant: Self-represented
For the Respondent: Tyna Mason, Counsel
Livia Meret, Counsel

SUMMARY DISMISSAL DECISION

[1] On April 1, 2021, Jennifer Andrews, an Assistant Water Manager (the "Respondent") with the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (the "Ministry"), issued a stop-work order (the "Order") under section 93(2)(b) of the *Water Sustainability Act* ("WSA") in response to alleged unauthorized activities occurring in or about Volcanic Creek and Granby River.

[2] On April 29, 2021, the Appellant filed an appeal of the Order to the Environmental Appeal Board (the "Board"). On May 10, 2021, he applied for a stay of the Order. A stay is an order by the Board to suspend an appealed decision until the Board makes a final decision on the appeal. If the Board does not stay the Order, it remains effective and enforceable while the appeal is underway.

[3] In my June 25, 2021 decision numbered EAB-WSA-21-A006(a)¹, I denied the Appellant's application for a stay in part for the following reasons:

I find that this is an exceptional circumstance where I ought to conduct a review of the merits of the appeal because the result of this stay application may "in effect amount to a final determination of the action". I make this finding based on the fact the Appellant has no legal authority to proceed with the works in or about the streams even if his stay application and appeal are

¹ This decision is publicly available on the Board's web site at www.eab.gov.bc.ca.

successful. In essence, the Appellant's appeal lacks the legal basis for the remedy being sought and therefore has little prospect of ever succeeding."

[4] Following the denial of the Appellant's stay application, I asked the Board's case manager to write to the parties requesting their positions on whether the Appellant's appeal should be summarily dismissed under section 31(1)(f) of the *Administrative Tribunals Act* ("ATA") due to there being no reasonable prospect that the appeal will succeed.

In a July 22, 2021 letter, the Board's case manager set out a submission schedule seeking the party's submissions on that question. This decision addresses that question.

BACKGROUND

[4] Decision EAB-WSA-21-A006(a) provides a substantive background related to this appeal. I will not repeat that information in this decision.

[5] The parties were invited to make submissions on whether the appeal should be summarily dismissed under section 31(f) of the ATA. The Board did not receive a submission from the Appellant.

[6] On September 22, 2021 the Board received a letter from the Respondent indicating that the Appellant's application to make changes in or about streams was approved. The Respondent enclosed a copy of the September 16, 2021 change approval authorized by the Assistant Water Manager.

SUBMISSIONS OF THE RESPONDENT

[7] The Respondent provided a submission dated August 31, 2021. The Respondent submits that the Appellant's appeal has no reasonable prospect of success because a hearing on the merits of the appeal of the Order will not provide the Appellant with the remedy sought.

[8] The Respondent refers to the Board's prior analysis of the legal test to be applied when considering whether to summarily dismiss an appeal under section 31(1)(f) of the ATA on the basis there is no reasonable prospect of success. In *Unifor Local 2301, Emily Toews, and Elisabeth Stannus v. Director, Environmental Management Act (Rio Tinto Alcan Inc., Third Party)*, Decision Nos. 2014-EMA-003(d), 004(d), & 005(d), June 25, 2018 [*Unifor*]², the Board considered legal tests outlined in *Berezoutskaia*³ and *Chiang*⁴.

[9] The Respondent submits that the Appellant sought approval to make changes in and about the streams on his property, then began the work without the resulted change request approval. This resulted in the Order. The Respondent argues the Appellant's appeal cannot reasonably succeed because setting aside the Order will

² This decision is publicly available on the Board's web site at www.eab.gov.bc.ca.

³ *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, at paras. 22-26.

⁴ *Chiang v. British Columbia (Human Rights Tribunal)*, 2014 BCSC 1859.

not permit him to conduct works in and about the streams on his property. The Appellant must have the requisite change approval to lawfully conduct works in and about the streams. While success on this appeal will set aside the Order, it will not authorize works in or about a stream. Therefore, the Respondent submits the appeal has no reasonable prospect of success.

[10] The Respondent submits the Order was squarely within her authority to issue under section 93 of the *WSA*, and was issued to stop unauthorized works in streams. The Respondent submits that the Appellant has not alleged she acted outside of her jurisdiction.

[11] The Board provided the Appellant the opportunity to reply to the submissions of the Respondent by August 31, 2021, and make his own arguments regarding whether the appeal should be summarily dismissed. The Appellant did not provide a submission.

[12] On September 22, 2021, the Respondent wrote the Board indicating that on September 16, 2021, she had issued the required change approval for the Appellant to conduct works in and about the streams adjacent to his property.

[13] The Board's Case Manager wrote the Appellant on September 23, 2021, acknowledging the Respondent's September 22, 2021 letter and identifying for the Appellant that the September 16, 2021 change approval appeared to provide the Appellant with the remedy sought in his appeal. The Case Manager asked the Appellant whether, in consideration of the issued change approval, he wanted to continue with this appeal and, if not, the Board would require notice in writing if he wanted to withdraw the appeal. The Case Manager also noted that the Board had not received any submissions from the Appellant respecting whether the Board ought to summarily dismiss the appeal and provided the Appellant until October 1, 2021 to provide any submissions. The Appellant did not respond.

ISSUE

[14] Should the Board summarily dismiss the appeal because it has no reasonable prospect of success?

REASONS and FINDINGS

[15] Section 31 of the *ATA* provides that any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that:

(f) there is no reasonable prospect of success the application will succeed.

[16] An "application" under the *ATA* includes an appeal, a review, or a complaint. An "application" excludes any interim or preliminary matter, or an application to the Court.

[17] Section 31(2) of the *ATA* provides that before dismissing all or part of an application under subsection (1), the tribunal must give the Applicant an opportunity to make a written submission or otherwise be heard.

[18] I am satisfied the Appellant received sufficient notice and opportunity to be heard on whether this appeal should be summarily dismissed under section 31(f) of the *ATA*.

[19] Although I am not bound by prior decisions of the Board, I accept and adopt the Board's analysis of the legal test to be applied when considering to summarily dismiss an appeal due to no reasonable prospect of success in *Unifor*. Specifically, I agree that the test outlined in *Berezoutskaia* and *Chiang* "is equally applicable to applications for summary dismissal under section 31(1)(f) of the [ATA]". At para. 123 of *Unifor*, the Board concluded the Courts' approach in *Berezoutskaia* and *Chiang*, which analyzed section 27(1)(c) of the *Human Rights Code*, was "equally applicable to applications for summary dismissal under section 31(1)(f)" of the *ATA*.

[20] In *Unifor* the Board considered whether to summarily dismiss a ground of appeal under section 31(1)(f) of the *ATA*, and not whether to dismiss the entirety of the appeal as in the present case. However, section 31(1)(f) of the *ATA* provides the Board the authority to summarily dismiss "all or part of" an appeal. Accordingly, I find that the principles underlying the test set out in *Unifor* with respect to applications under section 31(1)(f) of the *ATA* apply equally to applications to dismiss the entirety of an appeal.

[21] In *Unifor*, the Board noted that the Courts outlined an approach where a preliminary assessment of the evidence must be done to decide whether there is sufficient evidence to warrant moving the appeal forward on the merits. The Board summarized the test to be applied under section 31(1)(f) as follows at para. 123:

... the question is whether the evidence takes the impugned ground for appeal "out of the realm of conjecture", such that the evidence justifies allowing that ground to be heard at a full hearing of the merits. The onus is on the applicant for dismissal to show that there is "no reasonable prospect that findings of fact that would support the [ground for appeal] could be made on a balance of probabilities after a full hearing of the evidence".

[22] I have reviewed the available information to assess whether the evidence takes the appeal "out of the realm of conjecture" to determine whether there is any reasonable prospect of success. In this appeal the key facts are not in dispute. The Appellant does not deny that he made unauthorized changes in and about the two streams. Rather, he disputes whether he needed to have such authorization.

[23] The Appellant seeks to make changes in and out streams adjacent to his property, and had filed an application for the necessary change request under the *WSA*. However, and before receiving the necessary authority, he begun works resulting in the issuance of the Order. While the Appellant submitted that he should have had the right to complete the works in the streams to protect against loss or damage to his property, the Respondent has established that the Appellant can only lawfully do so with the change request authorization. Therefore, even if the Appellant succeeds in setting the Order set aside, he requires the necessary authority under the *WSA* to conduct works. The evidence demonstrates the Appellant now has received the necessary authority to engage in works in and about the streams.

[24] I am also persuaded by the Respondent's submissions that it is unlikely the Appellant would be successful in challenging the Order if the appeal was heard on

the merits. I am persuaded that the Respondent has the authority under section 93 of the *WSA* to issue a stop work order when unauthorized works are occurring in or about a stream. I am also satisfied that the evidence before me confirms that the Appellant had applied for the authorization to conduct the work but he did not have such authorization when the Order was issued. The evidence does not take the appeal "out of the realm of conjecture". There is no reasonable prospect that findings of fact that would support the appeal could be made on a balance of probabilities, after a full hearing of the evidence.

[25] Based on this evidence, I conclude that there is no reasonable prospect that the Appellant would be successful if this appeal proceeded to be heard on the merits.

DECISION

[26] For the reasons provided above, I summarily dismiss the Appellant's appeal under section 31(1)(f) of the *ATA*.

"David Bird"

David Bird, Vice Chair
Environmental Appeal Board

November 4, 2021