No. 15 1867
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

SHAWNIGAN RESIDENTS ASSOCIATION

PETITIONER

And:

DIRECTOR, *ENVIRONMENTAL MANAGEMENT ACT*,
COBBLE HILL HOLDINGS LTD. and
ENVIRONMENTAL APPEAL BOARD

RESPONDENTS

APPLICATION RESPONSE

Application response of: Cobble Hill Holdings Ltd. And South Island Aggregates Ltd., (the "application respondents")("CHH") and ("SIA")

THIS IS A RESPONSE TO the notice of application of Shawnigan Residents Association filed 9/July/2015.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application on the following terms: Preservation of the documents in the possession of Cobble Hill Holdings Ltd., and South Island Aggregates Ltd., as set out in paragraph 4.

Part 2: ORDERS OPPOSED

CHH and SIA oppose the granting of the orders set out in paragraphs 1, 2, (in part), 3 (in part), 4 (in part), 5 and 6 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

CHH and SIA take no position on the granting of the orders set out in that part of order #2 requiring Kristen Marrs to preserve the records listed in paragraphs 2(a) through (e) and in that part of order #3 requiring Cook Roberts to preserve the records listed in paragraphs 3(a) through (e) of Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. SIA applied to the provincial Ministry of Environment (MOE) for a permit related to its reclamation activities at a quarry it was operating south of Shawnigan Lake, in October 2011.
2. At the time of the application Active Earth Engineering Ltd. was retained by SIA to provide professional engineering services.
3. The application process took in excess of a year, requiring a significant amount of engineering design work including the preparation of several drafts of a technical assessment and review document (TAR), the final draft of which was submitted to the MOE in September 2012.
4. The process of review of the application for the Permit then proceeded for a further year.
5. During the year long assessment and review by MOE, a substantial amount of additional engineering design and planning work was required by the MOE.
6. During its assessment the MOE required changes and modifications to the proposed works as set out in the TAR, the MOE involved engineers, geoscientists, site remediation specialists, environmental consultants, hydrologists, geologists, and other qualified professionals all of whom influenced the final design and final permit requirements.
7. Shortly before the MOE permit was issued in August 2013, South Island Aggregates requested that the permit be issued to Cobble Hill Holdings Ltd., the land owner of the land in question.
8. In late 2012, when it was expected that the permit would be issued at around that time, an agreement was reached between SIA, CHH and Active Earth with respect to the proposed future operation of the reclamation activities in the quarry. It originated from concerns about the amount of fees outstanding and owing to Active Earth with no security. That is the agreement attached to the affidavit of Calvin Cook. It was later abandoned (the "Abandoned Agreement")
9. When the permit was not issued as contemplated, by the end of 2012 or early in 2013 and Active Earth did not contribute funds under the Abandoned Agreement, the parties to the Abandoned Agreement took no steps to implement the Agreement.

10. During 2013, MOE required SIA to undertake a significant amount of further work on its application. MOE did not completely adopt the technical approaches to dealing with the site remediation by filling with contaminated soils as originally set out by Active Earth, and SIA's contemplated costs of obtaining the permit mounted.

11. The MOE permit was issued in August 2013 and was immediately challenged with four appeals to the Environmental Appeal Board.

12. The appellants applied for and were granted a stay of the permit which remained in force for 16 months until March 20, 2015 when the decision of the Environmental Appeal Board was issued. The stay was rescinded by the EAB.

13. SIA and CHH incurred very significant expenses in addressing and responding to the appeal.

14. CHH, as a third party in the appeal proceedings, called very little evidence on its own behalf. In May 2014 Martin Block testified on behalf of CHH.

15. When Martin Block testified he was asked about the business relationship with Active Earth. By that time, the Abandoned Agreement had been abandoned, it was never brought into existence, there were no operations under it, shares in the companies formed for the purposes of the Abandoned Agreement had not been issued to any of the parties.

16. As a result, in fact and in law Active Earth had and has no ownership interest or business or equity interest in CHH or the permit.

17. Martin Block provided true and accurate evidence to the Environmental Appeal Board, including disclosing the existence of a very significant outstanding account due and owing to Active Earth.

18. After 31 days of hearing, and approximately a year after the commencement of the hearing, the Environmental Appeal Board issued a 121 page decision.

19. In it the Board dealt in detail with the challenges to Active Earth as qualified professionals including the following passages:

> "[268]...
>
> ***a. Ought the Delegate to have disregarded Active Earth's technical information regarding the Site because it was acting as an "advocate", rather than as a Qualified Professional during the application process?***
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> [269] Applicants who are applying for permits under section 14 of the *Act* must retain a Qualified Professional to develop a TAR in support of the application, if a TAR is required by the Ministry. It was required in this case. SIA retained Active Earth as the Qualified Professional for its application.
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> [270] Throughout the hearing, the Appellants argued that Active Earth should not be trusted and their information should be disregarded, because they were not acting as "Qualified Professionals"; rather, they

were advocates for the permit application. This argument is based on evidence that came out during the hearing that Active Earth had not been fully paid for some of its services. Mr. Block testified that Active Earth is owed approximately $500,000 for work that has been undertaken on this project. Therefore, according to the Appellants, Active Earth is a biased advocate because payment will depend upon the outcome of the permit application. As the CVRD puts it, Active Earth's financial fate is tied to that of its client. The Appellants submit that, because of this lack of independence, Active Earth was not open to other explanations with respect to the characteristics of the Site.

The Panel's Findings

[271] The Panel has considered the impact of the financial arrangement between Active Earth and Cobble Hill. In particular, the claim that Active Earth was not acting as a "Qualified Professional". This term is not defined in the legislation. It is described in the Ministry's guidance documents as a person who is registered in BC with an appropriate professional association, who acts under that association's code of ethics and is subject to disciplinary action by that association and, through suitable education, experience, accreditation and knowledge, can be reasonably relied on to provide advice within an area of expertise related to the application (see footnote 4).

[272] The Panel finds that, from the outset, it was clear to the Delegate that Active Earth was an advocate for the permit application. Its work was critically reviewed by many others, both before the Permit was issued, following the Permit, and at the appeal hearing. Active Earth's representatives defended their work to the Delegate as would any professional. As new information was obtained which conflicted with, or put into question, Active Earth's original understanding or characterization of the Site, it responded appropriately by changing the design to address the new information. The Panel finds that the fact that Active Earth was an advocate for the application, and that its original statements about the Site were modified or corrected, does not disqualify Active Earth from being a "Qualified Professional" for the permit application. The fact is that Active Earth employs qualified professionals, including professional engineers, who must abide by the standards set by their respective professional associations.

[273] The Panel finds no merit to the assertion that Active Earth should be disqualified because they have not been fully paid for their work to date. As a result, the Panel accepts that the Delegate properly considered the work prepared by Active Earth as the Qualified Professional for SIA and Cobble Hill."

19. The Board also dealt with the allegation that CHH was not a suitable entity to reliably operate the permit, the Panel's findings were in part as follows:

> "*The Panel's Findings*
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> [673] From the evidence of Mr. Block, it is evident that, on a day-to-day operational basis, the 3 companies are virtually interchangeable; i.e., it was not possible to determine which company Mr. Block or Mr. Kelly was representing at any given time.
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> [674] The Panel finds that the relationship between SIA, Cobble Hill and the numbered company are sufficiently linked that, for the purposes of determining whether Cobble Hill is a suitable permittee, the actions of one may properly be attributed to the other. The Panel also finds that, although the change in the permit applicant from SIA to Cobble Hill led to the Appellants' concerns about improper motives, there is no legal justification for refusing to issue a permit to a land owner instead of an operator. In this case, the Panel finds that the land owner and the operator are inextricably linked.
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> ...
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> [680] Regarding Mr. Block's evidence and actions during the hearing, the Panel heard evidence in response to each and every matter raised. Regarding his discussion with the comptroller after the Panel Chair's warning, it is clear to the Panel that Mr. Block made his inquiries out of a genuine desire to provide accurate information to the Panel. It was not done out of any lack of respect for the Chair's direction. The Panel rejects the assertion that Mr. Block's integrity or trustworthiness, or the integrity or trustworthiness of Cobble Hill, is put into question by this action.
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> [681] The Panel also carefully considered the Residents Association's assertion that Mr. Block withheld information from the Panel with respect to an agreement with the Malahat Nation in an attempt to mislead the Panel and paint Cobble Hill in a better light.
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> ...
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> [689] The Panel has reviewed all of the evidence, and is satisfied that Mr. Block's evidence was forthright and honest. The Panel is satisfied with his explanations for the matters identified by the Appellants and, in particular, is satisfied that his evidence was not intended to mislead. Further, the Panel finds that Mr. Block justified the expenditures to a reasonable degree and his estimates were close to the $2 million referred to in his affidavit.
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> [690] In conclusion, the Panel considered Mr. Block's testimony in its entirety, and finds that he was a credible witness who was placed in the difficult situation of answering questions regarding events that happened over a significant period of time, without the benefit of referring to notes or aids of any type to assist his memory. Although

> the Residents Association, and the other Appellants, may have a different view of some of the evidence than Mr. Block, or may question some of his explanations for testifying in the way that he did, the Panel does not accept that he intentionally misled or withheld evidence from the Panel, or that his integrity has been compromised. As a result, the Panel finds no basis to conclude that the actions of Cobble Hill, or its principal, demonstrate that Cobble Hill is unreliable and should not be trusted with the Permit.
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> [691] For all of these reasons, and in light of Cobble Hill's actions to date with respect to reporting issues as they arise and addressing them, the Panel finds that Cobble Hill is a suitable entity to be the Permittee. There is no compelling evidence that either Cobble Hill's actions, or those of the other 2 closely held companies, make it an "unreliable operator."

20. The Abandoned Agreement, even if it were to have been acted upon or enforced, does not alter the understanding that the Environmental Appeal Board had with respect to the relationship between Active Earth and CHH.

21. The decision of the Panel was based on a clear and disclosed financial relationship between the parties including a very substantial outstanding account.

Part 5: LEGAL BASIS

1. There is no urgency to this application. It has a significant impact on a large number of people and their businesses, and it is not in the interests of justice to proceed without adequate time to prepare.

2. There are others who seek to be heard. There is insufficient time to do so.

3. There are at least 2 matters that must be addressed before, or with this application.

4. This proceeding is an application for judicial review.

5. On judicial review, the review of the decision below is conducted on the record of the evidence in front of the Tribunal at the time of its decision.

6. Unless and until the information contained in the Cook affidavit is admitted on some basis permitted by the law in respect of judicial review, the said information is not in front of the court. It is not and will not be relevant to a review of the Board's decision.

7. The proper avenue, if a person considers that the conditions under which the Permit was issued have changed, is to address the Director who has reserved the right in the Permit to amend or alter the Permit on the basis of changed circumstances or to request that the Director amend, suspend or cancel the Permit in accordance with the provisions of sections 16 through 19 of the *Environmental Management Act*.

8. The test for a stay of the decision of an administrative tribunal is generally the same as that applied in civil proceedings.

- *Northwood Inc. v. British Columbia (Forest Practices Board)*, 2000 BCCA 7

9. A test for a stay requires:

- that there be some merit to the appeal in the sense that there is a serious question to be determined;

- irreparable harm would be occasioned to the applicant if the stay were refused;

- on balance the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted;

- *Hawkeye Power Corp. v. Sigma Engineering Ltd.,* 2014 BCCA 427

10. The information attached to the affidavit of Calvin Cook is not even properly before the Board in the judicial review at this time. In any event it does not change the merit of the judicial review application, which remains highly unlikely or of little or no merit given the very high hurdle of the applicant to show that the Board's decision is unreasonable.

11. Here the relief sought (i.e. an interim or interlocutory stay) will effectively determine the rights between the parties and alter the status quo. In such circumstances the court must look more searchingly at the merits of the "serious question" to be determined.

12. There is no merit in the applicant's position. It has not demonstrated any wrongdoing. The financial relationship in question and the fact that the Engineers were unpaid and stood to profit from the permit was known to the EAB and argued by the appellants in the hearing. Mr. Block, the witness whose evidence is challenged was asked extensive questions about the state of affairs at the EAB hearing which he answered candidly and truthfully.

13. The application is required to show, by evidence, irreparable harm. This it cannot do. *Westin License Co. v. Westin Construction Ltd.*, 1998 CanLII 3850 (BC SC) and *Sunshine Logging (2004) Ltd. v. Prior,* 2011 BCSC 1044.

14. The applicant, a public interest advocacy group, cannot show irreparable harm to it.

15. There is no evidence of irreparable harm to any person withstanding in this proceeding.

16. There is no evidence to refute the very clear finding of the Environmental Appeal Board that undertaking reclamation activities at this quarry are likely to cause any harm or pose any significant threat to the environment.

17. The new evidence in the Cook affidavit does not relate in any way to a revelation with respect to new activities, new contaminants, new pathways or new threats to the environment.

18. The evidence attached to the Cook affidavit is nothing more than a collateral attack on the credibility of one witness called in a proceeding where 29 witnesses testified and in respect of which the Board's decision is based almost entirely upon reviewing, weighing and deciding upon technical scientific evidence with respect to protection of the environment.

19. The EAB decision was issued March 20, 2015 and the SRA did not seek an injunction at that time. The present application is repetitive of evidence and argument that were before the EAB.

20. CHH has been operating as of May 2015 after having its reclamation activities at the quarry delayed by the permit application process and the appeal for in excess of two years.

21. A number of contractual commitments have been made by CHH to accept delivery of soil and a stay will cause significant financial loss and damage to CHH which if not irreparable, is a very substantial inconvenience to its operations.

22. Rule 10-4 requires, unless the court otherwise orders, that an order for any pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages. No such undertaking is given by the applicant in this application.

23. There is no reason to depart from the usual rule that the petitioner give an undertaking as to damages and, unless the court is satisfied that the petitioner has the financial ability to give a meaningful undertaking, there should be substantial security. *Dion et al. and IBC Investments Ltd. et al.* (Unreported, Vancouver Registry B.C.S.C. Court File No. A992554).

24. Alternatively, the stay should be denied on the basis that any undertaking could not be enforced. *Schwartz v. Riverside Forest Products Ltd.*, 2003 BCSC 52.

25. The evidence discloses that the Shawnigan Residents Association has no funds or assets. On the contrary, it is indebted to lawyers and experts as a result of this proceeding.

26. The operation of the permit was subject to a 16 month stay based on the unfounded allegations that there could be a risk to the environment and human health from the chemicals listed in the permit. The suitability of the multi-barrier approach and permitted controls was addressed fully by the Director of the Ministry of the Environment and in *de novo* hearing by the Environmental Appeal Board.

27. The question of risk (or irreparable harm) is *res judicata* and was determined without significant reference to the evidence of Active Earth. Nothing in the within action demonstrates that the science in support of the permit, as assessed by numerous independent experts and agencies has changed.

28. The Court should not remake the decision of the EAB in this fashion. It was based on a 31 day hearing by an expert panel, with over 9 qualified experts in support of the appellants and numerous other witnesses who are the leaders in their respective fields called by the Director to speak to the approval process.

29. The Abandoned Agreement has come to the Court's attention because it was stolen and is now presented to the Court taken out of context and in the absence of a record of the EAB's proceeding. The Court should not sanction such conduct and should not grant the applicant's relief that determines the rights of the parties on short notice and incomplete argument.

30. This is particularly so when the applicant refuses to provide the Court with the record of the decision it hopes to challenge.

31. The *status quo* is the operating mine reclamation activity, which is allowed and currently undertaken pursuant to the Permit.

Part 6: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Martin Block sworn and filed herein.
2. Affidavit #1 of Mike Kelly sworn and filed herein.
3. All affidavits and documents filed in the petition proceeding and applications.

The application respondent estimates that the application will take 2 days.

[√] The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

L. John Alexander
COX, TAYLOR
Barristers and Solicitors
Burnes House, 3rd Floor
26 Bastion Square.
Victoria, BC V8W 1H9

Fax number for service: 250-382-4236
E-mail address for service: alexander@coxtaylor.ca

Date: 14/July/2015

for .....

Signature of lawyer for application respondent L. John Alexander