ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – February 2, 2012

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-

IN THE MATTER OF appeals filed by Gas Plus Inc. and Handel Transport (Northern) Ltd. with respect to *Environmental Protection and Enhancement Act* Environmental Protection Order No. EPO-2010/58-SR and Amendment No. 3 issued to Gas Plus Inc. and Handel Transport (Northern) Ltd. by the Director, Southern Region, Operations Division, Alberta Environment.

Cite as: Stay Decision #2: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment* (02 February 2012), Appeal Nos. 10-034 & 11-023-ID2 (A.E.A.B.).

BEFORE:	Justice Delmar W. Perras (ret.), Board Chair.
SUBMISSIONS BY:	
Appellants:	Gas Plus Inc. and Handel Transport (Northern) Ltd., represented by Mr. Richard I. John.
Director:	Mr. Darren Bourget, Director, Southern Region, Operations Division, Alberta Environment, represented by Ms. Erika Gerlock, Alberta Justice.
Interested Persons:	The City of Calgary, represented by Mr. Timothy E. Haufe; and Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Terry Floate and Ms. Heather Cummings, Mr. Andy and Ms. Bonnie Ross, and Mr. Francesco Mele and Ms. Alison Hayter, represented by Mr. Richard Secord, Ackroyd LLP.

EXECUTIVE SUMMARY

Alberta Environment issued an Environmental Protection Order to Gas Plus Inc. and Handel Transport (Northern) Ltd. (the Appellants) requiring the remediation of a gas station site and off-site contamination. The remediation is required because a leak contaminated the gas station site and migrated into the adjacent residential and commercial areas, impacting a number of homes and businesses. On April 21, 2011, Alberta Environment issued an Environmental Protection Order. A third amendment was issued on September 13, 2011, requiring the Appellants to choose between options to remediate the contaminated area. The Appellants chose to construct a secant wall. Alberta Environment ordered construction of the secant wall to start by September 27, 2011 and be completed before November 15, 2011, to prevent additional contamination from moving off the gas station site and further impacting the environment and adjacent residential and commercial areas.

The Environmental Appeals Board received Notices of Appeal from the Appellants appealing the Environmental Protection Order and amendments. The Appellants appealed the third amendment and requested a Stay of implementing the remediation work. The Appellants filed three previous Stay applications; one was denied and the other two were withdrawn.

After reviewing and considering the submissions from Alberta Environment, the Appellants, and other interested persons, the Board determined that, even though there is a serious issue to be heard, there are significant human health and public safety issues associated with the contamination on the gas station site and the migration of the contamination into the residential area. The Board found those who might be affected by further migration of the contamination, particularly area residents, would suffer a greater harm if the Stay was granted than the Appellants would suffer if the Stay was not granted. The public interest warranted the status quo, specifically the requirement to start construction of the secant wall, remain in effect. Therefore, the Board denied the Stay application.

TABLE OF CONTENTS

I. INTRODUCTION

[1] These are the Environmental Appeals Board's reasons for denying an application for the Stay of the third amendment of an Environmental Protection Order. The application was filed on September 26, 2011, by Gas Plus Inc. and Handel Transport (Northern) Ltd., persons said to be responsible for contamination resulting from a gas leak at a gas station site located in the Bowness neighbourhood of Calgary, approximately two blocks from the Bow River. Some of the contamination has migrated from the gas station site into adjacent residential and commercial areas and impacting a number of homes and businesses. The order requires the remediation of the gas station site and the residential area affected by the contamination. The third amendment required Gas Plus Inc. and Handel Transport (Northern) Ltd. to chose an option to remediate the contamination.

[2] A Stay was requested for the portion of the third amendment that required construction of the secant wall, the chosen option, to start by September 27, 2011 and be completed by November 15, 2011. After receiving and considering written submissions, the Board concluded there are significant human health and public safety issues associated with the contamination on the gas station site and the migration of the contamination into the residential area. Therefore, the application for the Stay was denied on October 11, 2011, with reasons to follow.

II. BACKGROUND

[3] On December 3, 2010, the Director, Southern Region, Operations Division, Alberta Environment (the "Director"), issued Environmental Protection Order No. EPO-2010/58-SR (the "Order") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA") to Gas Plus Inc. and Handel Transport (Northern) Ltd. The Order was issued in relation to a gas station site located at 6336 Bowness Road NW, in Calgary (the "Site").

[4] On December 10, 2010, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Gas Plus Inc. ("Gas Plus") and Handel Transport (Northern) Ltd.

("Handel Transport") (collectively the "Appellants") appealing the Order.[1] The Order required the Appellants to prepare: (1) a delineation plan to determine the extent of the contamination; and (2) a remediation plan to clean up the contamination. The appeal did not challenge the essential elements of the Order.[2]

[5] On April 21, 2011, the Director issued an Amendment to the Order ("Amendment No. 1") changing the dates to receive the plans and requiring the start of a "Source Removal Program." On April 28, 2011, the Appellants appealed Amendment No. 1 (Appeal No. 11-002) and requested a Stay of the Source Removal Program portion of Amendment No. 1. The Board denied the Stay application.[3]

[6] On June 1, 2011, the Director issued a further amendment to the Order ("Amendment No. 2") amending the dates in Amendment No. 1. The Appellants appealed

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1 The Appellants and Director are collectively referred to as the "Parties."

2 The Notice of Appeal (Appeal No. 10-034) asked for the following relief:

> "1. A declaration that only [Handel Transport (Northern) Ltd. (HTNL)] is the owner of the [Site] and that pursuant to section 113, and in context of section 240, of the EPEA that HTNL is the 'person responsible' for the leak of hydro-carbons.
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> 2. A declaration that the [Order] is not directed to [Gas Plus] as HTNL is the owner of the property and not [Gas Plus] and is responsible for the tanks, pumps and sumps located on the property and which were the cause of the release of the substance.
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> 3. A declaration that aspects of the [Order] are outside of the jurisdiction provided to a Director pursuant to section 113 of EPEA.
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> 4. In accordance with the verbal commitment of [the Director] made to HTNL, that all of the time-lines in the [Order] be extended. Such an extension is reasonable in accordance with the nature of the substance released (hydro-carbons) and the nature of the adverse effect contemplated by such release. Moreover, the time-lines imposed by the [Order] are not realistic in light of the availability of contractors and the time required to fully remediate the hydro-carbons released. HTNL has been advised by O'Connor Associates Environmental Inc. that the remediation process may take as long as five years to complete. In this regard, HTNL and [Gas Plus] take the position that the time-lines imposed are patently unreasonable[.]
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> 5. If the level of remediation required by the [Order] requires compliance with a higher standard than that met by Shell [Canada Ltd. (Shell)] in 1997 that the [Order] be extended to and directed to Shell the prior owner of the [Site].
>
> 6. That the [Director] be directed to re-issue an 'Information Bulletin' which correctly states the circumstances surrounding the release of hydro-carbons by HTNL. More particularly, the re-issued Information Bulletin should indicate that HTNL is the owner of the subject site and that HTNL has acted reasonably in taking steps to mitigate the impact of the release of hydro-carbons on adjacent residences."

3 See: Stay Decision: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* v. *Director, Southern Region, Operations Division, Alberta Environment*, re: *Gas Plus Inc. and Handel Transport (Northern) Ltd.* (8 July 2011), Appeal Nos. 10-034 & 11-023-ID1 (A.E.A.B.).

Amendment No. 2 and asked for a Stay. On June 15, 2011, the Appellants withdrew their Stay application of Amendment No. 2.

[7] On September 13, 2011, the Director issued another amendment to the Order (Amendment No. 3). This amendment required the Appellants to choose between the following options for a remediation program:

a. Option "A" – Source Removal Program as specified in the EPO; or

b. Option "B" – Source Containment and On-site Remedial Program.

Amendment No. 3 required the Appellants to start either Option A or B by September 27, 2011, and complete the work by November 15, 2011.

[8] On September 19, 2011, the Appellants appealed Amendment No. 3 and requested a Stay of the requirement to choose between Option A or B. On September 20, 2011, the Appellants selected Option B, whereby, on September 22, 2011, the Board confirmed the Appellants were withdrawing their Stay application of Amendment No. 3.

[9] On September 26, 2011, the Appellants requested a Stay of Amendment No. 3 with respect to the commencement date of Option B. This is the Stay application that is the subject of this decision.

[10] On September 26, 2011, the Board asked the Parties, and any interested persons that might be affected by a Stay, to provide submissions on the following questions:

1. What are the serious concerns of Gas Plus Inc. and Handel Transport (Northern) Ltd. that should be heard by the Board?
2. Would Gas Plus Inc. and Handel Transport (Northern) Ltd. suffer irreparable harm if the Stay is refused?
3. Would Gas Plus Inc. and Handel Transport (Northern) Ltd. suffer greater harm if the Stay was refused pending a decision of the Board, than those that may be affected by the requirements of the Order?
4. Would the overall public interest warrant a Stay?
5. Is it appropriate to consider submissions on the Stay from persons who may be affected by the Order, Amendment No. 1, and the Stay application?

[11] The Board received submissions from the Appellants, Director, and interested persons (collectively the "Participants") on the Stay questions.[4] The Board notified the Participants on October 11, 2011, that the Stay application was denied with reasons to follow. These are the Board's reasons.

III. SUBMISSIONS

A. Appellants

[12] The Appellants referred to their earlier submissions regarding the first Stay application.

[13] The Appellants argued there is a serious issue that should be heard by the Board, because the direction to start Option B was issued without supporting scientific evidence, and new evidence gathered by the Appellants' consultant needs to be heard by the Board. The Appellants stated the timeline with respect to Option B was unreasonable.

[14] In response to the irreparable harm part of the Stay test, the Appellants submitted in their previous submission there were concerns regarding how the lessee, Bow Liquor Inc., would be impacted. They expressed concern regarding the release of gasoline vapours to the community if the Site was excavated.

[15] In addition, the Appellants stated Option B would change the groundwater flows that could destabilize the plume, causing it to shift and impact other persons. The Appellants suggested a triangular secant wall be built to contain the tanks and dispensers on the Site, and this would not interfere with the deep services on the land. This alternative was not accepted by the Director, because the data indicated the area under the Bow Liquor building must also be contained even though the soil concentration has equilibrated with the soil off-site.

[16] On the balance of convenience issue, the Appellants argued in their previous submission:

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[4] Interested persons who provided submissions were: The City of Calgary; Dr. Augustine Yip and Dr. Monica Skrukwa; Mr. Terry Floate and Ms. Heather Cummings; Mr. Andy and Ms. Bonnie Ross; and Mr. Francesco Mele and Ms. Alison Hayter. The individuals who provided submissions live or own property or utilities in the area impacted by the contamination.

a) The speculative benefit of completing the program is outweighed by the need to consider alternatives and not cause irreparable harm.

b) The manner in which the Director has managed the release is significant in assessing the balance of convenience. The Appellants cooperated with the Director prior to and after the issuance of the Order. The deadlines imposed by the Director to complete the work were designed to have the Appellants fail to comply.

c) The Site and adjacent properties are built on predominantly unconsolidated to weakly consolidated river sand gravel and coble. Without proper planning, any excavation will create instability and have a greater impact on the community.

d) The benefit of the public at large does not outweigh the interests of Bow Liquor Inc., the occupants of the adjacent neighbouring commercial building, or the danger created by a hastily performed program. Recent test results indicate the impact on the indoor air at the four homes affected has been abated and is being effectively managed.

e) The remaining release can be effectively and safely dealt with by *in situ* processes.

f) The urgency suggested is without merit, and what has been ordered is based on speculation and lack of scientific evidence. The contamination plume has been allowed to migrate off-site and they will continue to manage it.

[17] In addition, the Appellants argued with the passage of the high water mark twice, the stabilization of the plume, and the hearing scheduled for less than one month away, the balance of convenience favours allowing a Stay until the appeals are heard. There would be no change to the contaminated area during the period of the Stay, and therefore the benefit to the public does not outweigh the interests of Bow Liquor. A proper exploration of the science needs to be conducted prior to starting the implementation of Option B. The urgency suggested is without merit and does not justify the expense and negative impact that will be caused by implementing Option B.

[18] The Appellants submitted the public interest warranted a Stay for the following reasons:

a) Public safety is paramount, and implementing Option B may cause the plume to shift and impact other owners.

b) The Director must maintain his objectivity and create a workable plan, perhaps based on alternatives brought forward by the Appellants.

B. Director

[19] The Director submitted the Stay application constitutes either issue estoppel or *res judicata* as the substance of the request has not changed since the first Stay application was made.

[20] In response to the first step in the Stay test, the Director referred to his submission provided for the first Stay application. The Director stated there are serious issues under consideration in the appeals. The Director explained the Order was issued in response to his concerns that the Appellants were not taking adequate proactive and efficient actions to deal with the large release of gasoline.

[21] In response to the question regarding irreparable harm, the Director submitted the Appellants would not suffer irreparable harm. The Director stated the Appellants' argument on how the clean-up should be carried out does not meet the test for irreparable harm. The Director added there is no irreparable harm to Bow Liquor that cannot be compensated for by the Appellants.

[22] In response to the question who would suffer the greater harm, the Director stated the Appellants have not fully delineated the plume as required by the Order and the amendments and Amendment No. 3 requires the Appellants to answer deficiency letters. The Director disagreed with the Appellants' conclusion that the plume has stabilized and no further area will be contaminated during the length of the Stay. There is contaminated material on the Site that will continue to contaminate groundwater and flow off-site, thereby causing a risk to residents and the environment. When hydrocarbon concentrations exceed criteria, remedial action is required regardless of the off-site concentrations.

[23] The Director stated there is no evidentiary support for the Appellants' assertion the plume has stabilized, because data from monitoring wells at the leading edge of the plume indicate the concentrations have increased.

[24] The Director argued the continued presence of the source material on and off the Site and the impacts on residents in the area, other property owners, and the City of Calgary, outweigh any inconvenience that would be suffered by the Appellants and Bow Liquor if the Stay was not granted. The Director noted three homes are subject to ongoing operations of vapour interception systems, and only one has been cleared for re-occupancy.

[25] The Director submitted the public interest demands the Stay be denied. The interests of the public override the commercial interests of the Appellants or Bow Liquor. Residences have been impacted and others might be impacted with the continuing off-site spread of the substances.

[26] The Director disagreed with the Appellants' assertion that Option B may cause the plume to shift and impact other owners, and no evidence was provided to support this argument. The Director stated the Appellants' argument that more time is required to study the proposed Option B is another delay tactic to avoid taking aggressive actions at the Site which are necessary and scientifically justified.

C. Interested Persons

[27] Mr. Francesco Mele and Ms. Alison Hayter, Dr. Augustine Yip and Dr. Monica Skrukwa, Mr. Andy and Ms. Bonnie Ross, and Mr. Terry Floate and Ms. Heather Cummings (collectively the "Residents") stated the human health and safety issues have amplified since the first Stay application, because the delineation is not complete and there is no plan to remediate off-site. They submitted *res judicata* and issue estoppel bar the Appellants' Stay application. In addition, they argued the issues of the Appellants, specifically the usefulness of Option B, was not a serious issue to be tried given the context of the Site.

[28] The Residents noted the Appellants' argument regarding Bow Liquor was considered and rejected by the Board in the first Stay application, and no new argument or

evidence was provided by the Appellants. Therefore, the Appellants' argument on this matter must fail.

[29] The Residents submitted that, with respect to the possibility of destabilizing the contamination plume, the Appellants did not provide sufficient evidence to show that irreparable harm would occur. They noted there is concrete evidence showing the contamination has caused significant and adverse impacts off-site, including affecting their properties. They argued the Appellants' arguments on the method of remediation to be used did not demonstrate irreparable harm, and therefore, the Appellants failed to meet the test for irreparable harm.

[30] The Residents argued the balance of convenience weighs heavily in their favour. They submitted the Board should not rely on the Appellants' consultants, Tiamat Environmental Consultants Ltd. ("Tiamat"), since there are issues with Tiamat's reliability and objectivity. They noted it was Tiamat that recommended Option B, but it is now denying the effectiveness of the secant wall after two groundwater tests. They argued there is doubt on Tiamat's objectivity given Tiamat stated the displacement of two businesses is a factor for not constructing the secant wall, but this is an issue outside Tiamat's expertise. This raises doubt on Tiamat's ability to provide relevant findings and to provide an objective report that takes into consideration the interests of all affected parties.

[31] The Residents stated the hydrocarbon contamination poses serious and significant concerns regarding the health and well being of the public. They argued that, if the contamination is not contained, then time would have been lost in preventing the spread and effects of the contamination, and the harm cannot be redressed in monetary terms. The Appellants' concerns regarding Bow Liquor is strictly commercial in nature and can be compensated monetarily. These commercial interests cannot outweigh the displacement of people and the health and safety of the public. The Residents submitted that a landlord can always choose to terminate the lease and damages are an adequate remedy for the tenant. They stated the Appellants have an obligation to manage the release, and the Appellants have been given numerous opportunities to present information to support and implement alternatives.

[32] The Residents argued the risks to them are an irreparable harm that cannot be redressed monetarily given the risks and impacts to their lives, health, and wellness. This is

weighed against the potential monetary losses of the Appellants and Bow Liquor. The Residents submitted the balance of convenience strongly weighs against granting a Stay.

[33] The Residents stated the public health and safety concerns strongly support the denial of the Stay. They argued the Stay application is an attempt by the Appellants to shirk and delay their statutory responsibility of remediating the Site. They stated the purpose of the Order was to ensure the work was completed in a timely manner, but by granting the Stay, the intent and purpose of the Order would be defeated. The Residents stated this would not be in the best interest of the public. Therefore, the Stay application should be denied.

[34] The Residents argued the Appellants' stay application is barred by the principles of *res judicata* and issue estoppel. They stated all the conditions of *res judicata* were present in the Appellants' Stay application since the main issue in this application, as well as the first Stay application, was how and when the contamination is to be removed and at whose expense. According to the Residents, the Appellants reused the same submissions on the first Stay application even though the Board considered and rejected the arguments in the first Stay decision. The Board's decision to deny the Stay was a final decision. Since the current Stay application involves the same parties and raises the same issues, and the Board has made a final determination, *res judicata* applies and the Appellants are barred from raising these issues again.

[35] In addition, Mr. Terry Floate and Ms. Heather Cummings explained they live in the heart of the contamination plume and are suffering health problems due to the contamination. The work required to seal the cracks in their basement has not been done by the Appellants as required under the Order. They stressed the remediation work needs to be done immediately, and the longer it takes, the more time they are exposed to the dangers of the contamination.

[36] The City of Calgary stated the Appellants' submission in support of the Stay application did not meet the test established by the Board. The City stated the precautionary principle necessitates the Order be performed in order to protect the environment, the public interest, and impacted properties, and the appeal process should not be used to delay the performance of the Order.

[37] The City stated that, without complete delineation and assessment of the plume, it is not possible to state with any degree of certainty that subsurface conditions are stable given

seasonal variations, geotechnical and groundwater conditions, and hydraulic conductivity. The City explained a complete round of seasonal data would be required to demonstrate whether the hydrocarbon concentration in the groundwater had stabilized. The data provided by the Appellants did not indicate the contamination had equilibrated since levels of some constituents had increased. The City noted Tiamat had notified the Director on September 28, 2011, that it was still gathering missing data requested by the Director.

[38] The City argued the timeline to implement Option B cannot be described as unreasonable given the amount of time that has elapsed since the release and the issuance of the Order.

[39] The City stated the Appellants did not provide any scientific evidence to support their argument that Option B will change the groundwater flows, destabilize the plume, or impact other parties. The City argued using natural attenuation to remediate the Site does not constitute grounds to grant the Stay request. The City submitted the public interest in protecting the environment, public health, private property, and municipal infrastructure is not outweighed by the commercial interests of Bow Liquor.

[40] The City stated public safety is paramount, and the public interest has not and will not be served by further delay.

IV. STAY TEST

A. Legal Basis for a Stay

[41] 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."[5]

[5] Section 97 of EPEA also provides:

> "(3) Where an application for a stay relates to the issuing of an enforcement order or an

[42] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[6] and *Stelter*,[7] is adapted from the Supreme Court of Canada case of *RJR MacDonald.*[8] 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."[9]

[43] 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."[10]

[44] 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.[11] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could

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environmental protection order or to a water management order or enforcement order under the *Water Act* and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,

(a) order the Director under this Act or the Director under the *Water Act* to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and

(b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the *Water Act* in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

6 *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.).

7 *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.).

8 *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.

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

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

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

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*,[12] 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 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 denial of justice."[13]

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.[14] The damage that may be suffered by third parties may also be taken into consideration.[15]

[45] 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."[16] 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 considered factors such as the cumulative effect of granting a Stay,[17] third parties who may suffer damage,[18] or if the reputation and goodwill of a party will be affected.[19]

[46] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test.

[47] 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 given the opportunity to show

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

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

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

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

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

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

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

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

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."[20] The effect on the public may sway the balance for one party over the other.

B. Analysis

[48] The Participants agree there is a serious issue that needs to be heard, so the first step of the Stay test has been met. The appeals raise serious issues about when and how remediation is to be done and who is responsible. The Order and subsequent amendments were issued in response to a hydrocarbon spill causing contamination the Site and affecting persons and the environment in the adjacent area. The Order was issued to ensure work was completed in a timely manner. The Appellants seek to Stay the portion of Amendment No. 3 that requires the Appellants begin work on the secant wall by September 27, 2011, and complete construction by November 15, 2011. The Appellants do not disagree work needs to be done to start remediation of the Site and affected residential areas, but they disagree with the Director on the best approach.

[49] The second step is the determination of whether the Appellants would suffer irreparable harm if the Stay is not granted. The Appellants argued the displacement of a tenant and its retail business as well as the Appellants' gas station business, would cause irreparable harm.

[50] As stated in the first Stay decision, the Board believes these concerns can be converted into monetary terms. While the Director is statutorily protected against a claim in damages, in reviewing the Notices of Appeal, the Board notes the Appellants accept the spill occurred, that some form of remediation is necessary, and at least one of the Appellants is responsible. It would seem reasonable costs incurred related to the businesses affected could be paid by one or both of the Appellants. The Board finds the Appellants will not suffer irreparable harm if the Stay is not granted.

[51] The third step in the Stay test is to assess who will suffer the greater harm, the Appellants if the Stay is not granted or the Director if the Stay is granted. In this respect, the

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

Director is representing the environment and the public interest, which the Board has previously characterized as the fourth step in the test for granting a Stay. In this case, in looking at the greater harm step, the Board will include the public interest element of the test and will consider the submissions of the City of Calgary and the Residents in determining this part of the Stay test. In taking into account the balance of convenience and the public interest, the Appellants' application for a Stay fails.

[52] The Appellants acknowledged at least one of them is responsible for the contamination on and off the Site, and at least one of them is responsible for conducting the remediation work. Considering the impact the contamination has caused on and off-site in a residential area, there is unquestionably a public interest concern that needs to be addressed sooner rather than later. Homes have had to be evacuated due to the contamination. The contamination has not been contained even though the Appellants were aware of the spill more than a year ago.

[53] In issuing Amendment No. 3, the Director required the Appellants to start installing a secant wall on the Site. The Appellants consented to this method of remediation. The Director gave the Appellants two options to start the remediation work. The Appellants chose the secant wall, the option they brought forward as a viable remediation option. The Board believes the Director acted prudently and in support of the public interest by issuing Amendment No. 3. Action need to be taken to minimize impacts from the contamination.

[54] As stated in the previous Stay decision, the Court considered the actions of a public authority in a Stay application in *RJR McDonald*:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large…. Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought.
>
> 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."[21]

[55] Although the comments were made regarding *Charter* cases, the principle can be applied in other Stay applications involving a public authority.[22] The role of the Director is to make decisions to protect the environment and such decisions must invariably take into consideration public health and the well-being of society. If the secant wall is not installed, there is a possibility more contaminants may migrate off-site, and potentially cause new problems.

[56] There is no doubt the Residents have been impacted by the contamination plume. Steps need to be taken to protect human health and the environment from further impacts resulting from the off-site migration of contaminants.

[57] The Board finds the environment and the public interest risks and harms if the Stay was granted outweigh the interests of the Appellants and affected parties like Bow Liquor if the Stay was denied. Therefore, the Appellants have not met the final step in the Stay test, and the Stay must be denied.

C. *Res Judicata* and Issue Estoppel

[58] The Board does not agree with the Director's and Resident' argument that *res judicata* and issue estoppel apply to this stay application. Although the parties are the same, this Stay application applies to Amendment No. 3 and the requirements of implementing Option B. At the time of the first Stay application, Amendment No. 3 did not exist, and although the Stay application relates to the Order, Amendment No. 3 changes the conditions. It is those specific conditions that are being asked to be stayed. Amendment No. 3 requires the Appellants to start remediating the Site using an option that was not considered in the Order. Therefore, the issues are not the same, even though the arguments submitted by the Appellants are similar, and issue estoppel does not apply. In addition, *res judicata* cannot apply since the circumstances are different and the Board did not make any previous decision regarding Option B.

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21 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 68.

22 See: *Western Forests Products Inc.* v. *Sunshine Coast Regional District*, 2007 BCSC 1283 (CanLII).

V. CONCLUSION

[59] The Board denies the Stay application. The appeals raise serious issues. However, any harm to the Appellants that may result if the Stay is not granted can be compensated for monetarily. The balance of convenience strongly favours denying the Stay when the public interest is taken into account. The public health and safety concerns, which in the Board's view are paramount in this case, strongly support the denial of the Stay.

[60] The Order and Amendment No. 3 remain in full force and effect, and the Appellants are required to comply. The Director is free to take any enforcement action he is legally entitled to take within his discretion.

Dated on February 2, 2012, at Edmonton, Alberta.

"*original signed by*"

D.W. Perras
Chair