

ALBERTA  
ENVIRONMENTAL APPEAL BOARD

Decision

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Stay Hearing by Written Submission Only – June 8, 2001  
Date of Decision – July 9, 2001

**IN THE MATTER OF** sections 84, 85, 86, 87 and 89 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 and section 115 of the *Water Act*, S.A. 1996, c. W-3.5.

**-and-**

**IN THE MATTER OF** appeals and requests for a Stay filed by Mr. Tom and Mrs. Mae Adamyk, Mr. Lawrence and Mrs. Evelyn Kucy, Mr. Ted Jakubowski, and Mr. Jason Lewyk, President, St. Michael Trade and Water Supply, with respect to Approval 00147901-00-00 issued on May 16, 2001, under the *Water Act* by the Director, Environmental Service, Parkland Region, Alberta Environment to Cam-A-Lot Holdings.

Cite as: *Adamyk et al. v. Director, Environmental Service, Parkland Region, Alberta Environment, Stay decision re: Cam-A-Lot Holdings.*

**WRITTEN HEARING BEFORE** William A. Tilleman, Q.C.

**PARTIES**

Appellants: Mr. Tom and Mrs. Mae Adamyk, Mr. Lawrence and Mrs. Evelyn Kucy, and Mr. Jason Lewyk, St. Michael Trade & Water Supply.

Director: Director, Environmental Service, Parkland Region, Alberta Environment, represented by Ms. Heather Veale, Alberta Justice.

Approval Holder: Cam-A-Lot Holdings.

## **EXECUTIVE SUMMARY**

The Board has received Notices of Appeal from Mr. Tom and Mrs. Mae Adamyk, Mr. Lawrence and Mrs. Evelyn Kucy, Mr. Ted Jakubowski, and Mr. Jason Lewyk, President, St. Michael Trade and Water Supply, (collectively the “Appellants”) with respect to an approval issued under the *Water Act* to Cam-A-Lot Holdings for the exploration of groundwater near St. Michael, Alberta.

The Appellants have requested a Stay pending the hearing of their appeals. This decision is only with respect to the request for that Stay.

The Appellants have not convinced the Board that a Stay should be granted and therefore, the Board denies their request.

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## **I. BACKGROUND**

[1] On May 16, 2001, the Director, Environmental Service, Parkland Region, Alberta Environment (the “Director”) issued Approval 00147901-00-00 (the “Approval”) to Cam-A-Lot Holdings (the “Approval Holder”) pursuant to the *Water Act*, S.A. 1996, c. W-3.5. The Approval authorizes Cam-A-Lot Holdings to explore for groundwater at SW 17-056-18-W4 in St. Michael, Alberta, subject to certain terms and conditions.

[2] On May 16, 2001, the Director also advised persons, who had previously submitted statements of concern in respect of the application for the Approval, of his decision to issue the Approval.

[3] The Environmental Appeal Board (the “Board”) received Notices of Appeal and requests for a Stay on May 23, 2001 from Mr. Tom and Mrs. Mae Adamyk, on May 28, 2001 from Mr. Lawrence and Mrs. Evelyn Kucy, on May 30, 2001 from Mr. Ted Jakubowski, and on May 30, 2001 from Mr. Jason Lewyk, President of the St. Michael Trade and Water Supply Ltd. (collectively the “Appellants”).

[4] The Board acknowledged the appeals and requests for a Stay on May 24, 29 and 30, 2001. The Board also requested that the Director provide the records (the “Records”) related to the appeals. The Board received the Records on June 1, 2001 and subsequently provided copies to the Appellants and the Approval Holder.

[5] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

## **II. STAY REQUEST**

[6] In their notices of appeal, Ms. Kucy and Mr. Lewyk stated that they wanted the exploration stopped. By letter dated June 5, 2001, the Board asked Ms. Kucy and Mr. Lewyk whether they were requesting the Board to grant a Stay of the Director’s decision to issue the Approval until the appeal is heard. The Board stated:

“If Ms. Kucy and Mr. Lewyk are requesting a Stay, they are asked to answer the following questions as thoroughly as possible:

1. What is the serious concern that the Appellants have that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm for the refusal of a stay pending a decision of the Board on the appeal than the Approval Holder would suffer from the granting of the stay; and
4. Would the overall public interest warrant a stay?”

[7] On June 6, 2001, the Board sent a similar letter to Mr. and Ms. Adamyk after it received a letter from them also asking for a Stay.

[8] On June 6, 2001, Mr. Lewyk, on behalf of the St. Michael Trade and Water Supply, Mr. and Ms. Adamyk, and Mr. and Ms. Kucy, confirmed that they were seeking a Stay and responded to the Board’s questions.<sup>1</sup>

[9] On June 11, 2001, the Board asked Mr. Jakubowski to provide similar information on his Stay request. Mr. Jakubowski indicated that he would not be providing any further information. On June 15, 2001, the Board informed Mr. Jakubowski that it had decided to dismiss his application for a Stay pursuant to section 87(5)(a)(ii) of the *Environment Protection and Enhancement Act* (“EPEA”) for failing to comply with a written notice to provide additional information. However, Mr. Jakubowski remains an Appellant in this appeal.

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<sup>1</sup> The Appellants advised they were concerned with the “...irreversible damage to our wells and to the local environment that could be caused by this exploration and testing.” Further, the “... community well is the only source of water for the people in the Hamlet of St. Michael and for our Community Center.”

With reference to the irreparable harm if the stay is refused, the Appellants advised that they would suffer irreparable harm as it “...is impossible to book an event for up to 700 people [at the Community Center] when you have no guaranteed water supply.” They note that the “...loss of surface water has already put a noticeable strain on the aquifers.... [and] if this disruption and depletion of our aquifers is allowed it may mean years of water shortages before the aquifers are recharged enough to provide the water we all depend on.”

The Appellants stated that they would suffer greater harm if a Stay was refused citing that without “... adequate water supplies farming and living in this area will become extremely difficult.” They also stated that “Cam-A-Lot was warned of the problems their removal of surface water would cause and specifically that there was not sufficient water available for their operation.”

In response to the Board’s question on the overall public interest, the Appellants stated “...without a doubt in the best interest of the public to stop all exploration and testing while the board is deliberating on these appeals. The people in this area should not have to live every day in fear of loosing their water supply.”

[10] This decision is limited to the question of whether the Board should grant a Stay of the Director's decision to issue an Approval pending the hearing of the appeal. The effect of a Stay would be to order Cam-A-Lot Holdings to cease all works and activities authorized under the Approval until the appeals are determined.

### III. ANALYSIS

[11] Section 89 of the EPEA provides:

- “(1) Subject to subsection (2), submitting a notice of appeal 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 appeal has been submitted.”

Section 89 applies to appeals brought under the EPEA and the *Water Act*. The EPEA does not through its provisions outline the legal considerations to be used by the Board in deciding whether to grant a Stay application.

[12] The Board has previously applied a test in considering Stay applications in respect of decisions made under the EPEA. The test in our opinion equally applies to a Stay application in respect of a decision made under the *Water Act*. In *Przybylski v Director of Air and Water Approvals Division, Alberta Environmental Protection*,<sup>2</sup> (“*Przybylski*”) the parties proposed and the Board agreed to the following test that should apply when determining whether a Stay should be provided:

- (a) that upon a preliminary assessment of the merits of the Appellant's case, there is a *serious* question to be tried;
- (b) that the Appellant would suffer *irreparable harm* if the Stay is refused; and
- (c) that the Appellant 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.

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<sup>2</sup> *Przybylski v Director of Air and Water Approvals Division, Alberta Environmental Protection* (April 1, 1997), E.A.B. Appeal No. 96-070.

[13] In *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection*,<sup>3</sup> (“*Stelter*”) the Board included an additional element to the test:

(d) that the overall public interest warrants a Stay.

In *Stelter*,<sup>4</sup> the Board also further discussed the elements of the test it had adopted in *Przybylski*.<sup>5</sup> The Board said that a “serious question to be tried” suggests that it is a question that is not frivolous and vexatious and it requires the Appellant to show that there is a potential for success on the appeal.<sup>6</sup> On the question of “irreparable harm,” the Board said that it refers to the nature of the harm rather than its magnitude and that harm is irreparable if it cannot be adequately compensated in damages.<sup>7</sup>

[14] In the present case, the Appellants stated that their serious concern is “... for the irreversible damage to our wells and the local environment that could be caused by this exploration and testing.” The Board is satisfied that the Appellants are not acting in a frivolous or vexatious manner in bringing this appeal. However, the Appellants have not satisfied us that they will suffer any harm if the Approval Holder conducts groundwater exploration within the terms of the Approval. Although the Appellants state that the potential harm is the irreversible damage to their wells and the local environment, they have not explained how a groundwater exploration program would cause such harm.

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<sup>3</sup> *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay decision re: *GMB Property Rentals Ltd.* (May 14, 1998) E.A.B. Appeal No. 97-051.

<sup>4</sup> *Stelter*, at paragraph 11.

<sup>5</sup> In discussion the test, the Board referred to *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 11 D.L.R. (4<sup>th</sup>) 385 at 400 (S.C.C.) (“*RJR-MacDonald*”), citing *Re:Attorney-General of Manitoba and Metropolitan Stores (MTS) Ltd. et. al.* (1987), 38 D.L.R. (4<sup>th</sup>) 331 (S.C.C.). *RJR-MacDonald* relied upon *Deloitte Haskins & Sells v Coopers & Lybrand Inc.* (1996), 37 Alta. L.R. (3d) 64 (C.A.).

<sup>6</sup> *Stelter*, *supra* note 3, at paragraph 12.

<sup>7</sup> *Stelter*, *supra* note 3, at paragraph 13.

[15] Under the *Water Act*, a person who is ultimately seeking a water licence, must first satisfy the Director that he or she has access to a suitable water source. In order to establish whether a suitable water source exists, the person must undertake exploration, conduct and analyze tests and report the results of the exploration program to the Director. The exploration report is one of the things that the Director takes into account when deciding whether to issue a licence. Section 36(1) of the *Water Act* states that no person shall commence or continue an activity except pursuant to an approval. The *Water Act* defines “activity” to include groundwater exploration. Therefore, Cam-A-Lot Holdings cannot carry out any groundwater exploration activities without an approval from the Director.

[16] Section 38(4) of the *Water Act* provides that the Director may issue an approval that authorizes the temporary diversion of water *associated with carrying out an activity*, in this case, the activity being groundwater exploration. The Approval issued to Cam-A-Lot Holdings only authorizes the diversion of water incidental to a pumping test. The letter dated May 16, 2001, from the Director to each person who had submitted a statement of concern in respect of the Approval application stated:

“This approval only provides for the exploration of groundwater and does not authorize any use of water. Information from the groundwater exploration must be submitted prior to a decision on the application for licence.”

[17] According to the terms of the Approval the only water diversion and, therefore, potential harm to the Appellants’ water supply may occur during the pumping tests. However, even if a drawdown were to occur in the Appellants’ water sources during the pumping test, these tests are short term activities and any effects would be temporary. The Board is thus not convinced that if the pumping tests were undertaken before the appeal is heard, they would cause irreparable harm to the Appellants.

[18] The third element of the test adopted by the Board to determine a Stay application requires the Board to balance the harm suffered by the Appellants if a Stay is refused against the harm suffered by Cam-A-Lot Holdings if a Stay is granted. The Appellants have not established to the satisfaction of the Board that groundwater exploration will, itself, cause them any harm. Even if a temporary drawdown of the Appellants' water supply occurred during the pumping tests, the Board is not convinced that this would cause the Appellants greater harm than that caused to Cam-A-Lot Holdings if it were ordered to cease all groundwater exploration until the appeal is heard. The purpose of the groundwater exploration program is to provide information on the availability of a suitable source for water diversion. If Cam-A-Lot Holdings is prevented from obtaining that information, it is delayed in obtaining a licence, should a suitable water source exist, and is also delayed in pursuing other water supply options should the exploration program ultimately show that the groundwater resources are not suitable.

[19] Finally, the Board must decide whether it is in the public interest to grant a stay of the Director's decision to authorize groundwater exploration pursuant to the Approval. In the Board's view, it is in the public interest to require licence applicants to provide the Director with information about the proposed source of water diversion before the Director decides whether to issue a licence. By issuing an approval to conduct groundwater exploration, the Director ensures that he prescribes the scope and requirements of the exploration program so that he will ultimately obtain the information he needs to make an informed decision. It is also in the public interest to ensure that others are not detrimentally affected by an exploration program. However, unless the Appellants establish the likelihood of harm occurring before the appeal is heard, which they have not, the Board finds the public interest of promoting groundwater exploration compelling. The Board is not convinced of any public interest reason to prevent Cam-A-Lot Holdings commencing groundwater exploration before the appeals are heard.

**IV. DECISION**

[20] The Appellants have not satisfied the Board that a Stay should be granted. Therefore, the Board denies the Appellants' request for a Stay. We should add that this is not a decision on the merits of the appeals.

Dated on July 9, 2001, at Edmonton, Alberta.

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William A. Tilleman, Q.C., Chair