



ALBERTA
ENVIRONMENTAL APPEALS BOARD

May 26, 2006

Via Fax or Courier

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Dear Gentlemen, Ms. Graham, and Ms. Breaker:

Re: Town of Strathmore/EPEA Amending Approval No. 1190-01-13
Our File No.: EAB 05-053, 05-054 and 05-070

These are the Board's reasons with respect to the application for a stay filed by Mr. Jeerakathil on behalf of the Siksika First Nation and Ms. Donna Breaker (collectively the "Appellants"). The Appellants are seeking a stay against a pipeline that will be used to take treated wastewater from the Town of Strathmore and discharge it into the Bow River. The Board advised the parties of its decision to deny the stay, with reasons to follow, in a letter dated March 16, 2006, stating: "The Board has decided to deny the stay application at this time as the Appellants have failed to meet the *prima facie* requirements for a stay."

The Board is empowered to grant a Stay pursuant to section 97(2) of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c.E-12, ("EPEA") which provides: "The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted." The Board's test for a stay, as discussed in numerous decisions, is based on the Supreme Court of Canada case of *RJR MacDonald*.¹ The four aspects that the Board considers with respect to a stay are: (1) serious concern, (2) irreparable harm, (3) the balance of convenience, and (4) the public interest. All four aspects must be successfully argued for the Board to grant a stay.

¹ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. At paragraph 43, the Court states: "First, a preliminary assessment must be made of the merits of the case that there is a serious question

In support of their application for a stay, the Appellants advanced three arguments:

- (1) the Appellants will be harmed by the discharge of treated wastewater into the Bow River upstream of their reserve lands;
- (2) the Appellants will be harmed by the physical installation of the pipeline on lands upstream of their reserve lands; and
- (3) a stay is necessary to protect the Appellants' treaty rights because there has been a "failure to consult and accommodate".

The Board had decided that none of these three arguments provides a sufficient basis for the Board to grant a stay, and therefore, the application for a stay is denied.

Discharge of Treated Wastewater

The concern that the Appellants raised with respect to the discharge of treated wastewater is that upon entering the Bow River it will flow through the reserve lands, negatively impacting the Appellants' use of the river and the riparian lands. The Appellants provided the example that the discharge point is upstream of the infiltration galleries used to provide domestic water.

This argument fails in that it does not demonstrate any ongoing or pending irreparable harm. The pipeline is under construction and is not currently discharging treated wastewater into the river. The Board has no clear evidence before it indicating when this discharge will commence. As a result, this argument with respect to the stay is premature. The Appellants are free to bring a further application for a stay on this basis when there is more definitive information on when the pipeline will begin to be used.

Installation of the Pipeline

This argument was not well developed in the Appellants' submission and little, if any, supporting evidence was presented in the affidavits. The concern appeared to be that the physical installation of the pipeline is negatively impacting the Appellants' use of land. The Board notes that the pipeline is not being constructed on reserve lands. This argument fails in that it does not adequately address the balance of convenience or the irreparable harm aspects of the test for a stay.

The installation of a pipeline, by its very nature, is transitory in that when the work is done the pipeline right of way is reclaimed so that it will return to its natural state. Further, in the context of the entire landscape in this area of the Province, the installation of a pipeline of the length and type being considered in these appeals is a comparatively minor disturbance. Without additional evidence, this argument does not provide the Board with a basis to grant a stay.

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."

The Board has characterized the third element of this test in two parts (the balance of convenience and the public interest) based on the public interest that exists in the environmental cases that come before the Board. See: *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.); *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.); and *Nault and Mitchell v. Director, Southern Region, Regional Services, Alberta Environment*, Preliminary Motions re: *Town of Canmore* (29 May 2004), Appeal Nos. 04-019 and 04-020-CD (A.E.A.B.).

Failure to Consult and Accommodate

The final argument advanced by the Appellants is that a stay is necessary to protect their treaty rights because there has been a “failure to consult and accommodate.” This argument fails on three grounds.

First, the argument is predicated on the view that the Appellants will or are being harmed by the discharge of treated wastewater from the pipeline. As stated above, no water is currently being discharged from the pipeline and there is no information before the Board as to when the discharge will begin.

Second, the argument is predicated on the view that the Appellants will or are being harmed by the physical installation of the pipeline. As stated above, there is insufficient evidence before the Board to support this view.

Third, the argument does not correctly take into account the powers of the Board or the Minister in addressing these appeals and erroneously suggests it will not be possible to remedy a “failure to consult and accommodate.” Section 100(1) of EPEA provides:

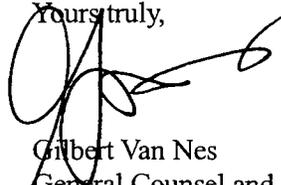
“On receiving the report of the Board, the Minister may, by order, (a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make ... and (c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.”

Based on a report and recommendations of the Board, the Minister has the power to reverse the approval that was granted, requiring the Town of Strathmore to remove the pipeline and reclaim the right of way. The Minister also has the ability to vary the approval, which could result in substantial changes being required to the pipeline project. It is not appropriate for any party to suggest what the Board’s report will recommend, nor is it appropriate to suggest how the Minister will exercise his discretion. The risk in proceeding with the pipeline in the face of these appeals, taking into account the powers of the Board and the Minister, is entirely on the Town. As a result, the Board finds there is no foundation to the argument advanced by the Appellants that a remedy cannot be granted if it is determined that there has been a “failure to consult and accommodate.” Therefore, this argument does not provide a basis for the Board to grant a stay.

Finally, without making a decision on the question, the Board notes that in previous decisions regarding the duty to consult the Board has held that this is a matter better dealt with in another forum.² Subject to the section 15 transitional provision, this also appears to be the view of the Legislature as expressed in the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c.A-3, where the Board is excluded from the list of having jurisdiction to deal with constitutional matters.

If you have any questions, please do not hesitate to contact me directly.

Yours truly,



Gilbert Van Nes
General Counsel and
Settlement Officer

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² Preliminary Motions re: *Chipewyan Prairie First Nation v. Director, Bow Region, Regional Services, Alberta Environment re: Enbridge Pipelines (Athabasca) Inc.* (22 March 2002), Appeal No. 01-110-ID (A.E.A.B.).