Appeal No. 96-070

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Stay Hearing - March 10, 1997
Date of Decision - April 1, 1997

IN THE MATTER OF Sections 84, 86 and 89 of the *Environmental Protection and Enhancement Act,* (S.A. 1992, ch. E-13.3 as amended);

-and-

IN THE MATTER OF an appeal and request for Stay filed by Mr. Joe Przybylski and Mr. Robert Przybylski, with respect to Approval No. 18756-00-00/Application No. 001 18756 issued to Cool Spring Dairy Farms Ltd. by Mr. David Spink, Director of Air and Water Approvals Division, Alberta Environmental Protection

Cite as: Przybylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection.

HEARING BEFORE Dr. John P. Ogilvie
Dr. Steve Hrudey
Mr. Ron Peiluck

APPEARANCES

Appellant: Mr. Joe Przybylski and Mr. Robert Przybylski, represented by Mr. Garry Appelt of Witten Binder

Other Parties: Mr. Grant D. Sprague, Environmental Law Section, Alberta Justice, representing the Director of Air and Water Approvals Division, Alberta Environmental Protection

Mr. Hans Mullink, Cool Spring Dairy Farms Ltd., represented by Mr. Larry T. Wells of Kay, Shipley, McVey and Smith

BACKGROUND

Procedural History

On August 13, 1996, the Environmental Appeal Board (the Board) received a Notice of Appeal dated August 9, 1996, filed by Mr. Joe Przybylski and Mr. Robert Przybylski (the Appellants). The appeal challenges Approval No. 18756-00-00/Application No. 001 18756 issued to Cool Spring Dairy Farms Ltd.(Cool Spring Dairy), for the construction, operation and reclamation of the Whitelaw forage drying facility. The Approval was issued on July 19, 1996, by the Director of Air and Water Approvals Division.

The Board wrote to the Przybylskis on August 14, 1996, acknowledging receipt of their appeal and by copy of that letter requested all related correspondence, documents and materials from the Department of Environmental Protection (the Department).

All requested correspondence was received from the Department on August 23, 1996, and a copy was sent to all parties. Along with the information sent to the parties, the Board requested comments of the Appellants to several matters related to their appeal. The Board also requested comments from all parties on procedural issues.

Written representations were received from the parties and a pre-hearing meeting was scheduled for October 10, 1996, but was later adjourned to October 18, 1996. The pre-hearing meeting did not take place on the scheduled date due to inclement weather conditions. All parties agreed that a hearing would be scheduled for November 25, 1996, and written submissions were to be received by November 18, 1996.

On November 19, 1996, the Board received a letter from Mr. Garry Appelt of Witten Binder, informing the Board that he would be representing the Przybylski family and requesting an adjournment to the hearing. Mr. Appelt also informed the Board that he had spoken with the other parties and that they had no objection to an adjournment. On

November 20, 1996, the Board granted the adjournment of the hearing. On December 4, 1996, through consultation with all parties, a hearing date was set for February 25, 1997, and written submissions were requested by February 17, 1997.

On December 17, 1996, an application for interim costs was received by the Board from counsel for the Appellants. A meeting date was set for January 6, 1997, by the Board to hear Mr. Appelt's application for costs. Correspondence was received from both the Department and Mr. Appelt requesting that the application for costs meeting be rescheduled and on January 2, 1997, the Board granted this request.

On February 18, 1997, the Department wrote and informed the Board that a plea would be entered on February 26, 1997, regarding a prosecution of the Approval holder. The Department asked that the hearing (scheduled for February 25, 1997) be adjourned pending resolution of the prosecution. On February 19, 1997, the Board wrote to all parties informing them that there would be an adjournment to the hearing but only until after the plea had been entered.

On February 21, 1997, the Board received written notification from Mr. Larry T. Wells of Kay, Shipley, McVey and Smith, that he was now representing Mr. and Mrs. Mullink.

Next, the Appellants on February 27, 1997, applied in writing pursuant to section 89 of the *Environmental Protection and Enhancement Act*, for a Stay of the decision of the Director pending the appeal. The relevant portions of this section reads:

> Stay of decision
>
> 89(1) Subject to subsection (2), submitting a notice of objection does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of objection has been submitted.

The Board wrote to all parties on February 28, 1997, informing them that in light of the Stay application, the Board requested a response to Mr. Appelt's submission within 10 days. Comments were due by 4:30 p.m. on March 10, 1997, to the Board's office. Upon receipt of all responses the Board notified the parties that it would then be conducting a hearing of the Stay application, based on written submissions, as outlined in section 86 of the *Environmental Protection and Enhancement Act*[1] (Act). Once the Board reviewed all submissions it would

[1]Section 86(2) of the *Environmental Protection and Enhancement Act* states:

> 86(2) In conducting a hearing of an appeal under this Part the Board is not bound to hold an oral hearing but may instead, and subject to the principles of natural justice, make its decision on the basis of written submissions.

accordingly issue a Decision on the Stay application.

BOARD REVIEW

In their submissions to the Board, all parties agreed the following tests should apply:

(a) That upon a preliminary assessment of the merits of the Appellants' case, there is a *serious* question to be tried;

(b) That the Appellants would suffer *irreparable harm* if the stay is refused; and,

(c) That the Appellants would suffer *greater harm* from the refusal of a stay pending a decision of the Board on the appeal than the Respondent would suffer from the granting of a Stay.

> *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 at 400 (S.C.C.), citing *Re Attorney-General of Manitoba and Metropolitan Stores (MTS) Ltd. et al.* (1987), 38 D.L.R. (4th) 331 (S.C.C.). *RJR-MacDonald, supra*, was relied upon in *Deloitte Haskins & Sells v. Coopers & Lybrand Inc.* (1996), 37 Alta. L.R. (3d) 64 (C.A.).

A "serious question to be tried" suggests that it is a question that is not frivolous or vexatious. It requires the Appellants to show that there is a potential for success on the appeal.[2]

"Irreparable harm" refers to the nature of the harm, and not its magnitude. Harm is irreparable if it cannot be adequately compensated in damages.[3]

The factors to be considered in assessing the "balance of convenience" depends on the facts of each case.[4]

The Board agrees with the tests. In their letter of March 3, 1997, the Department stated that they neither consent to nor oppose the Appellants' application for a Stay, so the Board will not refer to the Department's submission. In the Appellants' submission of February 27, 1997, Mr. Appelt submitted, on the issue of balance of convenience:

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[2] *RJR-MacDonald, supra,* at 401, and *Deloitte, supra,* at 67-68.
[3] *Deloitte, supra,* at 69.

> "It is submitted that human health is a paramount consideration of both the Environmental Protection and Enhancement Act and this Board.
>
> This case involves a long history of complaints against Cool Spring and Mr. Mullink by the Peace River Health Unit, Pollution Control Division, and the Appellants. This case involves a long history of operating without approval, effluent excesses, and adverse effect on neighbors.
>
> The operation of the Plant and the conduct of its owners has resulted in prosecution, which delays the Appellants' hearing. The Appellants' Notice of Appeal was filed August 13, 1996. The prosecution may not be completed until September 1997 or later because of new charges. More than one year will elapse since the Notice of appeal was filed. The problems associated with this Plant will be allowed to continue unless the Approval is stayed pending the hearing.
>
> It is submitted that if the stay of the Approval is not granted, the Przybylskis will suffer greater harm than Cool Spring would suffer if the stay were granted. Further, the harm that Cool Spring may suffer is, to a great extent, self inflicted."

The Approval holder, however, disagrees. In their submission of March 6, 1997, Mr. Wells indicated:

> "It is further submitted the effect of the Plant's operation on the Appellant's health, which is not admitted but expressly denied, is not the sole cause of the problems currently being experienced by Mr. Przybylski. After his eight year struggle with leukemia, his current state of health under normal conditions may very well be aggravated by smoke, exhaust fumes, dust from his own furnace or fireplace, etc.
>
> It is further submitted there is not medical evidence directly linking the emissions as being detrimental to Mr. or Mrs. Przybylski's health. The argument that the Plant is causing "irreparable harm" is not founded upon evidence to substantiate same."

CONCLUSION

The Board has carefully considered and reviewed the written submissions provided by the parties.

On the first test, there is clearly a serious issue to be tried based on evidence provided. The Board is mindful in making this decision that a separate Ministry (Justice) has come to the conclusion to proceed with charges against the Approval holder, which of course, has nothing to do with the appeal before this Board, which must be heard on its merits alone.

On the second test, we believe the Appellants' submission that the health effects are potentially grave to the Przybylskis. In reference to the health effects, the Appellants' submission states:

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[4] *RJR-MacDonald, supra,* at 406-407.

> "The dust is thick and makes breathing difficult. The dust covers the fields which creates more weeds and reduces the quality of crop. Both Mr. and Mrs. Przybylski experience problems with breathing and other irritations (e.g. itchy eyes) when the Plant is operating. Mr. Przybylski is continuously coughing. He is presently being treated for bronchitis and pneumonia, which is aggravated by dust. Mr. and Mrs. Przybylski are unable to rest in their own home because of the noise from the Plant."

The Board feels that a Stay should not be issued on the basis of speculation of harm. That said, the Board believes that the evidence on the operating performance of Cool Spring Dairy convinces the Board that the harm has objectively moved beyond speculation. And, there is, from the Appellants' perspective, substantive evidence that the Cool Spring Dairy operation is causing physical problems to the Przybylskis.[5] High particulate emissions and noise, given the proximity of the emissions to the Przybylski residence convinces the Board that there is not only a serious issue, but that there is evidence as to the likelihood of irreparable harm which has not been mitigated by the submission on behalf of Cool Spring Dairy.

On the third test, the Board has reviewed the evidence of harm from both the Appellants and the Approval holder's perspective and even if both sides were evenly balanced (the Department did not take a position either way), the Board has to deal with the issue of the balance of convenience between the parties. In doing this the Board assessed the issue of the public interest involved. On the one hand, there is a private operator (Cool Spring Dairy), that is in business and provides a service accordingly. On the other hand, there is evidence of an air pollution and noise problem to at least one element of the public, the Przybylski's. Protection of human health is one of the valuable declarations made and expressed specifically in the Act (section 2(a)). On balance, therefore, we feel the greater harm lies not on the Approval holder, but on their downwind neighbours, the

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[5]See Tab X of the Appellant's written submission. Letter dated February 25, 1997 from Dr. Douglas G. Snider, M.D. The letter states " Joe Przybylski is a patient of our clinic. He is 65 years of age. Mr. Przybylski has battled with leukemia since 1989. His cancer is now in remission but his immune system seems to be weaker. When Mr. Przybylski is subjected to dust his symptomology (sic) increases, including difficulty breathing, coughing, and an "itchy feeling" in his lungs and eyes. Mr. Przybylski's problems are particularly acute because he is presently being treated for pneumonia and bronchitis. I have suggested that he avoid exposure to airborne particulates."

appellant. Accordingly, the Board is in favour of a temporary halt to the harm suffered by the appellants and that portion of the public interest they represent.

The Board grants the Stay requested by the appellant.

A hearing date for this appeal will be set upon agreement with the parties following the prosecution trial of September 25, 1997.

Dated on April 1, 1997, at Edmonton, Alberta.

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Dr. John P. Ogilvie

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Dr. Steve Hrudey

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Mr. Ron Peiluck

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