



Environmental Appeal Board

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APPEAL NOS. 2002-WAT-027(a), 2002-WAT-028(a)

In the matter of an appeal under section 40 of the *Water Act*, R.S.B.C., 1996, c. 483.

BETWEEN:	V.E. Richard Baravalle Katherine Jackson	APPELLANTS
AND:	Regional Water Manager	RESPONDENT
AND:	David G. Saltman and A. Evelyn Postgate	THIRD PARTIES
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on July 10, 2002	
APPEARING:	For the Appellants: V.E. Richard Baravalle: V.E. Richard Baravalle Katherine Jackson: Katherine Jackson For the Third Parties: David Saltman and Evelyn Postgate	

STAY DECISION

APPLICATIONS

On April 25 and May 1, 2002, respectively, Katherine Jackson and V.E. Richard Baravalle appealed conditional water licence no. 100275 (the "Licence") issued on April 2, 2002, by Allan Zackodnik, Regional Water Manager (the "Regional Manager"). The Licence is held by David Saltman and Evelyn Postgate, and authorizes the diversion and use of water from Aylmer Creek for domestic purposes. In their Notices of Appeal, the Appellants requested a stay of the Licence pending a decision on the merits of the appeals.

This decision addresses the Appellants' applications for a stay of the Licence. The application was conducted by way of written submissions.

BACKGROUND

Aylmer Creek is located in the Queen's Bay area, near Nelson, British Columbia. The headwaters of Aylmer Creek include two forks. The main fork is generally referred to as Aylmer Creek, but is also sometimes referred to as North Aylmer Creek. The smaller fork is referred to as South Aylmer Creek. South Aylmer Creek joins the main fork some distance downstream of the diversion works authorized under the Licence. The channel downstream of the confluence of the forks is referred to as Aylmer Creek.

A number of people, including the Appellants, hold water licences on South Aylmer Creek and Aylmer Creek. Mr. Baravalle holds water licences on Aylmer Creek and South Aylmer Creek. Ms. Jackson holds a water licence on Aylmer Creek. The Appellants' water intakes on Aylmer Creek are located downstream from the diversion works authorized under the Licence.

The Appellants' water licences on Aylmer Creek have earlier precedence dates than the Third Parties' Licence. Consequently, under the *Water Act*, R.S.B.C. 1996, c. 483, the Appellants' water rights on Aylmer Creek have priority over the Third Parties' rights.

In November 2001, the Third Parties purchased the land to which the Licence is appurtenant. At that time, the Licence had not been issued, but the diversion works that are authorized under the Licence had been built and were in use. In 1990, the former owners had applied for a conditional water licence. That application was held in abeyance for a number of years while local water officials attempted to determine whether there was sufficient water flow in Aylmer Creek to issue further licences. Ultimately, that application was granted, leading to the issuance of the Licence. Meanwhile, the works were installed sometime during the 1990's. Although it is not clear from the information available to the Panel, it appears that the former owners may have installed and used the works under the authority of an approval issued under the *Water Act*. Alternatively, they may have relied on section 42 of the *Water Act* for the use of unrecorded water without the need for a licence.

In October 1999 and September 2001, respectively, Mr. Baravalle and Ms. Jackson wrote to the Regional Manager stating their objection to the application for the Licence.

The Licence was issued on April 2, 2002. In separate letters dated April 2, 2002, the Regional Manager advised the Appellants of his decision to issue the Licence. In part, the letters state:

The above application, to which you objected in your letter dated... has been investigated, and after considering all of the information available, I have decided that your objection is not such as to warrant a hearing.

Stream flow records show that there is water available for further licensing and furthermore, senior licences have the protection afforded by

their earlier dates of precedence. For these reasons, I am satisfied that the issuance of a licence from this application will not adversely affect your rights, and your objection is hereby dismissed.

The Licence authorizes the diversion of a maximum of 500 gallons of water per day for domestic purposes, to serve "one dwelling." The Licence authorizes the works described as "diversion structure, tank and pipe," and states that the "construction of said works has been completed and the water is being beneficially used." It also states that the water may be used "throughout the whole year." The Licence has a precedence date of July 26, 1990. Attached to the Licence is a permit under section 26 of the *Water Act* to enter onto and occupy a small strip of Crown land for the purpose of constructing, maintaining and operating the works.

On April 25 and May 1, 2002, respectively, the Board received Ms. Jackson's and Mr. Baravalle's Notices of Appeal. In their Notices of Appeal, the Appellants requested that the decision to issue the Licence be stayed.

The Third Parties oppose the applications for a stay.

The Regional Manager provided no submissions on this matter.

ISSUE

The issue raised by these applications is whether the Panel should grant a stay of the Licence pending a decision on the merits of the appeals.

RELEVANT LAW AND LEGISLATION

Section 40(7) of the *Water Act* grants the Board the authority to order a stay:

40 (7) An appeal does not act as a stay or suspend the operation of the order being appealed unless the appeal board orders otherwise.

In *North Fraser Harbour Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997) (unreported), the Board concluded that the test set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) applies to applications for stays before the Board. That test requires an applicant to demonstrate the following:

- (1) There is a serious issue to be tried;
- (2) Irreparable harm will result if the stay is not granted; and
- (3) The balance of convenience favours granting the stay.

The onus is on the applicant to demonstrate good and sufficient reasons why a stay should be granted under this test.

The Panel will address each aspect of the *RJR MacDonald* test as it applies to these applications.

DISCUSSION

Serious Issue

In *RJR MacDonald*, the Court stated that, as a general rule, unless the case is frivolous or vexatious or is a pure question of law, the inquiry as to whether a stay should be granted should proceed to the next stage of the test.

In determining whether the appeals raise serious issues, the Panel has considered the Appellants' grounds for appealing the Licence. Ms. Jackson and Mr. Baravalle both raise the following grounds for appeal:

- there is insufficient volume of water in Aylmer Creek to supply the needs of both the Third Parties and other licensees with priority rights on the creek; and
- the Licence was granted based on out-dated water flow records that do not reflect current conditions on Aylmer Creek.

Mr. Baravalle raises a number of other grounds for appeal. Among other things, he submits that the Regional Manager did not act impartially when he decided to issue the Licence. Mr. Baravalle also submits that the works illegally incorporate an additional water intake that serves another licensee, resulting in the system serving three dwellings instead of one and diverting more than the maximum allowance of 500 gallons per day.

The Appellants' submissions indicate that there are serious issues to be tried in these appeals. The issues include whether the Regional Manager properly exercised his discretion in deciding to issue the Licence, and whether the Third Parties are complying with the terms of the Licence. None of the parties has suggested that the issues raised by these appeals are not serious ones. The Panel finds that the appeals are not frivolous or vexatious, nor do they involve pure questions of law. The Panel finds that there are serious issues to be tried in these appeals.

Irreparable Harm

The second factor to be considered is whether the Appellants, as the applicants for a stay, will suffer irreparable harm if the stay is not granted. As stated in *RJR MacDonald*, at 405:

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' 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.

The Appellants submit that if a stay is not granted, they will suffer irreparable harm due to the Third Parties' continued restriction of the water supply in Aylmer Creek.

They submit that the diversion works include a "dam" that, due to its height, captures all of the water in the creek during periods of low flow. The Appellants maintain that in October 2001, the works severely restricted or cut off the flow of water, such that the downstream water level was too low to reach the Appellants' water intakes.

Mr. Baravalle submits the Third Parties' diversion works have severely affected his orchards, resulting in harm to his economic interests. He submits that this harm is irreparable since it involves damage to new orchards and future organic apple crops, and such damage is difficult to quantify. However, he acknowledges that he could recover some of his past economic losses through civil proceedings. Mr. Baravalle also submits that denial of a stay would provide "de facto" recognition of a flawed licensing procedure, and would result in irreparable harm to future environmental and economic values.

Ms. Jackson submits that if the Third Parties continue to impede the flow of water, she may lose money, time and effort she has invested over the past 15 years in rejuvenating and planting fruit-bearing plants and trees on her property. She also submits that the threat of losing the use of her water rights on Aylmer Creek will irreparably affect her property's value.

In addition, Ms. Jackson submits that the Third Parties' use of a holding tank could adversely effect water quality for downstream users, including the Appellants. She submits that the discharge of water from the tank back into the creek could cause bacterial contamination, and that cleaning the tank could cause siltation in the creek.

Mr. Baravalle and Ms. Jackson provided evidence purporting to establish that the Regional Manager relied on outdated flow data for Aylmer Creek when he issued the Licence. Ms. Jackson provided records of historical flow data for Aylmer Creek and South Aylmer Creek, from as early as 1926 and as recent as 1992. Mr. Baravalle also provided photographic evidence to support the Appellants' contention that there was insufficient water flow downstream of the Third Parties' diversion works between mid-September and mid-October 2001.

The Third Parties submit that there is sufficient water available in Aylmer Creek for all licensed users, and they note that the Appellants have priority rights in the event of a water shortage. The Third Parties submit that their "dam" allows a continuous supply of water to flow down the creek bed. They submit that the barrier is about 35-40 centimetres high and two feet wide where the water exits. They state that when their storage tanks are full, excess water flows back into Aylmer Creek via an overflow pipe. The Third Parties also maintain that the previous owners of their property advised them to turn back the flow of water to their house when water levels in the creek are low, so that all users could enjoy the use of the creek.

The Third Parties submit that Ms. Jackson has access to three sources of water, including a well. The Third Parties agree that Ms. Jackson has put much work into

her property, but note that she recently sold it. Therefore, the Third Parties question her reasons for participating in the appeal.

With respect to Mr. Baravalle, the Third Parties submit that he has provided no evidence to establish when his photographs were taken. They further submit that drier conditions prevailed last year due to the extreme lack of snow during the previous winter. The Third Parties also submit that Mr. Baravalle told them that last year the damage to his orchards consisted of the loss of two small trees.

Further, the Third Parties submit that there is no evidence that their use of storage tanks could cause contamination or siltation of the creek.

In rebuttal, Ms. Jackson submits that the sale of her property does not impact her wish to protect the integrity of Aylmer Creek for all users, including the next owner of her property.

In assessing claims of irreparable harm, the Panel is guided by the following statement in *RJR MacDonald*:

“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.

Ms. Jackson acknowledges that she has sold her property, and there is no evidence that she continues to hold a water licence on Aylmer Creek. Therefore, the Panel is not satisfied that Ms. Jackson will suffer any irreparable harm if a stay is denied.

With respect to Mr. Baravalle, the Panel finds that the Appellants’ evidence of water levels during Fall 2001 and past decades is not decisive of whether he will suffer from inadequate supply of irrigation water during September/October 2002, assuming that the appeal is decided before the dry season in 2003. Evidence of water levels during Fall 2001 is not necessarily indicative of levels for Fall 2002, as water levels in streams vary from year to year depending on factors such as seasonal precipitation and temperature levels. Further, the Appellants themselves submit that the flow data from 1992 and earlier is outdated and does not reflect current conditions on Aylmer Creek. In addition, the Panel is not satisfied that any harm that may have occurred in 2001, and which may occur in 2002, is the result of the Third Parties water use, or is simply the result of extreme dry weather conditions. The use of water in Aylmer Creek by other users located upstream from the Appellants may also contribute to any low water conditions experienced by the Appellants. The Panel notes that granting a stay of the Licence may have no effect on these potential causes or contributors to any losses suffered by Mr.

Baravalle. In any event, the Appellants' evidence in this regard is more relevant to the merits of the decision to issue the Licence than to the issues currently before the Panel.

The Panel accepts that Mr. Baravalle may suffer some economic losses if the water level in Aylmer Creek during September/October 2002 becomes too low to supply his needs. He could suffer losses as a result of damage to his fruit trees and/or damage to his apple crop. However, the Panel finds that such damages may be recoverable from private parties through a civil proceeding and would not be difficult to quantify, as courts do issue awards of damages based on future losses. Further, there is no indication that, if such losses occurred, it would impose considerable economic hardship on Mr. Baravalle. There is also no indication that the long-term viability of his orchards would be affected if water levels in Aylmer Creek became too low during September/October 2002.

For all of these reasons, the potential harm that Mr. Baravalle could suffer if a stay was denied cannot be characterized as irreparable. Accordingly, the Panel is not satisfied that Mr. Baravalle would suffer irreparable harm if a stay is denied.

In summary, the Panel finds that the Appellants have not established that they will suffer irreparable harm if a stay is denied.

Balance of Convenience

The balance of convenience stage of the test requires the Panel to determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay application pending a determination of the appeal on its merits.

The Appellants submit that the balance of convenience favours granting a stay. Ms. Jackson submits that the Third Parties will suffer no real harm if a stay is granted, because they did not install the diversion works or apply for the Licence. She suggests that if the Third Parties were required to dismantle the works, they could install a well, buy distilled water from the local supermarket, or use rain as their source of domestic water.

Similarly, Mr. Baravalle submits that a stay of the Licence would have no adverse effect on the Third Parties because they have two water storage tanks, including a 600-gallon tank. He also submits that they could use water from "Spriggins Creek" which, according to Mr. Baravalle, flows past the Third Parties' home.

The Third Parties submit that the balance of convenience favours denying the applications for a stay. The Third Parties submit that if a stay were granted and they were required to dismantle the works, it would adversely affect both them and another licensee whose intake is part of the diversion works. The Third Parties dispute Mr. Baravalle's suggestion that they use a 600-gallon storage tank. The Third Parties maintain that this tank is not currently connected to their water system, and connecting it would require extensive plumbing. The Third Parties also

submit that it is common practice for farmers to use an irrigation tank to water crops during dry periods, and Mr. Baravalle could install such a tank, or a well, to serve his irrigation needs.

If a stay were issued, the Third Parties would have no licensed domestic water supply during the period pending a decision on the merits of the appeal. The Panel notes that the appeal hearing is currently scheduled to commence on October 2, 2002. Even if the parties agreed to hear the appeal on an expedited basis, it could take some time before the appeal is decided. The Panel has considered the alternative water sources suggested by the Appellants, and finds that no reasonable alternative water sources are available to the Third Parties. Specifically, although the Third Parties have at least one storage tank currently connected to their water system, there is no indication that it could supply their water needs for a period of several months. Furthermore, use of the 600-gallon tank would provide little relief to the Third Parties considering that their current daily water allowance is 500 gallons. The Panel also finds that rain is not a reliable water source during the impending dry season, and there is no indication that the Third Parties have a licence to use water from Spriggins Creek, or any other stream. Finally, the Panel notes that purchasing bottled water to supply their domestic needs over a period of several months, or drilling a well, could potentially cost the Third Parties thousands of dollars. Consequently, the Panel finds that the alternatives suggested by the Appellants are either not viable or would result in significant cost and inconvenience to the Third Parties.

With regard to the potential harm to the Appellants' rights and interests if a stay were denied, the Panel has already noted that Ms. Jackson sold her property and there is no indication that she continues to hold a water licence on Aylmer Creek. Consequently, the Panel finds that she will suffer no harm or inconvenience if a stay is denied.

The Panel has found that Mr. Baravalle could suffer some losses if a stay is denied. However, the Panel has found that those losses, if incurred, would not be irreparable in nature and would not affect the long-term viability of his orchards.

In summary, the Panel finds that if a stay is granted, the Third Parties would have to incur significant costs and inconvenience to replace their current domestic water supply for the period pending a decision on the appeals. Conversely, if a stay is denied, Ms. Jackson would suffer no harm or inconvenience, and while Mr. Baravalle may suffer some losses, they would be neither irreparable nor substantial. Accordingly, the Panel concludes that if a stay was granted, the potential harm to the interests and rights of the Third Parties outweighs the potential harm to the interests and rights of the Appellants if a stay is denied.

For all of these reasons, the balance of convenience favours denying the applications for a stay.

DECISION

In making this decision, the Panel of the Environmental Appeal Board has carefully considered all of the evidence before it, whether or not specifically reiterated here.

For the reasons provided above, the Panel finds that the Appellants' applications for a stay of the Licence are denied.

The hearing will proceed as scheduled.

Alan Andison, Chair
Environmental Appeal Board

July 18, 2002