

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – October 20, 2014

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed by Joan Corbeil, Tania Demencuik, Terri Savitsky, and Paul Baumberg with respect to *Water Act* Approval No. 00349047-00-00 issued to the Municipal District of Bighorn by the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development.

Cite as: Stay Decision: *Corbeil et al. v. Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource*

Development, re: *Municipal District of Bighorn* (20 October 2014), Appeal Nos. 14-003-006-ID1 (A.E.A.B.).

BEFORE:

Justice D.W. Perras (Ret.), Board Chair.

SUBMISSIONS BY:

Appellants: Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg.

Approval Holder: Municipal District of Bighorn.

Director: Mr. Brock Rush, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development, represented by Ms. Jodie Hierlmeier, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Sustainable Resource Development (AESRD) issued an Approval to the Municipal District of Bighorn (the M.D. of Bighorn) under the *Water Act* for channel re-alignment, construction and excavation of a new creek channel, filling in of the existing channel, creation of a berm, and installation of bank protection.

Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg (the Appellants) appealed the issuance of the approval and requested a stay. The Board granted a temporary stay on June 9, 2014, until the Board received comments from the M.D. of Bighorn and AESRD. The Board postponed making a final decision on the stay pending the results of the mediation meeting. As the mediation did not resolve the appeals, the Board reviewed the submissions provided to determine if the stay should remain in place.

The Board determined all of the Appellants are directly affected by the proposed project authorized under the Approval.

The Board confirmed the stay was to remain in place until the appeals are heard and the Minister's decision is made. The Board found the test for the granting of a stay was met. There is a serious issue to be heard in these appeals as the Appellants raised concerns regarding proposed changes to the watercourse. Irreparable harm to the environment could result if the stay was not granted, particularly if the Minister's decision results in the Approval being varied or reversed, causing additional disturbance to the watercourse. The balance of convenience and the public interest favoured leaving the stay in place pending the decision on the appeals. Although the M.D. of Bighorn would be delayed in starting the proposed project until after the Minister issues his decision, the impact to the environment would be greater, particularly if the Minister's decision required the work to be reversed or varied. The Board found the public interest favoured minimizing the impacts to the environment.

The stay applies only to the portion of the project downstream from Station 1+060.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's decision and reasons for confirming the stay currently in place in respect of Approval No. 00349047-00-00 (the "Approval") issued to the Municipal District of Bighorn (the "Approval Holder" or "M.D. of Bighorn"). Alberta Environment and Sustainable Resource Development ("AESRD") issued the Approval to the M.D. of Bighorn under the *Water Act*, R.S.A. 2000, c. W-3, for channel re-alignment, construction and excavation of a new creek channel, filling in of the existing channel, creation of a berm, and installation of bank protection. The Approval applies to a site located in Pigeon Creek in the M.D. of Bighorn. The work is in response to damage done during the 2013 floods. Ms. Joan Corbeil, Ms. Tania Demencuik, Ms. Terri Savitsky, and Mr. Paul Baumberg (collectively, the "Appellants") appealed the issuance of the Approval and Ms. Savitsky requested a stay.

[2] The Environmental Appeals Board (the "Board") issued a temporary stay pending the outcome of the mediation meetings that was scheduled. The stay applied only to that portion of the project downstream of Station 1+060 and through Dead Man's Flats ("Phase 2").¹

[3] The Board received submissions from the Appellants, Approval Holder, and the Director (collectively, the "Parties") on whether the stay should remain in place. Based on the submissions and the information currently before the Board, the Board determined the stay should remain in place until the Minister issues his decision. The stay was granted on the basis the Board considered there was the potential of irreparable harm occurring to the watercourse if work proceeded prior to a hearing on the substantive arguments. In the Board's view, if the Appellants are successful in whole or in part at the substantive hearing, the Approval Holder will

¹ Although the Approval does not identify Phase 1 and Phase 2 of the proposed project, the Appellants' appeals and stay request relate to the lower part of the project downstream of Station 1+060, which they refer to as Phase 2. The Appellants refer to the portion of the project extending from the Thunderstone Quarry Waterfall to Station 1+060 as Phase 1. For clarity, the Board will use the terms "Phase 1" and "Phase 2" as defined by the Appellants.

not be able to undo certain work done under the Approval without causing further damage to the watercourse.

[4] The Board found the Appellants are directly affected given they own property directly adjacent to Pigeon Creek where the proposed work is to be undertaken. AESRD and the Approval Holder did not provide comments on the directly affected status of the Appellants.

II. BACKGROUND

[5] On May 12, 2014, the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Sustainable Resource Development (the “Director”), issued the Approval under the *Water Act* to the Approval Holder authorizing the installation of bank protection (rip rap), channel re-alignment, construction or excavation of a new channel, the filling in of an existing channel, and the construction of berms affecting Pigeon Creek in SE 13-024-10-W5M, SW 18-024-09-W5M, and NW 07-024-09-W5M related to flood recovery activities.

[6] On May 19 and 20, 2014, the Board received Notices of Appeal from the Appellants appealing the Approval. Ms. Savitsky also requested a stay of Phase 2 of the project.

[7] On May 23, 2014, the Board wrote to the Parties acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and stay request. The Board asked the Director to provide a copy of the documents upon which his decision was based (the “Record”). The Board also requested the Appellants to provide answers to the stay questions.²

² The Appellants were asked to answer the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than the Municipal District of Bighorn No. 8 would suffer from the granting of a stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by AESRD’s decision to issue Approval No. 00349047-00-00 to the Municipal District of Bighorn No. 8?

[8] On May 23, 2014, Ms. Savitsky clarified the stay request was for Phase 2 of the project, not the upper quarry portion, between Thunderstone Quarry Waterfall to Station 1 + 060, which is referred to as Phase 1.

[9] Between May 27 and 30, 2014, the Board received the Appellants' responses to the stay questions.

[10] On May 30, 2014, the Board received a copy of the Record. The Board provided a copy of the Record to the Parties on June 4, 2014.

[11] On June 9, 2014, the Board notified the Parties that a temporary stay of Phase 2 of the project was granted pending completion of the submission process and the Board's final decision on the stay. The Board asked the Director and Approval Holder to provide response submissions on the stay questions.

[12] On June 11, 2014, the Board notified the Parties that, based on the available dates provided by the Parties, the mediation meeting was scheduled for July 21, 2014.

[13] The Board received response submissions from the Director and Approval Holder on June 19 and 23, 2014, respectively, to the stay.

[14] Mr. Baumberg, Ms. Savitsky, and Ms. Corbeil provided final responses on June 30, July 2, and July 8, 2014, respectively. Ms. Demencuik did not provide a final response.

[15] On July 10, 2014, the Board notified the Parties that it was putting the stay decision on hold pending the mediation meeting.

[16] The mediation meeting was held on July 21, 2014, in Canmore. The appeals were not withdrawn, and the Board proceeded to determine whether the stay should remain in place until the hearing was held and the Minister makes his decision.

[17] On August 12, 2014, the Board requested the Approval Holder advise the Board whether the Approval Holder wanted to proceed with construction under the Approval or agree the temporary stay remain in place.

[18] On August 19, 2014, the Approval Holder notified the Board that it would like to proceed with construction of the proposed project.

[19] On August 25, 2014, the Board notified the Parties, with reasons to follow, that the stay was to remain in place. These are the Board's reasons.

III. DIRECTLY AFFECTED

[20] In order for the Board to grant a stay, it must first determine if the Appellants are directly affected. Pursuant to section 97(2) of EPEA only a "party" to an appeal can request a stay.³

[21] Ms. Demencuik stated she is directly affected, because the creek runs around her condominium. Ms. Corbeil stated the Appellants would be the most directly affected as they see and hear the creek because of its close proximity to their condominiums. Ms. Savitsky stated the Appellants are directly affected, because they will lose the intrinsic value and enjoyment of their property if the creek is relocated away from their condominiums. Mr. Baumberg stated the Appellants are directly affected by the proposed changes to the creek. He stated that while the entire hamlet enjoys the ambience the creek provides, no others are as close to the creek as the Appellants. Mr. Baumberg believed all creek side owners are affected by the mitigation project.

[22] The Approval Holder and Director did not provide any comments on whether the Appellants are directly affected. On reviewing the Record and the Appellants' submissions, the Appellants live in the condominium building most impacted by the 2013 floods. The proposed project is to be undertaken in the creek directly in front of their condominium building so any changes to Pigeon Creek will impact the Appellants. Therefore, the Board finds the Appellants are directly affected by the issuance of the Approval.

IV. STAY SUBMISSIONS

A. Appellants

³ Section 97(2) provides:
"The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."

[23] Ms. Demencuik stated that, although the flooding was devastating, the creek does not have to be moved to such an unnatural position. She stated it will affect the value of her property and will affect the look of the creek. She said she would suffer irreparable harm if the stay was not granted because the value of her creekside condominium will not be the same and the increased foot traffic along the creek will take away from the peacefulness of her property. Ms. Demencuik did not think the Approval Holder would suffer greater harm if the stay was granted than the Appellants would suffer if the stay was not granted. She said moving the creek would affect all those who enjoy the area, including the general public. She said she wanted the creek to return to as close to normal as possible.

[24] Ms. Corbeil stated the condominium owners should have been notified of the decision making process regarding their properties and lifestyle, because the decision to change the location and flow of the creek adversely affects them. Ms. Corbeil believed the creek should be allowed to follow its natural course, even though her building was most impacted by the flood. Ms. Corbeil stated her enjoyment of the area is adversely affected. Ms. Corbeil said the Appellants would suffer irreparable harm because their lifestyle would be forever changed. She said the natural beauty of the creek would be gone, the wildlife has all but disappeared now because of the berms and disturbance to the natural vegetation, and they would be unable to see wildlife, hear the creek, or enjoy the natural surroundings if the proposed project proceeded. Ms. Corbeil said their properties would be devalued. Ms. Corbeil stated the Appellants would suffer the greater harm, not the Approval Holder. She said the Approval Holder would save money if the creek was not moved further east. Ms. Corbeil asked the creek be restored to its original beauty and course, and that the natural environment and animals not be disturbed any more than necessary to make the area safe again. Ms. Corbeil argued the public interest warrants a stay because many people enjoy the area, and the creek has been a source of enjoyment visually, for the relaxing sounds of the water, for walking along, and skiing on in winter.

[25] Ms. Savitsky raised the following concerns:

1. Whether the person representing the Pigeon Creek condominium owners regarding the moving of the creek had the authority to sign legal documents on their behalf, and a decision of this magnitude legally requires a vote of the owners which did not occur. This could affect the

ownership of their land with the various rights that go with the creek and the surrounding area, and the required legal processes did not occur which complicates the issue.

2. The movement of the creek from its natural flow will have an adverse impact on the environment, vegetation, wildlife, and enjoyment of the area for condominium owners along the creek and the general public. The aesthetics of the landscape, vegetation, and natural habitat for wildlife was compromised and changed due to the flood, and will be compromised more with further development. It would be more environmentally friendly to leave the creek in its natural path. The area experienced enough adverse change and relocating the creek would be a serious concern.
3. The mitigation measures that are being placed upstream would be able to more than handle a similar event as the 2013 floods and correct most of the issues that affected their complex and hamlet. The relocation of the lower part of the creek is not necessary for building protection purposes, and the adverse effects of relocating the creek outweigh any benefits that may occur. It is not necessary to further disrupt the flow of the creek as historically it has never been an issue and never caused their properties any damage.
4. Human activity may have significantly changed the areas most impacted during the 2013 flood, and this should have been investigated when complaints were filed and before the flood mitigation strategy was presented.

[26] Ms. Savitsky understood AESRD preferred to have the creek remain in its natural course. She stated the property owners most affected by the flood are the most opposed to what was presented regarding the creek.

[27] Ms. Savitsky stated the Appellants would suffer irreparable harm. Ms. Savitsky said she purchased her property at a premium price for the location and the visual impact and sounds of having the creek near her property. She believed moving the creek would likely impact the privacy of the condominium units because many trees will have to be removed. Ms. Savitsky did not believe it was necessary to move the creek away from the Appellants' condominiums. She said the relaxing affect of the creek was invaluable to her and her well-being, and removing it for no rational reason would be harmful to her. Ms. Savitsky explained that, due to the curvature in the creek, the natural flow of water is to the other side of the creek,

so the excess flow goes away from their building onto their land on the other side of the creek and the flood plain that exists there.

[28] Ms. Savitsky stated the public interest warranted granting a stay. She said condominium owners along the creek, others in the area, and the general public enjoy the creek where it is naturally located. Ms. Savitsky stated moving the creek away from the roadway would be detrimental to the public's enjoyment of the area. Ms. Savitsky believed most Albertans want to maintain the natural landscape when and wherever possible.

[29] Mr. Baumberg stated that, as a member of the Pigeon Creek Board of Directors, the decision concerning the creek relocation was made without his input and before he could review the options being considered. Mr. Baumberg believed a decision of this magnitude and affecting so many property owners should involve those property owners.

[30] Mr. Baumberg expressed concern regarding notice of the changes to the creek. He was not aware of any notice being provided, and it was not until he saw the Notice of Decision did he know a decision regarding the creek realignment had been made. Mr. Baumberg also expressed concern regarding the timing of the posting of the Notice of Decision.

[31] Mr. Baumberg believed there were legal concerns regarding the creek relocation, because it is being moved onto property owned by the condominium association, thereby changing the property lines of the communal property which requires a vote of all condominium owners.

[32] Mr. Baumberg was concerned with the size and magnitude of the proposed project. He explained Pigeon Creek normally has no more than 15 cm of water in it, and he did not understand why a 10 metre wide creek bed was needed for this amount of water. He believed mitigation work being done upstream would protect the creek side condominiums.

[33] Mr. Baumberg stated the proposed changes to Pigeon Creek would impact his quality of life and those of the other Appellants. He said the value of their property, the aesthetics, the ambience of the area, enjoyment by visitors and tourists, and wildlife movement would be adversely affected. Mr. Baumberg explained the area was compromised by the 2013 flooding, and making the changes proposed would add to the turmoil. Mr. Baumberg believed

moving the creek channel is contrary to AESRD's mandate to leave water sources untouched as much as possible. He stated that leaving the creek where it is, is the easiest and simplest solution, and it would save time and money.

[34] Mr. Baumberg said he is already suffering harm, because the prospect of moving the creek created anxiety for him. He stated he paid a premium for his property given the privacy provided, the wildlife viewing, and the sound of running water. He said wildlife use the creek to move through the area.

[35] Mr. Baumberg stated the Appellants would suffer more harm if the stay was not granted. He said Pigeon Creek is the focal point and is what makes their property special. Mr. Baumberg did not see how the Approval Holder would suffer if the stay was granted, and any delay in the proposed project could be absorbed by the Approval Holder.

[36] Mr. Baumberg believed the public interest warranted a stay. He stated a stay would allow people to actually participate in the process. Mr. Baumberg said the residents would be able to view the documents pertaining to the proposed changes and have a say. Mr. Baumberg stated the creek adds value to the Appellants' property and impacts visitor stays in their rental properties. Mr. Baumberg said Pigeon Creek is a focal point of the community, and moving it or turning it into anything more than a creek with 15 cm of water is wrong.

B. Approval Holder

[37] The Approval Holder explained the proposed channel considered the June 2013 event as the basis for its design, allowing a 1.0 metre of freeboard above the predicted water surface elevation from the June 2013 event to account for accumulation of sedimentation and debris over time. The Approval Holder stated this takes into consideration the fact that Alberta Transportation may upgrade the crossings in the future to accommodate debris as well as clear water flow.

[38] The Approval Holder acknowledged the Appellants do not want the proposed armoured channel with large berms adjacent to their homes. The Approval Holder explained the Appellants were likely spared significant damage in the 2013 event because water and debris

escaped the channel over the right bank at the sharp bend downstream of the bridge. The Approval Holder explained that, given the planned development and flood protection for the area, the creek would not be allowed to follow the same path. The Approval Holder stated the proposed channel design is intended to protect the Appellants from large, potentially devastating events such as the June 2013 event; a smaller channel would not afford them as much protection.

[39] The Approval Holder explained it did not conduct a long term hazard and risk assessment, but the channel was designed to be a long term solution. The Approval Holder stated this approach is likely more cost effective than constructing a small capacity channel now and then a larger channel after the long term assessment is completed or after Alberta Transportation possibly upgrades the culverts. The Approval Holder stated the 1.0 metre freeboard is conservative, but Pigeon Creek has the potential to mobilize large amounts of sediment and debris, and the freeboard accounts for deposition of this material.

[40] The Approval Holder explained long term risk assessment and mitigation planning will take place over the summer and autumn of 2014, so as of yet, it did not know what, if any, mitigation strategies and measures were feasible. The Approval Holder stated it was possible sediment and debris storage structures in the form of debris racks, sediment basins, or flexible debris nets may be implemented, but these options are expensive and may not be possible on Pigeon Creek.

[41] The Approval Holder explained its consultant did not recommend a smaller channel downstream of the highway, and the most prudent course of action would be to construct a channel that would accommodate clear and debris floods. It was also recommended the channel be constructed to provide protection on both banks.

C. Director

[42] The Director took no position with respect to the stay request.

D. Rebuttal Submissions

[43] Ms. Corbeil expressed concern with the possibility of moving Pigeon Creek a considerable distance away from its present location. Ms. Corbeil explained that, during the flood, equipment came from the new housing project, River's Bend, to build a berm on the east side to stop the natural flow of the creek into the flood plain where the new development is located. A smaller berm was built on the Appellants' side of the creek, so their area was flooded instead of the natural overflow to the east. Ms. Corbeil explained they now have a deep creek bed with two berms which should manage any flooding, although the course of the creek has been changed significantly downstream of their condominiums, and the berm on their side is lower. Ms. Corbeil stated that, if the creek is moved another 100 feet east of its present location, more trees and animal and bird habitat will be lost as well as much of the vegetation. She believed they would no longer have a view, the sound of the creek, or see any animals. Ms. Corbeil did not want the creek moved to eliminate further damage to the area and considerable expense. She stated she would like to understand the reasoning behind changing the berms or the depth or width of the creek.

[44] Ms. Savitsky stated the biggest issue is moving the creek up to 100 feet from where it is currently located. She said it would be disruptive and have an adverse effect on many environmental factors if the creek was relocated. Ms. Savitsky was concerned with the height and width of the berm. She explained she owns some of the land on the other side of the creek and was fine with allowing the creek to flood outside the creek bed towards her land because it is the natural flow of the creek. Ms. Savitsky said the rest of the creek, from the bridge onward toward their building, also needs to be evaluated for the berm size and width.

[45] Mr. Baumberg stated it appeared the focus of the mitigation project revolves around the depth and width of the creek rehabilitation. He stated that, although he has concerns regarding the size of the project, he was primarily concerned with moving the creek. Mr. Baumberg noted there were three options considered: (1) moving the creek closer to the Appellants' condominium; (2) moving it further away from the condominiums; or (3) leaving the creek where it currently sits. Mr. Baumberg stated leaving the creek where it is resolves all of their opposition to the project, but moving the creek is not negotiable.

[46] The Board did not receive rebuttal submissions from Ms. Demencuik.

V. LEGAL BASIS FOR A STAY

[47] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. This section provides, in part:

- “(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
- (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted.”

[48] The Board also has the ability to lift a stay it previously granted if the evidence provided indicates the steps for a stay have not been met.

[49] The Board’s test for a Stay, as stated in its previous decisions of *Pryzbylski*⁴ and *Stelter*,⁵ is adapted from the Supreme Court of Canada case of *RJR MacDonald*.⁶ The steps in the test, as stated in *RJR MacDonald*, are:

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”⁷

[50] The same analysis is applied when determining whether a Stay should be lifted.

⁴ *Pryzbylski v. Director of Air and Water Approvals Division, Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (6 June 1997), Appeal No. 96-070 (A.E.A.B.).

⁵ *Stelter v. Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (14 May 1998), Appeal No. 97-051 (A.E.A.B.).

⁶ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (“*RJR MacDonald*”). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid v. Ethicon*, [1975] 1 All E.R. 504. Although the steps were originally used for interlocutory injunctions, the Courts have stated the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 30 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 41.

⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 43.

[51] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument.

[52] The second step in the test requires the decision maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.⁸ Irreparable harm will occur if the applicant will be adversely affected by the conduct the Stay is meant to prevent, should the applicant ultimately be successful in the appeal. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak v. Norcen Energy Resources*,⁹ the Alberta Court of Appeal defined irreparable harm by stating:

“By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice.”¹⁰

The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.¹¹ The damage that may be suffered by third parties may also be taken into consideration.¹²

[53] The third step in the test is the balance of convenience: “...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”¹³ The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have

⁸ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

⁹ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.).

¹⁰ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.) at paragraph 30.

¹¹ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹² *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹³ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110 at paragraph 36.

considered factors such as the cumulative effect of granting a Stay,¹⁴ third parties who may suffer damage,¹⁵ or if the reputation and goodwill of a party will be affected.¹⁶

[54] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. Public interest includes the "...concerns of society generally and the particular interests of identifiable groups."¹⁷ The effect on the public may sway the balance for one party over the other.

VI. ANALYSIS

[55] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant has to demonstrate through the evidence submitted that there is some basis on which to present an argument. As not all of the evidence will be before the Board at the time the decision is made regarding a stay application, "...a prolonged examination of the merits is generally neither necessary nor desirable."¹⁸

[56] The Appellants raised concerns regarding the changes that will occur in Pigeon Creek as a result of the construction of the flood mitigation berms, including the relocation of the creek and the impacts on wildlife, vegetation, people's use and enjoyment of the area, and the watercourse itself. The Appellants questioned the size and magnitude of the project. These concerns relate to the environmental impacts resulting from the proposed project authorized by the Approval. These are serious concerns that relate directly to the issuance of the Approval. Therefore, the first step in the stay test has been met.

¹⁴ *MacMillan Bloedel v. Mullin*, [1985] B.C.J. No. 2355 (C.A.) at paragraph 121.

¹⁵ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

¹⁶ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 79.

¹⁷ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 66.

¹⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 50.

[57] The second step in the test requires the decision-maker to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is lifted.¹⁹ Irreparable harm will occur when the applicant would be adversely affected to the extent the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other.

[58] The party claiming that damages awarded as a remedy would be inadequate compensation for the harm done must show there is a real risk that harm will occur. It cannot be mere conjecture.²⁰ The damage that may be suffered by third parties may also be taken into consideration.²¹

[59] The Appellants submitted they would suffer irreparable harm if the stay was not granted because continuing with the proposed project and moving the creek could impact on the value of their properties. The change in land values can be determined and, therefore, this argument does not support the Appellants' arguments that they will suffer irreparable harm.

[60] However, the Appellants commented in their submissions how Pigeon Creek is now different than prior to the 2013 flood. The 2013 flood not only damaged personal properties, but it also altered the watercourses in the area. The proposed project is intended to minimize the risk of future flooding events. The proposed work requires re-alignment and excavation of a new creek channel and the filling in of an existing channel. Berms will also be installed along the watercourse. If the Board recommends the Approval be varied and the Minister accepts the Board's recommendations, and if these recommendations include a variation of the proposed plan or the complete reversal of the Approval, the Approval Holder may be required to reconstruct or remove all of the works completed in order to comply with the Minister's order. Additional work could compound the impacts on the watercourse. When working along or in watercourses, reversing the work once completed is often difficult to accomplish without further impacts to the water body. It is the compounding of impacts on

¹⁹ *Manitoba (Attorney General) v. Metropolitan Stores*, [1987] 1 S.C.R. 110.

²⁰ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

²¹ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.) at paragraph 78.

Pigeon Creek that concerns the Board. Postponing construction of Phase 2 of the proposed project until after the Minister makes his decision may benefit the Approval Holder because, in the long run, it may reduce costs incurred.

[61] There will be no irreparable damage to the Approval Holder while the appeal is heard, other than a delay in construction. However, there could be irreparable harm done to the environment if the stay was not granted. Therefore, the second step of the stay test has been met.

[62] The third step in the stay test requires a determination of who would suffer the greater harm, the Appellants if the stay is not granted or the Approval Holder if the stay is granted. In determining who will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, would the Approval Holder suffer a greater harm during the time the appeals are considered and the Minister's decision released? It is only after the Board hears all of the arguments at the hearing, will it determine if there will be actual harm to the environment and if the Approval adequately reflects what must be done to minimize the impacts.

[63] In this case, the Board is not only looking at whether the Appellants would suffer the greater harm, but the Board is also looking at whether the environment would suffer a greater harm if the stay was not granted than would the Approval Holder if the stay was granted.

[64] If the stay is granted, the Approval Holder would be delayed in starting Phase 2 of the project. Although this may be an inconvenience, it is not the type of harm that would support denying the stay. The Board understands it will take less than three weeks for the work to be completed, including the work on Phase 1. Since Phase 1 is not being considered in this stay request, the timeframe to complete Phase 2 is anticipated to be less than three weeks. The Approval limits construction activities in the water body between September 1 to April 30. If work is not completed this year, the Approval Holder has the option of re-applying for an approval next year or asking for an extension if the Minister confirms the Approval as issued. Based on the information provided, the Board cannot conclude the Approval Holder would suffer harm if the stay is granted.

[65] The proposed project will require the construction of berms, the excavation of a new channel, and the filling in of an existing channel. Although the proposed project is intended to minimize impacts due to flooding, it will undoubtedly impact Pigeon Creek. Even though the determination of the greater harm is assessed for the period in which the hearing is held, it is difficult to find the environment would not suffer the greater harm if the Minister decides to reverse or vary the Approval.

[66] Therefore, the Board finds the Approval Holder will not suffer a greater harm if the stay is granted than the Appellants or Pigeon Creek would suffer if the stay is granted.

[67] The fourth step in the stay test is to assess whether the public interest supports the granting of the stay. The proposed project is intended for flood control along Pigeon Creek, and by reducing the impacts of flooding, use of public areas and private property, including that of the Appellants, would also be protected. The Approval Holder plans to complete the work prior to another flood event. The Board recognizes and appreciates these concerns and sees these concerns support denying the stay.

[68] However, there is also a public interest in protecting the environment and ensuring projects are planned to minimize impacts on the environment. If the Minister orders a variation or reversal of the Approval, and work has been completed, then the impacts on the environment would increase. There is a strong public interest in ensuring any project completed in Pigeon Creek is completed in an environmentally responsible manner with the least amount of disturbance.

[69] These are equally compelling public interest arguments for and against the stay, but given the potentially irreversible impacts on the watercourse if the work is completed prior to the Minister's decision, the Board considers the public interest supports the continuance of the stay. The fourth step in the stay test is met.

[70] The requirements to grant a stay have been met and the stay of Phase 2 is granted until Minister issues his decision or the Board orders otherwise. The Approval Holder can complete construction of Phase 1, which is the work between Thunderstone Quarry Waterfall to Station 1+060.

[71] The Board assures the participants that it has not made any decision regarding the issuance of the Approval at this stage of the process. It is only after the Board has heard all of the evidence at the substantive hearing that it will determine whether it should recommend the Approval be confirmed, reversed, or varied.

VII. ADDITIONAL RESPONSE

[72] On August 19, 2014, the Approval Holder responded to the Board's request for clarification on whether the Approval Holder intended to begin construction on Phase 2 of the proposed project. In the response, the Approval Holder explained it would like to proceed with construction and requested the stay be removed. The Approval Holder also stated:

“The Spring freshet could cause significant damage to public and private infrastructure and could result in safety concerns for residents and visitors to Dead Man's Flats. The Delay will result in extra costs and will reduce the amount of funds available for the mitigation project.”

[73] On August 21, 2014, Mr. Baumberg provided a rebuttal to the Approval Holder's e-mail.

[74] Both the Approval Holder's and Mr. Baumberg's e-mails were provided after the Board's deadline for receiving submissions on the matter of the stay. Therefore, the Board could not take these e-mails into consideration when it made its decision.

[75] Although the Approval Holder raised public interest concerns in its e-mail, it did not provide any evidence to support its statements. If the Approval Holder believes there are public safety concerns that need to be addressed because the stay is in place, the Approval Holder can make an application to have the Board reconsider its decision on the stay. Evidence would have to be provided to support the statements, and the other Parties would be given the opportunity to respond.

VIII. CONCLUSION

[76] The Board directs the stay remain in place until the Minister makes his decision following the hearing of these appeals or the Board directs otherwise. The stay only applies to Phase 2 of the project.

Dated on October 20, 2014, at Edmonton, Alberta.

D.W. Perras
Board Chair