

2019 ABEAB 38

December 23, 2019

Via E-Mail

Mr. Steven Mitchell
(*Appellant*)

Mr. Dylan Muscat
Oshry & Company
(*Counsel for Leonard and Dorothy Lane*)

Mr. Leonard Allan Lane

Ms. Elena Sacluti
Alberta Justice and Solicitor General
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(*Counsel for AEP*)

Mr. Russel Horne
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(*Counsel for David Pain*)

Dear Gentlemen and Ms. Sacluti:

Re: Decision Letter* – Re: Leonard Allan Lane/AEP Investigation No. 00019539
Our File No.: EAB 19-024

This is the decision and reasons of Mr. Alex MacWilliam, Ms. Tamara Bews, and Ms. Line Lacasse, members of the Environmental Appeals Board (the “Board”) and the panel members for the above-noted appeal. On July 28, 2019, the Board received a notice of appeal from Mr. Steven Mitchell. Mr. Mitchell appealed the decision of the Director, Regional Compliance, Upper Athabasca Region, Alberta Environment and Parks (the “Director”), to not take compliance action regarding a retaining wall located on the bed and shores of Lake Isle, in the Summer Village of Silver Sands, in Lac Ste. Anne County.

The Board’s initial review of the Notice of Appeal and accompanying documents submitted by Mr. Mitchell indicated the matter may not be appealable under the *Water Act*. The Board requested Mr. Mitchell provide further information as to whether the matter was appealable, which was received by the Board on September 2, 2019 and October 15, 2019. The Board has reviewed Mr. Mitchell’s written submissions and the Notice of Appeal, and has determined the Notice of Appeal filed by Mr. Mitchell deals with matters that are not appealable under section 115(1)(a) and (p), or any other provision, of the *Water Act*. Accordingly, the Board does not have jurisdiction to accept Mr. Mitchell’s appeal and the appeal is dismissed.

A. Background

* Cite as: *Mitchell v. Director, Regional Compliance, Upper Athabasca Region, Alberta Environment and Parks, re: Leonard Allan Lane/AEP Investigation 00019539* (23 December 2019), Appeal No. 19-024-DL1 (A.E.A.B.), 2019 ABEAB 38.

The following information is taken from the written submissions provided by Mr. Mitchell.

In 2009, Mr. Mitchell purchased land in the Summer Village of Silver Sands on the shore of Lake Isle ("Lot 6"), in Lac Ste. Anne County. His neighbours, Mr. Leonard Lane and Ms. Dorothy Lane (the "Lanes"), owned adjacent land also on the shoreline ("Lot 7"). A wooden barrier existed on the bed and shore of the lake in front of Lot 7 to protect the lot from erosion. Between 2011 and 2012, the Lanes replaced the wooden barrier with a wall made of galvanized steel sheeting, concrete, and boulders (the "Retaining Wall").

In October of 2012, Mr. Mitchell complained to Alberta Environment and Sustainable Resource Development ("AEP"), as it then was,¹ that the Retaining Wall was causing erosion on his property (Lot 6). On May 30, 2013, AEP sent a "Notice of Non-Compliance" to the Lanes regarding the Retaining Wall. The notice stated the Retaining Wall may be a contravention of section 142(1)(h) of the *Water Act*, but also said there was no further enforcement contemplated by AEP.

In 2014, Mr. Mitchell installed gabion baskets on the west portion of Lot 6 to protect against erosion. AEP subsequently ordered Mr. Mitchell to remove the gabion baskets, which he did.

In May 2017, AEP inspected the Retaining Wall but did not advise Mr. Mitchell if it had decided to issue an enforcement order against the Lanes.

In August 2017, Mr. Mitchell commenced legal action against the Lanes in the Court of Queen's Bench of Alberta.

In January 2018, the Director advised the Lanes that a decision had not been made regarding the Retaining Wall.

In October 2018, the Lanes sold Lot 7 to a new owner, Mr. David Pain.

On May 24, 2019, the Court of Queen's Bench refused Mr. Mitchell's application for a mandatory injunction² that would have required the removal of the Retaining Wall.

On June 28, 2019, the Director sent a letter to the Lanes advising that AEP would not take further compliance action and that it was closing its investigation.

On July 14, 2019, Mr. Mitchell filed a Notice of Appeal with the Board. Mr. Mitchell alleged the Director had not properly investigated his complaint and had not ordered the Retaining Wall be removed.

On August 1, 2019, the Board requested Mr. Mitchell provide further information as to whether the Director's June 28, 2019 letter was appealable.

On September 2, 2019 and October 15, 2019, the Board received written

¹ Alberta Environment and Sustainable Resource Development became Alberta Environment and Parks on May 24, 2015.

² A mandatory injunction is an injunction that requires a party to take a specific course of action.

submissions from Mr. Mitchell.

B. Submissions

Mr. Mitchell submitted he is directly affected by the Director's decision, as per section 115(1)(a) of the *Water Act*.³ Mr. Mitchell stated he did not receive notice of an approval application by the Lanes under the *Water Act*. Mr. Mitchell said the absence of an application for an approval under section 108 of the *Water Act* deprived him of an opportunity to file a formal written statement of concern under section 109 of the *Water Act*.⁴ Mr. Mitchell alleged the Lanes circumvented the approval process.

Mr. Mitchell submitted the Lanes have been in direct contact with the Director. Mr. Mitchell said the Lanes considered the closing of the file by the Director was evidence of an approval for the Retaining Wall. Mr. Mitchell stated the Lanes provided documents to the Court of Queen's Bench, which stated the Director had inspected and approved the Retaining Wall.

Mr. Mitchell said he attempted to fix the erosion problem on his land by installing natural stones and gabion baskets, but AEP ordered him to remove them. He said AEP did not inform him of the right to appeal that order.

Mr. Mitchell noted in the Court proceedings on May 24, 2019, Justice W. N. Renke found the Lanes breached the *Water Act* by not obtaining an approval for an activity.

Mr. Mitchell provided the Board with an Appraisal Report conducted by a real estate agent, and the 2019 Combined Tax and Assessment Notice from the Summer Village of Silver Sands. Mr. Mitchell stated these documents show he and his wife have been affected financially. Mr. Mitchell also argued he has been emotionally affected by this matter as he has been deprived of

³ Section 115(1)(a) of the *Water Act* provides:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
 - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided...."

⁴ Section 108(1)(a) the *Water Act* provides:

"An applicant

- (a) for an approval ...

shall provide notice of the application in accordance with the regulations."

Section 109 of the *Water Act* states:

"If notice is provided

- (a) under section 108(1), any person who is directly affected by the application ... may submit to the Director a written statement of concern setting out that person's concerns with respect to the application"

the quiet enjoyment of his lake lot.

Mr. Mitchell noted the Director has not released information regarding AEP's investigation of the Retaining Wall, despite a request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

Mr. Mitchell submitted the Board has jurisdiction to hear his appeal.

C. Discussion

Section 115(1)(a) of the *Water Act*⁵ provides for the filing of a notice of appeal with the Board under certain circumstances. In the context of this appeal, the most relevant circumstances are:

1. the Director must issue an approval; and
2. the person filing the notice of appeal must be directly affected by the Director's decision to issue an approval.

Mr. Mitchell stated the Retaining Wall is a breach of the *Water Act* because the Lanes do not have a *Water Act* approval. Mr. Mitchell argued the Director, by failing to take enforcement action regarding the Retaining Wall, has tacitly approved the Retaining Wall. Mr. Mitchell submitted he should be entitled to appeal the "implied" approval as he is a directly affected person who did not receive notice of an application under section 115(1)(a)(ii) of the *Water Act*.

Section 1(1)(f) of the *Water Act* defines "approval" as "an approval issued under this Act and a deemed approval under this Act." Section 37(1) of the *Water Act* states:

"A person who applies for an approval must

- (a) make an application to the Director in a form and manner satisfactory to the Director,
- (b) submit the information, including but not limited to plans and specifications, required by the Director,
- (c) pay the required fees, and

⁵ Section 115(1)(a) of the *Water Act* provides:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

- (a) if the Director issues or amends an approval, a notice of appeal may be submitted
 - (i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108, or
 - (ii) by the approval holder or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application was not provided...."

- (d) provide notice of the application in accordance with Part 8.”

The definition of “approval” in section 1(1)(f) of the *Water Act* makes it clear that an approval is a specific instrument created by legislation, and 37(1) requires an applicant for an approval to apply in the prescribed manner. An approval is often referred to in the *Water Act* in the same sentence as a licence, certificate, or registration, indicating it is similar to the other instruments.⁶

An approval is a physical document that must be kept visible and producible on demand. Section 39(1) of the *Water Act* states:

“An approval holder shall

- (a) ensure that a copy of the approval is
- (i) kept at the place where the activity occurs,
 - (ii) posted or otherwise made available, as required by the Director, and
 - (iii) produced in accordance with Part 10”

An approval cannot be granted by verbal consent or by silence on the part of the Director. The *Water Act* has no provisions for an “inferred” or “implied” approval.

There is no evidence before the Board indicating the Lanes applied for an approval and met any of the requirements of section 37(1) of the *Water Act*.

To be clear, a “deemed approval” is not an approval granted outside of the normal procedure. A “deemed approval” refers to temporary water authorizations issued under the old *Water Resources Act* that transitioned into approvals when the *Water Act* came into force.⁷

Based on the evidence before it, the Board finds the Director did not issue an approval for the Retaining Wall.

The Board notes Mr. Mitchell’s Notice of Appeal did not include as a ground of appeal the refusal of the Director to issue an enforcement order regarding the Retaining Wall. However, based on the Notice of Appeal, it appears to the Board Mr. Mitchell is seeking an enforcement order, even if he has not explicitly said so. The Board considers it appropriate to determine whether the decision not to issue an enforcement order is appealable before the Board.

Section 135(1) of the *Water Act* states: “The Director **may** issue an enforcement

⁶ For example, section 21(1) of the *Water Act* states:

“Notwithstanding the common law, a riparian owner, riparian occupant or person who owns or occupies land under which groundwater exists has the right to divert water only in accordance with section 21 and may not divert water for any other purpose unless authorized by this Act or under an approval, licence or registration.”

⁷ For example, section 18(3) of the *Water Act* provides: “Every temporary authority granted under a predecessor Act that on January 1, 1999 authorizes the diversion of water may, by order of the Minister, be a deemed approval or deemed licence under this Act.”

order to any person if, in the Director's opinion, that person has contravened this Act, whether or not that person has been charged or convicted in respect of the contravention." (Emphasis added)
 If the Director considered the Retaining Wall to be a contravention of the *Water Act*, the Director had the discretion to issue an enforcement order to the Lanes or the current owners.

Section 136(1) of the *Water Act* provides, in part:

"In an enforcement order, the Director may order any or all of the following ...

- (c) if no approval, preliminary certificate or licence has been issued and no registration has been effected, the stopping or shutting down of any activity, diversion of water, or operation of a works or thing either permanently or for a specified period of time;
- (d) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking until the Director is satisfied that the construction, operation, maintenance, repair, control, replacement or removal or the carrying out of the undertaking will be done in accordance with this Act;
- (e) the submission to the Director, for the Director's approval, of a proposal or plan to be undertaken by the person in order to remedy the contravention;
- (f) the removal or otherwise rendering ineffective of
 - (i) a works placed or constructed without approval...
 - (iii) an obstruction to the flow of water caused in any manner...
- (h) the minimization or remedying of an adverse effect on
 - (i) the aquatic environment, ... or
 - (iii) human health, property or public safety"

The Director has the authority under the *Water Act* to issue an enforcement order requiring the Lanes (or the new owners) to remove the Retaining Wall, but has chosen not to exercise that authority. The *Water Act* does not contain any provision that compels the Director to issue an enforcement order but instead leaves it to the Director's discretion.

Section 115(1)(p) of the *Water Act* states:

"A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances: ...

- (p) the person to whom an enforcement order is directed, if the Director issues an enforcement order directing
 - (i) the suspension or cancellation of an approval or licence or the cancellation of a preliminary certificate,
 - (ii) the stopping or shutting down of any activity, diversion of water or operation of a works if the activity, diversion or operation is the subject-matter of an approval or licence,

- (iii) the ceasing of construction, operation, maintenance, repair, control, replacement or removal of any works or the carrying out of an undertaking, if the works or undertaking is the subject of an approval, or
- (iv) the removal or otherwise rendering ineffective of any works or obstruction....”

The *Water Act* provides for appeals of a Director’s decision to issue an enforcement order, but is very clear as to who has this right of appeal. An enforcement order directing a person to remove works or an obstruction is only appealable by the person to whom the order is directed; not a third party such as Mr. Mitchell.

D. Decision

The Board can hear an appeal under section 115(1)(a) of the *Water Act* only if the Director has issued an approval. An approval cannot be deemed, implied, or inferred, to have been issued as any approval must meet the requirements under section 37(1) of the *Water Act*. The Board finds the Director did not issue an approval for the Retaining Wall. (The Board notes Justice Renke agreed with this assessment.) Mr. Mitchell is attempting to appeal an approval that has not been issued. As Mr. Mitchell’s notice of appeal does not meet the requirements under section 115(1)(a) of the *Water Act*, the Board does not have jurisdiction to hear this appeal.

Although the Director has the authority to issue an enforcement order to remove the Retaining Wall, there is nothing in the legislation that compels the Director to do so. The Director has the discretion, or as in this case the discretion not to issue, an enforcement order. Section 115(1)(p) of the *Water Act* is clear that only the person to whom an enforcement order is issued has a right to appeal. As Mr. Mitchell’s notice of appeal does not meet the requirements of section 115(1)(p) of the *Water Act*, an appeal of the Director’s decision not to issue an enforcement order is not appealable to the Board.

The Board finds Mr. Mitchell’s Notice of Appeal is not properly before the Board, therefore, the Board dismisses the appeal.

The Board notes Mr. Mitchell is involved in legal proceedings in the Court of Queen’s Bench regarding the Retaining Wall, which is likely the most appropriate forum for this matter.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 for Gilbert Van Nes, General Counsel, 780-427-6569 for Valerie Myrmo, Registrar of Appeals, and 780-427-7002 for Denise Black, Board Secretary. We can also be contacted via e-mail at valerie.myrmo@gov.ab.ca, gilbert.vannes@gov.ab.ca, and denise.black@gov.ab.ca.

Yours truly,

Gilbert Van Nes
General Counsel and
Settlement Officer

The information collected by the Board is necessary to allow the Environmental Appeals Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.