2012 ABEAB 39 **Appeal No. 12-036**

December 13, 2012

Via E-Mail

Mr. Travis Lidstone
Schnell Hardy Jones LLP

Ms. Erika Gerlock
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6

Dear Mr. Lidstone and Ms. Gerlock:

Re: Robert Bresciani/*Water Act* Enforcement Order No. WA-EO-2012/07-CR & EPEA Enforcement Order No. EO-2012/03-CR/Our File No.: EAB 12-035
Brero Holdings Ltd./*Water Act* Enforcement Order No. WA-EO-2012/07-CR & EPEA Enforcement Order No. EO-2012/03-CR/Our File No.: EAB 12-036

The Board has reviewed the submissions filed on behalf of Mr. Robert Bresciani and Brero Holdings Ltd. (the "Appellants") regarding the request for a stay. The Board denies the stay request of *Water Act* Enforcement Order No. WA-EO-2012/07-CR and EPEA Enforcement Order No. EO-2012/03-CR (collectively the "Orders") for the following reasons.

The Board's test for a stay, as stated in its previous decisions,[1] is adapted from the Supreme Court of Canada case of *RJR MacDonald.*[2] 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

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1 *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.).

2 *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.

> 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."[3]

In addition, the environmental mandate of this Board requires the public interest be considered in appeals before the Board. Therefore, the Board has always assessed the public interest as a separate step in the test. The parties are given the opportunity to show the Board how granting or refusing the stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[4] The effect on the public may sway the balance for one party over the other, but all steps in the stay test must be met in order to receive a stay.

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."[5]

The Appellants raised concerns regarding the issuance of the Orders including whether the decision to issue the Orders was based on inaccurate information and the implications of complying with the Orders. These concerns indicate there are serious issues to be heard. Therefore, the first step in the stay test has been met.

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.[6] 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. In *Ominayak* v. *Norcen Energy Resources*,[7] 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."[8]

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

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

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

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

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

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

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.[9] The damage that may be suffered by third parties may also be taken into consideration.[10]

The Appellants submitted they would suffer irreparable harm if the stay was not granted because they do not have the finances available to comply with the Orders, they would not be able to recover any of the money trying to comply with the Orders, even if they are successful in their appeal, and complying with the Orders would likely result in litigation from the trailer court tenants. These arguments do not demonstrate the Appellants will suffer irreparable harm. The costs resulting from these arguments can be calculated.

In addition, the Appellants argued complying with the Orders would require the eviction of the tenants. However, in reading the Orders, it does not require the eviction of the tenants; the Orders require the Appellants to provide an alternate supply of treated water for the tenants and to retain a qualified person to oversee the wastewater system. Any expenses incurred as a result of complying with these requirements can be compensated for monetarily. Again, this argument does not demonstrate the Appellants will suffer irreparable harm as explained in the stay test.

For the purposes of determining whether the stay should be granted, the Board considers any damages that may occur to the Appellants can be compensated for monetarily. Therefore, the Appellants have not met the second step of the stay test and the stay is denied.

Although the stay is denied because the Appellants will not suffer irreparable harm, the Board believes the public interest also supports the denial of the stay. Alberta Health Services issued an order under the *Public Health Act*, R.S.A. 2000, c. P-37, containing a boil water advisory, requiring monitoring of the drinking water and provision of an alternate safe water supply, and requiring the operation of the sewage disposal system to prevent contamination of the water supply. The Orders were issued in support of the concerns with safe drinking water for the tenants and the safe operation of the wastewater system. These are important public interest matters. Therefore, based on the information available before the Board at this time, the Board believes the public interest supports the denial of the stay, because the Orders are intended to protect the health and safety of the tennants of the trailer court. Therefore, the requirements to grant a stay have not been met and the stay is denied.

Please do not hesitate to contact me if you have any questions. You may contact me by call toll-free by first dialling 310-0000, followed by 780-427-4179, or by e-mail at gilbert.vannes@gov.ab.ca.

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

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

Yours truly,

Gilbert Van Nes
General Counsel and
Settlement Officer

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