

ALBERTA ENVIRONMENTAL APPEAL BOARD

Discontinuance of Proceedings

Date of Discontinuance of Proceedings – November 22, 2001

IN THE MATTER OF Sections 84, 85 and 87 of the
Environmental Protection and Enhancement Act, S.A. 1992 c. E-
13.3 and section 115 of the *Water Act*, S.A. 1996 c. W-3.5;

-and-

IN THE MATTER OF an appeal filed by Marc and Roch
Bremont with respect to the decision of May 5, 2000 by the
Director, Northwest Boreal Region, Natural Resources Service,
Alberta Environment, to refuse to issue an Approval under the
Water Act authorizing an existing ditch at NW 27-079-21-W5M.

Cite as: *Bremont v. Director, Northwest Boreal Region, Natural Resources Service,
Alberta Environment.*

Appellants: Marc and Roch Bremont, represented by Mr. Keith Wilson, Wilson Law Office.

Director: Mr. Nico Wyngaarden, Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment, represented by Mr. William McDonald, Alberta Justice.

Intervenors: Ducks Unlimited Canada, represented by Mr. Cyril Gurevitch, Burgess & Gurevitch; Mr. Paul Olivier; Mr. Hans Garde-Hansen; and Mr. Don Hayden.

EXECUTIVE SUMMARY

Marc and Roch Bremont applied to Alberta Environment for a *Water Act* approval to authorize an existing ditch used to deal with alleged flooding on their land adjacent to Lac Magliore, near Falher, Alberta. Alberta Environment declined to issue an Approval citing that the ditch is having an adverse effect on the lake levels.

The Environmental Appeal Board received an appeal from Marc and Roch Bremont stating that the weir structure constructed by Ducks Unlimited has caused flooding on their property and as a result the construction of a drainage ditch was needed.

After several attempts to mediate this appeal, the Board advised on September 10, 2001 that a hearing in this matter would be held on November 7, 2001.

The Board received intervenor requests and determined that Ducks Unlimited, Mr. Paul Olivier, Mr. Hans Garde-Hansen and Mr. Don Hayden would be granted intervenor status and allowed to participate in the hearing. After receiving submissions, the Board determined that the only issue to be heard at the hearing was “Whether the drainage ditch should be authorized under the *Water Act* or should it be closed and rendered ineffective?”

Five days prior to the hearing of this appeal, the Bremonts withdrew their appeal and advised that they would “seek remedies in another forum.” As a result of the withdrawal of the appeal, the Board is closing its file.

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I. BACKGROUND

A. The Application

[1] Messrs. Marc and Roch Bremont applied to the Director, Northwest Boreal Region, Natural Resources Service, Alberta Environment (the “Director”), for an Approval under the *Water Act*, S.A. 1996 c. W-3.5, to authorize an existing ditch used to deal with alleged flooding on their land at NW 27-079-21-W5M, adjacent to Lac Magliore, near Falher, Alberta. On May 5, 2000, the Director refused to issue an Approval citing that the ditch is having an adverse effect on the lake levels.

B. The Notice of Appeal

[2] The Environmental Appeal Board (the “Board”) received an appeal on May 19, 2000 from Messrs. Marc and Roch Bremont (the Appellants”) stating that the weir structure constructed by Ducks Unlimited has caused flooding on their property, and as a result the construction of a drainage ditch. In their Notice of Appeal, the Appellants request that the Board

- grant the Bremonts an Approval for the ditch plug, or alternatively, rule that the ditch plug does not require an Approval; and
- rule that Ducks Unlimited’s licence is invalid and require Ducks Unlimited to render ineffective its weir structure located on Lac Magliore; and
- grant such further relief as the Board deems just and equitable.

[3] In seeking the relief requested above, the Notice of Appeal identified seven grounds of appeal:

- The ditch plug was installed in accordance with a plan and at a location requested by Alberta Environment;
- Alberta Environment’s denial of the Approval for the ditch plug could result in continued flooding of the NW 27, thereby preventing the Bremonts from farming these lands;
- Alberta Environment failed to provide adequate or proper reasons for the denial of the Approval;

- Alberta Environment failed to take into account relevant information regarding the ditch plug;
- The Ducks Unlimited weir structure located on the Lac Magliore is illegal as Ducks unlimited does not have a valid water license for the structure and the flooding it causes;
- The ditch plug does not require an Approval from Alberta Environment as it is exempt under Section 2(d) of Schedule 1 of Alberta Regulation 205/98 because the drainage ditch does not result in a change in the flow or volume of water on the adjacent parcel of land; and
- Further grounds as may be determined upon receipt of documentation from the Department of Alberta Environment regarding the refusal of this Approval.”

C. Procedural History

[4] The Board acknowledged the appeal on May 23, 2000, and requested that the Director provide a copy of all correspondence, documents and materials related to the appeal (the “Record”).

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both Boards replied in the negative.

[6] The Board received the Record from the Director on June 9, 2000 and provided a copy to the Appellants. After reviewing all original material relevant to the appeal, the Director provided an additional Record on July 10, 2000 and forwarded a copy to the Appellants on July 12, 2000.

[7] On June 20, 2000, the Board requested the Appellants and the Director provide available dates for a mediation meeting/settlement conference, along with any agenda items, and

advise if there were any other persons that may have an interest in this appeal. The Board received a response from the Appellants on July 4, 2000 and the Director on July 13, 2000.

[8] The Appellants advised on August 2, 2000, that after reviewing the Record provided by the Board on July 10 and 12, 2000 that documents were missing and requested that the Director provide these additional documents. The Board acknowledged the letter and requested that it be provided a copy to ensure the appeal file is maintained. The Director advised the Appellants on August 16, 2000 that it would advise further once the Record was reviewed. A third supplemental Record was provided to the Board on September 25, 2000 and also to the Appellants.

[9] The Board received letters dated September 15, 2000 from the Director and September 22, 2000 from the Appellants regarding the involvement of Ducks Unlimited in this appeal. The Director contends that the positive benefit of the Ducks Unlimited's weir structure provides a positive benefit to the environment and would be hesitant to cancel the licence. The Appellants maintain that the structure has caused damage through flooding and infringed on their property rights. In response, the Board requested their comments on the participation of Ducks Unlimited and to again, provide dates for a mediation meeting. The Director advised on September 29, 2000 that Ducks Unlimited would be interested in this matter and forwarded information directly to them. The Director went on to say in his letter of October 5, 2000 that

"...with respect to Ducks Unlimited, while I feel that they may be interested in the issue before the Board, I note that Mr. Wilson has forwarded additional correspondence relating to a structure owned and operated by Ducks Unlimited that is also on this water body. That structure and the status of its approval under the *Water Act*, is an issue that is separate from the issue that is the subject of the appeal. In any participation by Ducks Unlimited, their role would be restricted to the issue at hand."

[10] On October 5, 2000, the Board addressed the interests of Mr. Paul Olivier and Mr. Don Hayden. The Board outlined the process for their possible opportunities to participate in the appeal process and requested that they clarify their intentions.¹

[11] The Board received a letter dated November 24, 2000 from counsel for Ducks Unlimited outlining their understanding of their involvement in the appeal and in response to this letter, the Appellants stated their concerns with various facts in a letter of December 1, 2000.

[12] The Board received comments from the Director and the Appellants on the participation of Ducks Unlimited and Messrs. Hayden, Olivier and Garde-Hansen, and on January 15, 2001 the Board addressed the Appellants and the Director suggesting that several principles be included in an agreement to mediate.² The Board requested that the Director, the

1 The Board received the additional information from Mr. Olivier and Mr. Hans Garde-Hansen on October 13, 2000 outlining their interest in the area for recreational purposes – bird survival possibilities and hunting, and requested they be permitted to participate in the appeal process. The Board also received a request from Mr. Donald Hayden to participate in the appeal process citing that his interest is “...to conserve Lac Magliore for waterfowl for the present and future generations”, and that he would be speaking on behalf of the Alberta Fish and Game Association and the Canadian Wildlife Federation. The Board sought comments from the Appellants and the Director on their participation.

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1. There should be some form of pre-mediation discussions, individually, between each of the participants (the Department, the Bremonts, Ducks Unlimited and the individual intervenors) and the mediator. This would take place by telephone call.
 2. Once these pre-mediation discussions are completed, the Director and the Bremonts would meet with the mediator in person. The Director and the Bremonts could choose to bring Ducks Unlimited or any of the other individual intervenors into the discussion as required.
 3. The Board anticipates that a discussion involving Ducks Unlimited would be useful and therefore suggests that Duck Unlimited be invited to observe the mediation from the “outer circle” and be brought to the table as required.
 4. The Board also suggests that the Director and the Bremonts consider some mechanism to bring to the table any of the suggestions and ideas that the individual intervenors may have. The Board would suggest that the individual intervenors be allowed to send a written submission to the mediation. Further participation could be considered by the intervenors at a later date at the discretion of the Director and the Bremonts.
 5. If a resolution were reached that deals solely with the issue between the Director and the Bremonts, then only they would sign off on the agreement. If greater participation of Ducks

Appellants and the intervenors provide their comments to its suggestion. The intervenors suggested that their participation may provide useful information to the Director and the Appellants in the "... restoration of this natural lake." The Director advised on January 23, 2001 that he agrees to the participation of Ducks Unlimited as their participation would be "...beneficial as the overriding issue with respect to this appeal is the destruction of a wetland, that Ducks Unlimited have an interest, through their operation of the weir, in maintaining." Ducks Unlimited responded advising on January 23, 2001 that they would be willing to participate in a mediation meeting as outlined in the Board's letter of January 15, 2001.

[13] In consultation with the parties, the Board held a mediation meeting with respect to this appeal on April 10, 2001 in Falher, Alberta, with conference calls being held with the Director, the Appellants, Ducks Unlimited, and Messrs. Hayden, Olivier and Garde-Hansen. Prior to the mediation meeting the mediator consulted with each party individually via conference call. As the mediation was unsuccessful, the Board proceeded to a hearing.

[14] In consultation with the parties, the Board advised that a hearing would be held November 7, 2001 at the Board's office. A Notice of Hearing was published in the *Falher Smoky River Express* on September 19, 2001 advising of the details of the subject matter of the hearing, date, time, location, and requested any intervenor requests be received by October 1, 2001.

[15] On July 30, 2001 the Board requested that the Appellants and the Director identify the issues to be heard at the hearing of the appeal. Initial submissions were received from the Director on August 7, 2001, the Appellants on August 10, 2001 and a response submission was received from the Director on August 22, 2001. On October 26, 2001, the Board advised the parties that the only issue to be heard at the hearing was "Whether the drainage ditch

should be authorized under the *Water Act* or should it be closed and rendered ineffective?” The Board also stated that it would not consider the validity of the Ducks Unlimited licence or the effect of the Ducks Unlimited licence. The Board also noted in its October 26, 2001 letter that written reasons for this decision would be forthcoming.

[16] The Board received intervenor requests early in the appeal process from Mr. Hans Garde-Hansen, Mr. Paul Olivier and Mr. Donald Hayden as indicated earlier in this report. The participation of Ducks Unlimited was also reviewed early in the process as the relief sought by the Appellants included the issue of the Ducks Unlimited’s licence for their weir on Lac Magliore.

[17] As a result of the hearing, intervenor requests were received from Mr. Garde-Hansen, Mr. Paul Olivier, Mr. Donald Hayden, and Ducks Unlimited. The first three intervenor requests summarized their recreational interest in this matter, including “the preservation of the lake, as a wildlife refuge, and migratory bird nesting and staging location.” Ducks Unlimited has similar interests to that of the first three intervenors supplemented by the knowledge of “historical lake levels and other statistical information taken by their own field personnel. They are well familiar with the history of this area...They also have evidence relating to the effect of the Bremont ditch regarding the maintenance of lake levels.” Throughout the history of this appeal, the Appellants have stated their relief directly relates to the licencing of the Ducks Unlimited’s weir. The Board concluded, in its October 26, 2001 letter that it grants intervenor status to Mr. Paul Olivier, Mr. Hans Garde-Hansen, Mr. Don Hayden and Ducks Unlimited. The Board also advised that written reasons for this decision would be forthcoming.

[18] On October 30, 2001, the Board received requests from Ducks Unlimited and the Appellants requesting additional time to file their written submissions for the hearing. The Board agreed to extend the deadline from November 1, 2001 to 2:00 p.m. on November 2, 2001. In this letter, the Appellants requested the Board:

- direct the Director to immediately disclose all additional documents and records that were obtained or produced subsequent to September 2000;
- request the parties develop an agreed statement of facts and exhibit book; and
- develop on orderly and fair schedule for the filing of materials, submissions, and hearing of this matter.

The Board advised the Appellants, in its October 30, 2001 letter, that it would “take this request under advisement and advise of its decision shortly. However, until the Board makes a decision, the parties are encouraged to continue their preparations for the hearing.”

[19] The Board provided a response to the Appellants’ letter of October 30, 2001 on October 31, 2001, advising that it has considered the letter, however, the hearing will proceed on November 7, 2001.³ Written submissions were provided by Ducks Unlimited, Mr. Don Hayden, Mr. Hans Garde-Hansen and Mr. Paul Olivier and acknowledged by the Board.

3 “First, Mr. Wilson indicates that the parties had differing views on the scope of the issues that the Board should consider and notes that the Board advised the parties of its decision respecting the scope of the issues that would be considered on October 26, 2001. With respect, the views of the parties with respect to the core issue – whether the ditch should be authorized or whether it should be closed – did not differ that greatly. Rather, it was Mr. Wilson’s view that these issues should be expanded to include consideration of a number of other issues, including the validity of the Ducks Unlimited licence and the alleged effects of the Ducks Unlimited licence. In the Board’s decision of October 26, 2001 the Board limited the scope of the hearing to exclude these additional issues. In the Board’s view, given that the scope of the hearing will be limited to this core issue, there should be sufficient time to prepare for and conduct the hearing in the time allotted.

Second, Mr. Wilson states that there are several hundred pages in the Director’s disclosure package, that there has been on-going activity since the Director’s original disclose package was prepared, and that disclose regarding this on-going activity has not been obtained. The Board notes Mr. McDonald’s efforts to ensure that the Board had a complete disclose package (see Mr. McDonald’s letters of June 8, 2000 and July 10, 2000) and the extent to which Mr. Wilson went to ensure that further documents were provided (see Mr. Wilson’s letter of August 2, 2000 where he requested further detailed disclosure). The Board also notes that Mr. Wilson has had this information since September 27, 2000. Further, it is not the Board’s usual practice to obtain subsequent disclosure packages. As a result, the Board is satisfied that it has the information necessary to review the Director’s decision to refuse the application and no further disclosure should be required. The Board also anticipates that the majority of activity on the file that has taken place since the original disclosure package was provided involves, as outlined in Mr. Wilson’s letter, on-going discussions between the Bremonts and the Director. As a result, the Board expects that Mr. Wilson will already have copies of this material in any event.

Third, Mr. Wilson indicates that because of the on-going discussions between the Bremonts and the Director, the Bremonts did not anticipate that this matter would be proceeding to a hearing and that they ‘relied’ in some way on these on-going discussion. Mr. Wilson also indicates that it was the Bremont’s understanding that ‘...the scheduling of the hearing was a mere formality to keep the appeal alive.’ Mr.

[20] On November 2, 2001, the Board wrote to Mr. Wilson confirming his telephone conversation with Board staff wherein he advised that the Bremonts would be withdrawing their appeal and that a letter would be sent confirming the withdrawal. On November 2, 2001, the Bremonts advised in a letter that they would be withdrawing their appeal.⁴

[21] On November 2, 2001, the Board received a letter from Ducks Unlimited seeking costs related to this appeal. The issue of costs will be dealt with in a separate Decision.

[22] As a result of the withdrawal of the appeal by the Bremonts, the Board's reasons for its decisions related to the issue for the hearing and the intervenors is now academic.

Wilson then indicates that 10 days ago the Director broke off the on-going negotiations and advised that the matter would be proceeding to the Board. The Board notes that it advised the parties of the November 7, 2001 date for the hearing and the October 31, 2001 deadline for filing submissions on September 10, 2001. The Board notes that at no time since the hearing was set did any of the parties raise the issues of an agreed statement of facts or the development of an exhibit book. As a result, the Board is of the view that adequate notice of the hearing was provided and, given the extension of time to file the submissions as indicated in the Board's letter of yesterday, there is adequate time to file submissions.

As a result, the Board has decided that **the hearing will proceed on November 7, 2001 as scheduled.** As indicated, the Board has extended the deadline to file submissions to 2.00 p.m. on November 2, 2001. Further, taking into account the concerns expressed by Mr. Wilson, the Board has decided to permit the parties to file final arguments in writing after the close of the hearing. The Board will use the time that would have been allotted to final arguments for the presentation of evidence. The Board will also like to extend the length of the hearing to try to ensure that it is completed in one day. The Board will be providing a schedule for the hearing shortly."

4 "I have been instructed by my clients to withdraw their appeal. The Bremonts have also instructed me to advise the Board that while they had initially hoped that the Board would be able to deal with the broader issues underlying their dispute, it became clear that the Board would not be able to do so. This coupled with their concerns about the fairness of the proposed timelines, led to the Bremont's decision to withdraw their appeal and seek remedies in another forum.

The Bremonts will continue to work toward a constructive resolution with the Department and Ducks Unlimited. However, in the event that this matter is not resolved, I have been instructed to commence a legal action against the Department and Ducks Unlimited."

II. DECISION

[23] Pursuant to section 87(7) of the *Environmental Protection and Enhancement Act*, and based on the Appellants' letter of November 2, 2001, the Board hereby discontinues its proceedings in Appeal 00-035 and will be closing its file.

Dated on November 22, 2001, at Edmonton, Alberta.

William A. Tilleman, Q.C.