

# ALBERTA ENVIRONMENTAL APPEALS BOARD

## Decision

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Date of Decision – June 28, 2019

**IN THE MATTER OF** sections 91, 92, and 95 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12;

**-and-**

**IN THE MATTER OF** an appeal filed by 728106 Alberta Ltd. and Wolfgang Wendrich with respect to Environmental Protection Order No. EPO-2016/03-SSR issued under the *Environmental Protection and Enhancement Act* by the Director, South Saskatchewan Region, Alberta Environment and Parks.

Cite as: *728106 Alberta Ltd. and Wolfgang Wendrich v. Director, South Saskatchewan Region, Alberta Environment and Parks, re: Crowsnest Mountain Resort* (28 June 2019), Appeal No. 16-006-D (A.E.A.B.), 2019 AEAB 21.

**BEFORE:**

Mr. Alex MacWilliam, Board Chair.

**SUBMISSIONS BY:**

**Appellants:** 728106 Alberta Ltd. and Mr. Wolfgang Wendrich.

**Director:** Mr. Stephen Mathyk, Director, South Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Meagan Bryson and Ms. Lisa Semenchuk, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

On June 30, 2016, Alberta Environment and Parks (AEP) issued an Environmental Protection Order (EPO) under the *Environmental Protection and Enhancement Act* to 728106 Alberta Ltd. and Mr. Wolfgang Wendrich (Appellants), requiring them to cease operation of all parts of the non-compliant water delivery system being used at the Crowsnest Mountain Resort, located in Coleman, Alberta.

On July 4, 2016, the Appellants submitted a Notice of Appeal to the Environmental Appeals Board (the Board), appealing the issuance of the EPO and requesting a stay of the EPO.

On July 26, 2016, the Board notified the Appellants and AEP the stay was denied.

On September 2, 2016, the Director notified the Board that he was cancelling the EPO. The Board proposed the appeal be dismissed as being moot and invited comments on this proposal from the Appellants and AEP.

After reviewing the comments provided by the Appellants and AEP, the Board determined the appeal was moot and, therefore, dismissed the appeal.

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## I. BACKGROUND

[1] On June 30, 2016, the Director, South Saskatchewan Region, Alberta Environment and Parks (“AEP” or the “Director”) issued Environmental Protection Order No. EPO-2016/03-SSR (the “EPO”) under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (“EPEA”) to 728106 Alberta Ltd. and Mr. Wolfgang Wendrich (the “Appellants”). The EPO was issued with respect to the water delivery system at the Crowsnest Mountain Resort (the “Resort”). The EPO required the Appellants to cease operation of all parts of the non-compliant water delivery system.

[2] On July 4, 2016, the Appellants filed a Notice of Appeal with the Environmental Appeals Board (the “Board”), appealing the issuance of the EPO and requesting a stay of the EPO. On the same day, the Board notified the Director the Notice of Appeal had been filed. The Board asked the Appellants to provide answers to the stay questions.<sup>1</sup>

[3] On July 6, 2016, the Appellants provided their response to the stay questions. On July 26, 2016, the Board notified the Appellants and the Director (collectively, the “Parties”) the stay was denied.

[4] On August 9, 2016, the Board notified the Parties the hearing would be held on October 21, 2016.

[5] On August 16, 2016, the Board confirmed the Appellants’ request for reconsideration of the Board’s stay decision. The Board asked the Director to provide submissions on the Appellants’ request for reconsideration of the Board’s stay decision, which was received on August 19, 2016.

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<sup>1</sup> The Appellants were asked to provide answers to the following questions:

1. What are the serious concerns of Crowsnest Mountain Resort that should be heard by the Board?
2. Would Crowsnest Mountain Resort suffer irreparable harm if the stay is refused?
3. Would Crowsnest Mountain Resort suffer greater harm if the stay was refused pending a decision of the Board, than those that may be affected by Crowsnest Mountain Resort’s activities?
4. Would the overall public interest warrant a stay?

[6] On August 29, 2016, the Board notified the Parties it was willing to reconsider the stay decision based on the Public Health Appeal Board's decision to lift the stay of an Alberta Health Services Order.

[7] On September 2, 2016, the Director notified the Board that he was cancelling the EPO.

[8] On September 6, 2016, the Board asked the Appellants if they intended to withdraw their appeal.

[9] On September 22, 2016, the Appellants stated they would withdraw their appeal contingent on them being able to meet and discuss the situation and possible remedies with the Director, preferably through mediation.

[10] On September 30, 2016, the Director responded that, since the EPO was cancelled, there was nothing further to discuss with respect to the matter under appeal. The Director encouraged the Appellants to continue discussions with AEP with respect to the Appellants' application for an amending approval for the construction, operation, and reclamation of a waterworks system for the Resort.

[11] The Appellants provided a response on October 21, 2016, requesting a mediation meeting be held, and the Director provided a final response on October 31, 2016, advising he did not wish to participate in mediation because the EPO that was the subject of the appeal was cancelled.

[12] On November 2, 2016, the Board proposed to the Parties that it would dismiss the appeal as being moot unless the Parties advised otherwise.

[13] On November 16, 2016, the Appellants notified the Board their appeal could be dismissed as being moot.

[14] On November 18, 2016, the Board notified the Parties the appeal was dismissed with reasons to follow. These are the Board's reasons.

## II. ANALYSIS

### 1. Judicial Analyses of Mootness

[15] The Courts have extensively analyzed the issue of mootness. In the leading case of *Borowski v. Canada (Attorney General) (No. 2)*,<sup>2</sup> the Supreme Court of Canada stated that “...if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.”<sup>3</sup> The Court in *Borowski* stated the matter before it was moot as the basis of the action had disappeared and the initial relief sought was no longer applicable.<sup>4</sup> The Court also stated that it may decline to decide a case which raises merely a hypothetical or abstract question. In *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028, the Alberta Court of Appeal said, “...an appellate court cannot order a remedy which could have no effect.”<sup>5</sup>

[16] In *Borowski*, the Court set out a process to determine whether, even though an issue may be legally or factually moot, the court should still exercise its discretion and hear the case. The three factors the courts need to consider are:

1. whether the parties retain an adversarial stake in the issues raised by the case (adversarial nature of the case);
2. whether, in the circumstances, the issues are important enough to justify the judicial resources necessary to decide the case (will the decision have some practical effect on the rights of the parties); and
3. whether the court would be departing from its traditional role in adjudicating disputes if it decided the case (proper role of the judiciary).

[17] The first step requires an assessment as to whether other issues or collateral consequences remain outstanding that could be determined if the matter was heard. In regards to the second part of the test, also referred to as “judicial economy”, the Court identified three

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<sup>2</sup> *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 (“*Borowski*”).

<sup>3</sup> *Borowski v. Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 at paragraph 15.

<sup>4</sup> *Borowski* was asking the court to declare section 251 of the Criminal Code of Canada invalid and inoperative, but the section had been struck down prior to *Borowski* being heard.

<sup>5</sup> *Resurgence Asset Management LLC v. Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

situations where the expenditure of judicial resources to determine a moot issue would be appropriate:

1. where the outcome of the case will have a practical effect on the rights of the parties;
2. where the circumstances giving rise to the case are of a recurring nature but of brief duration, thus rendering a challenge inherently susceptible to becoming moot; and
3. where the case raises an issue of public importance where a resolution is in the public interest.

Not all three situations have to be present, and it is up to the court to determine if the factors that are present warrant determining the matter.

[18] The third step is for the court to recognize its proper law-making function, and pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

## 2. The Board's Analysis of Mootness

[19] Section 95(5)(a) of EPEA states:

“The Board

- (a) may dismiss a notice of appeal if
  - (i) it considers the notice of appeal to be frivolous or vexatious or without merit ...
  - (iii) for any other reason the Board considers that the notice of appeal is not properly before it ....”

[20] The Board has considered when an issue is moot in previous decisions. In *Butte Action Committee*,<sup>6</sup> the Board stated:

“By moot, the Board means that, even if we proceed to a hearing, there is no remedy that we could give to address the Appellants’ concerns because the issue found within the Approval appealed from is now abstract or hypothetical.”<sup>7</sup>

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<sup>6</sup> *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.).

<sup>7</sup> *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D

[21] The mootness issue was also discussed in *Kadutski*,<sup>8</sup> where the Board stated:

“An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect.”<sup>9</sup>

3. Application to This Appeal

[23] In order to have a valid appeal there must be an appealable decision before the Board. In this case, the Director has withdrawn the EPO issued to the Appellants. The Board does not have the authority to confirm, reverse, or vary something that does not exist. The Appellants asked the Board to reverse the EPO, but the Director’s cancellation of the EPO has effectively achieved the results asked for by the Appellants.

[24] The issue before the Board is factually moot because the Board does not find any grounds on which to hear the appeal. As was the case in *Borowski*, the Appellants can no longer pass the “live controversy” test, because the basis of their appeal, the EPO, has disappeared (i.e. been rescinded), and thus the initial relief sought is no longer applicable. Ultimately, the issue is no longer “tangible and concrete.” Therefore, it is necessary for the Board to consider the factors established in *Borowski* to determine if it should exercise its discretion to hear the appeal.

[25] Looking at the first factor, it is the Board’s view the Appellants no longer have an adversarial stake in the appeal because the only source of conflict has been removed. Also, aside from the issuance of the EPO, there are no other collateral consequences that remain outstanding that could be determined if the matter was heard.

[26] Turning to the second factor, The Board concludes there is no justification for the expenditure of resources to decide this appeal, because the Board cannot grant a remedy that would have no practical effect on the rights of the parties. Additionally, there is no issue of a recurring nature, nor any issue of public importance to warrant expending resources to hear the matter.

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(A.E.A.B.) at paragraph 28.

<sup>8</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.).

<sup>9</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.

[27] In respect of the third factor, in the opinion of the Board making a decision on an appeal in the absence of a dispute affecting the rights of the parties could be viewed as intruding into the role of the legislative branch and outside the Board's statutorily designated role. Based on the empowering provision of section 95(5)(a)(iii) of EPEA, it is reasonable for the Board to dismiss the Appellants' Notice of Appeal because it is no longer properly before the Board. The appeal is moot because, if the Board were to proceed with its hearing, any decision it made would be "abstract or hypothetical,"<sup>10</sup> and without any "real effect."<sup>11</sup>

### III. CONCLUSION

[28] The Board dismisses the appeal pursuant to section 95(5)(a)(iii) of EPEA.

Dated on June 28, 2019, at Edmonton, Alberta.

*"original signed by"* \_\_\_\_\_

Alex MacWilliam  
Board Chair

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<sup>10</sup> *Butte Action Committee and Town of Eckville v. Manager, Regional Support, Parkland Region, Natural Resource Service, Alberta Environment re: Crestar Energy* (9 January 2001), Appeal Nos. 00-029 and 00-060-D (A.E.A.B.) at paragraph 28.

<sup>11</sup> *Kadutski v. Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.) at paragraph 36.