Environmental Appeal Board

Citation: *Kochel Cattle & Timber Inc. v. Water Manager*, 2025 BCEAB 20

Decision No.: EAB-WSA-24-015(a)

Decision Date: 2025-05-16

Method of Hearing: Conducted by way of written submissions concluding on May 7, 2025

Decision Type: Preliminary Stay Application Decision

Panel: Darrell LeHouillier, Chair

Appealed Under: *Water Sustainability Act*, SBC 2014, c. 15

Between:

Kochel Cattle & Timber Inc.

Appellant

And:

Water Manager

Respondent

Appearing on Behalf of the Parties:

For the Appellant: John Kochel, Representative

For the Respondent: Livia Meret and Brian Blunt, Counsel

PRELIMINARY STAY APPLICATION DECISION

[1] This preliminary decision concerns an appeal to the Environmental Appeal Board (the "Board"), from Kochel Cattle and Timber Inc. (the "Appellant"). The Appellant appeals an order (the "Order") issued by Dave Francis (the "Respondent"), a water manager appointed under the *Water Sustainability Act*.[1] The Respondent is employed by the Ministry of Water, Land and Resource Stewardship (the "Ministry").

[2] The Appellant has applied for a stay of the Order. This preliminary decision addresses that application.

BACKGROUND

[3] The Respondent issued the Order on September 19, 2024, based on authority from section 93 of the *Act*. A cover letter indicates that the Order arose after an assistant water manager was notified that there were possible unauthorised works in Goldie Creek, west of Vanderhoof, British Columbia. The cover letter indicates that a site inspection of Goldie Creek on the Appellant's property revealed "substantial unauthorized changes" to Goldie Creek and its tributaries.

[4] The Order requires the Appellant to:

- cease all activities that may cause or allow "unauthorized changes or disturbance" to Goldie Creek and its unnamed tributaries on the Appellant's property;
- ensure "all materials and equipment are kept in safe and stable locations" at least five meters from the streams;
- retain a qualified environmental professional (a "QEP") with certain qualifications to provide a report that provides a preliminary assessment of the condition of the streams and to identify remedial actions that could be implemented by November 30, 2024, to mitigate potential impacts to the streams during peak flow periods in 2025; and
- submit a copy of that report by a specified time on October 30, 2024.

[5] The Order also indicates that a separate order may direct the Appellant to implement any plan put forward by the QEP.

[6] The Appellant appealed the Order, arguing that the contents of the Order and its cover letter were "entirely inconsistent with discussions on site previously" between the Appellant and government employees.

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[1] S.B.C. 2014, c. 15 (the "*Act*").

[7] On March 31, 2025, the Appellant applied for a stay of the Order and provided submissions in support. The Respondent provided submissions in reply. While the Appellant was granted the opportunity to make rebuttal submissions, it advised the Board that it would not do so.

ISSUE

[8] Should the Board grant a stay of the Order?

POSITIONS OF THE PARTIES

Appellant

[9] The Appellant says a stay is appropriate because:

- the works were "ancient" and the Appellant only added dirt on top of them, before July 10, 2024;
- staff from the Ministry had inspected the relevant sites in July 10, 2024, while on the property for other purposes and had no concerns at that time;
- those who reported the presence of works in Goldie Creek and its tributaries had a "personal vendetta" against the Appellant or those associated with the Appellant; and
- the Order was unnecessary, unfair, unjust, time consuming, stressful, and demeaning, in the view of the Appellant.

[10] The Appellant also indicated that the Respondent had agreed to a stay.

Respondent

[11] The Respondent argues the application for a stay should be dismissed because the Appellant failed to provide any valid grounds for a stay, incorrectly indicated that the Respondent agreed to a stay, and failed to address the relevant test for a stay, outlined in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[2]

[12] The Respondent argues that the Appellant's request for a stay should be denied, consistent with previous Board decisions where the effect of a stay would be to remove a prohibition against doing something that appellant had no legal right to do in any case. The Respondent further argues that the reasons in support of the stay are trivial, including

[2] 1994 CanLII 117 (SCC) [*RJR-MacDonald*].

the Appellant's view of the Order, and do not rely on "any actual evidence as a reason for the stay being granted."

ANALYSIS

[13] The *RJR-MacDonald* test is referenced in the Board's *Practice and Procedure Manual* as the test that will be applied to stay applications. Neither party argued that the Board should use any other test, so I have used that test for the purposes of this preliminary decision.

[14] The *RJR-MacDonald* test indicates that three criteria must be satisfied for a stay to be granted:

- there must be a serious issue to be tried;
- irreparable harm will likely result if the stay is denied; and
- the balance of convenience must favour the granting of a stay.

Whether There is a Serious Issue to be Tried

[15] With respect to the first part of the test, the Respondent notes that the Board has previously found that there was not a serious issue to be tried where the only issue was whether the appellant in that case was being forbidden from doing something he had no legal right to do in any event.[3]

[16] This case is distinguishable from *Jones*. In this case, not only is the Appellant being ordered to cease making changes to a stream, it is also being prohibited from making or allowing a "disturbance" of Goldie Stream and its tributaries. It is unclear what "disturbance" means in that context. Furthermore, the Order imposes other requirements, including that the Appellant must retain a QEP and have them submit a report on a specified timeframe requires the Appellant to expend time and resources.

[17] The first branch of the test from *RJR-MacDonald* is described, in that case, as a "low threshold." All that is required is that the issue(s) not be frivolous or vexatious. I consider that the Order prohibits actions that may be otherwise permissible at law and requires the expenditure of time and resources. Disputing the appropriateness of those contents of the Order is neither frivolous nor vexatious. I am satisfied that the first branch of the *RJR-MacDonald* test is satisfied.

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[3] *Larry Jones v. Assistant Water Manager, Ministry of Forests, Lands, Natural Resource Operations and Rural Development*, 2021 BCEAB 16 (CanLII) ("*Jones*").

Whether Irreparable Harm Will Likely Result if the Stay is Denied

[18] Irreparable harm, in the context of the *RJR-MacDonald* test, is explained at paragraphs 63 and 64 of that decision:

> 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.
>
> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision ...; where one party will suffer permanent market loss or irrevocable damage to its business reputation... or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined....

[19] I agree with the Respondent that the Appellant has not satisfied the second branch of the *RJR-MacDonald* test. Since the Appellant is the party applying for the stay, it bears the burden of proof with respect to each of the three branches of the *RJR-MacDonald* test.

[20] Whether the Appellant's works were a minor matter (as implied by the Appellant's submission that the stream alteration at issue was only adding dirt on top of existing, "ancient" works) and whether Ministry staff had previously not been concerned with the state of the streams may be relevant to the appeal on its merits, but do not establish that irreparable harm will likely result if the stay application is denied. Whether the report of works in Goldie Creek and its tributaries was motivated by a vendetta, as claimed by the Appellant, is of questionable relevance to both issues. Lastly, the Appellant's objections to the Order, including that it is unnecessary, unfair, unjust, time consuming, stressful, and demeaning, does not establish likely irreparable harm, as discussed above, if the Appellant's stay application is denied.

[21] As noted by the Respondent, the Board has previously stated in *Kenneth and Dawn Olynyk v. Assistant Water Manager*, 2021 BCEAB 10 (CanLII), "the applicant must provide sufficient evidence to establish its interests are likely to suffer [irreparable] harm." The Appellant, which is the applicant in this case, has failed to do so.

Conclusion

[22] Because the Appellant has failed to satisfy the second branch of the *RJR-MacDonald* test, I do not need to address the third branch. I decline to do so in the interests of providing a speedier reply to the parties on this application.

DECISION

[23] I find that the Board should not grant a stay of the Order. I deny the Appellant's application to that effect.

[24] In reaching this conclusion, I have considered all information and authorities referenced by the parties, whether or not specifically referenced in my decision.

"Darrell LeHouillier"

Darrell LeHouillier, Chair
Environmental Appeal Board