

MANITOBA

Order No. 110/10

THE HIGHWAYS PROTECTION ACT

November 2, 2010

Before: Graham Lane, C.A., Chairman
Susan Proven, P.H.Ec., Member

**APPEAL OF A HIGHWAY TRAFFIC BOARD
DECISION: PROVINCIAL TRUNK HIGHWAY 15,
RURAL MUNICIPALITY OF SPRINGFIELD**

1.0 Summary

By this Order, The Public Utilities Board (Board) declares Highway Traffic Board's (HTB) decision denying the second HTB application of Suruj Persaud to be a nullity and of no effect. There were defects in HTB's process, and, as a result the Board will not consider the appeal on the merits and returns the matter to HTB.

2.0 Background

In March 2008, Mr. Persaud applied to HTB for approval to construct an access driveway onto Poplar Road and, as well, planned to construct a dwelling, fence, garage, well and tree shelter (tree farm) on his property. HTB held a hearing and issued Permit 082-08 approving the access driveway, a dwelling, fence, parking area, and, as well, a change of land use from Agricultural to Agricultural / Commercial, on certain conditions.

On April 29, 2009, Mr. Persaud applied to HTB for new permit conditions, including approval of moving the fence line back from 3 meters to 1.5 meters from the first permit and building the second access driveway 7 meters from the property line. Mr. Persaud's request was not submitted on the required form (mandated by Manitoba Regulation 42/89), nor did it contain the information required in Schedule 1 of regulation 42/89.

HTB considered the request without issuing a new notice of hearing. HTB held two hearings, on May 5, 2009 and June 30, 2009, and decided to approve the fence setback but deny the second driveway access onto Poplar Road. The amended permit (082/08A) was not issued until April 22, 2010. (On April 21, 2010, HTB sent a registered mail letter to Mr. Persaud advising him of HTB's decision.)

Mr. Persaud appealed to the Board on May 20, 2010, and the Board called for a public oral hearing to be held on October 1, 2010, and issued written notice of the hearing to identified

interested parties, including the applicant Mr. Persaud, his counsel, HTB, the Department of Manitoba Infrastructure & Transportation (MIT), the Rural Municipality of Springfield and adjacent landowners.

Counsels for the applicant and MIT requested that the hearing proceed by way of written submissions, intending to argue that the amended permit should be declared a nullity; the Board provided notice of that intent, issuing, on September 21, 2010, a notice of cancellation of oral public hearing to all of the identified interested parties. A deadline of October 1, 2010 for the filing of written submissions was set out in the notice.

Written responses were received by the October 1st deadline from counsel for the applicant, counsel for the HTB and counsel for MIT.

3.0 Applicant

Counsel for the applicant wrote on October 1, 2010 to confirm that the applicant takes no position on the preliminary issue of nullity of HTB's ruling respecting Mr. Persaud's second request, and awaits the outcome of the appeal.

4.0 Highway Traffic Board

Counsel for HTB wrote on August 31, 2010 to indicate HTB takes no position on the preliminary issue of nullity of HTB's ruling.

5.0 Manitoba Infrastructure and Transportation

Counsel for MIT submitted a brief of argument on the preliminary issue as to whether the HTB's failure to follow the proper process leading to the amended permit made it a nullity.

MIT submits that HTB does not have statutory authority to reconsider a matter as a continuation of an earlier proceeding, and that it was required to consider the second request as a new proceeding. MIT also submits that HTB did not have the power to waive mandatory service of notice of the second proceedings (section 17(2) of *The Highways Protection Act, The HPA*).

MIT submits that the second decision and amended permit 082-08A are a nullity, and, as a result, the Board does not have jurisdiction to consider the appeal on its merits.

6.0 Board Findings

The Board accepts the submissions of MIT and concludes that HTB's decision is defective and, accordingly, permit 082-08A is a nullity.

Mr. Persaud's request to change his permit was made to HTB approximately one year after the granting of the permit. The terms being requested by the applicant were materially different from the first permit and did not constitute a mere correction. HTB has no authority to re-open an earlier proceeding to consider such an amendment request. The second request should have been treated as a fresh application under section 17(1) of *The HPA*, and the mandatory notice requirements of section 17(2) of *The HPA* were required to be followed by the HTB.

HTB cannot waive the requirement for notice, which notice requirement does not merely extend procedural protection to the applicant, but exists to inform and protect the public generally.

There is a limited exception which allows HTB to dispense with notice under section 17(3) of *The HPA*. For HTB to dispense with notice, urgency must exist. No urgency was demonstrated on the facts in this case.

The Board therefore finds that the decision of HTB under appeal is a nullity at law and the Board cannot consider the appeal on its merits. If the applicant wishes to proceed, the requirements of *The HPA* must be met and HTB must proceed through its process to carry out its duties in accordance with the law on the fresh application.

The Board further notes, on review of the HTB record of proceedings, that there were different panel members present for commencement of the review of the second Persaud request at its May 5, 2009 hearing compared to the record for continuance of the hearing on June 30, 2009. It is unclear from the recorded status of the May 5th hearing as to whether the panel had already started the decision making process, as the status of the proceeding is recorded as “deferred”. It is a well defined principle of administrative law that “he who hears must decide”, such that if a panel is constituted and its process for decision making is underway, a new panel ought not be constituted in the middle of the decision making process.

The Board does not find in this case that such a defect occurred, given the state of the record and the limited submissions before it (none addressing this issue); however, it is possible that a procedural defect respecting changes to a decision making panel in the midst of an ongoing process could also lead to an invalid result.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board’s Rules of Practice and Procedure (Rules). The Board’s Rules may be viewed on the Board’s website at www.pub.gov.mb.ca.

