

Environmental Review Tribunal
Tribunal de l'environnement



ISSUE DATE: November 17, 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⁺

HEARD:

ADJUDICATOR(S):

November 6, 2020 by telephone conference call
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 (“Ministry”). The Director’s Order requires the Appellants to submit a completed application for a permit to take water for a dam constructed at Part Lot 10 and Lot 11, Concession 14, South Frontenac.

Prior Procedural Orders

[2] A two-day hearing was scheduled in this matter for April 7 to 8, 2020, but was cancelled due to the COVID-19 pandemic. The Tribunal has since held a number of teleconferences to determine a way forward. By Procedural Order issued October 13, 2020, an in-person hearing was scheduled for December 2 to 4, 2020, to commence at 10 a.m. to be held in the Council Chambers, Township of South Frontenac.

Motion for Adjournment

[3] By email of October 23, 2020, the Ministry notified the Tribunal of its Notice of Motion for Adjournment of the hearing that is scheduled for December 2 to 4, 2020. The motion is on consent of all parties, with the exception of the Rivendell Golf Corporation, an added party to these appeals. The Rivendell Golf Corporation was made a party at the first pre-hearing conference in this matter on December 17, 2019, but has not attended any of the teleconference calls or made any submissions since then. The Rivendell Golf Corporation was provided with the motion material but did not respond to the motion.

[4] The adjournment is being requested due to a proposed regulatory change that if implemented would remove the legal basis for the order that is the subject of this appeal. Counsel for the Director, Mr. McCulloch, provided motion materials consisting

of factual background to the motion, and an excerpt from the Environmental Registry of Ontario, Registry Posting 019-2517, related to a proposed amendment to Ontario Regulation 387/04 that would exempt certain types of dams, including this dam, from the requirement to obtain a permit to take water for water takings that exceed 50,000 litres of water on any day, with limited exceptions.

[5] In the motion material, Mr. McCulloch advised that the Director became aware on or about October 14, 2020 that the Ministry had posted a notice on the Environmental Registry on October 6, 2020, proposing to amend Regulation 387/04 under the *Ontario Water Resources Act* to provide an exemption for most dams from the requirement to obtain a permit to take water as currently stipulated under s. 34 of the *Ontario Water Resources Act*.

[6] On October 20, 2020, Mr. McCulloch confirmed that if the regulation is amended as proposed, the dam that is the subject of this hearing would no longer require a permit to take water and therefore, there would be no grounds to issue the order that is the subject of this appeal.

[7] In support of the motion, Mr. McCulloch noted that conditions at the dam are being maintained at a status quo as has been the case for a number of years. He also noted that the Ministry has not received any complaints or responded to any incidents in 2020 with respect to the dam.

Analysis and Findings

[8] The Tribunal heard oral submissions on the motion by teleconference call on November 6, 2020.

[9] In determining whether to grant the adjournment, the Tribunal considered the submissions of the parties and the Tribunal's *Rules of Practice and Practice Directions* ("Rules") that relate to adjournments. Rule 104 sets out the requirements of a party(s)

to provide to the Tribunal to support the request, and Rule 105 sets out the Tribunal's considerations in determining whether or not to grant the request.

[10] The Tribunal notes that both the Director and the Appellants consent to the adjournment. Although the Rivendell Golf Corporation has not responded to the requested adjournment, they are not an appellant in this matter, and therefore their interest in the matter is less direct than those of an appellant. The adjournment will not cause or contribute to any existing or potential risk of environmental harm as the dam continues to be operated as it has for over 20 years. No party will be inconvenienced by the adjournment, given that the status quo has remained in effect as has been described during previous status teleconference calls. The Tribunal notes that there have been no complaints or other incidents reported to the Ministry in 2020.

[11] The Tribunal is satisfied that the adjournment request was submitted in a timely manner after the parties became aware of the proposed regulatory amendment and the potential legal impact to the subject matter of the hearing was confirmed. Further, the request is sufficiently in advance of the hearing dates to result in the least inconvenience to the parties and participants. The Tribunal is of the view that it would be a poor use of resources and not in the public interest to hold a three-day hearing prior to determining whether the subject matter of the hearing will be moot due to a regulatory amendment being passed shortly after the hearing is held.

[12] The Tribunal grants the requested adjournment to a teleconference call to be held following the expected decision on the proposed amendment to Regulation 387/04.

ORDER

[13] The Tribunal orders that:

1. The hearing scheduled for **December 2 to 4, 2020** is adjourned to a status **teleconference call on January 28, 2021** to commence at **10 a.m.** The call-in details will be provided by the Tribunal's Case Coordinator.

*Hearing Dates Adjourned
Procedural Direction Ordered*

"Helen Jackson"

HELEN JACKSON
MEMBER

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Environmental Review Tribunal

A constituent tribunal of Ontario Land Tribunals

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