

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – August 27, 2001

IN THE MATTER OF sections 84, 85, and 87 of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 and section 6 of Schedule 5 of the *Government Organization Act*, S.A. 1994, c.G-8.5;

-and-

IN THE MATTER OF an appeal filed by Mr. Henry Beaumont, Q.C. of Beaumont Church, on behalf of Macalgary Developments (Scenic) Inc. and Sunbow Consulting Ltd. with respect to Enforcement Order No. 99-01 issued under the *Government Organization Act* by the Deputy Minister, Alberta Environment.

Cite as: *Macalgary Developments (Scenic) Inc. et al. v. Deputy Minister, Alberta Environment.*

**PRELIMINARY MEETING BY
WRITTEN SUBMISSION ONLY**

William A. Tilleman, Q.C., Chairman
M. Anne Naeth, Ph.D.
Steve E. Hrudehy, Ph.D.

WRITTEN SUBMISSIONS

Appellants: Macalgary Developments (Scenic) Inc. and
Sunbow Consulting Ltd., represented by Mr.
David A. Thurmeier, Beaumont Church.

Department: Deputy Minister, Alberta Environment
represented by Ms. Charlene Graham,
Alberta Justice.

Executive Summary

Macalgarly Developments (Scenic) Inc. and Sunbow Consulting Ltd. (the Appellants) have appealed an Environmental Protection Order (EPO) issued to them by Alberta Environment under the *Government Organization Act*. The EPO directs the Appellants to remove a berm that they constructed in a transportation utility corridor established as a Restricted Development Area.

The purpose of this decision is to determine which issues included in the Notice of Appeal are to be included in the hearing of the appeal. The Appellants have proposed that ten issues should be included in the hearing of the appeal. Alberta Environment has “...no concerns with the ‘concepts’ raised in...” the first four issues identified by the Appellants, but has concerns with remaining six issues.

Upon reviewing the ten issues, the Board held that the relevant issues raised by the Appellants are included within the two issues proposed by Alberta Environment. Therefore, the Board determines the issues that will be included in the hearing of this appeal are:

1. Did the Deputy Minister act within his jurisdiction under the *Government Organization Act* in issuing the Enforcement Order?
2. Given the facts of this case, was the decision to issue an Enforcement Order correct and reasonable?”

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I. BACKGROUND

A. Procedural Background

[1] On October 26, 1999, the Environmental Appeal Board (the “Board”) received a Notice of Appeal from Mr. Henry Beaumont, Q.C. of Beaumont Church, on behalf of Macalgary Developments (Scenic) Inc. and Sunbow Consulting Ltd. (the “Appellants”). The appeal is with respect to the decision of the Deputy Minister, Alberta Environment (the “Department”) to issue Enforcement Order No. 99-01 (the “Enforcement Order”) under the *Government Organization Act*, S.A. 1994, c.G-8.5, for the removal of a berm constructed on a transportation utility corridor established as a Restricted Development Area (“RDA”).

[2] On October 26, 1999, the Board acknowledged receipt of the Notice of Appeal and requested a copy of all records (the “Records”) in relation to the appeal from the Department.

[3] 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 replied in the negative.

[4] On January 13, 2000, the Department provided the Records requested by the Board and a copy was forwarded to the Appellants.

[5] The Board then made numerous attempts to mediate this matter. But, on August 31, 2000, the Board concluded:

“As the Department does not wish to proceed to a[nother] mediation meeting, the Board will arrange a pre-hearing per section 13 of the *Environmental Appeal Board Regulation* in this matter as soon as possible.”¹

¹ Section 13 of the *Environmental Appeal Board Regulation*, A.R. 114/93, provides:

“Where the parties do not agree to a resolution of the subject matter of a notice of appeal, the presiding Board member, in consultation with the parties, may

- (a) determine a date for a future meeting,
- (b) admit any facts agreed to by the parties,
- (c) admit any evidence agreed to by the parties,
- (d) determine the matters to be included in the hearing of the appeal pursuant to section 87(2) and (3) of the Act,
- (e) determine any matter of procedure,

[6] On September 7, 2000, the Department advised that it would prefer to deal with all or some of the pre-hearing issues by way of written submission. In response to this suggestion, the Appellants advised the Board in a letter, dated September 11, 2000, that there were a number of other issues that should be addressed including:

- “1. An application which we understand will be made by the community for standing to make submissions at the hearing.
2. A determination whether the City of Calgary will be a party to the appeal.
3. We understand there has been a meeting with representatives of the Province and interested community members to discuss a number of issues and that there are archeological studies contemplated, funding for which is currently being discussed with the MLA.
4. In addition, some effort should be devoted to determining a statement of agreed facts and admitted evidence, dates for exchanges of written submissions etc.”

Further, on September 13, 2000, the Appellants advised the Board that the City of Calgary had been proposed as a party to the appeal and the Tuscarora Community Association also wished to make submissions.

B. Determination of Issues

[7] On November 6, 2000, the Board wrote to the parties and proposed a series of issues to be addressed by way of a preliminary meeting by written submissions only in accordance with section 87² of the *Environmental Protection and Enhancement Act*, S.A. 1992, c.E-13.3 (the “Act”). These issues included:

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- (f) have the parties exchange documents and written submissions, and
 - (g) where an oral hearing is to be held, determine
 - (i) the order of witnesses,
 - (ii) the day-to-day conduct of the hearing, and
 - (iii) any other matter necessary for the hearing.”

² Section 87 of the Act provides:

“(2) Prior to conducting a hearing of an appeal the Board may in accordance with the regulations determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal, and in making that determination the Board may consider the following:

- (a) whether the matter was the subject of a public hearing or review under the *Natural Resources Conservation Board Act* or under any Act administered by the Energy Resources Conservation Board and whether the person submitting the notice of appeal received notice of and participated in or had the opportunity to participate in the hearing or review;

- “(1) What are the substantive issues to be considered by the Board (see s. 87 of the Act)?
- (2) What is the standing of the City of Calgary in this appeal? If the City of Calgary does not have standing, what role should they play at the hearing (see ss. 7(2)(c) and 9 of the Regulation)?
- (3) What is the standing of any of the Local Community Residents in this appeal? If the Local Community Residents do not have standing, what role should they play at the hearing (see ss. 7(2)(c) and 9 of the Regulation)? Should they be permitted to intervene and if so, what level of participation should be permitted?
- (4) What is the standing of any other potential participants identified by the parties? If these other potential parties do not have standing, what role should they play at the hearing (see ss.7(2)(c) and 9 of the Regulation)? Should they be permitted to intervene and if so, what level of participation should be permitted?
- (5) What is the relevance, if any, of the ‘archeological work’ identified by Mr. Thurmeier?
- (6) Any other preliminary motions or matters brought forward by the parties.”³

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- (b) whether the Government has participated in a public review in respect of the matter under the *Canadian Environmental Assessment Act* (Canada);
- (c) whether the Director has complied with section 65(4)(a);
- (d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made;
- (e) any other criteria specified in the regulations.

(3) Prior to making a decision under subsection (2) the Board may, in accordance with the regulations, give to a person who has submitted a notice of appeal and to any other person the Board considers appropriate, an opportunity to make representations to the Board with respect to which matters should be included in the hearing of the appeal.

(4) Where the Board determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing....”

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Sections 7(2)(c) and 9 of the Environmental Appeal Board Regulation, A.R. 114/93 state:

7(2) A published notice referred to in subsection (1)(a)(ii) or (b)(ii) must contain the following:...

- (c) a statement that any person who is not a party to the appeal and wishes to make representations on the subject matter of the notice of appeal must submit a request in writing to the Board.

9(1) A request in writing referred to in section 7(2)(c) shall

- (a) contain the name, address and telephone number of the person submitting the request,
- (b) indicate whether the person submitting the request intends to be represented by a lawyer or other agent and, if so the name of the lawyer or other agent,
- (c) contain a summary of the nature of the person’s interest in the subject matter of

In a letter, dated November 15, 2000, the Appellants objected to these issues being addressed until the matter of other parties had been addressed. In a letter, dated November 7, 2000, the Department submitted that the Appellants and the Department should address these issues before the Board considers adding other parties.

[8] In a letter, dated December 6, 2000,⁴ the Board reviewed the legislation governing the determination of issues and the procedure by which additional parties are added to an appeal. The Board noted that it had not received any response to its letter of November 6, 2000 from either the City of Calgary or the Tuscarora Community Association. As a result, the Board went on to establish a process to receive submissions with respect to the determination of the issues.

the notice of appeal, and
(d) be signed by the person submitting the request.

(2) Where the Board receives a request in writing in accordance with section 7(2)(c) and subsection (1), the Board shall determine whether the person submitting the request should be allowed to make representations in respect of the subject matter of the notice of appeal and shall give the person written notice of that decision.

(3) In a notice under subsection (2) the Board shall specify whether the person submitting the request may make the representations orally or by means of a written submission.

⁴ The December 6, 2000 letter advised:

“To be clear, the main intent of the Board in its letter of November 6, 2000 was to address the section 87 process. Specifically, the Board asked: ‘What are the substantial issues to be considered by the Board (see s.87 of the Act)?’

The Board also went on to ask in questions (2) and (3) what is the standing of the City of Calgary and the Local Community Association (more correctly called the Tuscarora Community Association) in this appeal. ... The Board notes that it has received no request by either the City of Calgary or the Tuscarora Community Association to be added as a full party or to be included in the determination of the issues.

The Board then went on to address the issue of potential intervenor status of the City of Calgary and the Tuscarora Community Association with the second and third part of questions (2) and (3). While we are not in the phase where intervenor status is normally determined, it was the Board’s view that this issue could be addressed, with respect to these parties, at the same time as the other questions in order to expedite this appeal. **Given the apparent confusion that this appears to be creating for the parties, the Board will deal with the issue of intervenors later in the appeal process. In accordance with sections 7 and 9 of the Environmental Appeal Board Regulation, once the Board has set a hearing date, the Board will publish the required notice and entertain applications from intervenors. ...**

Conclusion

The Board is therefore of the view that the only issue to be dealt with at this time, in a preliminary meeting by written submission only, is the question: ‘Which matters included in the notice of appeal properly before it will be included in the hearing of the appeal?’ ...” [Emphasis in the original.]

C. Submissions

[9] The Appellants' Initial Submission of December 15, 2000 advised that the following issues should be considered:

- “a. What is the scope of discretion pursuant to which an Enforcement Order may be issued under section 5, schedule 5, of the *Government Organization Act*?
- b. Does section 5, schedule 5 of the *Government Organization Act* allow the Minister discretion to issue an Enforcement Order to summarily adjudicate an issue between the Provincial Crown as owners of land within a ...[RDA]... and parties alleged to have trespassed upon the RDA?
- c. What information was provided to the Minister by the Department for the exercise of discretion leading to the issuance of the Enforcement Order under appeal?
- d. Was the information provided to the Minister by the Department a sufficient jurisdictional basis for the exercise of the Minister's discretion and the Order under appeal pursuant to section 5, schedule 5 of the *Government Organization Act*?
- e. What additional information ought to be considered by the Board in review of the Enforcement Order under appeal?
- f. What is the environmental effect of compliance with the Enforcement Order under appeal?
- g. Upon a review of all relevant evidence, does the Board find that there is a jurisdictional basis to exercise the discretion granted by section 5, schedule 5 of the *Government Organization Act*?
- h. If so, upon a review of all relevant evidence, does the Board find that the facts and the circumstances of this matter warrant the issuance of an Enforcement Order?
- i. If so, what form of order does the Board consider appropriate?
- j. What order ought to be made with respect to costs?”⁵

[10] In its January 3, 2001 response, the Department advises that it had

“... no concerns with the ‘concepts’ raised in issues (a) – (d). Perhaps these issues could be simply stated as follows:

⁵ Section 5 of Schedule 5 of the *Government Organization Act* states:

(5) When a regulation under this section is amended and the effect of the amendment is to add land to the area, the Registrar of Land Titles shall, on receiving the Minister's further notice under subsection (4), endorse on each certificate of title for the additional land a memorandum of the original notice under subsection (3) and the further notice under subsection (4).

1. Did the Deputy Minister act within his jurisdiction under the *Government Organization Act* in issuing the Enforcement Order?
2. Given the facts of this case, was the decision to issue an Enforcement Order correct and reasonable?"

The Department further advised that it had concerns with the remainder of the issues identified by the Appellants principally in that these issues were general statements of law that the Board would have to address in any event.

[11] The Appellants responded on January 9, 2001 and confirmed that its jurisdictional arguments would concern "... the limits on the exercise of the Minister's discretion." Further, the Appellants responded to some of the concerns raised by the Department and noted, finally, that

"... we will not take issue with respect to the passage of the regulation in accordance with regard to the provisions of the *Regulations Act* and the requirements for publication prior to adoption as set out in subparagraph (iv)(d) of the Notice of Appeal."

II. DISCUSSION

[12] This is an appeal of an Enforcement Order. The right to issue the Enforcement Order arises under the *Calgary Restricted Development Area Regulations*.⁶ The validity this regulation is no longer an issue. The issue of procedural compliance has been withdrawn as indicated in paragraph 11.

[13] The Board's authority is derived from section 6(1) of Schedule 5 of the *Government Organization Act*:

"A person to whom an enforcement order is directed under section 5(1)(a) or (b) may appeal the enforcement order by submitting a notice of objection to the Environmental Appeal Board established under the *Environmental Protection and Enhancement Act*."

[14] The Department suggests two issues to be dealt with:

- "1. Did the Deputy Minister act within his jurisdiction under the *Government Organization Act* in issuing this Enforcement Order?

⁶ *Calgary Restricted Development Area Regulation*, A.R. 211/76.

2. Given the facts of this case, was the decision to issue an Enforcement Order correct and reasonable.⁷⁷

[15] The Appellants suggest the ten issues that they wish to see addressed. These issues, listed as (a) – (j) in paragraph 9, have been modified somewhat in the Appellants' letter of January 9, 2001. The Board will examine each of these issues in turn.

A. Issue (A) – Scope of Discretion

[16] The first issue identified by the Appellants was: What is the scope of discretion pursuant to which an Enforcement Order may be issued under section 5, Schedule 5 of the *Government Organization Act*?

[17] This issue is covered, in a more case specific test, in the Department's first question.

B. Issue (B) – Issue as Landowner

[18] The second issue suggested by the Appellants was: Does section 5, Schedule 5 of the *Government Organization Act* allow the Minister discretion to issue an Enforcement Order to summarily adjudicate an issue between the Provincial Crown as owner of land within a RDA, and parties alleged to have trespassed upon the RDA?

[19] There is an underlying assumption here that the Enforcement Order is such an adjudication. Using a power for an improper purpose may be a ground of attack. If so, then this argument is captured within the Department's second question. If the attack is broader than that, then it is beyond the issues raised by this appeal.

C. Issue (C) – Information Provided to the Decision-Maker

[20] The third issue suggested by the Appellants was: What information was provided to the Minister by the Department for the exercise of discretion leading to the issuance of the Enforcement Order under appeal?

[21] This is not an issue. It is simply a question of fact, which the Department has answered in its letters of December 12 and 15, 2000. If the Appellants are not satisfied with the answer, this could be raised as an evidentiary point in the hearing. It is clearly a relevant question included in the Department's second issue.

⁷ Letter from the Director dated January 3, 2001.

D. Issue (D) – Was the Information Sufficient?

[22] The fourth issue suggested by the Appellants was: Was the information provided to the Minister by the Department a sufficient jurisdictional basis for the exercise of the Minister's discretion and the Order under appeal pursuant to section 5, Schedule 5 of the *Government Organization Act*?

[23] This appears to be a combination of the Department's first and second issues and adds nothing more.

E. Issue (E) – Additional Information

[24] The Appellants' fifth issue was: What additional information ought to be considered by the Board in review of the Enforcement Order under appeal?

[25] This is a matter of relevance of evidence proposed to be tendered in support of the appeal. Such evidence would only be relevant to the second issue suggested by the Department, since the first is only a point of law. The evidence the Appellants propose to use is set out in the letter of January 9, 2001.

[26] The Board recognizes that some of the evidence the Appellants propose to tender, may be relevant to the second issue identified by the Department. However, this would be dealt with as an evidentiary point in the course of the hearing. As such, this issue is included within the Department's second issue.

F. Issue (F) – Environmental Effects of Compliance

[27] The sixth issue raised by the Appellants was: What is the environmental effect of compliance with the Enforcement Order under appeal?

[28] The Department challenges this issue saying that since this is an appeal under the *Government Organization Act*, one cannot draw on the Act's purpose sections.⁸ However, since

⁸ Section 2 of the *Environmental Protection and Enhancement Act* states:

2(1) The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

- (a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;
- (b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

one of the purposes of an RDA, although not the only one, is environmental protection, it seems that one would end up in the same place. The powers come, after all, from the “Environmental Matters” Schedule of the *Government Organization Act*. Surely, it is arguable that an Enforcement Order directing compliance, the effect of which is to cause environmental harm, might be questioned as an illegitimate exercise of power. For example, if someone illegally builds a dam that entraps water, surely one should be able to challenge an order to destroy the dam if the effect is to flood the downstream land in the process.

[29] The Board is not, in this decision, accepting the Department’s argument that evidence of the potential environmental impact of compliance with a particular Enforcement Order can never be relevant to whether the Enforcement Order should have been issued. While the Board accepts that it is the Order and not its effect that is under appeal, the one may have some relevance to the other. Evidence of the residents’ response however, does not amount to evidence of environmental effect since, in the Board’s view, it is beyond the Department’s obligation in considering the issuance of an Enforcement Order to canvas adjacent residents as to their wishes.

[30] The issue goes to the reasonableness of the Enforcement Order, and is therefore captured within the Department’s second issue.

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- (c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;
 - (d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;
 - (e) the need for Government leadership in areas of environmental research, technology and protection standards;
 - (f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;
 - (g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;
 - (h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;
 - (i) the responsibility of polluters to pay for the costs of their actions;
 - (j) the important role of comprehensive and responsive action in administering this Act.

There is no comparable section in the *Government Organization Act*.

G. Issue (G) – Was There a Jurisdictional Basis?

[31] The seventh issue suggested by the Appellants was: Upon a review of all relevant evidence, does the Board find that there is a jurisdictional basis to exercise the discretion granted by section 5, Schedule 5 of the *Government Organization Act*?

[32] This is fully encompassed in the Department's suggested issues.

H. Issue (H) – Was the Enforcement Order Properly Issued?

[33] The eighth issue was: If so, upon a review of all relevant evidence, does the Board find that the facts and the circumstances of this matter warrant the issuance of an Enforcement Order?

[34] This is fully encompassed in the second issue suggested by Department.

I. Issue (I) – What Form of Order?

[35] The ninth issue was: If so, what form of order does the Board consider appropriate?

[36] It seems obvious that if an appeal succeeds, the Board will set out its views on this. It is not needed as an issue on appeal.

J. Issue (J) - Costs

[37] The final issue was: What order ought to be made with respect to costs?

[38] This is provided for in the Act. It does not need to be set out. It is up to the parties to apply for costs at the appropriate time. If the Appellants wish to apply for interim costs, they may do so once the hearing has been advertised and parties are determined. If the Appellants wish to apply for interim costs, they may do so at the end of the hearing.

III. CONCLUSION

[39] In accordance with section 87 of the Act, the Board has concluded that the following matters included in the Notice of Appeal shall be included in the hearing of the appeal:

3. Did the Deputy Minister act within his jurisdiction under the *Government Organization Act* in issuing the Enforcement Order?
4. Given the facts of this case, was the decision to issue an Enforcement Order correct and reasonable?"

[40] In accordance with section 87(4) of the Act, no representations may be made to the Board on any other issues.

Dated on August 27, 2001, at Edmonton, Alberta.

Dr. William A. Tilleman

Dr. M. Anne Naeth

Dr. Steve E. Hrudehy