

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – July 29, 2016

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

-and-

IN THE MATTER OF appeals filed by Cory Wiebe, Nancy Pratch Wiebe, Aline Pratch, Darren Pratch, and Valerie Pratch with respect to *Water Act* Amending Approval No. 00344519-00-03 issued to ATCO Electric Ltd. by the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks.

Cite as: Stay Decision: *Wiebe et al. v. Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *ATCO Electric Ltd.* (29 July 2016), Appeal Nos. 15-033-034, 036-038-ID1 (A.E.A.B.).

BEFORE:

Mr. Alex MacWilliam, Board Chair.

SUBMISSIONS BY:

Appellants:

Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, Mr. Darren Pratch, and Ms. Valerie Pratch.

Approval Holder:

ATCO Electric Ltd., represented Mr. Shawn Munro and Mr. Blake Williams, Bennett Jones LLP.

Director:

Mr. Mohammad Habib, Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball and Mr. Larry Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks (AEP) issued an Amending Approval to ATCO Electric Ltd. (ATCO) under the *Water Act*. The Amending Approval amended the original Approval which authorized ATCO to place, construct, operate, maintain, remove, or disturb works in or on any land, water, or water body for the purpose of altering wetlands for the construction of a power transmission line.

Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, Mr. Darren Pratch, and Ms. Valerie Pratch (the Appellants) appealed the issuance of the approval and requested a stay. The Board granted a temporary stay until the Board received comments from ATCO and AEP.

After reviewing the submissions provided, the Board denied the stay application. The Board found the test for the granting of a stay was not met. There is a serious issue to be heard in these appeals as the Appellants raised concerns regarding potential impacts to the wetlands. However, there would be no irreparable harm to the environment or the Appellants if the stay was not granted. The construction of the transmission was complete except for the stringing of the conductors. The balance of convenience and the public interest favoured denying the stay application. The Board found the public interest favoured minimizing the impacts to the environment, which would require the work be completed under frozen conditions.

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I. INTRODUCTION

[1] These are the Environmental Appeals Board's decision and reasons for denying the stay in respect of Amending Approval No. 00344519-00-03 (the "Amending Approval") issued to ATCO Electric Ltd. (the "Approval Holder" or "ATCO"). Alberta Environment and Parks ("AEP") issued the Amending Approval to ATCO under the *Water Act*, R.S.A. 2000, c. W-3, allowing the disturbance of wetlands for the construction of a transmission line located in the County of St. Paul. Mr. Cory Wiebe, Ms. Nancy Pratch Wiebe, Ms. Aline Pratch, Mr. Darren Pratch, and Ms. Valerie Pratch¹ (collectively, the "Appellants") appealed the issuance of the Amending Approval and requested a stay.

[2] The Environmental Appeals Board (the "Board") issued a temporary stay pending the receipt and review of submissions from ATCO and AEP and final comments from the Appellants on whether the stay should be granted for the duration of the appeal process.

[3] The Board received submissions from the Appellants, Approval Holder, and Director (collectively, the "Participants") on whether the stay should remain in place. Based on the submissions and the information before the Board, the Board determined the stay should not remain in place.

II. BACKGROUND

[4] On January 5, 2016, the Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), issued the Amending Approval under the *Water Act*. The Amending Approval amended the original Approval which was issued on February 4, 2014. The original Approval authorized the Approval Holder to place, construct, operate, maintain, remove, or disturb works in or on any land, water, or water body for the purpose of altering wetlands. The Amending Approval revised clause 3.2 of the original Approval, stating the activities shall be undertaken in accordance with an additional report: Letter Report: Wetland

¹ Ms. Sue Reilly withdrew her appeal on February 2, 2016. See: Board's February 3, 2016 letter dismissing her appeal.

Field Confirmation, St. Paul Transmission Project, dated September 9, 2015, submitted by Tetra Tech for ATCO Electric Ltd. AEP No. 0344519-R002 (the “Letter Report”).

[5] On January 21, 2016, the Board received Notices of Appeal from the Appellants appealing the Amending Approval and requesting a stay.

[6] On January 23, 2016, the Board wrote to the Participants acknowledging receipt of the Notices of Appeal and notifying the Approval Holder and the Director of the appeals and stay request. The Board requested the Appellants provide answers to the stay questions.²

[7] On January 22, 2016, the Board received responses to the stay questions from Ms. Nancy Wiebe and the Approval Holder.

[8] On January 22, 2016, the Board notified the Participants that, based on the information available to the Board at this time, it appeared Ms. Wiebe had not filed a valid Statement of Concern, and therefore, it was not authorized to issue a stay in response to Ms. Wiebe’s request.

[9] On February 25, 2016, the Board received a stay request from Ms. Valerie Pratch.

[10] On February 29, 2016, the Board notified the Participants that, based on the information provided in the stay request, a temporary stay was granted, subject to certain conditions. The Board requested submissions from the Participants on an expedited basis.

[11] On February 29 and March 4, 2016, the Board received submissions from the Approval Holder and Director, respectively. On March 4, 2016, the Board received the rebuttal submission from the Appellants.

² The Appellants were asked to answer the following questions:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board, than ATCO would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?
5. Are the Appellants directly affected by Alberta Environment and Park’s decision to issue Approval No. 00344519-00-03 to ATCO?

[12] On March 5, 2016, the Board notified the Participants that the stay application was dismissed, and the temporary stay was lifted. The Board indicated that written reasons for its decision would be provided at a later date. These are those reasons.

III. STAY SUBMISSIONS

A. Appellants

[13] The Appellants requested a stay to prevent the “destruction” of Julien Lake and the associated riparian lands. The Appellants explained their families rely on the water system for potable water use, livestock watering, and in the tree seedling nursery. The Appellants stated their livelihood relies on the wetlands situated on their lands and surrounding area. The Appellants said the wetland system on their property and the lands to the north are connected and are important to landowners in the area. They stated the wetlands need to be conserved, protected, and managed in a sustainable manner.

[14] The Appellants stated an interruption in the water system from the wetlands to the tree nursery would impact their livelihood, costing them at least \$60,000.00 to replace the existing system and additional costs for potential crop failures and loss of clients. They said there would be a high risk the nursery would not be able to operate if the water source was interrupted.

[15] The Appellants explained the ability of the wetlands to store large amounts of melting snow and runoff during drought years is important to their livestock. They stated that if the wetland cannot provide adequate water for their livestock, it would require a \$60,000.00 investment to drill water wells to replace the existing system. The Appellants believed Julian Lake was connected to their water system and had the ability to recharge groundwater in the area, but the system was at risk if it was interrupted by the construction of the transmission line.

[16] The Appellants explained harming the wetlands ecosystem would discourage diversity of wildlife species, which they enjoy and has become a part of their lives. They said the land provides food for their families, including mushrooms, berries, and herbs that grow close to the wetland. The Appellants stated that depletion of the wetland by drilling holes for the

transmission line and driving through it for construction of the transmission line puts the wetland at risk as well as the vegetation and wildlife around the wetland. The Appellants said the delicate balance of the wetland will take many years to recover after a disturbance, if it can recover at all.

[17] The Appellants stated the construction of the transmission line would cause soil erosion and allow invasive species to enter the wetland and their lands.

[18] The Appellants explained they are committed to responsibly protecting their land for future generations and enable future generations to enjoy the wetlands.

[19] The Appellants said the destruction of the wetland will inhibit their recreational activities. The Appellants explained they are horseback riders, and they enjoy watching wildlife on their land. The Appellants said disturbing the wetland will impact wildlife and bird watching.

[20] The Appellants noted in the Letter Report, the biologist did not observe any wildlife when the wetlands were assessed. The Appellants said there are amphibians and bird life in the wetlands on their land. They questioned the accuracy of the Letter Report. The Appellants noted Julien Lake was not one of the wetlands included in the study, but the Letter Report suggested the assessment of Julien Lake was done for the 2013 Tetra Report³ in preparation of the hearing before the Alberta Utilities Commission (“AUC”). The Appellants questioned how this was completed when they never granted permission to access their land and Julien Lake is surrounded by their lands.

[21] The Appellants noted that, under the *Water Act* and the Wetland Restoration/Compensation Guide, avoidance of wetlands is the preferred response to deal with impacts to wetlands. The Appellants questioned when it was decided that avoidance would not be considered for the wetlands on their lands, and if it was decided at the AUC hearing, why AEP was not at the table. The Appellants argued it was unfair the landowners would have to suffer the adverse effects due to the loss of wetlands.

[22] The Appellants argued the Director failed to investigate if all the information was correct and completed with the current standards and guidelines, particularly the issue of

³ See: Tetra Report EBA Inc., *2013 Wetland Impact Assessment – St. Paul Transmission Project C22203120-05* (Calgary: 2013).

avoidance. The Appellants considered the Approval Holder's wetland compensation proposal unacceptable.

[23] The Appellants said that if the Approval Holder was allowed to continue with construction, there would be nothing to appeal.

[24] The Appellants stated they would suffer irreparable harm as would the environment, wetlands, and wildlife. The Appellants said the health of their families and livestock would be impacted by having to work under the transmission line.

[25] The Appellants argued they would suffer irreparable harm by placing a resource at risk and impacting the benefits they receive from the lands, including enjoying the lands and using the lands as an organic food source. They stated money cannot replace the pride and positive energy their families have for their lands. The Appellants stated the Approval is not needed when an existing transmission route, located half a mile from the wetlands, was being decommissioned and would provide a route that would avoid the wetlands.

[26] The Appellants stated the wetland has the ability to repair itself if the appeals were successful. The Appellants noted the Approval Holder will reassess the encroachment of vegetation on the line and will remove the vegetation for another 10 years. The Appellants said this will eventually take its toll on the functioning of the wetland.

[27] The Appellants stated that, if the land is disturbed, local plant species will be displaced by invasive plants introduced by contaminated construction equipment or through the disturbance of the soils.

[28] The Appellants said the Approval Holder did not follow a clubroot cleaning policy on their land. The Appellants stated the removal of the shelterbelt by the Approval Holder increased the chances of clubroot being spread onto their lands from adjoining lands via wind erosion. In addition, the Appellants noted the Approval Holder did not require its contractors to remove dirt from their shoes before entering the Appellants' lands even though the Approval Holder was notified in writing and on signs posted at all entry-ways of the required cleaning process for equipment and personnel. The Appellants said the Approval Holder failed to follow its commitments to the AUC by failing to adhere to best management practices

identified under the Government of Alberta Clubroot Management Plan and the practices followed by the landowners.

[29] The Appellants stated the presence of invasive plant species can result in fewer habitats for native and non-weed species and an overall degradation to native habitat. The Appellants said the proposed project would involve clearing of forested areas and, as a result, cannot avoid impacts through direct habitat loss.

[30] The Appellants stated there would be adverse effects on their water resources. They explained any contamination in the vicinity of the watershed would put the waterbodies at risk. The Appellants said there was equipment stored on their property overnight with no contaminant basins placed under the equipment.

[31] The Appellants explained the wetlands contribute to the recharge of watertables that affect the aquifer they withdraw water from. They stated surface runoff into the wetlands would be impacted by compaction of the soils and ruts caused during construction.

[32] The Appellants said they, as landowners, have a greater commitment to the lands and wetlands than just considering the harm the Approval Holder would suffer. The Appellants stated the Approval Holder pieced the project together as it went along, and it did not provide the full picture to the AUC. The Appellants said the need for the transmission line was never shown. The Appellants noted the Approval Holder had the opportunity to engage the landowners in the decisions regarding the wetlands for which the landowner is the steward, but the Approval Holder declined to do so.

[33] The Appellants believed the wetland habitat would suffer greater harm than the Approval Holder would suffer.

[34] The Appellants argued the public interest supports the stay application. They noted the wetland provides a service to the community for bird watching, and the wetland recharges and maintains the groundwater.

[35] The Appellants stated people in the community do not know why the Approval Holder cannot follow the existing transmission line half a mile away to avoid the wetlands. The Appellants argued the Approval Holder based its decision to build the transmission line on

financial profit. The Appellants said the Approval Holder would not suffer any losses because it can put a temporary line on the ground.

B. Approval Holder

[36] The Approval Holder requested the Board dismiss the stay application on the basis the Appellants did not demonstrate they are potentially affected by the Amending Approval or, alternatively, the three-part test for granting a stay was not met.

[37] The Approval Holder stated the only lands owned by the Appellants that are impacted by the Amending Approval are those lands where Wetland No. 118 is present. The Letter Report comprised all of the information filed in relation to the Amending Approval. The Approval Holder noted the Letter Report findings resulted in no significant changes in relation to Wetland No. 118. The Approval Holder submitted that, since the Amending Approval did not materially alter the original Approval as it related to Wetland No. 118 or the Appellants' lands where Wetland No. 118 is present, the Appellants cannot be considered directly affected by the Amending Approval. Therefore, according to the Approval Holder, the Appellants are not eligible to apply for a stay of the Amending Approval.

[38] The Approval Holder stated the applicant has the burden of establishing there is a serious question to be heard, so in this case, the Appellants must raise a serious question as to the correctness of the new conditions of the Amending Approval.

[39] The Approval Holder submitted the Appellants failed to raise any grounds to challenge the correctness of the Amending Approval. The Approval Holder stated the concerns raised by the Appellants were general in nature, not relevant to the Amending Approval, were previously addressed by the AUC, or were addressed in the original Approval.

[40] The Approval holder noted the Appellants challenged the routing of the transmission line and suggested an alternate route. The Approval Holder stated this was addressed in the AUC decision. The Approval Holder said the avoidance of wetlands contemplated in the Amending Approval was considered and assessed throughout the AUC application, hearing, and approval process.

[41] The Approval Holder submitted the Appellants' right to appeal arises from the new condition in the Amending Approval. The Approval Holder explained the amendment requires the Approval Holder to undertake activity in accordance with the Letter Report. The Approval Holder stressed the Letter Report did not alter the original Approval or the underlying information upon which the original Approval was issued. The Approval Holder explained the Letter Report only confirms the work undertaken in the Wetland Impact Assessment - St. Paul Transmission Project, dated December 2013. The Approval Holder stated that any grounds challenging the original Approval conditions that remain in the Amending Approval were outside the scope of the Appellants' right to appeal and not properly before the Board.

[42] The Approval Holder noted the Appellants' stay application focused on alleged impacts to the wetlands associated with Julien Lake. The Approval Holder agreed with the Appellants that Julien Lake was not one of the wetlands included in the Letter Report. The Approval Holder submitted that Julien Lake was not subject to the Letter Report and, therefore, the Appellants failed to raise a serious question as to the correctness of the new condition in the Amending Approval.

[43] The Approval Holder submitted the Appellants did not provide any evidence they would suffer irreparable harm. The Approval Holder explained the construction of the transmission line on lands owned by the Appellants is already complete except for the stringing of the conductors. The Approval Holder stated there is no evidence the Appellants would suffer irreparable harm as a result of stringing operations on the transmission line if the stay application was denied. The Approval Holder explained the granting of the stay would delay work and impact the Approval Holder's ability to carry out the remaining stringing work under frozen ground conditions which would require additional mitigation.

[44] The Approval Holder stated the Appellants relied on mere conjecture that they would suffer irreparable harm from electromagnetic fields. The Approval Holder said these matters were unrelated to the Amending Approval and were addressed in by the AUC in its decision.

[45] The Approval Holder stated that granting a stay would likely increase the risk of harm to the Appellants. The Approval Holder submitted the Appellants failed to meet the second step in the test for a stay.

[46] The Approval Holder submitted the balance of convenience and public interest favours the Approval Holder. The Approval Holder said it would suffer serious, possibly irreparable harm if the stay was granted and work would be delayed.

[47] The Approval Holder advised the Board that, as a result of warm weather conditions, break-up was underway and any delay in construction would increase the potential for environmental impacts to the land. The Approval Holder explained the costs of mitigating the environmental impacts increase as spring thaw progresses. The Approval Holder submitted a stay could potentially compromise the Approval Holder's ability to work under frozen ground conditions which would require additional mitigation measures to ensure its work had minimal impact on the environment.

[48] The Approval Holder explained the stringing of the straight 2.25 mile length of transmission line would occur in a single operation, crossing the Appellants' lands and those of adjoining property owners to the north and south. The Approval Holder stated that construction during break-up would require increased mitigation measures on the entire stretch of the 2.25 mile stretch of the transmission line, including on lands adjoining the Appellants' lands.

[49] The Approval Holder stated the public interest favours a dismissal of the stay application. The Approval Holder said that in addition to increased costs due to construction in the summer months, a stay would impose standby penalties on the Approval Holder for labour and equipment, now estimated to total between \$30,000.00 and \$35,000.00 per day, which would ultimately be borne by ratepayers. The Approval Holder explained that demobilizing and remobilizing equipment would be an alternative to bearing standby penalties, but it would cost more than \$100,000.00.

[50] The Approval Holder requested the Board dismiss the Appellants' stay application.

C. Director

[51] The Director agreed with the arguments presented by the Approval Holder with respect to the stay request in that the Appellants did not establish: (1) there was a serious issue to be heard; (2) the Appellants would suffer irreparable harm if the stay was not granted; or (3) on the balance of convenience, the Appellants would suffer greater harm if the stay was not granted than the harm to the public interest and the Approval Holder if the stay was granted.

[52] The Director submitted the harm the Appellants allege they would suffer if the stay was not granted were not sufficiently related to the revised condition in the Amending Approval. The Director argued all the harms alleged by the Appellants were related to the decision to grant the original Approval.

[53] The Director submitted the Board must dismiss the stay request.

D. Rebuttal Submission

[54] The Appellants explained they have lived at the site on the northern banks of Julien Lake for the past 25 years. The Appellants noted the Director found Ms. Valerie Pratch directly affected.

[55] The Appellants believed their water wells, at their residence and at the nursery, shared water bearing formations with the wetlands. The Appellants explained their land overlooks the wetland basin of Julien Lake, which is a viable and functional ecological system of biodiversity. The Appellants stated their families have a deep personal commitment to protect the wetlands and riparian lands from impacts of development, and this interest motivates them to have the wetlands retained as a functional aquatic environment.

[56] The Appellants explained they pick native mushrooms, herbs, and berries in and around the wetland, and their families enjoy watching the wildlife, bird watching, and the aesthetic values of the wetlands. They said the destructive activity will alter the wetlands for all or part of their life cycles. The Appellants argued that, even though no rare plants were identified in the application, it does not indicate that rare plants do not exist in the area, and it may be there were too few or the inventories were not completed in this area. The Appellants noted the AUC required supplemental vegetation surveys be conducted on the lands where

access could not be obtained, but in the Letter Report, Julien Lake was not considered. The Appellants questioned why the vegetation of Julien Lake was not surveyed.

[57] The Appellants explained Julien Lake is hydrologically connected to Lake No. 2, which also lies on lands directly affected by the construction of the transmission lines.

[58] The Appellants explained the vegetation around wetland number 114 varies from the heavily farmed lands on the east to preserved vegetation on the Appellants' side, making the wetland on their property prosper and be ecologically different from the portion that extends onto the property to the east.

[59] The Appellants noted a report prepared for the AUC by the Lauch Group, a group they belonged to at the time of the AUC hearing, recommended efforts should be made to avoid wetlands that are productive for waterfowl and to understand local and regional movement of waterfowl so that appropriate mitigation measures could be implemented. The Appellants questioned why avoidance of wetlands was not considered by the Approval Holder and the Director.

[60] The Appellants explained their tree nursery, which provides seedlings to the forest industry, is located on lands directly affected by the construction of the transmission lines. The Appellants stated the loss of the continuous shelterbelt created an adverse effect since the hole in the shelterbelt no longer protects their lands from the noise and dust pollution from the county road that parallels the shelterbelt. The Appellants said their lands are now exposed to erosion from adjacent properties, creating the opportunity for soil borne club root spores to spread to their lands. The Appellants explained they would bear the additional costs if their property becomes infected with clubroot.

[61] The Appellants said they have worked with the Approval Holder to put a sanitation program into effect to prevent the spread of clubroot, but there continued to be infractions by the Approval Holder that required constant monitoring of the construction site. The Appellants stated the Approval Holder's activities have increased the probability for the spread of clubroot on the Appellants' lands from low to high.

[62] The Appellants explained the nursery has provided assistance to community groups and the Town and County. The Appellants stated the wetlands are a valuable source of water for the nursery.

[63] The Appellants said the Approval Holder stored and fueled equipment on the Appellants' lands without spill equipment in place.

[64] The Appellants expressed concern that the biologist conducting the study for the Letter Report did not observe any wildlife at the nine wetlands assessed. The Appellants stated the two wetlands on their lands have amphibians and bird life, and their family has enjoyed observing diverse species of wildlife. The Appellants argued the Letter Report is deficient and failed to capture the full ecological biodiversity present in the wetlands. The Appellants noted Julien Lake was not included in the Letter Report even though the transmission line is going through Julien Lake.

[65] The Appellants noted the Director issued an extension to the original Approval on March 4, 2015, and an amendment to the extension on June 30, 2015, to update clerical errors. The Appellants said that, in an attempt to make good on the application, the Director requested a copy of the Post-Construction Reclamation Assessment that documents the results of wetland monitoring and any remedial measures or contingency plans used. The Appellants stated the Amending Approval was more than a simple assessment of wetlands and was, instead, a way to fix a deficient application.

[66] The Appellants stated the application for the Amending Approval used outdated legislation, and the Director failed to implement the new Alberta Wetland Policy. The Appellants stated the Approval Holder did not work under an environmental protection plan until the Amending Approval.

[67] The Appellants stated no one addressed any of the concerns raised in their Statements of Concern.

[68] The Appellants stated the Approval application was deficient until September 2015, and the Approval Holder constructed the transmission line without submitting a proper environmental protection plan, the post-construction reclamation assessment, or any remedial or contingency plans.

[69] The Appellants said their lands were subject to the adverse effects of construction and will be continually disturbed and trespassed on for monitoring.

[70] The Appellants stated the Approval Holder has caused irreparable harm to the environment by not following the environmental protection plan. The Appellants said the Approval Holder had to be constantly supervised to ensure the lands were protected as best as they could be.

IV. LEGAL BASIS FOR A STAY

[71] 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.”

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

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

“First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally,

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

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

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

an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.”⁷

[74] The same analysis is applied when determining whether a stay should be lifted.

[75] 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.

[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.⁸ Irreparable harm will occur if the applicant will be adversely affected by the conduct the stay is meant to prevent, should the applicant ultimately be successful in the appeal. It is the nature of the harm that is relevant, not its magnitude. The harm must not be quantifiable; that is, the harm to the applicant could not be satisfied in monetary terms, or one party could not collect damages from the other. In *Ominayak v. Norcen Energy Resources*,⁹ the Alberta Court of Appeal defined irreparable harm by stating:

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

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

[77] The third step in the test is the balance of convenience, which 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.”¹³ The decision-maker is required to weigh the burden that the remedy would impose on the respondent against the benefit the

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

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

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

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

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

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

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

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,¹⁴ third parties who may suffer damage,¹⁵ or if the reputation and goodwill of a party will be affected.¹⁶

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

V. ANALYSIS

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

[80] The Appellants raised concerns regarding the potential impacts the project will have on the wetlands located on the Appellants' properties. The issue was raised in their Notices of Appeal, is related to the Amending Approval, and is within the Board's jurisdiction. The potential environmental impacts resulting from the proposed project is a serious issue. Therefore, the first step in the stay test has been met.

[81] The second step in the test requires the decision-maker to decide whether the applicant seeking the stay would suffer irreparable harm if the stay is lifted.¹⁹ Irreparable harm will occur when the applicant would be adversely affected to the extent the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is

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

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

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

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

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

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

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.

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

[83] Since the Board can only consider the time it would take for the Minister to make a decision if a hearing was held when assessing whether a stay should be granted, the Appellants' concerns regarding electromagnetic fields are not relevant.

[84] The Appellants submitted they would suffer irreparable harm if the stay was not granted because of the impacts on the wetlands and the potential for club root disease to spread onto their property. The Appellants are concerned clubroot will spread to their property, either on the construction equipment and other vehicles used by the Approval Holder or via wind and erosion spreading the spores through openings in the windbreak. The Appellants did not provide any documentation to show clubroot spores cannot penetrate intact windbreaks, so suggesting there will be an increased risk due to the opening in the windbreak is conjecture. The Board acknowledges clubroot can spread due to unclean equipment traveling from an infested site to a clean site. The costs for monitoring for and dealing with clubroot can be difficult to calculate, but it is possible. Therefore, the risk of clubroot spreading onto the Appellants' property does not demonstrate irreparable harm.

[85] The Appellants also stated the wetlands could recover if they are not continually disturbed. This indicates the wetlands will not suffer irreparable harm during the time the appeal is heard.

[86] Based on this evidence, the Board finds the second step of the stay test has not been met. Any impact to the Appellants can be quantified and compensation can be calculated.

[87] The third step in the stay test requires a determination of who would suffer the greater harm, the Appellants if the stay is not granted or the Approval Holder if the stay is

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

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

granted. In determining who will suffer the greater harm, the Board considers the timeframe in which the appeal would be resolved. Essentially, would the Appellants or Approval Holder suffer a greater harm during the time the appeals are considered and the Minister's decision released? It is only after the Board hears all of the arguments at the hearing will it be in a position to determine if there will be actual harm to the environment and if the Amending Approval adequately reflects what must be done to minimize the impacts.

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

[89] If the stay is granted, the Approval Holder would be delayed in completing the project. Although this may be an inconvenience, it is not the type of harm that would support denying the stay. However, the Approval Holder explained there would be less environmental damage if the work is done under frozen conditions. If a stay was granted until the Minister makes her decision, the most favourable work conditions, from an environmental perspective, could be missed. Since the intent of an approval is to minimize the environmental impacts of a project, it appears prudent to allow the work to continue within a time period that minimizes environmental impacts.

[90] The Approval Holder explained the poles for the transmission line are already in place and only the stringing of the conductors needs to be completed. The holes have been drilled and the posts are in place. The remaining work will occur above the ground and the wetlands. The Board understands the Appellants' concerns regarding increased vehicle traffic on their property while the work is completed. However, the Appellants did not provide any indication how any impact the vehicular traffic on the limited work space will result in any significant harm. In addition, the Approval Holder explained there would be less of an impact to the environment while working under frozen conditions, which would include less compaction and disturbance to the vegetation if the site was still frozen.

[91] Therefore, the Board finds the impact to the environment would be greater if the stay was granted. The balance of convenience in this case favours the denial of the stay and the lifting of the temporary stay.

[92] Although the Appellants demonstrated there is a serious issue to be determined, the Appellants did not demonstrate they would suffer irreparable harm. In addition, the balance of convenience favours the denial of the stay to minimize further environmental impacts from construction of the proposed project. Therefore, the stay request is denied and the temporary stay is lifted.

[93] In making the decision to deny the stay request, the Board did not have to make a final determination of the directly affected status of the Appellants or whether the issues were adequately dealt with at an AUC hearing. These matters will be decided after the Board has received and reviewed the submissions from the Participants on these matters. The Board assures the Participants that it has not made any decision regarding the issuance of the Amending Approval at this stage of the process.

VI. CONCLUSION

[94] The Board denies the stay request and the temporary stay is lifted. The Board will continue to process the appeals and will make its determination on the preliminary matters after submissions have been received and reviewed.

Dated on July 29, 2016, at Edmonton, Alberta.

A handwritten signature in black ink, appearing to read 'Alex MacWilliam', written over a horizontal line.

Alex MacWilliam
Board Chair