Environmental Review Tribunal
Tribunal de l'environnement

ISSUE DATE: May 17, 2019 **CASE NO:** 19-013

PROCEEDING COMMENCED UNDER section 140(1) of the *Environmental Protection Act,* R.S.O. 1990, c. E.19, as amended

Appellant:	Morriston Park Nursing Home Inc.
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject to appeal:	Order to perform work in regards to the on-site septic system
Reference No.:	7040-B9JQUB-1
Property Address/Description:	7363 Calfass Road
Municipality:	Township of Puslinch
Upper Tier:	County of Wellington
ERT Case No.:	19-013
ERT Case Name:	Morriston Park Nursing Home Inc. v. Ontario (Environment, Conservation and Parks)

Heard: March 29 and April 12, 2019 by telephone conference call and in writing

APPEARANCES:

Parties	**Counsel**
Morriston Park Nursing Home Inc.	Peter Pickfield
Director, Ministry of the Environment, Conservation and Parks	Andrea Huckins

ORDER DELIVERED BY MARCIA VALIANTE

REASONS

Background

[1] This Order relates to a motion brought by Morriston Park Nursing Home Inc. ("Appellant") for a stay of Director's Order No. 7040-B9JQUB-1 ("Director's Order") pending the resolution of the appeal.

[2] The Appellant operates a 28-bed nursing home ("Facility") on a 10-hectare property near the Village of Morriston, in the Township of Puslinch ("Site"). On July 14, 2018, Michael Hindriks, a Senior Environmental Officer with the Ministry of the Environment, Conservation and Parks ("MECP"), attended the Site and inspected the sewage disposal system ("sewage system") for the Facility. In his Onsite Sewage Disposal Site Inspection Report, completed on August 2, 2018 and, following internal review, mailed to the Appellant on August 23, 2018, Officer Hindriks noted that the MECP had never issued an environmental compliance approval ("ECA") for the sewage system and that the Appellant was unable to provide a copy of a municipal approval or permit issued for its construction. Officer Hindriks identified the sewage system as a Class 4 Septic System, comprised of two septic tanks, a pumping station and a tile leaching bed. During his inspection, he observed that the sewage system had malfunctioned and was experiencing sewage break-out at the leaching bed area. Specifically, he noted that the leaching bed area was overgrown with shrubs and grasses, that the ground was saturated with effluent, that there was visible pooling of effluent, and that strong septic odours were evident. He also indicated that the location of the leaching bed is up-gradient of a large on-site pond shared with an adjoining landowner and is potentially up-gradient of the Site's drinking water well.

[3] In his Inspection Report, Officer Hindriks identified "Actions Required" to include: installation of a flow meter and maintenance of daily records of water use at the Site forthwith; provision of an interim site servicing plan by September 7, 2018; discontinuance of the use of the leaching bed by September 14, 2018; retention of a

qualified person to complete the work and prepare an ECA application by September 14, 2018; and submission of the ECA application to the Approvals Branch of the MECP by May 15, 2019.

[4] In response to the Inspection Report, the Appellant installed a water meter and, following meetings with Officer Hindriks by the end of October retained a qualified person, David Morlock, a registered Professional Engineer, to conduct the work required. On December 31, 2018, Mr. Morlock submitted an Interim Wastewater Servicing Plan to the MECP on behalf of the Appellant ("Interim Plan"). This Interim Plan contained an assessment of the condition of the sewage system and a proposed rehabilitation plan.

[5] Following review of the Interim Plan, on February 19, 2019 Officer Hindriks issued Provincial Officer's Order No. 7040-B9JQUB ("P.O. Order") pursuant to s. 16.1 of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40 ("OWRA"), requiring the Appellant, by February 26, 2019, to retain a qualified person to carry out required work and, by March 8, 2019, to cease discharging raw sewage from the septic tanks into the leaching bed, to retain a licensed waste hauler to empty the septic tanks and pumping chamber on a regular basis and dispose of the sewage at an approved waste disposal site, to visually inspect the septic tanks and pumping chamber daily, and to retain all receipts and records.

[6] The Appellant requested a review of the P.O. Order. On February 28, 2019, Amy Shaw, Director, MECP, issued the Director's Order, varying the compliance date for the Appellant to retain a qualified person and confirming the remainder of the P.O. Order. The Appellant then appealed the Director's Order to the Environmental Review Tribunal ("Tribunal") in accordance with s. 100(4) of the OWRA. The Appellant has complied with the Director's Order since March 8, 2019.

[7] On March 29, 2019, the Tribunal held a telephone conference call ("TCC") with the parties to discuss the scheduling of a stay motion. The parties provided their written materials and on April 12, 2019, the Tribunal heard the stay motion by TCC. During the TCC, an issue arose relating to the Tribunal's jurisdiction on which the Tribunal asked the parties to provide written submissions by April 23, 2019, which was done.

Issues

[8] The main issue is whether to grant a stay of the Director's Order pending resolution of the appeal. Although initially expressed in the alternative, the Appellant ultimately modified its request to: a stay of the Director's Order pending resolution of the appeal conditional on implementation of the Interim Plan. This raised an issue regarding whether the Tribunal has jurisdiction to approve the Interim Plan at this stage of the proceeding in the absence of the Director's consent. Given the findings below, this latter issue need not be addressed.

Relevant Legislation and Rules

[9] Section 102 of the OWRA sets out the Tribunal's jurisdiction respecting a stay:

> **Stay of action under review**
>
> 102 (1) The commencement of a proceeding before the Tribunal under section 100 does not stay the operation of a direction, order, report or decision made, issued or given under this Act, other than,
>
> (a) an order to pay the costs of work made under section 84; or
>
> (b) an order to pay an environmental penalty.
>
> **Tribunal may grant stay**
>
> (2) The Tribunal may, on the application of a party to a proceeding before it, stay the operation of a direction, order, report or decision, other than,
>
> (a) a direction, order or report to monitor, record and report; or
>
> (b) an order issued under section 89.3, 89.8 or 89.12.

> **When stay may not be granted**
>
> (3) The Tribunal shall not stay the operation of a direction, order, report or decision if doing so would result in,
>
> (a) danger to the health or safety of any person;
> (b) impairment or serious risk of impairment of any waters or any use of waters; or
> (c) injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

[10] Rule 110 of the Tribunal's *Rules of Practice* ("Rules") outlines the test the Tribunal applies in considering whether to grant a stay:

> **Motion Seeking an Interim Stay/Stay and Removal of a Stay**
>
> …
>
> 110. The Party shall provide evidence and submissions in support of its motion respecting:
>
> (a) how the relevant statutory tests that are applicable to the granting or removal of a stay are met;
> (b) whether there is a serious issue to be decided by the Tribunal;
> (c) whether irreparable harm will ensue if the relief is not granted; and
> (d) whether the balance of convenience, including effects on the public interest, favours granting the relief requested.

Discussion, Analysis and Findings

Introduction

[11] The Appellant relied on evidence presented in the Affidavits and Reply Affidavits of Mr. Morlock and Karen Bolger, the Appellant's Chief Operating Officer. The Director relied on evidence presented in the Affidavits of Officer Hindriks and Jennifer Volpato, a District Engineer with the MECP's Guelph Office, who reviewed the Interim Plan and Mr. Morlock's Affidavit at the request of the Director.

[12] The parties agree that the statutory bars to the Tribunal issuing a stay, found in s. 102(2) and (3) of the OWRA, do not apply on the facts here. The Tribunal agrees that the Director's Order is not an order or direction to "monitor, record and report". The

Tribunal also agrees that the evidence presented does not establish that granting a stay *would result in* danger to the health or safety of any person, impairment or serious risk of impairment of any waters or any use of waters, or injury or damage or serious risk of injury or damage to any property or to any plant or animal life.

Rule 110 (b) – Serious Issue

[13] Under the test for a stay in Rule 110, the first consideration is whether there is a "serious issue" to be decided by the Tribunal in this proceeding. In considering this, as was noted in *Limoges v. Ontario (Ministry of the Environment),* [2007] O.E.R.T.D. No. 14 at para. 56, the Tribunal applies "a very low threshold, intended only to rule out frivolous or vexatious claims." The Director concedes that the Appellant has raised a serious issue in this appeal. The Tribunal agrees. Thus, the only issues in dispute with respect to Rule 110 are whether the Appellant will suffer irreparable harm if the stay is not granted and, if so, whether the balance of convenience favours granting the stay.

Rule 110 (c) – Irreparable Harm

[14] The Appellant submits that it will suffer irreparable harm if the stay is not granted. The Appellant argues that compliance with the Director's Order will require it to spend between $8,000 and $10,000 per month, for a period of 12 to 18 months, totalling some $96,000 to $180,000. It argues that, given its financial circumstances, this expense has "the potential to threaten the financial sustainability of the Nursing Home and could potentially lead to the closure of the Nursing Home or in the alterative, the eviction of residents on a very short notice." According to the Appellant, its average monthly revenues range between $150,000 to $170,000, 82% of which is provided by the Ministry of Health and Long Term Care, and average monthly expenses range between $160,000 to $180,000, which means that it operates at a deficit. The Appellant submits that its real property is heavily mortgaged and it is unable to get a further loan from its bank to pay the costs of compliance because there is insufficient security. In addition, the Appellant submits that having a functioning septic system is a term of its existing

mortgage, so that if the stay is not granted and the Interim Plan not implemented the bank could foreclose.

[15] The Appellant stated that it has already spent more than $33,000 as a result of the P.O. Order and the Director's Order. A rough estimate of the cost to comply with Mr. Morlock's proposed Interim Plan was said to be $40,000, although this was not detailed in Mr. Morlock's evidence.

[16] The Appellant argues that severe financial harm is a type of irreparable harm, citing the Tribunal's decision in *Ghosh v. Ontario (Environment and Climate Change)*, 2016 CanLII 21196 ON ERT ("*Ghosh*"). The Appellant also cites *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 ("*RJR*"), where the Supreme Court of Canada held that irreparable harm refers to the "nature of the harm" and gave as an example of irreparable harm a party being put out of business. According to the Appellant, determining whether the cost of compliance is irreparable must be judged in relation to the size of the operation and its financial circumstances, distinguishing cases such as *RJR* and *Rubin v. Ontario (Ministry of the Environment),* [2012] O.E.R.T.D. No. 70 ("*Rubin*"), where stays were denied because the corporations had substantial assets.

[17] The Director submits that the onus to demonstrate that irreparable harm would occur is on the Appellant and it has not met that onus. The Director argues that, even if the Appellant has variable profit and sometimes operates at a deficit, its financial statements show that it budgets for and has funds available on an ongoing basis to pay for expenses related to property maintenance and a range of sundry supplies and other items. Further, the Director submits, the Appellant's business model should not be used as an excuse for failing to meet its environmental obligations.

[18] The Director also challenges the Appellant's cost estimates for compliance, arguing that the invoices submitted show that the actual cost of pumping and disposing of the sewage is less than the Appellant predicted, between $7,000 and $8,000 per

month, based on pumping three times per week, which the Appellant considers to be necessary, but may not be. The Director submits that this cost cannot be considered irreparable harm in the circumstances, in light of the approximately $40,000 the Appellant would have to expend immediately to implement the Interim Plan. The Director also notes that the items included in the $40,000 estimate were not specified, suggesting that that figure might underestimate the actual costs required to implement the Interim Plan.

[19] The Director submits that the circumstances in *Ghosh* were different from those here, so that case should be distinguished. The Director also refers to the Tribunal's order in *Rubin*, where the Tribunal ruled that unrecoverable costs or financial loss must result in "financial hardship" in order to amount to irreparable harm.

Findings on Irreparable Harm

[20] The onus is on an appellant seeking a stay to demonstrate that irreparable harm will, not may, occur if a stay is not granted. As stated by the Tribunal in *Baker v. Ontario (Ministry of the Environment),* [2013] O.E.R.T.D. No. 21 ("*Baker*"), at para. 81, "[i]n other words, an unsubstantiated claim or proof of a risk of irreparable harm is not sufficient to meet this part of the test for a stay."

[21] The Tribunal has adopted the meaning of irreparable harm from the *RJR* decision. There, the Supreme Court stated, at para. 59:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …; where one party will suffer permanent market loss or irrevocable damage to its business reputation…; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined…. The fact that one party may be impecunious does not automatically determine the application in favour of the other party, who will not ultimately be able to collect damages, although it may be a relevant consideration….

[22] The cases contemplate that the financial impact of complying with an order could be considered irreparable harm, at least in some circumstances. Certainly if the compliance cost is so significant, given an appellant's resources that an appellant would be "put out of business" or suffer some form of permanent harm to its business, such consequences could amount to irreparable harm, so long as there is sufficient evidence to demonstrate that such consequences would occur. The other circumstances identified in *RJR* may be where the cost could not be recoverable from another party.

[23] Here, the Appellant makes an argument along the lines of the first type of situation, submitting that it may have to close the nursing home or evict some tenants at short notice if it has to comply with the Director's Order.

[24] The Appellant does not dispute that it must have a functioning sewage system. Unlike cases such as *Rubin* and *Baker*, the Appellant's Notice of Appeal does not allege that it should not have been named in the Director's Order and that someone else is responsible for carrying out necessary work and ultimately paying for it. The appeal here instead focuses on what work should be required as interim actions. It is not disputed that the Appellant will eventually have to expend funds to implement a permanent solution and in the meantime will have to expend funds on short-term actions.

[25] The Director's Order identifies only the interim actions of pumping and disposing of sewage off-site, until the permanent solution is decided on and an ECA is issued. Officer Hindriks' Inspection Report did not indicate what the permanent solution should be but only required the Appellant to retain a qualified person to prepare and submit an application for an ECA, to include "all repairs, replacements and up-grades as recommended by the qualified person to meet MECP requirements,…" by May 15, 2019. To date, no application for an ECA has been submitted.

[26] The Appellant proposes alternative interim actions as set out in the Interim Plan. The Interim Plan identifies a number of water conservation practices to reduce flow, several rehabilitative measures that may provide additional hydraulic capacity in the existing leaching bed in the short term, and some contingency measures. Ms. Volpato was asked by the Director to review the Interim Plan and, in a memorandum dated April 3, 2019 and repeated in her Affidavit, she found that there is inadequate information in the Interim Plan to permit her to reach a professional opinion on its adequacy. She was also of the view that it has an insufficient monitoring program. The Director opposes the Interim Plan, and the request for a conditional stay, on this basis.

[27] Because the Appellant revised its request for a stay of the Director's Order in its entirety to a request for the Tribunal to grant a stay conditional on implementation of the Interim Plan, this is not a situation where the Appellant will either have to comply fully with an order, with all the attendant costs, or do nothing and incur no costs at all. Rather, the Appellant has accepted that interim actions are necessary because it cannot operate the existing sewage system as is. By the Appellant's reckoning, the difference is between an immediate cost of at least $40,000 and monthly expenditures for pumping and off-site disposal spread out over a number of months, which could total $180,000.

[28] According to the invoices for pumping and off-site disposal, a realistic amount to comply with the Director's Order is $7,000 to $8,000 per month. The Appellant bases the 12- to 18-month multiplier on the length of time that, in Mr. Morlock's experience, it usually takes for the MECP to process an ECA application. However, it is not at all clear that interim actions would extend for that period. Certainly this proceeding, which is concerned only with the interim actions, could be concluded well within that period. Furthermore, the Appellant has so far not provided the additional information requested by the Director, based on Ms. Volpato's review, which might satisfy the MECP to accept the Interim Plan as an effective interim plan and thereby lead to a resolution of the issues in this proceeding. It is also not certain that the ECA application process would take as long as predicted by Mr. Morlock, given the Director's offer to help fast-track the Appellant's application at the Approvals Branch. It is concerning that the Appellant has

taken no steps to begin the ECA application process, which it was directed to commence back in August and to complete by May 15, 2019, and which is unaffected by the question of what interim actions should be taken. Thus, to a certain extent, the length of time that the expense of complying with the Director's Order would continue is in the hands of the Appellant.

[29] It is necessary to consider the particular circumstances in each case to determine whether there will be harm that is irreparable. The Appellant relies on *Ghosh* as an example of comparable circumstances. The Tribunal does not agree that the circumstances in *Ghosh* are similar to those here. There, the company was undergoing a court-supervised debt restructuring, with time-sensitive negotiations underway, and the Tribunal found that expending significant funds on evaluating site conditions at such a critical time in the restructuring process would require the diversion of resources and would jeopardize restructuring efforts. Here, while evidence was provided that the Appellant at times operates at a deficit, the evidence was insufficient to convince the Tribunal that an additional short-term expenditure of up to $8,000 per month would be enough to put the Appellant out of business or require it to evict residents on short notice, particularly in light of the Appellant's expressed willingness to expend $40,000 on implementation of the Interim Plan.

[30] The Tribunal finds that the Appellant has not demonstrated that it would suffer irreparable harm if a stay of the Director's Order is not granted.

Rule 110(d) – Balance of Convenience

[31] In *Rubin*, the Tribunal did not make a finding on whether unrecoverable financial loss short of "financial hardship" can constitute irreparable harm but did find on the facts that the appellants had sufficient assets to cover the "relatively small cost of compliance". In this case, the Appellant has not demonstrated that it will suffer irreparable harm. However, even if one were to accept that the Appellant would suffer

some financial harm by complying with the Director's Order and to accept that degree of harm as irreparable, the balance of convenience favours the Director.

[32] The Appellant submits that the balance of convenience favours granting a stay. It argues that its financial sustainability is threatened by having to comply with the Director's Order and that there is no risk to the environment because it will implement the Interim Plan if a stay is granted.

[33] In *Baker*, the Tribunal stated that the "public interest is a significant factor [it] will consider in weighing the balance of convenience." In the case of an order issued under s. 16.1 of the OWRA, the public interest is in the protection of water quality. In issuing the P.O. Order, Officer Hindriks stated in his affidavit:

> The Preventive Measure Order was issued to prevent an occurrence of a spill, prevent an occurrence of an on-site drinking well impact, prevent an occurrence of a surface water impact and to ensure an approved sewage works adequately functions for the nature [of] the Site operations. I was of the opinion that the nature of the Site and the undertakings at the Site is such that if a contaminant is discharged into the natural environment from the Site, the contaminant will result or is likely to result in an adverse effect and that the requirements specified in the Order were necessary or advisable so as to prevent or reduce the risk of any such discharge, or to prevent, decrease or eliminate any adverse effect or impairment of the quality of the water.

[34] While it is Mr. Morlock's opinion that the Interim Plan would be effective in protecting the surrounding environment, this is challenged by Ms. Volpato on the basis that insufficient information has been provided to satisfy the MECP that the actions will be adequate and effective in protecting on- and off-Site water resources and the Interim Plan does not include sufficient monitoring. Taking a precautionary approach, the Tribunal finds that the balance of convenience favours an interim approach that provides the greater certainty that water resources will be protected until this proceeding is resolved.

ORDER

[35] The Tribunal dismisses the Appellant's motion for a stay of Director's Order No. 7040-B9JQUB-1.

Motion Dismissed
Stay Refused

"Marcia Valiante"

MARCIA VALIANTE
VICE-CHAIR