

Environmental Review Tribunal

Tribunal de l'environnement



ISSUE DATE: July 15, 2020

CASE NO.: 19-060

PROCEEDING COMMENCED UNDER section 100(4) of the *Ontario Water Resources Act*, R.S.O. 1990, c. O.40

Appellant:	John Sherk (File No. 19-060)
Appellant:	Elizabeth Sherk (File No. 19-061)
Appellant:	Kathryn Stouffer (File No. 19-062)
Appellant:	Estate of Norma Sherk (File No. 19-063)
Respondent:	Director, Ministry of the Environment, Conservation and Parks
Subject of appeal:	Order issued to submit a completed application for a Permit to Take Water for the dam constructed 4567-BDKPTK-1
Reference No.:	4567-BDKPTK-1
Property Address/Description:	Part of Lot 10, and Lot 11, Concession 14
Municipality:	South Frontenac
Upper Tier:	County of Frontenac
ERT Case No.:	19-060
ERT Case Name:	Sherk v. Ontario (Environment, Conservation and Parks)

APPEARANCES:

Parties

John Sherk, Elizabeth Sherk, Kathryn Stouffer, Estate of Norma Sherk

Director, Ministry of the Environment, Conservation and Parks

Counsel+/Representative

John Sherk

Paul McCulloch⁺

Participant

Robert Sherk

Self-represented

HEARD: June 24, 2020 by telephone conference call
ADJUDICATOR: Helen Jackson, Member

PROCEDURAL ORDER

[1] On August 7, 2019, John Sherk, Elizabeth Sherk, Kathryn Stouffer, and the Estate of Norma Grace Sherk (“Appellants”) filed appeals with the Environmental Review Tribunal (“Tribunal”) regarding Director’s Order No. 4567-BDKPTK-1 (“Director’s Order”) made on July 24, 2019 by Trevor Dagilis, Kingston District Office, Ministry of the Environment, Conservation and Parks. The Director’s Order requires the Appellants to submit a completed application for a permit to take water (“PTTW”) for a dam constructed at Part Lot 10 and Lot 11, Concession 14, South Frontenac.

Prior Procedural Orders

[2] Previous pre-hearing conferences were held in this matter, in-person on December 17, 2019, and by teleconference on March 3, 2020, in order to address procedural matters in preparation for a two-day hearing initially scheduled for April 7-8, 2020. The hearing was scheduled to be in-person in Sydenham, Ontario.

[3] On March 17, 2020, the Province of Ontario declared a state of emergency in response to the COVID-19 pandemic. As a result, the in-person hearing was adjourned to a date to be confirmed. The Tribunal advised that it would be in contact with the parties, participants and presenters as soon as possible to reschedule the hearing once in-person events can be convened again.

[4] By email of March 23, 2020 to the Tribunal, the presenters Hannes and Dorina Friedli withdrew their status as presenters and requested instead that they be considered as observers.

Teleconference of June 24, 2020

[5] A teleconference was convened with the parties and participant to hear submissions on a way forward, given that there is currently no date when in-person hearing events may resume, due to the ongoing pandemic. Kenneth Harper, representative of the Rivendell Golf Corporation, an added party to the appeal, acknowledged the teleconference date of June 24, 2020, and advised he would not be able to attend. He indicated that the teleconference should go ahead in his absence.

[6] On behalf of the Appellants, John Sherk, with the support of Robert Sherk, a participant, requested that the Tribunal continue to adjourn to a date where an in-person hearing could be held. John Sherk is of the view that a virtual hearing, either by teleconference or videoconference, will be prejudicial to the Appellants' case, and he expressed concern that he may not have the appropriate technology to support a virtual hearing. John Sherk also expressed his view that the Director should withdraw the Director's Order, to avoid the expensive and lengthy process of preparation and attendance at a hearing.

[7] Counsel for the Director did not object to the requested continued adjournment. Paul McCulloch indicated that the Director was amenable to a written hearing or a hearing by videoconference, or some combination thereof; but also acknowledged that if John Sherk was not comfortable with a hearing that was not an in-person hearing, it would not be fair to push ahead.

[8] The Director and John Sherk both expressed the view that it may be possible to have a safe in-person hearing at a later date, adhering to appropriate protocols.

Discussion, Analysis and Findings

[9] In considering the Appellants' request to adjourn the matter until such time as an in-person hearing can be held, the Tribunal reflected upon the direction provided in the Tribunal's *Rules of Practice* ("Rules").

[10] Tribunal Rule 104 addresses requests for adjournment:

104. A Party seeking an adjournment shall provide evidence and submissions in support of the motion respecting:

- a) Whether the other Parties consent to the request and the date suggested for the commencement or continuation of the Hearing;
- b) Detailed reasons for the request, including, if appropriate, affidavit evidence;
- c) Evidence that the Party made all reasonable efforts to avoid the need for the adjournment request;
- d) Any urgency for the request because of the public interest;
- e) Any inconvenience to other Parties, Participants and Presenters due to the adjournment; and
- f) Any other factors relating to the considerations listed in Rule 105.

[11] Tribunal Rule 105 provides that:

105. In deciding whether or not to grant a request for an adjournment, the Tribunal may consider:

- a) The interests of the Parties in a full and fair Hearing;
- b) The interests of others potentially affected by the matters before the Tribunal who, after notification of the Hearing, may have arranged their affairs in the expectation of observing or participating in the Hearing;
- c) The integrity of the Tribunal's process;
- a) The circumstances giving rise to the need for an adjournment;
- b) The timeliness of the request for the adjournment;
- c) The position of the other Parties on the adjournment request;
- d) Whether an adjournment will cause or contribute to any existing or potential risk of environmental harm;
- e) The consequences of an adjournment, including expenses to other Parties;
- f) The effect of an adjournment on Participants and Presenters;
- g) The public interest in the delivery of the Tribunal's services in a just, timely and cost effective manner; and
- h) Whether the proceeding before the Tribunal is an appeal of a renewable energy approval under section 142.1 of the Environmental Protection Act.

[12] The Appellants state that there is no urgency to resolve this matter at a virtual hearing, as the conditions at the property are being maintained at a *status quo*, as has been the case for a number of years. The Appellants are of the view that an adjournment to an in-person hearing would provide them with the best opportunity to explain the history of the site and to present their case effectively.

[13] As confirmed by the Director, there is no environmental harm that would arise by a continued adjournment. The site conditions are stable. The issue in dispute is a legal issue regarding the need for a PTTW, and does not require the Appellants to take any actions at the site other than submitting an application for a PTTW. Mr. McCulloch noted that by previous Order of the Tribunal there is a stay of the Director's Order until the final disposition of the appeals.

[14] The Director agrees to a further adjournment. Mr. McCulloch stated that the Courts have begun to hold in-person hearings in some cases and suggested that it may be possible to hold an in-person hearing for this matter safely by following protocols similar to the Courts' procedures, particularly given the number of people involved in this matter.

[15] Based upon the submissions of the parties, in particular, the Appellants' concerns of prejudice, and in line with the direction provided in Rules 104 and 105, the Tribunal finds it appropriate to adjourn to a later date, at which time there may be more information available regarding the ability to hold an in-person hearing event.

[16] The Tribunal directed that the matter is adjourned to a further teleconference in a couple of months at which time the issue can be addressed. The Tribunal is of the view that by the time of the next teleconference there may be additional information regarding the trajectory of the on-going COVID-19 pandemic, and the public health directions provided in response to it.

[17] With respect to the question of whether the hearing is to be held in-person or by other means, such as written or videoconference; the Tribunal directed that this determination would be made following the next teleconference. In making that determination, the Tribunal will consider the factors enumerated in Rule 189.

[18] Rule 189 addresses written and electronic hearings:

189. Where permitted by law, the Tribunal may decide to conduct any part of the proceeding in person or by way of a written or electronic Hearing, and in coming to its decision, may consider any relevant factors, including;

- a) The suitability of a written or electronic Hearing format considering the subject matter of the Hearing;
- b) Whether the nature of evidence is appropriate for a written or electronic Hearing;
- c) The extent to which the matters in dispute are questions of law;
- d) The convenience of the Parties, including any anticipated prejudice to a Party;
- e) The cost, efficiency and timeliness of the proceeding;
- f) Ensuring a fair and understandable process;
- g) The desirability or necessity of public participation or public access to the Tribunal's process; and
- h) the fulfillment of the Tribunal's statutory mandate.

[19] The Tribunal signaled to the parties that it is not willing to adjourn this matter *sine die*, and notwithstanding the Appellants' preference for an in-person hearing, the manner of the hearing will ultimately be a decision made by the Tribunal with a view to balancing all of the factors noted above, most notably consideration of Rule 189 (e) the cost, efficiency and timeliness of the proceeding; and (h) the fulfillment of the Tribunal's statutory mandate.

Case Management

[20] Based on the submissions of the parties, the Tribunal adjourned the matter for approximately two months, at which time there may be more information available regarding the ability to hold an in-person hearing event. The Tribunal scheduled a further teleconference at which time the issue will be re-visited.

ORDER

[21] The Tribunal orders that:

1. A teleconference is scheduled for **September 9, 2020 at 10 a.m.** to address the approach to a hearing in this matter.
2. Call-in details will be provided by the case coordinator.

*Hearing Adjourned
Teleconference Scheduled*

"Helen Jackson"

HELEN JACKSON
MEMBER

If there is an attachment referred to in this document,
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Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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