

COURT FILE NUMBER

COURT

COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANT

RICK SKIBSTED, LINDA SKIBSTED,  
RICHARD CLARK, WENDY CLARK, HALF-  
DIAMOND HC LIMITED, JONATHAN  
GROVES, DEREK MCMILLAN and SPRUCE  
COULEE FARMS LTD.

Clerk's Stamp

RESPONDENTS

MINISTER OF ENVIRONMENT AND  
PROTECTED AREAS, ALBERTA  
ENVIRONMENTAL APPEALS BOARD,  
DESIGNATED DIRECTOR UNDER THE  
*WATER ACT* and BADLANDS RECREATION  
DEVELOPMENT CORP.

DOCUMENT

**ORIGINATING APPLICATION**

ADDRESS FOR SERVICE AND  
CONTACT INFORMATION OF  
PARTY FILING THIS DOCUMENT

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### NOTICE TO THE RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date: May 28, 2024

Time: 10:00am

Where: Calgary Courts Centre, 601 5<sup>th</sup> Street SW, Calgary, AB T2P 5P7

Before: Justice in Morning Chambers

Go to the end of this document to see what you can do and when you must do it.

### Basis for this claim:

1. The Applicants seek judicial review of a March 28, 2024 decision by the Alberta Environmental Appeals Board released as decision 2024 ABEAB 7 pursuant to section 99 of the *Environmental Protection and Enhancement Act* ("**EPEA**") and an April 8, 2024 decision by the Minister of Environment and Protected Areas (the "**Minister**") released as Ministerial Order 07/2024 pursuant to section 100 of the *EPEA* (collectively, the "**Decisions**").
2. The Decisions vary Approval No. 00406489-00-00 (the "**Approval**").

3. The Alberta Environmental Appeals Board and the Minister made the following errors which merit judicial review, *inter alia*:
- a. Breaching the Applicants' right to procedural fairness by failing to provide them with the degree of institutional independence required of the Alberta Environmental Appeals Board pursuant to the *EPEA*, which institutional bias arises from, *inter alia*:
    - i. The absence of administrative control over its own procedures due to a lack of funding to conduct a hearing in which the Alberta Environmental Appeals Board could afford to grant the Applicants their right to be heard;
    - ii. Advising the Applicants on October 28, 2021, May 16, 2022 and December 23, 2022 that the Alberta Environmental Appeals Board was "allocated very limited resources" such that it could not accord the Appellants with a fair hearing;
    - iii. Improperly reversing the onus onto these and other Applicants in a circumstance in which the Alberta Environmental Appeals Board does not have sufficient funding to offer appellants a full hearing to meet their onus;
    - iv. Assigning a higher "standard of proof" to recommend to the Minister that he or she reverse an Approval or Licence; and
    - v. In the foregoing context, never recommending to the Minister that he or she reverse an Approval or Licence, or, alternatively, doing so only in "extremely" rare cases;
  - b. Breaching the Applicants' right to procedural fairness by exhibiting a reasonable apprehension of bias, or in the alternative, failing to accord the Applicants' with an open mind, which bias is informed by, *inter alia*:
    - i. Appointing members to the Alberta Environmental Appeals Board, including the appointments of each member of the panel that heard the subject appeal, with the specific purpose of recommending to the Minister that she confirm or vary the Approval so that the "economically important [Badlands project] can proceed";
    - ii. Providing comment, through the Board's general counsel, to the Toronto Star, Strathmore Times and/or Drumheller Mail in relation to the subject appeal that "it is extremely rare" for the Alberta Environmental Appeals Board to recommend that an Approval be reversed;
    - iii. Providing comment through the Board's general counsel, to the Toronto Star, Strathmore Times and/or Drumheller Mail that "[the Appellants] have to basically try to convince the board that the decision (issued by Alberta Environment)...that there is something wrong with it", thereby pre-deciding the issue of onus; and
    - iv. Pre-deciding the issue of onus by writing the parties on May 13, 2022, prior to the commencement of the hearing, that "the Board's jurisprudence is clear that the onus is on the appellants to prove that the decision being appealed should be varied or reversed";
  - c. Erring substantively and procedurally by fettering their discretion, and misinterpreting the discretion afforded the Alberta Environmental Appeals Board and the Minister under section 38(2)(c) of the *Water Act* and section 95 of the *EPEA* by refusing to consider the:
    - i. Ultimate undertaking for which the Approval is sought;
    - ii. *Species at Risk Act* and any applicable recovery strategies, except to identify the presence of a species at risk;

- iii. Economic viability of the development for which the Approval was sought; and
  - iv. Analyses outside of or contrary to the ABWRET form;
- d. Misinterpreting the *Species at Risk Act* and the jurisdiction to confirm or vary an approval that destroys critical habitat;
- e. Breaching the Applicants' right to procedural fairness, and erring substantively, by reversing the onus onto the Applicants to prove a negative, namely that the Approval should not be granted, which decision is in error because:
  - i. The nature of the hearing was a *de novo* hearing;
  - ii. The Applicants do not have access to the Approval site;
  - iii. Both the *Water Act* and the *EPEA* require an applicant to demonstrate sufficient basis for the granting of an approval, not that directly affected citizens demonstrate an approval should not be granted; and
  - iv. Placing the onus upon the Approval holder for certain aspects of the appeal, seemingly acknowledging that the Approval holder ought to bear the onus;
- f. Breaching the Applicants' right to procedural fairness and erring substantively by giving the Designated Director full standing before the Alberta Environmental Appeals Board, which decision is in error because:
  - i. It is contrary to the express purposes of the *EPEA* and *Water Act* which contemplate a fair hearing, not a hearing in which an appellant is forced to respond to both an approval holder and the decision maker whose decision is under appeal;
  - ii. Creates a reasonable apprehension of bias in that any decision referred back to the Designated Director is done so in the context of the Director's participation in an appeal; and
  - iii. Varying the Approval conditions to refer the matter back to the Designated Director in the context of wetland 2 in the context of the Director's participation in an appeal;
- g. Misinterpreting the binding nature of the *Alberta Wetland Policy*, the discretion to derogate from that legislated Policy and the legal test for determining when the requirement of avoidance is met under the Policy;
- h. Refusing to deal with the issues placed before it, including the binding nature of the *Alberta Wetland Policy* and the "correctness" of the ABWRET form;
- i. Misinterpreting and failing to apply the precautionary principle;
- j. Applying divergent and unreasonable "standards of proof" depending on the relief, specifically a reversal, variance or confirmation of an approval, contrary to the *Water Act*, the *EPEA* and procedural fairness;
- k. Failing to state what "standard of proof" is applicable for reversing an Approval;
- l. Making erroneous findings of fact that were contrary to the evidence before the Alberta Environmental Appeals Board, including, *inter alia*, that Dr. Angus Chu "had never prepared a stormwater management plan in support of a *Water Act* application" and the relative wetland value for wetlands 1, 2, 4 and 5;

- m. Releasing a decision that was not made by all members of the panel, in breach of section 17(2) and section 6 of the *Environmental Appeal Board Regulation* and contrary to the principle of 'he who hears must decide';
- n. Misinterpreting the *Water Act*, the *Alberta Wetland Policy* and the Board's jurisdiction vis-à-vis that of Kneehill County's, by refusing to consider the ultimate undertaking for which the Approval was sought;
- o. Misinterpreting the applicability of the *South Saskatchewan Regional Plan*;
- p. Applying unreasonable setback distances;
- q. Breaching the Applicants' right to procedural fairness, otherwise then as described above, by, *inter alia*:
  - i. On December 23, 2022, mid hearing, writing the Designated Director and the Approval holder to advise them that they had failed to adequately respond to the Applicants and providing them additional time to do so;
  - ii. Failing to provide the Applicants with a hearing sufficient for them to meet the incorrect onus placed upon them by the Alberta Environmental Appeals Board;
  - iii. Forcing the Applicants to split their case by failing to provide them with sufficient time to meet the onus placed upon them;
  - iv. Holding hearings at unreasonable hours of the day; and
  - v. Denying the Applicants' request that they be given access to the Approval holder's property through a site visit or otherwise;
- r. Such other and further grounds as this Honourable Court will entertain at the hearing.

**Remedy sought:**

- 4. A stay of proceedings of Approval No. 00406489-00-00.
- 5. An Order adjourning this Originating Application to a Special Justice Chambers hearing.
- 6. An Order granting judicial review of the Decisions.
- 7. An Order in the nature of *certiorari* quashing the Decisions and a declaration that the Decisions are invalid and void procedurally and substantially.
- 8. An Order granting the Applicants costs.
- 9. Such further and other Orders and Declaration as the Honourable Court deems appropriate.

**Affidavit or other evidence to be used in support of this application:**

- 10. The Record or Materials of the Alberta Environmental Appeals Board and the Minister.
- 11. Such further and other materials as counsel may advise and this Honourable Court may permit.

**Applicable Acts and regulations:**

- 12. *Species at Risk Act*.
- 13. *Water Act*.

14. *Alberta Wetland Policy.*
15. *Environmental Protection and Enhancement Act.*
16. *Environmental Appeal Board Regulation.*
17. *Public Lands Act.*
18. *Alberta Rules of Court.*
19. Acts and Regulations as counsel may advise and this Honourable Court may permit.

**WARNING**

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to rely on an affidavit or other evidence when the originating application is heard or considered, you must reply by giving reasonable notice of that material to the applicant(s).