

ALBERTA
ENVIRONMENTAL APPEALS BOARD
DECISION

Date of Decision – November 4, 2021

IN THE MATTER OF sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Bob Fedyna and Desmond McClure with respect to the decision of the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 5041876 to Shaun Larsen.

Cite as: *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Larsen* (4 November 2021), Appeal Nos. 20-006 and 008-D (A.E.A.B.), 2021 ABEAB 29.

BEFORE:

Ms. Meg Barker, Acting Board Chair.

SUBMISSIONS BY:

Appellants:

Mr. Bob Fedyna; and Mr. Desmond McClure.

Approval Holder:

Mr. Shaun Larsen.

Director:

Mr. Muhammad Aziz, Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Mr. Paul Maas, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an approval under the *Water Act* to Mr. Shaun Larsen (the Approval Holder), allowing the construction of a diversion ditch for the purpose of flood control at SE-23-58-21-W4M, near Redwater, Alberta (the Approval).

Mr. Bob Fedyna and Mr. Desmond McClure (the Appellants) filed appeals of the Approval on June 8, 2020, and June 30, 2020, respectively, with the Environmental Appeals Board (the Board). The basis of the Appellants' appeals was that the diversion ditch was causing flooding to their land.

The Board held two mediations. The first mediation was with the Appellants, the Director, and the Approval Holder. It was not successful.

The Board held a second mediation meeting between the Approval Holder and AEP. As a result of the second mediation meeting, the Approval Holder reclaimed the diversion ditch and asked AEP to cancel the Approval. In response to this request, AEP cancelled the Approval.

AEP then asked the Board to dismiss the appeals because they were moot. There was no longer an Approval that the Board could recommend to the Minister of Environment and Parks to confirm, reverse, or vary. The Board asked the Appellants if they had any concerns, and no responses were received. As a result, the Board declared the matter moot and dismissed the appeals.

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I. BACKGROUND

[1] On December 5, 2019, the Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks (the “Director”) issued Approval No. 5041876 (the “Approval”) under the *Water Act*, R.S.A. 2000, c. W-3, to Mr. Shaun Larsen (the “Approval Holder”). The Approval allowed the Approval Holder to change the location of water for the purposes of drainage, flood control, erosion control, or channelling, and to construct a diversion ditch at SE-23-58-21-W4M (“the Diversion Ditch”), near Redwater, Alberta.

[2] On June 8, 2020, the Environmental Appeals Board (the “Board”) received a Notice of Appeal from Mr. Bob Fedyna, appealing the issuance of the Approval.

[3] On June 10, 2020, the Board wrote to Mr. Fedyna, the Director, and the Approval Holder acknowledging receipt of the Notice of Appeal. Despite the appeal being filed after the legislated deadline, the Board accepted the Notice of Appeal.¹

[4] On June 30, 2020, the Board received a Notice of Appeal from Mr. Desmond McClure. The Board acknowledged receipt of the Notice of Appeal and notified the Approval Holder and Director of the appeal. Again, despite the appeal being filed after the legislated deadline, the Board accepted the Notice of Appeal.²

[5] The basis of the appeals filed by Mr. Fedyna and Mr. Desmond (collectively, the Appellants) is their view that the Diversion Ditch is causing flooding on their respective lands, including diverting additional water from upstream of the Approval Holder’s lands. On this basis, the Appellants are found to be directly affected by the Approval.³

¹ *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Park, re: Larsen* (2 November 2021), Appeal Nos. 20-006 and 008-ID1 (A.E.A.B.), 2021 ABEAB 28.

² *Fedyna and McClure v. Director, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Park, re: Larsen* (2 November 2021), Appeal Nos. 20-006 and 008-ID1 (A.E.A.B.), 2021 ABEAB 28.

³ See Board’s Letter dated September 22, 2020.

[6] Specifically, Mr. Fedyna's Notice of Appeal requested: "Rescind Larson ditch [approval]. Reverse ditching project. Return water path to its natural flow." Further, Mr. McClure's Notice of Appeal requested:

"[Alberta Environment and Parks (AEP)] must also enforce the closing of Mr. Larsen's ditch, also restoring the land back to its natural state of water flow, thus no longer affecting my property, Mr. Fedyna's property, and other landowners downstream. This ditch is causing great grief to everyone unfortunate enough to be downstream of it. ... I ask you to make this right. Mr. Larsen and his neighbours' water is not to be made my water."

[7] On November 23, 2020, the Board held a mediation with the Appellants, the Approval Holder, and the Director (collectively, the "Parties") in attendance. The mediation did not resolve the appeals.

[8] On December 14, 2020, the Approval Holder wrote to the Board advising:

"Going forward from here we would ask the Board to place Mr. Fedyna and Mr. McClure's appeals in abeyance. As the approval holder I have decided to fill in the ditch and return the ditch to its natural state. I have asked AEP to rescind my approval and they stated they cannot do so until the land is returned to its natural state. We plan to do this next summer and have the works completed by September 1, 2021. After we have completed the work we will ask the AEP to remove our approval and once that is complete I will notify the Board of the now removed approval. I would then ask the Board to void the appeals as there will no longer be an approval to appeal."

[9] On February 4, 2021, the Board wrote to the Parties stating:

"Mr. Larsen has requested the Board close the mediation meeting. Mediations are held on a voluntary basis and will only be held if all parties agree to participate. Since Mr. Larsen no longer wishes to participate, the Board has closed the mediation.

Mr. Larsen has requested the appeals be held in abeyance until the ditch is filled in and the Director cancels the Approval. The anticipated completion date is September 1, 2021.

Mr. McClure and Mr. Fedyna are asked to advise the Board if they agree to the appeals being held in abeyance while Mr. Larsen completes the work on the ditch, to the Director's satisfaction, and the Director cancels the Approval. If the Appellants do not agree to hold the appeals in abeyance, the next step in the

appeal process would be to schedule a hearing of the appeals in April or May 2021.”

[10] On February 11, 2021, Mr. Fedyna wrote the Board stating: “We would appreciate it if Mr. Larsen filled his ditch partially by May 2021. This is due to the drainage into our fields that the ditch causes. If it is not blocked by spring it will ruin our crops for another season, just like it did last year.” On February 22, 2021, Ms. McClure wrote to the Board stating: “... [W]e only ask that the deadline for the ditch to be filled in be moved up to the spring, when the flow of water to us needs to be stopped.”

[11] On February 22, 2021, the Board wrote to the Director and the Approval Holder, asking them to respond to the Appellants’ request. On March 1, 2021, the Approval Holder responded to the Board advising: “I have previously submitted my timeline and intention. This has not changed to date.”

[12] On April 21, 2021, the Board wrote to the Director and the Approval Holder, asking them for an update regarding the work and the requirement for filling in the Diversion Ditch.

[13] On April 28, 2021, the Board received a letter from the Director stating:

“In response to the Board’s letter of April 21, the Director has not received any information from the Approval Holder that would suggest that the work to infill the ditch has begun.

The Director still feels there may be an opportunity to resolve the appeals and remains willing to discuss a path forward with the parties. The Director had previously offered to work with the Approval Holder to proceed with the remediation of the ditch. The Director is willing to work with the Approval Holder to address any concerns about the process and continues to take no position as to the timing of said remediation work. If it is still the Approval Holder’s intent to proceed with this approach, the Director remains willing to work together and to expedite the process upon receiving confirmation from him.”

[14] On April 28, 2021, the Board also received an email from the Approval Holder stating:

“I am currently reconsidering my options in relation to the ditch and the Approval due to recent developments on this matter. I now believe I will need to consult

legal counsel with Water Act expertise regarding how best to proceed with the Approval and address the appeals.

I respectfully suggest that due to the extremely busy nature of the seeding season (for grain crops), which I am currently immersed in, and which provides my livelihood, that the Board contact me at the end of May for an update regarding this file.

I intend to take no action and make no decisions until then.”

[15] On May 27, 2021, the Board wrote to the Parties advising:

“Further to the Board’s letter of May 5, 2021, the Board acknowledges a telephone conversation between Mr. and Ms. Larsen and the Board’s General Counsel and Settlement Officer.

As stated in the Board’s letter of May 5, 2021, the Director is willing to return to mediation and has offered to assist Mr. Larsen to determine how to proceed with the work on the ditch. Mr. Larsen has indicated that he wishes to take the Director up on this offer but would prefer to restart the mediation with a new mediator.

The Board is prepared to facilitate this mediation between Mr. Larsen and the Director. If it is appropriate and with the consent of the Director and Mr. Larsen, the Board would invite the Appellants to participate at a later point in the process.”

[16] On June 10, 2021, the Board wrote to the parties advising:

“The Board would like to proceed with an in-person mediation meeting between the Director and Mr. Larsen in Edmonton. ... Mr. Larsen and Mr. Maas are asked to provide their available dates to the Board in July 2021 for pre-mediation conference calls and a mediation meeting in July 2021. ... The Mediator would also like to speak to Mr. Fedyna and Mr. McClure. Mr. Fedyna and Mr. McClure are asked to provide the Board with their available dates and times in July 2021 for conference calls with the Mediator and Mr. Van Nes, General Counsel, by June 15, 2021.”

[17] The Mediator held pre-mediation calls with the Director, the Approval Holder, and each of the Appellants. A mediation meeting was held on August 6, 2021, with the Director and the Approval Holder in attendance. On August 9, 2021, the Board wrote to the Parties advising:

“At the mediation meeting, Mr. Larsen formally agreed to restore the Diversion Ditch to natural contours and predevelopment conditions. This work is to be completed by September 1, 2021. Upon completion of the work, Mr. Larsen will advise the Director and request that the Approval be cancelled. ...

The Board will be in contact again with the parties to these appeals once the Director confirms that that Approval has been cancelled.”

A copy of the Interim Resolution was attached to the Board’s letter. A copy of the Interim Resolution is attached to this Decision as Appendix “A”.

[18] On August 27, 2021, the Board received an email from Mr. Fedyna stating: “Can you please do a site visit to confirm that the ditch Shaun Larsen is repairing has been restored to its original state. I would like to know that the original grade has been maintained.”

[19] On August 30, 2021, the Board wrote to the Director, asking the Director to respond to Mr. Fedyna’s request.

[20] On September 16, 2021, the Director responded to the Board’s request stating:

“The Director is in receipt of the Board’s letter dated August 30 and Mr. Fedyna’s email of August 27, requesting that site visit be performed.

In response, I can advise that Mr. Larsen has provided written confirmation to the Director that he restored the work (i.e., the ditch) to pre-development conditions in accordance with the terms of the Resolution Agreement, along with a photograph of the decommissioned works. The Resolution Agreement does not contemplate a site visit. In the Director’s view, Mr. Larsen has complied with the terms of the Resolution Agreement and thus there is no need to conduct a site visit at this stage within the context of the Board process. As a result, the Director intends to proceed with the cancellation of Mr. Larsen’s Approval as per the terms of the Resolution Agreement, provided to all parties by the Board.

Lastly, as previously indicated, [Alberta Environment and Parks’ (AEP)] position is that once the cancellation of the Approval has been processed, the appeals will be moot. Should the parties to the appeals wish to organize a site visit among themselves outside of the Board process, they are free to do so. However, AEP will not be participating in a site visit at this stage.”

The Board responded on September 16, 2021, advising that it would await the Director’s decision.

[21] On October 25, 2021, the Board received a letter from the Director stating:

“I can advise that the Director cancelled Mr. Larsen’s Water Act Approval No. 5041876 on October 22, 2021 in accordance with the terms of the Interim Resolution Agreement dated August 6, 2021. The attached document confirms the cancellation of the Approval.

In the Director’s view, the remediation of the ditch and the cancellation of Mr. Larsen’s Approval have satisfied the remedy the Appellants requested in their Notices of Appeal. Further, with the cancellation of the Approval, there is no longer an approval to appeal. Thus, the Director requests that the Board dismiss EAB Appeals No 20-006 and 20-008 for mootness.”

[22] On October 25, 2021, the Board wrote to the Parties stating: “Please be advised that since the Approval has been cancelled, the Board intends to declare the appeals moot and close its file in this matter. If the parties have any concerns they are asked to advise the Board by November 1, 2021.” No responses were received from any of the Parties.

II. ANALYSIS

[23] As discussed, the Approval upon which the appeals are based has been cancelled. Therefore, the issue before the Board is whether the appeals are moot.

A. Judicial Analyses of Mootness

[24] The Courts have extensively analyzed the issue of mootness. In the leading case of *Borowski v. Canada (Attorney General) (No. 2)*,⁴ the Supreme Court of Canada stated that “...if subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.”⁵ The Court in *Borowski* stated the matter before it was moot as the basis of the action had disappeared, and the initial relief sought was no longer applicable.⁶ The Court also stated

⁴ *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 (“*Borowski*”).

⁵ *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 at paragraph 15.

⁶ *Borowski* was asking the court to declare section 251 of the Criminal Code of Canada invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

that it might decline to decide a case that raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, the Alberta Court of Appeal said, “...an appellate court cannot order a remedy which could have no effect.”⁷

[25] In *Borowski*, the Court set out a process to determine whether, even though an issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical effect on the rights of the parties); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[26] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, also referred to as “judicial economy,” the Court identified three situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

1. where the outcome of the case will have a practical effect on the rights of the parties;
2. where the circumstances giving rise to the case are of a recurring nature but of brief duration, thus rendering a challenge inherently susceptible to becoming moot; and
3. where the case raises an issue of public importance where a resolution is in the public interest.

⁷ *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

Not all three situations have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

[27] The third step is for the court to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

B. The Board’s Analysis of Mootness

[28] Section 95(5)(a) of *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”), states:

“The Board

(a) may dismiss a notice of appeal if

(i) it considers the notice of appeal to be frivolous or vexatious or without merit ...

(iii) for any other reason the Board considers that the notice of appeal is not properly before it”

[29] The Board has considered when an issue is moot in previous decisions. In *Butte Action Committee*,⁸ the Board stated: “By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”⁹

[30] The mootness issue was also discussed in *Kadutski*,¹⁰ where the Board stated: “An appeal is moot when an appellant requests a remedy that

⁸ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

⁹ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

¹⁰ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re:*

the Board cannot possibly grant because it is impossible, not practical, or would have no real effect.”¹¹

C. Application to This Appeal

[31] In order to have a valid appeal, there must be an appealable decision before the Board. In this case, the Director has cancelled the Approval. The Board does not have the authority to recommend that the Minister confirm, reverse, or vary something that does not exist.¹² The Appellants asked the Board to cancel the Approval,¹³ but the Director’s cancellation of the Approval has effectively achieved the results requested by the Appellants. The Appellants have already been granted the most extreme remedy the Board can recommend.

[32] The issue before the Board is factually moot because the Board does not find any grounds on which to hear the appeal. As was the case in *Borowski*, the Appellants can no longer pass the “live controversy” test because the basis of their appeal - the Approval - has been cancelled. Thus the relief requested by the Appellants - the infilling of the Diversion Ditch - has already been completed. Ultimately, the issue is no longer “tangible and concrete.” Therefore, it is necessary for the Board to consider the factors established in *Borowski* to determine if it should exercise its discretion to hear the appeal.

Ranger Oil Limited (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

¹¹ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

¹² Section 100(1)(a) of EPEA provides: “On receiving the report of the Board, the Minister may, by order, (a) confirm, reverse or vary the decision appealed”

¹³ See Mr. Fedyna’s Notice of Appeal, dated June 8, 2020, which provided: “Rescind Larson ditch [approval]. Reverse ditching project. Return water path to its natural flow.” See Mr. McClure’s Notice of Appeal, dated June 30, 2021, which provided, in part: “[AEP] must also enforce the closing of Mr. Larsen’s ditch, also restoring the land back to its natural state of water flow”

[33] Looking at the first factor, in the Board's view, the Appellants no longer have an adversarial stake in the appeals because the only source of conflict between the Appellants and the Approval Holder – the Diversion Ditch - has literally been removed. Aside from the Approval, there are no other collateral consequences that remain outstanding that could be determined if the matter was heard – there is no remedy to be granted against the Approval Holder.

[34] Turning to the second factor, the Board concludes there is no justification for the expenditure of resources to decide these appeals because the Board cannot grant a remedy that would have a practical effect on the rights of the parties – the most the Board could do is recommend that the Approval be reversed (cancelled), which has already been done.

[35] In respect of the third factor, in the opinion of the Board, making a decision on an appeal in the absence of a dispute affecting the rights of the parties could be viewed as intruding into the role of the legislative branch and outside the Board's statutorily designated role. Based on the empowering provision of section 95(5)(a)(iii) of EPEA, it is reasonable for the Board to dismiss the Appellants' Notice of Appeals because they are no longer properly before the Board. The appeals are moot because, if the Board were to proceed with its hearing, any recommendations the Board could make would be "abstract or hypothetical"¹⁴ and without any "real effect."¹⁵

¹⁴ *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

¹⁵ *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

III. DECISION

[36] In the Board's view, the appeals are moot. Therefore, pursuant to section 95(5)(a) of EPEA,¹⁶ the Board finds that the (a) appeals are without merit, and (b) are not properly before the Board.

[37] Therefore, the appeals are dismissed.

Dated on November 4, 2021, at Edmonton, Alberta.

-original signed-

Meg Barker
Acting Board Chair

¹⁶ Section 95(5)(a) of EPEA provides:
"The Board
(a) may dismiss a notice of appeal if
(i) it considers the notice of appeal to be frivolous or vexatious or without merit ...
(iii) for any other reason the Board considers that the notice of appeal is not properly before it"

Appendix A




**INTERIM RESOLUTION
ENVIRONMENTAL APPEALS BOARD
EAB File Nos. 20-006 and 008**

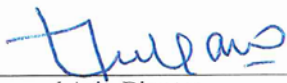
In the matter of the mediation of the appeals filed by Desmond McClure and Bob Fedyna (Appellants) in relation to the December 5, 2019 decision of the Director, Regulatory Assurance Division-North, Alberta Environment and Parks (Director), to issue Approval No. 5041876 under the *Water Act*, R.S.A. 2000, c. W-3, to Shaun Larsen (Approval Holder).

The Director and the Approval Holder have agreed to the following terms and conditions:

1. In the Director's opinion, to determine the actual impact of the partially completed Diversion Ditch as it was constructed would require a full detailed hydrological study supported by flow measurements. Such information is not currently before the Director.
2. The Approval Holder shall restore the Diversion Ditch authorized by the Approval to natural contours and predevelopment conditions by September 1st, 2021. The reason the Approval Holder shall restore the Diversion Ditch to natural contours and predevelopment conditions is because the Director has determined that the completed Drainage Ditch would be non-compliant with the terms and conditions of the Approval as a result of the water entering the Diversion Ditch from an upstream parcel.
3. Upon completion of the work authorized under condition 2, the Approval Holder shall provide the Director with: (1) confirmation that the Diversion Ditch has been reclaimed to natural contours and predevelopment conditions, and (2) a request to cancel the Approval.
4. Upon completion of the work authorized under condition 2, the Director shall cancel the Approval and provide the Approval Holder with written confirmation that the Approval has been cancelled because the Director has been advised that the works have been restored to natural contours and predevelopment conditions. The Director will advise the Board that Approval has been cancelled.

RESOLUTION AGREED TO BY ON AUGUST 6, 2021.


Shaun Larsen
Approval Holder


Muhammad Aziz, Director
Regulatory Assurance Division-North,
Alberta Environment and Parks

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Classification: Public