Court of Queen's Bench of Alberta

Citation: Cleanit Greenit Composting System Inc v Director (Alberta Environment and Parks), 2022 ABQB 582

Date: 20220826
Docket: 2203 09663
Registry: Edmonton

Between:

Cleanit Greenit Composting System Inc.

Applicant

- and -

Director (Alberta Environment and Parks) and the Environmental Appeals Board

Respondents

Reasons for Decision
of the
Honourable Justice Kevin Feth

Overview

[1] Cleanit Greenit Composting System Inc. owns and operates a commercial composting facility in the west end of Edmonton. Operation of the facility is authorized by the Alberta Government through a registration under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

[2] On March 30, 2021, the Director (Alberta Environment and Parks) issued an order cancelling Cleanit Greenit's registration effective June 30, 2022 ("Cancellation Decision"). The

reasons for the cancellation were ongoing concerns about the construction and operation of the composting facility, including:

a) Poor odour management resulting in numerous public complaints from surrounding residents;

b) Groundwater contamination and inadequate monitoring;

c) Deficient surface water and leachate management;

d) Acceptance and management of hazardous waste and recyclables;

e) Acceptance and management of liquid based waste;

f) Diminished quality of compost due to the types of feedstock accepted; and

g) Annual amounts of waste accepted at the facility exceeding maximum limits.

[3] The Director concluded that the terms of the registration could not adequately and effectively address the concerns.

[4] Cleanit Greenit appealed the Cancellation Decision to the Environmental Appeals Board, but the Board refused to hear the appeal because of a lack of jurisdiction.

[5] Cleanit Greenit then submitted to the Director a closure plan for the facility with a proposal that the registration be continued until a shutdown at the end of 2024. The Director did not approve the closure plan and refused the requested change to the registration's expiry date.

[6] In June 2022, Cleanit Greenit sought judicial review of the decisions made by the Director and the Board.

[7] Pending the outcome of the judicial review, Cleanit Greenit asks this Court to grant an interim stay, an interlocutory injunction, or an Order in the nature of *mandamus* allowing its business to continue operating. The judicial review will not be heard until November 9, 2023, with the possibility that a decision will issue months later.

[8] Having considered the legal tests for the interim relief sought, including the competing interests of the public and Cleanit Greenit, I conclude that interim relief is not just and equitable in all the circumstances. The application is dismissed.

Issues

[9] The interim relief application raises the following issues:

a) Should an interim stay or interlocutory prohibitive injunction be granted preventing the operation of the Cancellation Decision?

b) Alternatively, should an interlocutory mandatory injunction or an Order in the nature of *mandamus* be granted compelling the Director to extend the registration until either the judicial review proceeding is determined or a new authorization is granted?

Background

[10] Cleanit Greenit's authority to operate its composting facility came from a "registration", as distinguished from an "approval", issued in accordance with the *Act*. The distinction rests in

part on the amount of feedstock, including manure and vegetative matter, collected by a facility during a year. Registrations are utilized for facilities accepting up to 20,000 tonnes while approvals are required for facilities receiving more than 20,000 tonnes: *Activities Designation Regulation*, Alta Reg 276/2003 at ss 5(1),(2) and Schedules 1 and 2.

[11] Under a registration, the operator commits to comply with the *Code of Practice for Compost Facilities* ("Code of Practice"). Alberta Environment and Parks characterizes a registration as a regulatory tool for low to medium risk activities.

[12] Under an "approval", the operator submits to a more rigorous application process, including public notice of the application. The approval may include most, if not all, of the terms and conditions required for construction, operation and reclamation of the project, including releases to air, water or land, requirements for facility operations and closure activities, environmental monitoring, and reporting obligations.

[13] In 2011, the predecessor to Alberta Environment and Parks issued an Enforcement Order against Cleanit Greenit about its composting facility because of contraventions of the *Act*, the *Waste Control Regulation*, Alta Reg 192/1996, and the Code of Practice. The Enforcement Order has continued in place since then with numerous amendments. The concerns have included Alberta Environment and Parks' conclusion that Cleanit Greenit is accepting more waste than allowed, the repetitive production of offensive odours affecting surrounding communities, and adverse effects on groundwater.

[14] From January 2015 to November 2020, Alberta Environment and Parks received 833 odour complaints from the public about Cleanit Greenit's operations. Offensive odours allegedly caused by the composting activities have led to a social media campaign by Edmonton residents to close the facility, organized via a Facebook Group called "Stop the Stink West Edmonton."

[15] One of the purposes of the *Act* is to ensure the wise use of the environment by mitigating adverse environmental impacts from commercial activity: s 2 of the *Act.* The statute gives the Director the discretion to cancel a registration if he deems it appropriate.

[16] Following lengthy investigations and a consultative process with Cleanit Greenit, the Director cancelled the registration with an effective date 15 months into the future (June 30, 2022) so the company could decide whether to continue with the composting facility and if so, to seek a new authorization through an approval.

[17] On April 27, 2021, Cleanit Greenit appealed the Cancellation Decision to the Board. The Board's Registrar immediately responded that the Cancellation Decision did not appear to be appealable. However, Cleanit Greenit was invited to submit further comments following which the Board would decide whether to accept or dismiss the appeal. Cleanit Greenit provided additional submissions in May 2021.

[18] On January 28, 2022, the Board dismissed the appeal, concluding the *Act* does not provide for an appeal of the Director's decision to cancel a registration ("Appeal Dismissal"). The merits of the appeal, therefore, were not addressed.

[19] On March 23, 2022, Cleanit Greenit submitted to the Director a detailed proposal for a phased facility shutdown, including a request that the closure date be extended to December 31, 2024. On April 22, 2022, the Director decided that the closure plan proposal did not sufficiently resolve his concerns about the facility; he declined to extend the expiry date for the registration

("Closure Plan Refusal"). The Director invited Cleanit Greenit to submit a request for an approval.

[20] On June 17, 2022, Cleanit Greenit applied for an approval. The Director has not yet made a decision about that request.

[21] On June 21, 2022, Cleanit Greenit applied for judicial review of the following:

a) The Cancellation Decision;

b) The Appeal Dismissal; and

c) The Closure Plan Refusal.

[22] On June 27, 2022, Cleanit Greenit applied for the following interim relief pending the determination of the judicial review proceeding:

a) an interim stay of the Cancellation Decision;

b) alternatively, an interlocutory injunction prohibiting the Director from cancelling the registration until the judicial review is determined or a new authorization is provided; and

c) alternatively, an Order in the nature of mandamus (or an interlocutory mandatory injunction) compelling the Director to extend the expiry date of the registration until either the determination of the judicial review or a new authorization is provided.

[23] On June 28, 2022, a Justice of this Court granted an interim, interim stay pending the hearing of this application.

Parties' positions

[24] Cleanit Greenit submits that the test for granting a stay pending judicial review is substantively similar to the test for granting injunctive relief. On that basis, I am asked to apply the same legal test to the first two applications.

[25] If I decline to provide that relief, Cleanit Greenit asks that the Director be compelled through an Order in the nature of *mandamus* to extend the registration date. Cleanit Greenit contends that the closure plan submitted to the Director was also a request to reconsider the Cancellation Decision, which the Director either did not do or failed to properly consider. Cleanit Greenit submits that the company's interests and the public interest favour keeping the facility in operation until the merits of the judicial review are determined.

[26] The Director opposes any interim relief on the basis that the judicial review does not raise serious legal issues, and because the adverse environmental impact and the negative consequences for the community outweigh the harm to Cleanit Greenit. Moreover, the Director denies that the closure plan submission was a request to reconsider the Cancellation Decision or that he had any authority to conduct a reconsideration.

[27] The Board takes no position on this application but made submissions about the Board's jurisdiction.

Law and Analysis

[28] The Court may stay the operation of a decision or act sought to be set aside under an application for judicial review pending the determination of the application. However, a stay should not be ordered if detrimental to the public interest or public safety: Rule 3.23 of the *Alberta Rules of Court*, Alta Reg 124/2010.

[29] The parties agree that the stay application is guided by the tripartite test described in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 334, 347-349 [***RJR-MacDonald***]:

a) Is there a serious question to be heard on the merits (meaning not frivolous or vexatious)?

b) Will the applicant suffer irreparable harm if the stay is not granted?

c) Does the balance of convenience between the parties favour granting the stay?

[30] The standard of proof is the balance of probabilities and the onus rests with the applicant to establish that the test is met.

[31] As government authority is involved, the public interest is a special factor considered at the second and third stages of the analysis: ***Trca v Alberta (Director of SafeRoads)***, 2022 ABQB 85 at para 9.

[32] The three stages are not airtight compartments. To some extent, strength in one part of the analysis can compensate for weakness in another, especially the second and third branches which are "inexorably linked and should be considered together": ***Irwin v Alberta Veterinary Medical Association***, 2015 ABCA 176 at para 21; ***Pocklington Financial Corp v Alberta Treasury Branches***, 1998 ABCA 254 at para 8; ***Musaskapeo v Alberta (Director of SafeRoads)***, 2021 ABQB 1018 at para 13 [***Musaskapeo***].

[33] The factors guide the Court's exercise of discretion but the fundamental question remains whether granting a stay is just and equitable in all the circumstances: ***AB v College of Physicians and Surgeons of Alberta***, 2021 ABCA 320 at para 42 and footnote 66; ***Musaskapeo*** at para 14.

[34] The test for an interlocutory injunction follows the general three-part framework in ***RJR-MacDonald***, except where a mandatory injunction is sought. In those exceptional circumstances where a respondent would be compelled to undertake a positive course of action, the first stage of the test is more onerous. As articulated in ***R v Canadian Broadcasting Corp***, 2018 SCC 5 at para 18 [***CBC***], the applicant:

> must demonstrate a strong prima facie case that it will succeed at trial. This entails showing a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[35] Distinguishing between mandatory and prohibitive injunctions requires the Court to "look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought...": ***CBC*** at para 16. A mandatory injunction requires the respondent to *do* something rather than *refrain from doing* something.

[36] To the extent that Cleanit Greenit seeks to prohibit the Director from cancelling the registration, the injunction sought is prohibitive and the test is the same as that utilized in seeking

an interim stay. However, where Cleanit Greenit asks the Court to compel the Director to extend a valid registration with a fixed end date or an expired registration, the injunction sought is mandatory. The Director is forced to extend regulatory authorization for a time period not contemplated by the existing or expired registration and to continue with all regulatory obligations, including inspection and enforcement.

[37] An Order in the nature of *mandamus* is similar to a mandatory injunction. A public authority or decision maker is compelled to take positive steps by performing a statutory duty owed to the applicant.

[38] The test for *mandamus* was outlined by the Federal Court of Appeal in ***Apotex Inc v Canada (Attorney General)***, [1994] 1 FC 742 at 766-769 [***Apotex***]. The most relevant principles may be summarized as follows:

a. There must be a public legal duty to act;

b. The duty must be owed to the applicant;

c. There is a clear right to the performance of that duty, in particular:

    i. The application has satisfied all conditions precedent giving rise to the duty;

    ii. There was a prior demand for the performance of the duty, a reasonable time to comply with the demand unless refused outright, and a subsequent refusal which can be either express or implied;

d. No other adequate remedy is available to the applicant;

e. The order sought must be of some practical value or effect;

f. There is no equitable bar to the relief sought; and

g. On a balance of convenience, *mandamus* should lie.

[39] Rule 3.15 confirms that an order in the nature of *mandamus* may be granted as a remedy in an application for judicial review. Section 13(2) of the *Judicature Act*, RSA 2000, c J-2 states that an "... order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made..." The ability of this Court to exercise *mandamus* on an interim, temporary basis has been recognized in Alberta: ***Prosper Petroleum Ltd v Her Majesty the Queen in Right of Alberta***, 2020 ABQB 127 at para 32 and 2020 ABCA 85 (in chambers); ***Mohr v Strathcona (County)***, 2018 ABCA 165 at para 2 (in chambers).

[40] In some jurisdictions, however, reservations have been expressed about ordering *mandamus* where the statutory duty to act is at issue or the order would be an interim declaration of rights giving the applicant its remedy rather than preserving the *status quo*: ***Wasylynuk v Canada (Royal Mounted Police)***, 2020 FC 962 at paras 66-69 [***Wasylynuk***]; ***Delisle v Canada (Attorney General)***, 2004 FC 788 at para 13; ***Brissett v Canada (Department of Citizenship and Immigration)***, 2002 FCT 971, 228 FTR 314 (Fed TD) at para 11; ***Norgard v Anmore (Village) Approving Officer***, 2008 BCSC 1236 at para 13. I agree with that reasoning.

[41] In ***Wasylynuk***, Justice Little observed that an interlocutory mandatory injunction would be a suitable alternative approach.

[42] The principles in ***Apotex*** reinforce that *mandamus* is only available when no other adequate remedy is available. During the oral hearing, Cleanit Greenit was content to characterize this part of its application as a request for an interlocutory mandatory injunction. I have proceeded on that basis.

[43] The distinction between an interim stay/interlocutory prohibitive injunction and an interlocutory mandatory injunction becomes significant in this case if no serious issue on the merits is shown to challenge the Cancellation Decision and the Appeal Dismissal. In those circumstances, Cleanit Greenit's registration had a definitive end date, the registration has now lawfully expired, and the company would be attempting to force the Director to extend the expiry date of the registration or to revive it.

[44] Cancelling a registration and extending its expiry date engage different provisions under the *Act*. The Director's authority to cancel a registration is found in s 70(3)(b) which allows him, on his own initiative, to "cancel or suspend an approval or registration." The authority to extend a registration is found in s 69(1): "The Director may extend the expiry date, if any, of an approval or registration for one or more periods of not more than one year each."

[45] As Cleanit Greenit's requests for an interim stay or an interlocutory prohibitive injunction engage the same analysis, I will deal with them together. Cleanit Greenit agrees with that approach. I will then address the request for a mandatory injunction.

A. Should an interim stay of the Cancellation Decision or an interlocutory injunction prohibiting the operation of the Cancellation Decision be granted?

[46] Each factor in the tripartite analysis raises concerns about Cleanit Greenit's application.

a) No serious issue to be heard

[47] The Court usually conducts "an extremely limited review of the case on the merits": ***RJR-MacDonald*** at 338. This factor is generally a threshold to be satisfied, rather than an attempt to measure the strength of the applicant's underlying claim.

[48] In some exceptional circumstances, however, a more rigorous merits review may be undertaken into the strength of the applicant's claim to support the granting of a stay. A "clear case" on the merits, for example, can invite a "relaxed test" for granting a stay or injunction, rather than strict adherence to the tripartite analysis: ***LPI v 000 Alberta Ltd***, 2005 ABCA 23 at para 7; ***Exxonmobil Canada Energy v Novagas Canada Ltd***, 2002 ABQB 455 at paras 10, 42-48.

[49] Cleanit Greenit attempts to stop the cancellation of its registration through challenges to both the Cancellation Decision and the Appeal Dismissal. A serious issue on the merits for either of those challenges invites the possibility of a stay.

i) Cancellation Decision

[50] Cleanit Greenit argues that the Director erred in his findings of fact supporting the Cancellation Decision and misinterpreted the applicable statutory framework. Further, the Director's process was supposedly procedurally unfair because he failed to adequately investigate his concerns and exercised his discretion for an improper purpose.

[51] An application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act: Rule 3.15(2). Failure to

comply with the limitation period is fatal to a review of that decision: ***AUPE v Alberta***, 2001 ABCA 309 at para 3; ***Athabasca Chipewyan First Nation v Alberta (Minister of Energy)***, 2011 ABCA 29 at paras 20-25 [***Athabasca Chipewyan***].

[52] The Rule is strictly construed: ***Ruhl v Alberta (Human Rights Commission)***, 2015 ABQB 513 at para 18; ***Yuill v Alberta (Workers' Compensation Appeals Commission)***, 2016 ABQB 369 at paras 74-75; ***Athabasca Chipewyan*** at para 27.

[53] The Court has no discretion to extend the deadline: ***Baker v Drouin***, 2017 ABQB 204 at paras 18-22.

[54] Cleanit Greenit did not file its application for judicial review of the Cancellation Decision until June 2022, more than 14 months after the decision was made. Judicial review of the Cancellation Decision is out of time.

[55] Cleanit Greenit advances two arguments to circumvent the limitation period. First, the company argues that the limitation period was not engaged until the company knew definitively that the Board had declined to take jurisdiction. Until then, a judicial review application was premature. Filing an application would have promoted fragmented litigation, which is usually to be avoided. Consequently, until the Board issued its decision, the limitation period did not start.

[56] I disagree. The 6 month limitation period commenced on the date of the Cancellation Decision, not when Cleanit Greenit discovered that an appeal was unavailable. The authorities are clear on this point. Cleanit Greenit could have preserved its rights by filing the judicial review application while awaiting the Board's decision. The company was even put on notice by April 29, 2021 that the Board's Registrar doubted the Cancellation Decision was appealable. Cleanit Greenit failed to take a necessary step. This line of argument raises no serious issue about the operation of the limitation period.

[57] Second, Cleanit Greenit submits that the Director undertook a reconsideration of the Cancellation Decision when the closure plan proposal was reviewed in April 2022. The Cancellation Decision was therefore not "final" until the Closure Plan Refusal because the Cancellation Decision and the Closure Plan Refusal were part of a continuing process with the same subject matter. Cleanit Greenit argues the Cancellation Decision was revived by the request for reconsideration and the limitation period restarted.

[58] This submission suffers from multiple flaws. The Cancellation Decision, on its face, did not purport to be provisional, interim, or subject to some form of additional consideration. To the contrary, the decision clearly communicated that the Director had taken administrative action by cancelling the registration and setting an expiration date. Cleanit Greenit appeared to understand that the Cancellation Decision was final since an appeal was delivered to the Board.

[59] Cleanit Greenit's argument about resurrecting the previous decision through a request for reconsideration has been made unsuccessfully by litigants in other statutory regimes, most notably workers' compensation legislation. The authorities have repeatedly and consistently found that limitation periods are not avoided where an administrative decision maker declines to reconsider a matter; such a request does not revive the earlier decision: see as examples, ***Johannesson v Alberta (Workers' Compensation Board, Appeals Commission)*** (1995), 175 AR 34, 1995 CanLII 9160 (QB) at paras 34-35; ***Molineaux v Alberta (Workers' Compensation Board Appeals Commission)***, 2001 ABQB 932 at para 56; ***Belkadi v Alberta (Appeals Commission for Alberta Workers' Compensation)***, 2013 ABQB 124 at 28-30; ***Vidéotron***

Télécom Ltée v Communications, Energy and Paperworkers Union of Canada, 2005 FCA 90 at para 5.

[60] The limitation period reflects the public policy choice that when an administrative decision is made, the outcome binds and any challenge to it must be made promptly. Finality is desirable because the people affected by the decision must be able to rely on it and organize their affairs accordingly. The underlying rationale for the limitation period would be frustrated if a dissatisfied party could restart the clock at any time by simply asking the decision maker to reconsider.

[61] In any event, no serious issue has been identified that the Director has the authority to "reconsider" a decision to cancel a registration. The Director only has the powers conveyed by the statute. The general principle is that an administrative decision maker can only exercise the powers conveyed by legislation, as confirmed by the Supreme Court of Canada in ***Chandler v Association of Architects (Alberta)***, [1989] 2 SCR 848, 101 AR 321 (SCC), at paras 20 – 22. An administrative decision maker does not have inherent jurisdiction to reconsider a decision.

[62] The *Act* does not provide for a reconsideration by the Director of his decision to cancel a registration. If the Legislature had intended to give the Director that authority (rather than issuing a new registration), the statutory language would say so. In contrast, the Legislature expressly granted to the Board the power to reconsider its decisions: s 101.

[63] Even where a reconsideration is authorized, the reconsidered decision is a separate, distinct decision. In ***Dilcox v Alberta***, 2006 ABQB 596, the Court explained at para 22:

> A decision on the same subject matter made pursuant to Reconsideration is a distinct decision. It substitutes the prior decision. (*Alberta v. Alberta (Labour Relations Board)* (1997), 47 Alta. L.R. (3d) 171, 201 A.R. 1 (Alta. Q.B.) (at para.9)). As such, reconsideration decisions must attract distinct remedies of appeal.

[64] The Alberta Court of Appeal affirmed that conclusion in ***Allergan Inc v Alberta (Justice and Solicitor General)***, 2021 ABCA 32 at paras 24-25.

[65] Finally, the evidence before me is clear that the closure plan proposal was not a request to reconsider the Cancellation Decision. The substance of the proposal was to undertake a phased shutdown of the facility with an *extension* to the expiry date, not the reversal of the cancellation. The Affidavit from Cleanit Greenit's Operations Manager, Marco Castro-Wunsch, explains that the company "submitted to the Director a proposed site closure plan with a phased shutdown and sought an amendment to the effective cancellation date in the Decision." A delay until December 31, 2024 was requested. Mr. Castro-Wunsch also describes the company's subsequent discussion with the Director: "All [Cleanit Greenit] sought was an extension on the Registration Cancellation date ... to close the site in an environmentally friendly manner." In short, the closure plan proposal engaged the Director's authority to extend the expiry date of a registration under s 69(1) of the *Act*, not the cancellation power under s 70(3)(b).

[66] Accordingly, this part of Cleanit Greenit's argument also fails to raise a serious issue about the operation of the limitation period.

[67] As the limitation period is plainly operative, the Cancellation Decision is not subject to judicial review on the merits.

ii) Appeal Dismissal

[68] The Cancellation Decision can be reversed by the Board if the decision is within the scope of the Board's jurisdiction: s 98 of the *Act*.

[69] Cleanit Greenit's appeal asserted that in cancelling the registration, the Director misunderstood: (1) Cleanit Greenit's acceptance of feedstock and quality of the compost; (2) the acceptance and management of hazardous waste/recyclables and liquid based waste; (3) the amount of waste accepted per year; (4) public complaints about odour from the compost facility, feedstock, and compost operation and management of the odours; (5) groundwater quality and monitoring; and (6) surface water and leachate management: ***Cleanit Greenit Composting System Inc v Director, Regulatory Assurance Division, North Region, Capital District, Alberta Environment and Parks***, 21-001-D, 2022 ABEAB 2 [***Cleanit Greenit Composting***]. The relief sought was to reverse or stay the Cancellation Decision, or to extend the cancellation date.

[70] The Board declined to consider the merits of the appeal after concluding that the cancellation of a registration is not a matter within the scope of the Board's statutory jurisdiction. The Board only has the jurisdiction granted to it by the provisions of the *Act*: ***Normtek Radiation Services Ltd v Alberta Environmental Appeal Board***, 2020 ABCA 456 at para 67 [***Normtek***]. The Legislature has limited the decisions that can be appealed to those identified in s 91 of the *Act* and registrations are not expressly listed. Accordingly, the Board concluded that it "has no authority to include other decisions made by a Director to those listed in section 91": ***Cleanit Greenit Composting*** at 6.

[71] Cleanit Greenit submits that an appeal to the Board is available pursuant to s 91(1)(c) which states that a notice of appeal may be submitted "where the Director cancels or suspends an *approval*." The company contends that an *approval* includes a registration.

[72] Cleanit Greenit argues that an expansive approach to the Board's jurisdiction should be favoured because that allows for greater access to the Board's expertise and to the early resolution of disputes, which serves the objectives of the legislation. Cleanit Greenit also points out that one aspect of the statute's objectives is "to support and promote the protection, enhancement and wise use of the environment" while recognizing the "important role of comprehensive and responsive action" in administering the legislation: s 2 of the *Act*.

[73] Further, Cleanit Greenit notes that the legislative history of the *Act* includes comments from the Minister of the Environment in 1992, during second reading before the Legislative Assembly, that the Board would provide an independent review of the decisions made by directors and other people within the Department of the Environment: *Alberta Hansard*, June 4, 1992 at 1184. From the general statutory words and a brief, imprecise comment by the former Minister, I am asked to infer that the Legislature intended an expansive approach to the Board's jurisdiction.

[74] The words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the act, the object of the act and the intentions of the legislative body: ***Agrium v Orbis Engineering Field Services***, 2022 ABCA 266 at para 25.

[75] The statutory language must not be contorted into an interpretation ignoring the plain wording selected by the Legislature. The *Act* and its regulations set out the activities requiring

approval or registration and the key aspects of the process for obtaining either an approval or a registration.

[76] The *Act* expressly distinguishes between a "registration" and an "approval". Section 1 defines the terms separately and nothing in the statutory definitions suggests that a "registration" is a form of "approval":

> "approval" means an approval issued under this Act in respect of an activity, and includes the renewal of an approval;
>
> ...
>
> "registration" means, except in sections 23, 24, 34(n), 154(b) and 175(d), a registration issued under this Act in respect of an activity, and includes the renewal of a registration...

[77] The *Act* refers to the two concepts in dozens of sections, often mentioning them disjunctively as "an approval *or* registration". In particular, ss 68 to 71 address the Director's powers to issue, extend the expiry date of, amend, suspend, cancel or modify an approval *or* registration. Some of the subclauses in those sections are confined to an approval while others expressly apply to both. Section 72 prescribes notice requirements for approvals and registrations in separate subsections.

[78] As a principle of statutory construction, the Legislature is presumed to use different terms deliberately and to assign different meanings to the terms.

[79] The distinction is maintained in the *Activities Designation Regulation* established under the *Act*. Section 2 lists those activities requiring an approval. Section 3 defines the activities requiring a registration. The activities are plainly different.

[80] Operationally, an approval and a registration refer to different regulatory mechanisms. The latter is not a subset of the former.

[81] In short, Cleanit Greenit's interpretation of the *Act* is contrary to the plain and ordinary meaning of the words in the statute and the operation of the regulatory regime. The vague reference in s 2 of the *Act* to "comprehensive and responsive action" and the general comments made by the former Minister of the Environment in the Legislative Assembly do not raise a serious issue about the scope of the Board's jurisdiction.

[82] Cleanit Greenit also argues that s 95 of the *Act*, concerning the powers and duties of the Board, supports an expansive approach to jurisdiction by allowing anyone "directly affected" by a registration decision to appeal to the Board. I do not agree.

[83] Cleanit Greenit relies on s 95(5)(a)(ii). That provision deals with standing, not the scope of the decisions appealable to the Board. Specifically, the subsection states:

> The Board
>
> (a) may dismiss a notice of appeal if ...
>
> (ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the

> person submitting the notice of appeal is not directly affected by the decision or designation...

[84] The provision allows the Board to dismiss a valid appeal in specified circumstances, including when "the Board is of the opinion that the person submitting the notice of appeal is not *directly affected* by the decision." The statutory language does not expand the Board's jurisdiction to hear matters outside the scope of s 91 nor to entertain an appeal from any decision on any subject so long as the appellant is "directly affected".

[85] Moreover, the subsection covers ss 91(1)(a)(i) or (ii), (g)(ii) or (m) of the *Act*. Those provisions do not address the cancellation of a registration or approval. The authority to appeal from a cancellation is found in s 91(1)(c).

[86] In determining whether Cleanit Greenit's arguments reveal a serious issue for judicial review of the Board's decision, I must also consider the standard of review and any uncertainty about the standard.

[87] Cleanit Greent argues the standard is correctness. The Director does not concede that point. The Board asserts that the standard of review is reasonableness, being deferential to the Board's expertise about the interpretation of its enabling statute.

[88] Determining the standard of review begins with a presumption that reasonableness is the applicable standard: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at paras 16-17 [***Vavilov***]. The presumption can be rebutted in two types of situations, neither of which applies here.

[89] When the Board interprets the words of its home statute, deference is appropriate. The Alberta Court of Appeal recently applied the reasonableness standard of review to the Board's interpretation of words in the *Act*: ***Normtek*** at paras 69-74. No uncertainty about the standard of review was expressed.

[90] Reasonableness review ensures that "courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process." The Court considers "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified." The focus must be "on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place": ***Vavilov*** at paras 13, 15.

[91] In short, the reviewing court considers whether the decision made, including both the rationale offered for it and the outcome, was reasonable: ***Vavilov*** at para 83. The applicant bears the onus of showing the decision was not reasonable.

[92] On a reasonableness standard of review, the Appeal Dismissal is irrefutably transparent, intelligible, and justified. The outcome is unequivocally aligned with its underlying rationale. Having regard for the deferential standard applicable to the Board's decision, I conclude that Cleanit Greenit has failed to establish a serious issue on the merits for the judicial review of the Appeal Dismissal.

iii) Conclusion on serious issue

[93] Cleanit Greenit has failed to demonstrate that the judicial review application raises a serious issue about the validity of the Cancellation Decision or the Appeal Dismissal. The absence of a serious issue is fatal to the stay application (and the prohibitive injunction).

[94] Even if Cleanit Greenit had met the initial threshold, the remaining stages of the analysis would not favour a stay.

b) Some irreparable harm

[95] If the Cancellation Decision is not stayed, Cleanit Greenit submits that the business will be closed and the company will suffer significant economic loss, including an estimated expense of $980,000 to transport processing materials to a landfill.

[96] Cleanit Greenit also asserts that third parties and the public will be negatively affected because 8 employees will lose their jobs, current municipal clients will be required to take their material waste to landfills, carbon offsets will be lost, and the environment will lose the benefit of composted soil.

[97] Cleanit Greenit also argues that the judicial review will be rendered nugatory.

[98] Irreparable harm is that which "either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other": ***RJR-MacDonald*** at 341. The Court examines "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application": ***RJR-MacDonald*** at 341.

[99] At this stage of the analysis, the Court considers the nature of the harm, rather than its magnitude: ***RJR-MacDonald*** at 341. The extent of the harm is assessed when weighing the balance of convenience: ***Musaskapeo*** at para 39. However, the threshold of irreparable harm must still be met by the evidence.

[100] Where the actual harm is financial, "clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence": ***Newbould v Canada (Attorney General)***, 2017 FCA 106 at para 29; ***Kalia v Real Estate Council of Alberta***, 2021 ABQB 950 at para 53. The evidence must be "at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": ***Glooscap Heritage Society v Canada (National Revenue)***, 2012 FCA 255 at para 31. Evidence of hypothetical or merely possible harm is not sufficient: ***Budial v British Columbia (Superintendent of Motor Vehicles)***, 2020 BCSC 2093 at para 18; ***Rogina v British Columbia (Superintendent of Motor Vehicles)***, 2012 BCSC 840 at paras 20-21.

[101] The loss of the ability to earn an income by being put out of business can be irreparable harm: ***RL Crain Inc v Hendry*** (1988), 1988, 48 DLR (4th) 228, CanLII 5042 (Sask QB).

[102] Only harm suffered directly by the applicant is considered at this stage of the analysis: ***Arctic Cat v Bombardier Recreational Products Inc***, 2020 FCA 116 at para 32 [***Arctic Cat***]. Concerns about the impact on the public or the environment can be assessed in the balance of convenience when the public interest is considered.

[103] Irreparable harm may be presumed when refusal to grant the stay might render the proceeding nugatory but the presumption is rebuttable: ***Canadian Natural Resources Limited v Arcelormittal Tubular Products Roman SA***, 2013 ABCA 357 at para 8.

[104] The Court also considers whether the harm suffered by the applicant was "self-inflicted and avoidable" in determining whether irreparable harm is established: ***Arctic Cat*** at para 33. An interim stay or an interlocutory injunction is a form of equitable relief. The applicant must come to the Court with clean hands. Where the applicant unreasonably delays in commencing the judicial review application or seeking an interim stay, the Court may consider whether the irreparable harm is caused by the applicant's own conduct and therefore should be disregarded.

[105] Cleanit Greenit offers scant evidence about its own economic harm. In trying to meet its evidentiary burden on a balance of probabilities, Mr. Castro-Wunsch deposes that the company will have to shutdown its business, but he does not say whether the business is currently profitable. No financial records are provided to show that the company has earned any profits in recent years. No financial statements or profit and loss statements are tendered. The limited information suggests Cleanit Greenit exhausted its financial resources some time ago and lacks funding for investment. The bleak picture does not suggest a profitable enterprise.

[106] Mr. Castro-Wunsch asserts that if the facility is suddenly shutdown, 3,000 tonnes of processing material will need to be transported to a landfill and "possibly" another 27,000 tonnes of material still on the site. If the latter, the estimated cost of trucking the material to landfills, including labour and trucking expenses, is approximately $980,000. However, he does not explain how that figure is determined.

[107] Cleanit Greenit also fails to explain whether its business model allows it to earn revenue from the finished compost currently on the site even without a registration.

[108] The company has not met its burden to demonstrate through clear and compelling evidence, at a convincing level of particularity, that substantial financial harm will result from the cancellation of the registration.

[109] Mr. Castro-Wunsch's evidence implies that the abrupt closure of the facility will exacerbate the expenses incurred by Cleanit Greenit. However, the company has been on notice for more than 15 months about the effective cancellation date of the registration. The evidence does not explain why a controlled shutdown was substantially delayed until now.

[110] Cleanit Greenit also fails to explain why a new authorization in the form of an approval was not sought until June 2022. The Director invited Cleanit Greenit to consider applying for a new authorization when the Cancellation Decision issued in March 2021. In November 2021, representatives of Alberta Environment and Parks met with Cleanit Greenit to discuss the procedure for seeking an approval. Even now, an approval might be possible to allow Cleanit Greenit to operate the composting facility.

[111] In short, much of the company's shutdown expense has been self-inflicted and might have been significantly reduced by reasonable mitigation efforts. The evidence does not meet the company's burden of showing irreparable financial harm.

[112] Finally, Cleanit Greenit argues that the judicial review will be rendered nugatory in the absence of a stay. I accept that closing the facility will significantly undercut the company's reasons for continuing the judicial review when a decision is more than a year away. Reviving the business might be challenging. The risk is real. However, Cleanit Greenit has not deposed

that the judicial review will be abandoned if the stay is not granted. More fundamentally, the risk could have been significantly mitigated by pursuing judicial review in a timely way.

[113] Overall, I conclude that the risk of the judicial review becoming nugatory is sufficiently substantial that irreparable harm is shown. The magnitude of that irreparable harm can be addressed when the balance of convenience is weighed.

c) The balance of convenience favours the public interest

[114] The third stage of the analysis weighs the interests of the public against the private interests of Cleanit Greenit. The public interest weighs heavily in the balance, especially where members of the public are exposed to possible health risks, odour and groundwater pollution, and are deprived of their enjoyment of residential property. Environmental protection is also a significant public concern.

[115] Harm to the public is presumed where the relief sought would restrain a government regulator from carrying out its mandate. Where a governmental authority is charged "with promoting the public interest and actions are taken by that governmental authority in discharging that responsibility, a court must assume harm to the public if the actions are restrained": ***360Ads Inc v Okotoks (Town)***, 2018 ABCA 319 at para 13.

[116] Under the *Act*, the Director's responsibility is presumptively exercised in a manner balancing the statutory objectives for the protection, enhancement, and wise use of the environment. Those objectives include the protection of the environment, the need for Alberta's economic growth, and sustainable development: s 2. The composting facility's contributions to the economy, community development, and environmental enhancement were therefore presumptively considered when the decision was made to cancel the registration.

[117] The evidence also reveals, including through the history of the Enforcement Order and amendments to it, that the Department made numerous efforts over the years to regulate and address concerns about the composting facility, often with unsatisfactory results.

[118] The merits of the judicial review proceeding are scheduled to be heard in November 2023 and a decision might not issue for many more months. If the composting facility continues to operate until at least the hearing date, the Director has concluded that the following harm will be visited on the public:

a) Persistent and offensive odour experienced by surrounding residents, interfering with the use and enjoyment of their property and their quality of life;

b) Acceptance of inappropriate feedstock resulting in the distribution of finished compost containing dioxins and furans concentrations 400-600 times the permitted amount under the registration;

c) Continued impact on the shallow groundwater and possibly deeper well levels, including high levels of chloride and sulphate, and the presence of E.coli;

d) Potential offsite runoff of drainage ditches;

e) Receipt and accumulation of more waste on the site than permitted by the registration; and

f) No effective mechanism to enforce compliance with regulatory obligations.

[119] Cleanit Greenit takes issue with these conclusions and contends that its composting facility serves a public good by converting organic waste materials into compost soil, reducing greenhouse gasses, diverting garbage from landfills, and reducing illegal dumping. The company also notes that the facility employs 8 people and contributes financially to non-profit organizations.

[120] Cleanit Greenit argues that by April 2022, when the Closure Plan Refusal issued, the Director only had four remaining concerns: a) groundwater quality; b) surface water and leachate management; c) production of odours; and d) the amount of waste and other material at the location. The company contends that each of these concerns was poorly investigated by the Director or has been substantially mitigated.

[121] First, the company submits that illegal dumping of liquid waste on an adjacent site by an unidentified polluter is the cause of the groundwater concerns. While some evidence of illegal dumping is offered, no compelling evidence is provided that the dumping caused the chloride and sulphate levels on the composting facility's land or the presence of E.coli.

[122] The Director testified that subject matter experts in his Department, including hydrogeologists, supplied the conclusions on which he relied. Those expert opinions are entitled to deference in the absence of clear and compelling evidence from Cleanit Greenit challenging the conclusions, which has not been provided. On the current evidence, I find that the public risk likely remains.

[123] Second, the surface water and leachate management concerns involve structural issues at the facility, including the condition of a berm and ditches. Cleanit Greenit submits that the real issue is the risk of water escaping from the location and that the last "runoff event" was in 2004. Consequently, the risk is supposedly low.

[124] Risk management is a multifactorial exercise demanding evidence and expertise about many things, including the magnitude of the risk, the environmental impact if the risk materializes, and the nature, timing, efficacy, and expense of remediation efforts. Further, Cleanit Greenit's argument ignores that the regulator and the public are entitled to have preventive measures in place that avoid the adverse impact on the environment. In short, the company's argument that it should be allowed to roll the dice and hope for good weather is unpersuasive.

[125] Third, Cleanit Greenit argues that the offensive odours might be caused by other sources, the number of public complaints was inflated by a local group's "smear campaign", and the number of recent public complaints is low. However, the evidence shows a pronounced and persisting concern over many years, repeatedly investigated by the Department, with the Department's consistent conclusion being that the composting facility is the source of offensive odours and emissions. The reduction in public complaints over recent months might simply reflect the public's knowledge of the imminent closure and a resignation that further complaints will not improve matters or accelerate the shutdown. The regulator's conclusions are entitled to deference, absent clear and compelling evidence to the contrary. The company has not satisfied me, on a balance of probabilities, that the odours have been significantly mitigated or that the Director's conclusions should be rejected.

[126] Fourth, the company contends that the maximum allowance of new waste material was not exceeded in 2021 (although the allowance was exceeded in 2020 while the company was

under an Enforcement Order curtailing the quantities on site). Again, the regulatory history does not establish with any confidence that the limits will likely be respected in the future.

[127] In summary, even if some improvements have occurred, the changes are too little and too late. The evidence shows persistent and pronounced environmental and regulatory problems when the Cancellation Decision was made and during the time since then.

[128] Cleanit Greenit also contends that closing the composting facility will have numerous negative effects on the public. For example, the company asserts that the closure will require 30,000 tonnes of material to be trucked to a landfill, resulting in exhaust and greenhouse gas emissions, and that the composting facility might be abandoned. However, no evidence is adduced about the magnitude of the environmental impact. Further, the Cancellation Decision does not require the immediate removal of material from the site, nor does the company explain why a phased shutdown did not start many months ago when the Cancellation Decision was made. Until that decision was set aside or reversed, Cleanit Greenit was required to comply with it and plan accordingly.

[129] The company asserts that a financial inability to properly close the facility "may occur" but does not provide evidence to demonstrate the magnitude of the risk.

[130] The company states that if the facility is closed, the risk of illegal dumping will increase, 24,000 tonnes of carbon offsets will be lost, the environmental benefits of its compost will be sacrificed, research collaborations with local farmers will cease, and financial contributions to local not-for-profit organizations will end. However, little evidence is provided to substantiate these claims and the magnitude of the loss. Further, some of the evidence suggests the finished compost product created by the company contains dioxins and furan concentrations that dramatically exceed acceptable parameters. In any event, the facility will not be closed if an approval is obtained in a timely way.

[131] I find that the Cancellation Decision was exercised in the public interest and that substantial harm to the public will continue if the decision is stayed. The public interest weighs heavily in favour of rejecting the stay. Cleanit Greenit has not proven the magnitude of the irreparable harm suffered by the company as a result of the Cancellation Decision. Further, the risk of a judicial review being rendered nugatory is largely due to the company's own delay in advancing the application in a timely manner.

[132] I conclude that the balance of convenience favours the public interest over the interests of Cleanit Greenit.

[133] After considering the three stages of the ***RJR-MacDonald*** analysis, I conclude that granting an interim stay or an interlocutory prohibitive injunction is not just and equitable in all the circumstances. That part of the application is dismissed.

B. Should an interlocutory mandatory injunction compelling the Director to extend the expiry date of the registration be granted?

[134] The remainder of the application involves the judicial review of the Closure Plan Refusal, which is not out of time. However, a valid and subsisting Cancellation Decision is in place.

[135] Cleanit Greenit asks this Court to compel the Director to extend the expiry date of the registration until the judicial review is heard (and presumably decided) or until the Director has provided the company with his decision about the approval application.

[136] The mandatory injunction is sought because the Director allegedly did not properly consider the closure plan proposal, which included a request to extend the registration's expiry date until December 2024.

a) No strong *prima facie* case

[137] Cleanit Greenit argues that the Director failed to properly exercise his duty under the *Act* and the Code of Practice to consider a final closure plan because an abrupt closure is not within the range of reasonable decisions. The company also contends that the Director misapprehended that the proposed extension was until July 1, 2030. Additionally, Cleanit Greenit submits that the Director declined to personally evaluate certain components of the proposed closure plan and failed to properly consider information provided by Cleanit Greenit to address the Director's concerns.

[138] At the outset, Cleanit Greenit identifies no legislative duty owed to it by the Director to consider an extension to a valid cancellation date as part of a closure plan. The Director nevertheless apparently viewed the closure plan proposal as including a request for an extension to the expiry date. In his Closure Plan Refusal, the Director's reasons for rejecting the extension make no mention of a lack of authority to consider the request. Instead, the proposal was rejected on the merits. Accordingly, the Director appears to have proceeded on the basis that the closure plan proposal invited him to exercise his discretion under s 69(1) of the *Act* and he considered that request.

[139] The abrupt closure of the composting facility is the result of Cleanit Greenit not using the 15 months granted by the Director on March 30, 2021 to wind up the composting facility's operations. The company seeks to benefit from a problem of its own making. A lack of diligence cannot justify an extension to the expiry date.

[140] Cleanit Greenit contends that the Director misapprehended the request because his decision letter states in part: "[Cleanit Greenit] has included a schedule in the Plan with proposed steps for closure of the site by *July 1, 2030*." The company asserts that the proposed closure date was December 31, 2024 and that the misunderstanding prejudiced the exercise of discretion.

[141] Context is important. The closure plan expressly proposed a reduction in feedstock intake over 2.5 years. Any remaining residual material on the site would be mixed and brought to a landfill or another compost facility within a further six months. However, a table within the closure plan described steps that would occur from April 2022 until July 1, 2030, with the final step being the last day that all business records would be retained. In a sense, the composting facility would not be fully closed until the records ceased to be preserved on July 1, 2030. The Director's statement about the "closure of the *site* by July 31, 2030" might be referring to the closure of the regulated activity, not just the physical location. If so, the Director understood the proposal correctly.

[142] The Director met with Cleanit Greenit's legal counsel on April 14, 2022 to discuss the closure plan, just 8 days before the Closure Plan Refusal was rendered. A fundamental misunderstanding about the final date for accepting feedstock seems unlikely in the circumstances. The issue cannot be fully determined until the Record for the judicial review is filed. Based on the evidence before me, Cleanit Greenit has raised a genuine issue, but the risk of an error by the Director on this ground is unlikely.

[143] In any event, s 69(1) of the *Act* only gives the Director the authority to extend a registration "for one or more periods of not more than one year each." Consequently, the Director only had the authority to extend the registration date for a period of one year. The cancellation date for the registration was June 30, 2022; the Director only had the authority at the first instance to extend the cancellation date to June 30, 2023, not to December 2024 as requested by Cleanit Greenit.

[144] Cleanit Greenit argues that the Director failed to personally review the company's proposals for an Ambient Air Monitoring Program and a Groundwater Remedial Action Plan, instead deferring to subject matter experts within the Department. However, the company does not explain why the Director could not refer technical assessments about odour and groundwater pollution to subject matter experts who could then advise him. The evidence does not demonstrate that the Director unreasonably fettered his discretion by seeking that advice or that he delegated the decision to others. He relied on subject matter experts for opinions and recommendations about factual findings, but that was not an improper exercise of his discretion.

[145] Cleanit Greenit also contends that the Director failed to properly evaluate the information provided by the company and to investigate alternative sources of odour pollution and groundwater contamination. However, while the company identified some possible alternative sources, little compelling evidence was offered to show that the odour and groundwater contamination were caused by those sources. The company offered theories, not proof.

[146] Cleanit Greenit also repeats the claim that the Director only had four remaining concerns when the Closure Plan Refusal issued and that those concerns were not properly investigated or have been mitigated. I addressed those arguments earlier in relation to the application for a stay. They are not compelling.

[147] For this injunction application, Cleanit Greenit carries the burden of demonstrating a *strong likelihood* on the law and the evidence presented that the judicial review will be successful in setting aside the Director's decision to deny an extension to the expiry date for the registration. The evidence does not satisfy that burden.

[148] The application for an interlocutory mandatory injunction fails to meet the initial threshold and therefore cannot succeed.

[149] In any event, even if Cleanit Greenit had met that threshold, the application would fail because of the remaining stages of the analysis.

b) Some irreparable harm

[150] Cleanit Greenit has demonstrated a real risk of the judicial review becoming nugatory but the magnitude of that irreparable harm is unclear. The balance of the irreparable harm claim has not been established for the reasons addressed in relation to the stay request.

c) Balance of convenience again favours the public interest

[151] Cleanit Greenit asks for an interlocutory mandatory injunction until November 2023, or in the alternative, until a new approval is granted. However, the company did not indicate when an approval might issue, how long the approval process might take, or the company's chances of obtaining an approval.

[152] An application for an approval requires the payment of a fee and public notice. The Director indicates that the fee has not been paid and public notice has not been given.

[153] I have no information suggesting that an interlocutory injunction, if put in place until an approval is granted, will expire any earlier than November 2023.

[154] At this stage of the analysis, the public interest (including protection of the environment) still weighs heavily in the balance, as previously explained. Harm to the public is presumed because the injunction would interfere with the Director's exercise of his mandate in the public interest.

[155] The Director identified specific unresolved issues in the Closure Plan Refusal. Even if some of the public harm has been mitigated, the remaining risk is substantial. Moreover, the public benefit from the continuing operation of the composting facility is largely unproven and of limited weight.

[156] Cleanit Greenit has not shown the magnitude of the irreparable harm. Further, the risk of a judicial review being rendered nugatory is largely due to the company's own delay in advancing the application in a timely manner.

[157] My determination is that the balance of convenience favours the public interest over the interests of Cleanit Greenit.

[158] Having considered the three stages of the ***RJR-MacDonald*** analysis, an interlocutory mandatory injunction is not just and equitable in all the circumstances. That part of the application is also refused.

Conclusion

[159] The application for interim relief is dismissed.

[160] If the parties wish to speak to costs, they are to approach me within 21 days.

Heard on the 17th day of August, 2022.
Dated at the City of Edmonton, Alberta this 26th day of August, 2022.

Kevin Feth
J.C.Q.B.A.

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