2024 ABEAB 11 **Appeal Nos. 23-103-108-ID1**

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – March 28, 2024

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act,* RSA 2000, c. E-12;

-and-

IN THE MATTER OF appeals filed with respect to the decision of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, to issue Environmental Protection Order Nos. EPO-EPEA-35659-15 and EPO-EPEA-35659-17 to Mantle Materials Group Ltd., previously JMB Crushing Systems Inc., Byron Levkulich, Director, Mantle Materials Group Ltd. and JMB Crushing Systems Inc., and Aaron Patsch, Director, Mantle Materials Group Ltd. and JMB Crushing Systems Inc.

Cite as: Stay Decision: *Mantle Materials Group Ltd. et al.* v. *Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas* (28 March 2024), Appeal Nos. 23-103-108-ID1 (AEAB), 2024 ABEAB 11.

Classification: Public

BEFORE: Barbara Johnston, Board Chair.

PARTIES:

Appellants: Mantle Materials Group Ltd., Byron Levkulich, and Aaron Patsch, represented by Alison Gray, Gowling WLG (Canada) LLP.

Inspector: Heather Dent, Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas, represented by Vivienne Ball and Lee Plumb, Alberta Justice.

Classification: Public

EXECUTIVE SUMMARY

The Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas (Inspector) issued two Environmental Protection Orders (Orders) under the *Environmental Protection and Enhancement Act* (EPEA) to Mantle Materials Group Ltd. (Mantle), Byron Levkulich, and Aaron Patsch (Appellants). Byron Levkulich and Aaron Patsch are directors of Mantle. The Orders direct Mantle to perform reclamation work with respect to two aggregate pits located in the County of Smoky Lake (the Smoky Lake Pits).

The Environmental Appeals Board (the Board) received a Notice of Appeal from the Appellants accompanied by a request for a stay of the Orders. The Board received submissions from the parties on whether a stay should be granted.

In considering the stay application, the Board asked the Appellants and the Inspector 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 is refused pending a decision of the Board on the appeals, than the harm that could occur from the granting of a stay?
4. Would the overall public interest warrant a stay?

The Board found the Appellants met the Board's test for a stay. The Appellants raised serious concerns that the Orders created an immediate obligation to reclaim the Smoky Lake Pits irreparably harming Mantle's ability to sell the Smoky Lake Pits as part of a restructuring proposal under the *Bankruptcy and Insolvency Act* (the BIA). The Appellants demonstrated that, if the Smoky Lake Pits were sold as part of the restructuring proposal under the BIA, the balance of convenience favoured the Appellants, and the overall public interest warranted a stay because the environmental obligations associated with the Smoky Lake Pits would be assumed by the purchasers in accordance with legislation and policy. Considering these factors together, the Board determined it was just and equitable to grant the stay. The Board granted a stay of the Orders.

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1. INTRODUCTION

[1] These are the Environmental Appeal Board's (the "Board") reasons for the Board's decision regarding Mantle Materials Group Ltd. ("Mantle"), Byron Levkulich and Aaron Patsch (collectively the "Appellants") application for a stay in respect of the decisions of the Inspector, Regulatory Assurance Division North, Alberta Environment and Protected Areas (the "Inspector"), to issue Environmental Protection Orders No. EPO-EPEA-35659-15 ("Order 15") and No. EPO-EPEA-35659-17 ("Order 17") under the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12 ("EPEA") to the Appellants (collectively, the "Orders").[1] The Orders direct Mantle to complete reclamation work and monitoring, as well as apply for a reclamation certificate for two aggregate pits located in the County of Smoky Lake (the "Smoky Lake Pits").

[2] On October 23, 2023, the Board received Notices of Appeal from the Appellants together with a request for a stay of the Orders.

[3] The Board reviewed the written submissions received from the Appellants and the Inspector (the "Parties") and on December 18, 2023 decided to issue a stay of the Orders.

[4] The Board's reasons for its decision are provided below.

2. BACKGROUND

[5] Byron Levkulich and Aaron Patsch are the former directors of JMB Crushing Systems Inc. ("JMB Crushing") and 2161889 Alberta Ltd. ("216 Alberta"), and are the current directors of Mantle.

[6] JMB Crushing and 216 Alberta amalgamated and continued as Mantle on May 1, 2020, as part of a restructuring arrangement (the "CCAA Reorganization Transaction") under *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended ("CCAA").

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[1] Environmental Protection Order Nos. EPO-EPEA-35659-15 and EPO-EPEA-35659-17 issued on October 18, 2023, by the Inspector, Regulatory Assurance Division North, Environment and Protected Areas, to Mantle Materials Group Ltd., Byron Levkulich, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd., and Aaron Patsch, Director, JMB Crushing Systems Inc. and Mantle Materials Group Ltd.

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[7] Mantle acquired the Smoky Lake Pits as part of the CCAA Reorganization Transaction. Mantle operates the Smoky Lake Pits under Surface Material Leases 110047 and 110026.

[8] On July 13, 2023, Mantle filed a Notice of Intention to Make a Proposal (the "Proposal Proceedings") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "BIA").

[9] Mantle and the trustee under the Proposal Proceedings (the "Proposal Trustee") commenced a sale and solicitation process (the "Sale Process") for the active aggregate pits, including the Smoky Lake Pits, (the "Active Aggregate Pits") acquired by Mantle as part of the CCAA Reorganization Transaction, with the intent of selling or assigning the Active Aggregate Pits to new owners.

[10] On October 18, 2023, the Inspector issued Order 15 and Order 17 against the Appellants ordering amongst other things, that the Smoky Lake Pits be reclaimed by November 24, 2023, and that a reclamation certificate be applied for by January 1, 2025.

[11] On October 23, 2023, the Board received Notices of Appeal of the Orders from the Appellants and a request for a stay.

[12] On November 10, 2023, the Board acknowledged receipt of the Notices of Appeal and requested the Inspector advise if she would consent to the stay of the Orders or undertake not to enforce the deadlines in the Orders. On November 17, 2023, the Inspector advised she did not consent and would not make such an undertaking.

[13] On November 17, 2023, the Board requested the Appellants make an application for the stay and provide additional information in support of their stay application.

[14] On November 22, 2023, the Board received the Appellants' initial submissions respecting the stay application (the "Appellants Initial Submissions").

[15] On November 23, 2023, the Board advised the Parties that the Board had determined the Appellants had made a *prima facie* case for a stay and established a process for the Parties to make submissions.

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[16] On November 30, 2023, the Board received the Inspector's response submissions (the "Inspector's Response Submissions") and on December 7, 2023, the Board received the Appellants' rebuttal submissions (the "Appellants' Rebuttal Submissions") regarding the stay.

[17] On December 18, 2023, the Board advised the Parties that the Board had reviewed the Parties' submissions and that the Board had decided to grant a stay of the Orders, which would remain in place until the appeal is addressed.

[1] The Board's reasons for its decision are provided below.

3. ISSUES

[18] The Board received comments from the Appellants and the Inspector on the following questions regarding the stay application:

1. What are the serious concerns raised by 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 on the appeals, than the harm that could occur from the granting of a stay?
4. Would the overall public interest warrant a stay?

4. LEGISLATION AND CASELAW

[19] The fundamental question before the Board in a stay application is whether granting the stay would be just and equitable in all the circumstances.[2]

[20] The Board's the authority to grant a stay is found in section 97 of EPEA, which provides in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.

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2 *Cleanit Greenit Composting System Inc* v. *Director (Alberta Environment and Parks),* 2022 ABQB 582 ("*Cleanit Greenit*") paragraph 33.

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

[21] Granting a stay is an extraordinary remedy. To guide the Board in exercising its discretion, the Board has adapted its test for a stay from the Supreme Court of Canada case of *RJR-MacDonald* v. *Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"), [3] as stated in previous decisions.[4] The steps in the test, as stated by the Court 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."[5]

[22] The first step of the test requires the applicant to show there is a serious issue to be tried. The applicant must demonstrate through the evidence submitted that there is some basis for presenting an argument. Often when a stay application is made, the Board does not have all the evidence before it, therefore, "… a prolonged examination of the merits is generally neither necessary nor desirable."[6]

[23] The second step of the test requires the Board to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is not granted. 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.

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3 In *RJR-MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon,* [1975] 1 All ER 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 SCR 110 at paragraph 30 and *RJR-MacDonald* at paragraph 41.

4 See Stay Decision: *Gereluk* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks,* re: *Stone's Jewellery Ltd.* (23 November 2021), Appeal No. 20-002-ID1 (AEAB), 2021 ABEAB 34; *Pryzbylski* v. *Director of Air and Water Approvals Division*, *Alberta Environmental Protection re: Cool Spring Farms Dairy Ltd.* (1 April 1997), Appeal No. 96-070 (AEAB), 1997 ABEAB 5; *Stelter* v. *Director of Air and Water Approvals Division*, *Alberta Environmental Protection*, Stay Decision re: *GMB Property Rentals Ltd*. (14 May 1998), Appeal No. 97-051 (AEAB), 1998 ABEAB 16; and Stay Decision: *Northcott* v. *Director*, *Northern Region*, *Regional Services*, *Alberta Environment,* re: *Lafarge Canada Inc*. (11 January 2005), Appeal Nos. 04-009, 04-011, and 04-012-ID1 (AEAB), 2005 ABEAB 6.

5 *RJR-MacDonald* at paragraph 43.

6 *RJR-MacDonald* at paragraph 50.

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[24] Irreparable harm was defined by the Alberta Court of Appeal in *Ominayak* v. *Norcen Energy Resources*, 1985 ABCA 12 ("*Ominayak*"):

> "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."[7]

[25] 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 speculation. Damages that third parties suffer can also be considered.[8]

[26] The third step in the test is the balance of convenience. Here the Board must determine which of the parties will suffer the greater harm from the granting or refusal of a stay pending a decision on the merits."[9] The Board is required to weigh the burden the stay would impose on the Inspector against the benefit the Appellants would receive. This weighing is not strictly a cost-benefit analysis but, rather, a consideration of significant factors, such as the cumulative effect of granting a stay,[10] third parties who may suffer damage,[11] or the reputation and goodwill of a party will be affected.[12]

[27] In the third stage of the test, any alleged harm to the public is to be assessed. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[13] The environmental mandate of the Board requires the Board to consider whether the overall public interest would warrant the granting of a stay. As stated by the Board in *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment,* 10-034 & 11-002-ID1, 2011 ABEAB 21("*Gas Plus*"):

> "The Environmental mandate of this Board requires the public interest be considered in appeals before the Board. Therefore, the Board has assessed the public interest as a separate step in the test. The applicant and the respondent are

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7 *Ominayak* at paragraph 31, citing *The Law of Injunctions*, 4th edition, volume 1 at page 34.

8 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp.*, 147 AR 113 (AB KB) ("*Edmonton Northlands*") at paragraph 78.

9 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 36.

10 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.

11 *Edmonton Northlands* at paragraph 78.

12 *Edmonton Northlands* at paragraph 79.

13 *RJR MacDonald* at paragraph 66.

> given the opportunity to show the Board how granting or refusing the Stay affect the public interest. … The effect on the public may sway the balance for one party over the other." [14]

In this respect the Inspector is representing the environment and the public interest.

[28] In most cases, if all the steps of the test in *RJR-MacDonald* are not met a stay will not be granted. In all cases, however, as previously noted, the fundamental question before the Board remains whether the granting of a stay is just and equitable in the circumstances.[15] As stated by Justice Feth in the Alberta Court of Queen's Bench decision in *Cleanit Greenit Composting System Inc.* v. *Director (Alberta Environment and Parks),* 2022 ABQB 582, "[t]he factors guide the Court's exercise of discretion but the fundamental question remains whether granting of a stay is just and equitable in all circumstances."[16]

[29] Further, the Board notes in *Cleanit Greenit,* Justice Feth, found that "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".[17] Together, all these factors guide the Board's exercise of discretion.

[30] The standard of proof in a stay application is the balance of probabilities, and the onus is on the Appellants to establish that the stay test is met.[18]

5. SUBMISSIONS

[31] The Board has reviewed the evidence and arguments submitted by the Parties regarding the application to stay the Orders. The following is a summary of the most salient submissions considered by the Board.

5.1. Appellants

[32] The Appellants submitted a stay should be granted as the test in *RJR-MacDonald* was satisfied.

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14 *Gas Plus* at paragraph 65.
15 *Cleanit Greenit* at paragraph 47.
16 *Cleanit Greenit* at paragraph 33.
17 *Cleanit Greenit* at paragraph 32.
18 *Cleanit Greenit* at paragraph 30.

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5.1.1. Serious Concerns to be Heard by the Board

[33] The Appellants submitted there are serious concerns to be heard by the Board. The Appellants submitted the test to be met at this stage is a low one and that the Appellants need only show the appeals were not frivolous and there is an arguable issue to be determined on appeal.[19]

[34] The Appellants argued the issues in the appeals are whether the Inspector had the authority or factual basis to issue the Orders, and whether Mantle could complete the reclamation work and apply for a reclamation certificate by the deadlines set in the Orders. The Appellants submitted six weeks was not sufficient time to complete the reclamation activities required by the Orders. The Appellants also submitted the authority of the Inspector to issue the Orders was at issue because the Inspector erred as she relied on her opinion that Mantle did not have the financial ability or the intention of reclaiming the Smoky Lake Pits, which the Appellants asserted was not factually correct.

[35] On this basis, the Appellants submitted there are serious issues to be considered by the Board and the first element of the *RJR-MacDonald* test was satisfied.

5.1.2. Irreparable Harm

[36] The Appellants submitted they would suffer irreparable harm if the stay was denied as the Orders negatively impacted the Proposal Proceedings in a manner that could not be compensated in damages and the success of the Sale Process was thwarted by the requirement the Smoky Lake Pits be reclaimed by November 24, 2023.

[37] The Appellants submitted the irreparable harm suffered by the Appellants was not speculative or hypothetical. The Orders interfere with the Sale Process by creating an immediate liability to reclaim the Smoky Lake Pits. The Appellants argued the interference caused by the Orders would negatively impact the marketing of the Smoky Lake Pits under the Sale Process and prevent Mantle from finding third-party purchasers who would assume the associated environmental obligations as part of the Sale Process. This would prevent Mantle from mitigating its environmental liability associated with the Smoky Lake Pits and maximizing proceeds available

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[19] Appellants' Initial Submissions at page 5.

through the Proposal Proceedings to address Mantle's reclamation obligations, ahead of distribution to secured and unsecured creditors.

[38] The Appellants submitted that the irreparable harm is not that there is a failure to mine or sell the Smoky Lake Pits but that the Orders interfere in the Sale Process because of the Inspector's decision to proceed with enforcement action. The Appellants argued it is economic sense that the marketing of the Smoky Lake Pits would be harmed by the issuance of the Orders because a purchaser is not going to be interested in purchasing an aggregate pit that must immediately be reclaimed in accordance with the terms of an environmental protection order. The Appellants argued there should be no immediate obligation to reclaim the Smoky Lake Pits as the Appellants are marketing the Smoky Lake Pits under the Sale Process as active operating aggregate pits with reclamation obligations to be assumed by the purchasers.

[39] The Appellants further submitted they suffered irreparable harm because the reclamation work required under the Orders cannot be completed in the timelines ordered, causing the Appellants to be in breach of the Orders and at risk of further regulatory action through no fault of their own. The Appellants submitted there is no assurance that financing for the immediate reclamation of the Smoky Lake Pits would be available in the context of the regulatory requirements of the Proposal Proceedings. The Appellants noted Byron Levkulich and Aaron Patsch do not have the financial ability to fund the immediate reclamation of the Smoky Lake Pits.

[40] On this basis, the Appellants submitted they would suffer irreparable harm if the Board did not grant a stay of the Orders, and that the second element of the *RJR-MacDonald* test was satisfied.

5.1.3. Balance of Convenience and Public Interest

[41] On the balance of convenience test, the Appellants submitted if the stay were denied, they would suffer greater harm.

[42] The Appellants submitted that the Orders were not required for the reclamation obligations to be accounted for in Mantle's insolvency proceedings. The Appellants submitted the immediate obligation to reclaim the Smoky Lake Pits was not coextensive with the legal obligation to reclaim the pits pursuant to EPEA. It was the issuance of the Orders that caused irreparable harm to the Appellants and tips the balance in favour of granting of the stay.

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[43] The Appellants submitted Mantle, the Proposal Trustee and the Court are aware they must comply with Supreme Court of Canada decision in *Orphan Well Association* v. *Grant Thornton Limited and ATB Financial*, 2019 SCC 5 ("*Redwater*") which the Appellants stated "stands for the proposition that any monies in the insolvent's estate cannot be distributed to creditors until such time as any end-of-life reclamation obligations are completed."[20] The Appellants argued that a stay was consistent with the *Redwater* decision as it allows for the Sale Process to proceed unfettered by the Orders and offers the best opportunity for all associated reclamation obligations to be met.

[44] The Appellants acknowledged there is inherent uncertainty in bankruptcy proceedings. The Appellants argued that this uncertainty does not cause harm to the public interest and that "the best opportunity to ensure the reclamation obligations are ultimately met is through the sale of the Smoky Lake Pits."[21] The Appellants noted that Alberta Environment and Protected Areas ("EPA") has been updated on the status of the Proposal Proceedings at every step, including the provision of a copy of a confidential draft plan regarding how Mantle would address reclamation of any Active Aggregate Pits not sold during the Sale Process.[22] The Appellants submitted that EPA is aware certainty regarding reclamation obligations associated with the Smoky Lake Pits will only be achieved once each step in the process is completed which is why a stay should be granted.

[45] The Appellants explained that Mantle had applied to convert the Proposal Proceedings to a CCAA proceeding. The Appellants noted the Proposal Trustee was of the view that it was critical that the Proposal Proceedings continue or that they be continued under CCAA "in order to complete the sale of the Active Aggregate Pits by purchasers who assume the reclamation obligations and if the pits are not sold, to provide for reclamation obligations to be

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[20] Appellants' Rebuttal Submissions at page 3.

[21] Appellants' Rebuttal Submissions at page 11.

[22] See Appellants' Rebuttal Submissions at page 10 where the Appellants stated that the draft plan is confidential and has not been approved by the Court so could not be provided in these stay proceedings. The Appellants also noted EPA had an opportunity to comment on the draft.

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addressed."[23] The Appellants restated that if a stay is denied, there was no certainty that the Appellants could access the financing necessary to immediately reclaim the Smoky Lake Pits.

[46] The Appellants submitted their interests aligned with the public interest in seeing the Smoky Lake Pits reclaimed. The Appellants stated that one of the stated purposes of the Proposal Proceedings was to satisfy Mantle's environmental obligations in a manner acceptable to EPA, which the Appellants submitted focused on the public interest not the Appellants' private interests. The Appellants argued a stay of the Orders would permit Mantle to market the Smoky Lake Pits under the Sale Process as operating aggregate pits with significant reserves. The Appellants asserted that a stay serves the public interest as a sale of the Smoky Lake Pits under the Sale Process would require the purchasers to assume the associated environmental obligations in accordance with legislation and EPA policy, benefiting all stakeholders.

[47] The Appellants argued it was in the overall public interest to stay the Orders because the value of the Smoky Lake Pits is greater than the cost of the associated environmental reclamation obligations. The Appellants submitted this makes the Smoky Lake Pits attractive to purchasers under the Sale Process and as discussed, if the Smoky Lake Pits are sold under the Sale Process, the purchasers would be required to assume the associated environmental obligations. Based on the foregoing, the Appellants submitted the balance of convenience favoured the Appellants, and the overall public interest warranted a stay. The Appellants submitted they had met the *RJR-MacDonald* test, and the Board should stay the Orders.

5.2. Inspector

[48] The Inspector submitted the stay should be denied as the Appellants had not met the tripartite test in *RJR-MacDonald.*

5.2.1. Serious Concerns to be Heard by the Board

[49] The Inspector submitted there is no serious issue to be tried in the appeals. The Inspector submitted there are no specific requirements that must be met to satisfy this part of the

[23] Appellants' Rebuttal Submissions at page 9.

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test, the threshold was a low one and the onus was on the Appellants to demonstrate on the evidence that there must be some basis on which to present an argument.[24]

[50] The Inspector submitted the evidence established the Inspector had the authority to issue the Orders so there is no serious issue to be heard by the Board. The Inspector submitted Mantle had not completed mining or reclamation activities since acquiring the Smoky Lake Pits under the CCAA Reorganization Transaction. The Inspector further submitted there was uncertainty regarding who would, or how the Smoky Lake Pits would be reclaimed after completion of the Proposal Proceedings, so it was appropriate for the Inspector to issue the Orders based on the Inspector's opinion it was necessary to conserve and reclaim the Smoky Lake Pits.

[51] The Inspector submitted there is no serious issue to be tried because the deadlines in the Orders were reasonable. The Inspector argued the failure of the Appellants to meet the deadlines in the Orders was not due to the unreasonableness of the deadlines but due to the Appellants' own inaction, and failure to reclaim or sell the Smoky Lake Pits in the two and a half years since the CCAA Reorganization Transaction.

[52] On this basis the Inspector submitted the Appellants had not met the first prong of the *RJR-MacDonald* test.

5.2.2. Irreparable Harm

[53] The Inspector submitted the Appellants had not met the second part of the *RJR-MacDonald* test.

[54] The Inspector stated that "irreparable" refers to the nature of the harm not the magnitude and is a harm that cannot be quantified in monetary terms nor be cured, usually because one party cannot collect damages from the other. The Inspector, citing *RJR-MacDonald*, submitted the issue to be decided was: "whether a refusal to grant relief could so adversely affect the applicants' own interests that harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory applications".[25]

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[24] Inspector's Response Submissions at page 4.

[25] Inspector's Response Submissions at pages 6 and 7.

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[55] The Inspector submitted evidence of irreparable harm is required.[26] The Inspector argued any harm alleged by the Appellants was hypothetical or speculative, and not supported by evidence.

[56] The Inspector argued the Orders do not thwart the Proposal Proceedings or negatively impact the marketability of the Smoky Lake Pits under the Sale Process, the deadlines set in the Orders were reasonable, and that the Appellants did not suffer irreparable harm. The Inspector argued she had determined it was necessary to conserve and reclaim the Smoky Lake Pits and that the Orders enforced pre-existing reclamation obligations. The Inspector further argued issuing the Orders to reclaim the Smoky Lake Pits did not cause irreparable harm because the reclamation obligations already existed under the disposition for each pit, legislation and EPEA policy.

[57] The Inspector submitted the Appellants made no attempt to meet the deadlines set in the Orders and any harm incurred was speculative and due to the Appellants' own inaction. The Inspector argued the Appellants had over two years to mine and reclaim the Smoky Lake Pits and failed to do so. The Inspector further argued the Appellants had over two years since the CCAA Restructuring Transaction to sell or assign the Smoky Lake Pits and had not done so and therefore, the Orders did not cause or contribute to the failure of the Sale Process or any other sale of the Smoky Lake Pits. The Inspector submitted the Appellants did not provide any evidence of a failed sale or a required reduction in purchase price because of the issuance of the Orders.

[58] In the alternative, the Inspector argued that if the Appellant suffered harm, it was financial in nature and due to the Appellants' own business decisions regarding the Smoky Lake Pits not the Orders.[27]

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[26] See the Inspector's Response Submissions at page 7 where the Inspector, citing *Cleanit Greenit,* submitted that:

1. the threat of irreparable harm must be met by the evidence;
2. 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";
3. evidence of hypothetical or merely possible harm is not sufficient; and
4. 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.

[27] See Inspector's Response Submissions at pages 10 and 11, where the Inspector referred to the Affidavit of Byron Levkulich sworn August 7, 2023 at paragraph 34.

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[59] Based on the foregoing the Inspector submitted the Appellants would not suffer irreparable harm if the stay were denied.

5.2.3. Balance of Convenience and Public Interest

[60] The Inspector submitted the Appellants failed to satisfy the third part of the *RJR-MacDonald* test because the balance of convenience favours the public interest, and the Appellants must comply with the Orders pending the outcome of the appeals.

[61] The Inspector submitted the balance of convenience test is a determination of which of the parties will suffer the greater harm from the granting or refusal of the stay, pending the decision on the merits. The factors considered in assessing the balance of convenience vary in each case and are fact specific.[28]

[62] The Inspector submitted this is not a cost-benefit analysis but the balancing the burden granting a stay would have on the public interest in the administration and effective enforcement of EPEA against the benefit to the Appellants if a stay was granted.[29]

[63] The Inspector submitted a stay of the Orders would negatively impact EPA's authority to take enforcement action under the Orders and would harm the broader public interest inherent in the policies of the protection of the environment. As previously discussed, the Inspector was concerned about the financial ability and intent of the Appellants to reclaim the Smoky Lake Pits, and the uncertainty surrounding the outcome of the Proposal Proceedings. The Inspector argued that given the uncertainty about Mantle's future, the Orders were issued to protect the public interest by requiring Mantle to immediately reclaim the Smoky Lake Pits so as to ensure the failure of Mantle to reclaim the Smoky Lake Pits would not continue indefinitely. The Inspector submitted the deadlines in the Orders were reasonable as it was not in the public interest to establish deadlines beyond the 2023 operating season.

[64] The Inspector submitted that if the Appellants alleged the public interest is at risk if a stay is denied, the Appellants must demonstrate harm because private applicants are presumed to be pursuing their own private interests rather than those of the public at large.[30] The Inspector

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28 Inspector's Response Submissions at pages 11 and 12.

29 Inspector's Response Submissions at page 12.

30 Inspector's Response Submissions at page 13.

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submitted, in the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant and that harm to the public interest is presumed if the actions of the public authority are restrained.[31]

[65] The Inspector submitted the facts showed the Appellants were pursuing their own private interests by focusing on maximizing the funds available through the Proposal Proceedings for Mantle and its creditors rather than ensuring reclamation obligations for the Smoky Lake Pits were fulfilled or accounted for in the restructuring proceedings.

[66] The Inspector argued that denying a stay would be consistent with the decision of the Supreme Court of Canada in *Redwater.* The Inspector submitted that the Court in *Redwater* found that end-of-life environmental obligations must be completed before any creditors can recover money from the estate. The Inspector stated the objective of the Orders was to ensure the pits were reclaimed immediately or accounted for in Mantle's insolvency proceedings in accordance with *Redwater*.

[67] The Inspector submitted the third prong of the *RJR-MacDonald* test was not met and a stay should be denied by the Board.

6. ANALYSIS AND FINDINGS

[68] The Board has the authority to grant a stay under section 97 of EPEA.[32]

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31 See Inspector's Response Submissions at page 13 where the Inspector cited the following statement of the Supreme Court of Canada in *RJR-MacDonald* at paragraph 76*:*

> "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."

Further at page 13 of the Inspector's Response Submissions, the Inspector cited the following statement of the Court in *Cleanit Greenit* at paragraph 115:

> "[H]arm 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."

32 Section 97 of EPEA provides in part:

[69] As previously noted, granting a stay is an extraordinary remedy. The Board has adapted its test for a stay from the Supreme Court of Canada decision in *RJR-MacDonald:*

> "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."[33]

[70] These factors guide the Board's exercise of its discretion in a stay application. However, "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".[34] As stated by the Court in *Cleanit Greenit,* "… the fundamental question remains whether granting a stay is just and equitable in all the circumstances."[35]

6.1. Serious Concerns

[71] At this step of the test, a Court usually undertakes "an extremely limited review of the case on the merits."[36] As stated by the Court in *Cleanit Greenit,* "[t]his factor is generally a threshold to be satisfied, rather than an attempt to measure the strength of the applicant's underlying claim."[37] The first step of the test requires the Appellants to show there is a serious issue to be tried. As not all the evidence may be before the Board at the time the decision is made regarding the stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[38] The Appellants must demonstrate through the evidence submitted there is some basis on which to present an argument.

"(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.

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

[33] *RJR-MacDonald* at paragraph 43.

[34] *Cleanit Greenit* at paragraph 32.

[35] *Cleanit Greenit* at paragraph 33.

[36] *Cleanit Greenit* at paragraph 47.

[37] *Cleanit Greenit* at paragraph 47.

[38] *RJR-MacDonald* at paragraph 50.

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[72] The Appellants have raised concerns the Inspector did not have the authority to issue the Orders, and that the deadlines in the Orders were unreasonable because they were unattainable.

[73] At this stage of the test, it is sufficient that the Appellants show a basis for their argument as required by the first part of the *RJR-MacDonald* test applied by the Board. In the Board's view, the concerns raised by the Appellants directly relate to the Orders and they are serious in nature.

[74] The Board notes the Parties have provided contradictory evidence regarding the status of progressive reclamation and mining at the Smoky Lake Pits and the overall intention of Mantle to reclaim the Smoky Lake Pits. It is in the Board's view that these matters go to the merits of the appeals and are not part of the Board's considerations in this stay application.

[75] The Board finds the first step of the test in *RJR-MacDonald* is met.

6.2. Irreparable Harm

[76] 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. Irreparable harm is harm that cannot be quantified in monetary terms or harm that cannot be cured, usually because one party cannot collect damages from the other. As stated in *Cleanit Greenit*, citing *RJR-MacDonald,* "[t]he Court examines 'whether a refusal to grant relief could so adversely affect the applicant's own interests that harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.'"[39]

[77] It is the nature of the harm that is relevant, not its magnitude. The magnitude or extent of the harm is considered in the third step of the test when weighing the balance of convenience.[40]

[78] As well, the harm cannot be hypothetical or merely possible. As stated by the Court of King's Bench in its decision in *Alberta (Director of Public Lands Disposition Management*

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[39] *Cleanit Greenit* at paragraph 98, citing *RJR-MacDonald* at paragraph 30.

[40] *Cleanit Greenit* at paragraph 99. See also *Alberta (Director of Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks)* v. *Syncrude Canada Ltd*, 2023 ABKB 447 at paragraph 52.

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Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks) v. *Syncrude Canada Ltd.*, 2023 ABKB 447 ("*Syncrude*"):

> "Harm that is speculative, hypothetical, or only arguable at best does not qualify as irreparable harm. Administrative inconvenience, without more, is not irreparable harm." [41]

[79] Where the actual harm is financial, however, the evidence of irreparable harm must be clear and compelling because the nature of financial harm can be proven by concrete evidence. The evidence must demonstrate, at a convincing level of particularity, that there is a real probability that unavoidable irreparable harm will result unless a stay is granted.[42]

[80] The Board finds the Appellants suffered irreparable harm because the Orders interfered with Mantle's ability to sell the Smoky Lake Pits as part of the Proposal Proceedings. The Board is of the view that the Orders negatively affected the Sale Process by creating regulatory uncertainty and an immediate financial obligation to reclaim the Smoky Lake Pits. The Board concurs with the Appellants' view that when determining an offer price, a prospective purchaser would take into consideration the regulatory risk that the Smoky Lake Pits were subject to the Orders, the risk EPA may not withdraw or amend the Orders, and that compliance with the Orders requires immediate reclamation of the Smoky Lake Pits prior to the commencement of any mining operations. These factors would negatively affect a valuation of the Smoky Lake Pits by a prospective purchaser in such a manner that the prospective purchaser may choose not to submit an offer or submit an offer at a reduced price. The Inspector's submission that they would be willing to discuss the Orders with prospective purchasers is, in the Board's view, not sufficient to significantly reduce the uncertainty created by the Orders.

[81] The Board finds that while the nature of the harm is financial, it is not possible to quantify the impact of the harm on the Sale Process as the Orders were issued after the commencement of the Sale Process and prior to the final bid date. It is impossible to quantify the monetary impact the regulatory uncertainty, caused by the Orders being issued, had on the sale of the Smoky Lake Pits because this requires a comparison of what prospective purchasers would

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[41] *Syncrude* at paragraph 53.

[42] *Cleanit Greenit* at paragraph 100.

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have offered had the Orders not been issued, to what successful purchasers paid for the Smoky Lake Pits.

[82] The Board finds that the second step of the *RJR-MacDonald* test has been met.

6.3. Balance of Convenience and Public Interest

[83] The final step of the *RJR-MacDonald* test requires the Board to consider the balance of convenience and the public interest. The balance of convenience is determined by asking, "...which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[43] The decision maker is required to weigh the burden the stay would impose on the respondent against the benefit the applicant would receive. This weighing is not strictly a cost-benefit analysis but, rather, a consideration of significant factors. The courts have considered factors such as the cumulative effect of granting a stay,[44] third parties who may suffer damage,[45] or if the reputation and goodwill of a party will be affected.[46]

[84] The courts have recognized that any alleged harm to the public is to be assessed at the third stage of the test. The public interest includes the "... concerns of society generally and the particular interests of identifiable groups."[47]

[85] The Board appreciates that the Inspector has argued that the Orders were issued to ensure the long-term reclamation obligations were accounted for in Mantle's insolvency proceedings. However, it is the Board's view that if a stay is denied, the acceleration of long-term reclamation obligations and the regulatory uncertainty caused by the issuance of the Orders would cause more harm to the Appellants by interfering with the Proposal Proceedings and the Sale Process than the public interest would suffer if a stay was issued and EPA's ability to enforce the Orders was delayed. The Board accepts the Appellants' evidence that if the Smoky Lake Pits can be sold under the Sale Process, the associated environmental obligations will be assumed by the purchasers subject to legislative and regulatory requirements, and on terms and conditions

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43 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 SCR 110 at paragraph 36.
44 *MacMillan Bloedel* v. *Mullin*, [1985] BCJ No. 2355 (CA) at paragraph 121.
45 *Edmonton Northlands* at paragraph 78.
46 *Edmonton Northlands* at paragraph 79.
47 *RJR-MacDonald* at paragraph 66.

acceptable to EPA. The Board finds the assumption by purchasers of the environmental obligations associated with the Smoky Lake Pits would be in the public interest.

[86] The Board is of the view that if the Inspector takes steps to enforce the Orders, it will negatively impact the likelihood of the Smoky Lake Pits being sold as part of the Sale Process, and it is uncertain if the Appellants will be able to finance the immediate reclamation of the Smoky Lake Pits in the context of the regulatory requirements of the Proposal Proceedings. The Board finds it is not reasonable to expect the purchasers of the Smoky Lake Pits to complete end-of-life associated reclamation obligations before commencing mining operations and then at some time in the future after reserves have been depleted, complete the same end-of-life reclamation obligations to satisfy regulatory and legislative requirements. Moreover, sand and gravel are a scarce resource in Alberta, and it is in the overall public interest to provide the best opportunity for the Smoky Lake Pits to be operated as active aggregate pits and be reclaimed in due course at their end-of-life by the operator and in accordance with EPEA legislative and regulatory requirements.

[87] The Board finds the balance of convenience and the overall public interest warrant the issuance of a stay of the Orders.

[88] The Board finds the test for granting a stay as set out in *RJR-MacDonald* has been met.

7. IS IT JUST AND EQUITABLE TO GRANT A STAY?

[89] The *RJR-MacDonald* test for a stay guides the Board's exercise of discretion when considering a stay application, but the fundamental question before the Board remains whether granting a stay is just and equitable in all the circumstances.[48]

[90] The Board notes the Parties are taking steps to ensure that the Smoky Lake Pits are reclaimed pursuant to regulatory and legislative requirements. Where the Parties disagree, is in the timing of the reclamation, by whom, and how this is best achieved. The Appellants have stated they do not have the financial means to immediately reclaim the Smoky Lake Pits, and if reclaimed, they would likely have to be removed from the Proposal Proceedings. None of the Parties benefit

48 *Cleanit Greenit* at paragraph 33.

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from the Appellants being unable to sell the Smoky Lake Pits in the Proposal Proceedings, or from Mantle becoming insolvent if forced to immediately reclaim the Smoky Lake Pits. This situation will not only cause harm to Mantle, but also leaves a great deal of uncertainty regarding the ultimate reclamation of the pits.

[91] A more just and equitable solution for the Parties is to grant a stay of the Orders to allow time for the Proposal Proceedings to continue unimpeded by the Orders. If the Proposal Proceedings are successfully concluded, the Parties may meet their long-term objectives as the Smoky Lake Pits could be operated as active aggregate pits and reclaimed at their end-of-life by the new operator in accordance with EPEA legislative and regulatory requirements. While this outcome is not guaranteed, it is preferable to the uncertainty created if Mantle were to become insolvent.

[92] In summary, the Board is of the view that granting a stay would be just and equitable and therefore, grants a stay of the Order.

8. DECISION

[93] On the application by the Appellants for a stay of the Orders, the Board finds the Appellants have met the test for the stay. The Board finds the Appellants have raised a serious issue, would suffer irreparable harm, the balance of convenience favours the Appellants, and that the overall public interest warrants a stay.

[94] The Board finds that it would be just and equitable to grant a stay of the Orders.

[95] The Board grants a stay of Environmental Protection Order EPO-EPEA-35659-15 and Environmental Protection Order EPO-EPEA-35659-17. The stay will remain in effect until the appeals are resolved unless otherwise ordered by the Board or the Minister.

Dated on March 28, 2024, at Edmonton, Alberta.

Barbara Johnston
Board Chair

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