



ALBERTA
ENVIRONMENTAL APPEALS BOARD

May 25, 2022

Via E-Mail

Mr. Richard Harrison
Wilson Laycraft
#1601, 333 – 11 Avenue SW
Calgary, AB T2R 1L9
(*Counsel for the Appellants*)

Mr. James Zelazo
CFO & Development Manager
Mr. Jay Zelazo, CEO
Badlands Recreation Development Corp.
6761 Fairmont Drive SE
Calgary, AB T2H 0X6
(*Approval Holder*)

Ms. Nicole Hartman
Mr. Paul Maas
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(*Counsel for the Director, Alberta
Environment and Parks*)

Dear Gentlemen and Ms. Hartman:

**Re: Decision Letter* - Badlands Recreation Development Corp./Water Act
Approval No. 00406489-00-00 Our File Nos.: EAB 19-066-070**

These are the Board's decisions following the case management meeting held on May 16, 2022. These decisions were made by the Board's Chair, Dr. Chidinma Thompson.

The following issues were addressed in the case management meeting:

1. (a) when the outstanding reasons for the preliminary motions decision will be issued, and (b) when any remaining preliminary motions may be decided;
2. the length of the hearing;
3. the dates for the hearing;
4. schedule for filing the written submissions (supplemental submissions are to be filed on the bank swallows and the additional appellants added to the proceeding);
5. newspaper articles;

* *McMillan et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp. (25 May 2022), Appeal Nos. 19-066-071, 074, 081, and 083-085-ID3 (A.E.A.B.), 2022 ABEAB 21.*

6. whether section 106 of the *Legal Professions Act*, R.S.A. 2000, c. L-8 applies to the Board;¹ and
7. the substitution of witnesses by the Director and the effect on evidence related to the standard of review.

1.(a) Outstanding Reasons for Preliminary Motions

As stated at the case management meeting, the Board is currently working on its reasons for the four preliminary motions the parties previously filed. **These reasons will be provided on or before May 31, 2022.** Specifically, these preliminary motions are:

1. the reconsideration motion on the standing of a number of proposed Appellants having regard to the *Normtek Radiation Services Ltd. v. Alberta Environmental Appeal Board*, 8, 2020 ABCA 456 decision;
2. whether portions of the Director's written submission for the hearing should be struck on the basis that the role of the Director in an appeal should be limited;
3. whether more detailed "will say statements" should be required from the witnesses for the Approval Holder and the Director; and
4. whether more detailed "will say statements" should be required from the witnesses for the Appellants.

As previously advised on April 22, 2022, the Board's decision respecting these motions is as follows:

1. the reconsideration motion is granted, in part, with Mr. Jon Groves (EAB 19-081) and Ms. Shauna Kenworthy (EAB 19-074) granted standing;
2. the motion to strike parts of the Director's written submissions is denied;
3. the motion requesting more detailed "will say statements" from the witnesses on behalf of the Approval Holder and Director is denied; and
4. the motion requesting more detailed "will say statements" from the witnesses on behalf of the Appellants is denied.

1.(b) Remaining Preliminary Motions that were before the Board

As discussed at the case management meeting, as detailed in the Board's letter of April 22, 2022, the Board has dealt with the remaining issues identified by Ms. Hartman in her letter of April 8, 2022:

1. whether the Board has jurisdiction to take into account an economic analysis of a proposed project;

¹ See Appendix A.

2. whether the BDO Report submitted by the Appellants is relevant to the appeals and the issue of whether the terms and conditions of the Approval are adequate; and
3. the Appellants' application seeking leave to submit additional evidence and material to the Board.

In its letter of April 22, 2022, the Board stated it cannot deal with whether it has jurisdiction to take into account the economic analysis of the proposed project or whether the BDO Report is admissible as preliminary motions. **The Board wishes to hear the evidence and arguments of the parties at the hearing on these issues.** The Board will determine whether it has the jurisdiction to consider the economic analysis and what weight, if any, to give to the BDO Report following the hearing of the appeals.

Further, concerning the Appellants' motion to submit additional evidence, **the Board grants the Appellants' motion to provide additional evidence.** This includes the evidence regarding the bank swallows the Appellants identified in their June 22, 2021 letter. As stated, the Director and the Approval Holder will have the opportunity to respond to this evidence in their supplemental response written submissions, and the Appellants can provide a rebuttal written submission.

2. Length of the Hearing

As discussed at the case management meeting, **the hearing will be 4 days.** The parties will each be allocated 6 hours to present their direct evidence. Further, 3 hours will be allocated for each party for cross-examinations of each of the parties opposite in interest. A schedule will be provided shortly. In setting this schedule, the Board is mindful that some parties may not use all of the time allocated to them.

3. Dates for the Hearing

Further to the discussion in the case management meeting, and based on the available dates of the parties and witnesses, including the limited schedule of one of the witnesses for the Approval Holder, the Board will hold the hearing by Webex on **Wednesday, November 2; Thursday, November 3; Friday, November 4; and Monday, November 7, 2022.** The Webex links for the hearing will be provided closer to the dates of the hearing.

Mr. Zelazo, on behalf of the Approval Holder, advised the Approval Holder may retain counsel at some time shortly before the hearing to assist in the cross-examination of the Appellants. Based on this advice, **the Board will not grant an adjournment of the hearing based on the unavailability of counsel for the Approval Holder.** The Approval Holder should retain counsel who is available for the hearing dates set.

4. Schedule for Filing Supplemental Written Submissions & Expert Reports

Further to the discussion in the case management meeting, and based on the schedules of the parties and their clients, the schedule for receiving supplemental written submissions and any expert reports is as follows:

- (a) the Appellants are to file their initial supplemental written submission and any expert reports by 4:30 pm on **August 8, 2022**;
- (b) the Approval Holder and the Director are to file their response supplemental written submissions and any expert reports by 4:30 pm on **September 16, 2020**; and
- (c) the Appellants are to file their rebuttal supplemental written submission by 4:30 pm on **October 7, 2022**.

When filing your submissions and expert reports with the Board, ensure you provide copies to the other parties by the due dates listed above. Please include a list of your witnesses along with their CVs for any expert witnesses that have not already been provided.

All presentations and visuals must be provided to the Board and the other parties in advance of the hearing and no later than 4:30 pm on **October 26, 2022**.

5. Newspaper Articles

No additional comments were provided concerning the newspaper articles identified in Mr. Harrison's letter of May 13, 2022.

As stated by the Board in its letter of May 13, 2022, the Board's General Counsel is not a decision-maker and will not be making any decisions in this matter. The decision-makers are the members of the Board hearing these appeals. **You can be assured that the Board Members are approaching these appeals with an open mind and will follow the principles of a fair hearing and the due process that governs the Board.**

6. Section 106 of the Legal Professions Act

The Appellants' counsel raised the issue as to whether section 106 of the *Legal Professions Act*, R.S.A. 2000, c. L-8 applies to the Board. In other words, counsel for the Appellants asked whether Badlands Recreation Development Corp. ("Badlands") is required by law to retain legal counsel to represent it in these appeals or whether it is prohibited from being represented by its corporate director. The Board considered the submissions of the parties and the Board counsel, the applicable legislation and case law cited by the Appellants' counsel.

For the following reasons, the Board has decided that **section 106 of the *Legal Professions Act* does not apply to the Board and proceedings before the Board. Therefore, Badlands is not required by law to retain legal counsel to represent it in these appeals.**

Section 106 of the *Legal Professions Act* prohibits a person from practicing as a barrister or as a solicitor, acting as a barrister or solicitor in civil or criminal courts, commencing or carrying on or defending any action or proceeding before a court or judge on behalf of another person, or settling or negotiating a settlement for any claim for loss or damage founded in tort. However, the *Environmental Appeal Board Regulation*² permits a person appealing or appearing before the Board to be represented by a lawyer or other agent. While this regulation does not define "person", section 28(1)(nn) of the *Interpretation Act*³ provides that "person" includes a corporation and the heirs, executors, administrators or other legal representatives of a person.

The Board has a long history of corporate parties being represented by agents, which is contemplated by the *Environmental Appeal Board Regulation* and the Board's *Rules of Practice*. In *Kievit v. Alberta (Director, Approvals, Southern Region, Regional Services, Alberta Environment)*,⁴ the Board confirmed that appellants are permitted to have another person, an "agent," represent the appellant in an appeal. In many situations, this can be very helpful, particularly if this assists in presenting the issues in an organized and efficient manner.

The Appellants' counsel referred to *908077 Alberta Ltd. (Escape & Relax) v. 1313608 Alberta Ltd.*⁵ However, the Board notes that the Court of Appeal in this case expressly referred to "civil cases". The Alberta Court of Appeal subsequently confirmed in *Real Estate Strategies Group Inc. v. Prairie Communities Corp.*⁶ that section 106 of the *Legal Professions Act* refers to court proceedings and litigation.

The Board is not a court of civil or criminal jurisdiction. The Board is an administrative tribunal, and its regulatory proceedings must be distinguished from the court's civil and criminal cases. The Supreme Court of Canada has acknowledged that the Board, by its legislative mandate or the nature of the subject matter assigned to its administration, is more concerned with community interests at large and with technical policy aspects of a specialized subject, and one cannot expect the Board to function in the manner of a traditional court. This is particularly so where the Board membership is drawn partly or entirely from persons experienced or trained in the sector of activity consigned to the administrative supervision of the Board.⁷

² *Environmental Appeal Board Regulation*, Alta Reg 114/1993 sections 5(1)(d), 9(1)(b), and (10)(3) and (3.1).

³ *Interpretation Act*, R.S.A. 2000, c I-8. The *Interpretation Act* applies to every enactment. "Enactment" means an Act or a regulation or any portion of an Act or regulation. See sections 2 and 28(1)(m).

⁴ *Kievit v. Alberta (Director, Approvals, Southern Region, Regional Services, Alberta Environment)*, 01-097-105, 107-D2, June 24, 2002 at paragraph 22.

⁵ *908077 Alberta Ltd. (Escape & Relax) v. 1313608 Alberta Ltd.*, 2015 ABCA 117 at paragraph 3.

⁶ *Real Estate Strategies Group Inc. v. Prairie Communities Corp.* at paragraphs 4 to 6, 9 to 10, and the cases cited therein.

⁷ *Innisfil (Township) v. Vespra (Township)* [1981] 2 S.C.R. 145 at page 168.

From the foregoing, the Board has concluded that Badlands is entitled to be represented in these appeals by its corporate director or an agent of its choice. However, the Board noted Badland's intention to retain counsel two to three weeks before the hearing to assist with the actual hearing and examining parties at the hearing. The Board also noted the concerns of counsel for the Appellants and counsel for the Director and agrees that Badland's decision concerning retaining counsel will not be permitted to jeopardize the hearing of this appeal in any way.

7. The Substitution of Witnesses and the Effect on the Standard of Review

The Appellants' counsel raised the issue of whether the Director's decision can be reviewed on a reasonableness standard, where the Director is unable to produce for cross-examination the subject-matter witnesses upon whose opinion the Director relied on when making his decision. In other words, whether the Director's inability to produce for cross-examination individuals that assisted the Director in making the decision affects the Board's choice of the standard of review of the Director's decision in an appeal.

The Board considered the submissions of the parties. For the following reasons, **the Board has decided that the appropriate standard of review for an appellate tribunal to apply to a decision-maker of first instance is not affected by a party's entitlement or lack thereof, to cross-examination.** The Board has determined on several occasions that the standard of review of the Director's decision needs to be determined on a case by case basis. This standard of review will either be reasonableness or correctness. In each case, the Board will apply the test set out by the Alberta Court of Appeal in *Newton v. Criminal Trial Lawyers' Assn* (the "Newton Test")⁸, namely: the nature of the statutory scheme; the roles of the appellate body and decision-maker of first instance under the enabling legislation; the nature of the issues being decided; a comparison of the expertise and "advantageous position" of the appellate body and the decision-maker of first instance, including whether new evidence can be considered in the hearing of the appeal (is the hearing de novo); and the need to be economical with the appeal process (the number, length, and cost of appeals), including the need to respect the role of the decision-maker of first instance (preserving the economy and integrity of the first decision-making process).⁹

⁸ *Newton v. Criminal Trial Lawyers' Assn.*, 2010 ABCA 399 (Alta. C.A.).

⁹ *Brookman and Tulick v. Director, South Saskatchewan Region, Alberta Environment and Parks*, 2017 ABEAB 13 at paragraphs 166 and 418; *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks*, 2019 ABEAB 1 at paragraph 17; *Sears Canada Inc. et al. v. Director, Regional Compliance, South Saskatchewan Region, Alberta Environment and Parks*, 2020 ABEAB 6 at paragraphs 217 to 222.

The Court of Appeal clarified that not all the Newton Test factors are in play in every analysis of the standard of review. However, the primary factor in setting the standard of review is to examine the respective roles of the Director and the Board, and this is first and foremost a question of statutory interpretation.¹⁰ According to the Court of Appeal, the respective roles of the decision-makers as determined through statutory interpretation will always be the ultimate determiner of what standard of review an appellate tribunal should apply.¹¹

From the foregoing, the law is clear as to the test the Board must apply and the ultimate determining factor of the Board's standard of review of the Director's decision in each appeal before the Board. The Appellants' entitlement to cross-examination of any witness is not one of the factors set out by law for determining the standard of review. The Board rejects the Appellants' submission that the failure of the Director to produce the requested witnesses for cross-examination means the Director has conceded to a correctness standard of review of the Director's decision or automatically changes the standard of review from reasonableness to correctness.

The Director's counsel has advised the Board that the Director's witness, Scott Stevens, the wildlife biologist who assisted the Director with the decision under appeal, can no longer attend the hearing due to personal reasons. Similarly, Mathew Wilson, the wetland specialist who assisted the Director with the decision, cannot attend. He is no longer employed by the Department and no longer lives in Alberta. The Director has informed the Board that Scott Stevens will be substituted with Joel Nicholson, another wildlife biologist knowledgeable in the Department's general referral processes and wildlife policies. Mathew Wilson will be substituted with Amanda Cooper, another wetland specialist knowledgeable in the Department's general referral processes and wetland policies. The Board accepts the Director's reasons for the unavailability of these witnesses who directly assisted the Director with the decision under appeal.

While the Board appreciates that the substitute witnesses were not directly involved in the decision under appeal, the Board accepts the Director's submissions that they are the Department's subject-matter experts in the same areas of interest. The Appellants will be entitled to cross-examine the Director's available subject-matter witnesses on the relevant topics. The *Environmental Appeal Regulation*¹² gives each party an opportunity to direct questions to the other parties in attendance at an oral hearing. The regulation does not specify who is to be made available for cross-examination. Accordingly, the Appellants' inability to cross-examine, particularly Scott Stevens and Mathew Wilson, will have no bearing or any effect on the Board's determination of the standard of review of the Director's decision in these appeals.

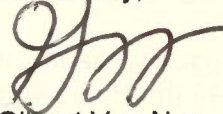
¹⁰ *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks*, 2019 ABEAB 1 at paragraph 19.

¹¹ *Cherokee Canada Inc. et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Operations Division, Alberta Environment and Parks*, 2019 ABEAB 1 at paragraph 20 citing *Pelech v. Alberta (Law Enforcement Review Board)*, 2010 ABCA 400 (Alta. C.A.) at paragraph 22.

¹² *Environmental Appeal Regulation*, AR 114/93, section 14(a).

Please do not hesitate to contact the Board if you have any questions. I can be reached toll-free by first dialing 310-0000 followed by 780-427-4179 or via e-mail at gilbert.vannes@gov.ab.ca.

Yours truly,

A handwritten signature in black ink, appearing to read 'G. Van Nes', with a stylized flourish at the end.

Gilbert Van Nes
General Counsel
and Settlement Officer

M:\EABVAppeals 2019\19-059 Badlands Recreation (A. Reiffenstein)\Letter May 25 2022 - Case Management Decisions.docx

Appendix A

Section 106 of the *Legal Professions Act* provides:

106(1) No person shall, unless the person is an active member of the Society,

- (a) practise as a barrister or as a solicitor,
- (b) act as a barrister or as a solicitor in any court of civil or criminal jurisdiction,
- (c) commence, carry on or defend any action or proceeding before a court or judge on behalf of any other person, or
- (d) settle or negotiate in any way for the settlement of any claim for loss or damage founded in tort.

(2) Subsection (1) does not apply to the following:

- (a) a student-at-law in respect of anything permitted to be done by the student-at-law in the course of the student-at-law's service under articles or under the rules made pursuant to section 105;
- (b) a person who holds an authorization granted under section 48 in respect of services provided within the scope of the authorization and in accordance with the rules under section 48, or a person who is deemed by the rules to hold an authorization under section 48 in respect of services provided in accordance with the rules;
- (c) a professional corporation in respect of services performed while it holds a permit under Part 8 that is not under suspension;
- (d) a person employed by an active member or professional corporation pursuant to a resolution of the Benchers under section 108 in respect of services provided by that person within the scope of that person's employment and in accordance with the resolution;
- (e) a university law student in respect of services permitted to be provided by that student by the rules that are provided in accordance with the conditions prescribed by the rules;
- (f) a notary public in respect of services provided by the notary public in the exercise of powers conferred on the notary public by law;
- (g) a public officer in respect of any acts performed by the public officer within the scope of the public officer's authority as a public officer;
- (h) a person who acts on the person's own behalf in an action, matter or proceeding to which the person is a party;
- (i) a person in respect of the preparation by the person of a document for the person's own use or to which the person is a party;
- (j) an officer or employee of a corporation, partnership or unincorporated body in respect of the preparation of a document for the use of the corporation,

partnership or unincorporated body or to which it is a party;

- (k) a person licensed as an insurance adjuster under the *Insurance Act* in respect of services provided by the person as an insurance adjuster;
- (l) a person permitted by statute to appear as the agent of another person before a justice of the peace, the Provincial Court or a provincial judge in respect of services provided by that person as an agent;
- (m) a person holding professional legal qualifications obtained in a country outside Canada in respect of services permitted to be provided by that person in accordance with the rules in giving legal advice respecting the laws of that country.

(3) Subsection (2)(l) does not include a person who is disbarred.