ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – March 31, 2020

IN THE MATTER OF sections 121, 123, and 125 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211 and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF appeals filed by Jason King and Kingdom Properties Ltd., with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue PLA-19/08-AP-LAR-19/08.

Cite as: Reconsideration Decision: *King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 March 2020), Appeal Nos. 19-0005-0006-RD (A.P.L.A.B.), 2020 ABPLAB 3.

BEFORE: Mr. Gordon McClure, Chair; Dr. Nick Tywoniuk, Board Member; and Ms. Line Lacasse, Board Member.

SUBMISSIONS BY:

Appellants: Mr. Jason King and Kingdom Properties Ltd., represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.

Director: Mr. Neil Brad, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Mr. Jason King is the sole shareholder of Kingdom Properties Ltd. (collectively, the Appellants). The Appellants hold two Miscellaneous Leases (MLLs) on public land for a commercial campsite and storage site. The Director issued an Administrative Penalty to the Appellants for allegedly subleasing the MLLs without authorization. The Appellants filed a Notice of Appeal with the Public Lands Appeal Board (the Board).

The Appellants requested the Board order a stay of the Administrative Penalty until the appeal was resolved. The Board summarily granted the stay and stated the Director could request the Board reconsider its decision if the Director had any concerns. The Director requested the Board consider the Director's submissions on the stay, which the Board interpreted as a request for reconsideration.

The Board received submissions from the Appellants and the Director regarding the stay. After reviewing the submissions and the legislation, the Board determined the Appellants met the three-part test for a stay as set by the Supreme Court of Canada in *RJR-MacDonald*:* (1) there was a serious issue to be heard; (2) the Appellants would likely suffer irreparable harm without a stay of the Administrative Penalty; and (3) the burden on the Appellants if the Board were to refuse the stay was far greater than the burden imposed on the Director by granting the stay. The Board also found it was in the public interest to grant the stay.

The Board granted a stay of the Administrative Penalty until the Board lifts the stay or until the Minister makes a decision regarding the appeals.

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

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding a preliminary motion by the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), to have the Board reconsider its decision of September 25, 2019, to grant a stay of Administrative Penalty PLA-19/08-AP-LAR-19/08 (the "Administrative Penalty"). The Administrative Penalty was issued by the Director to Mr. Jason King and Kingdom Properties Ltd. (collectively the "Appellants") for alleged contraventions of the *Public Lands Act* (the "Act") and the *Public Lands Administration Regulation* ("PLAR").

II. BACKGROUND

[2] Kingdom Properties Ltd. ("Kingdom") is a corporation registered in Alberta. Mr. King is a director and sole shareholder of Kingdom.

[3] On November 14, 2013, the Director issued Miscellaneous Leases ("MLL") 130164 and 130166 (the "MLLs") to Kingdom authorizing the use of public land near Conklin, Alberta. The terms and conditions for MLL 130164 specified the land described in the lease were only to be used for a commercial campsite. The terms and conditions for MLL 130166 stated the land described in the lease were only to be used for a storage site.

[4] On August 29, 2019, the Director issued the Administrative Penalty to the Appellants for $734,500.00. The Director stated the Appellants contravened the Act and PLAR, and assessed the penalty at $20,000.00, which included two counts of subleasing the MLLs without authorization at $5,000.00 each, and two counts of receiving money for allowing access to public land at $5,000.00 each. The Director determined the Appellants received proceeds of $714,500.00 from the alleged contraventions and used that amount as the proceeds assessment.

[5] On September 16, 2019, the Appellants filed a Notice of Appeal with the Board appealing the Administrative Penalty.

[6] On September 20, 2019, the Board wrote to the Director and the Appellants (collectively the "Parties") acknowledging receipt of the Notice of Appeal, and requesting the Director provide the Department's Record consisting of all documents and electronic media that

were available to the Director when making his decision and the applicable policy documents (the "Department's Record). The Department's Record was received by the Board on November 21, 2019, and provided to the Appellants on November 24, 2019.

[7] On September 23, 2019, the Appellants requested the Board grant a stay of enforcement of the Administrative Penalty. The Appellants provided an affidavit from Mr. King in support of the request. The Board considered the request and granted a stay of the Administrative Penalty, which would be in effect until the Board heard the appeal and the Minister issued an order, or until the Board directed otherwise. In the September 25, 2019 letter communicating the Board's decision (the "Decision Letter"),[1] the Board informed the Director that if he had any concerns, he could request the Board reconsider its decision.

[8] On September 27, 2019, the Director requested the Board suspend its stay decision until the Director responded to the stay application.

[9] On October 25, 2019, the Board advised it considered the Director's request to be a request for a reconsideration of the Board's decision to grant the stay and granted the request. The Board set out a schedule for the Parties to provide written submissions, and stated the stay would remain in place until the Board decided on the reconsideration request.

[10] On November 4, 2019, the Director advised he wished to "exercise his right to cross-examine" Mr. King on his affidavit. On November 6, 2019, the Appellants submitted the Director did not have any right of cross-examination and requested the Board make a preliminary determination whether the cross-examination would be permitted. After reviewing the submissions and relevant legislation, the Board determined there existed in Alberta an inherent right to cross-examination of witnesses. On November 12, 2019, the Board advised the Director and the Appellants that the Director could cross-examine Mr. King on his affidavit. The Board set a schedule for exchange of questions regarding the Appellants' affidavit and received questions from the Director on December 6, 2019, and answers from the Appellants on December 19, 2019.

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[1] *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (25 September 2019), Appeal Nos. 19-0005-0006-DL1 (A.P.L.A.B.), 2019 ABPLAB 22.

[11] On January 17, 2020, the Director provided its response written submission and the Appellants provided a rebuttal written submission on January 24, 2020.

[12] The Board reviewed the submissions and has reconsidered its stay decision. The Board has decided to uphold its initial decision to grant the stay of the Administrative Penalty.

III. RECONSIDERATION PROCEDURE

[13] Section 125 of the Act contains the authority for the Board to reconsider any decision it makes.[2]

[14] Under the authority of section 123(9) of the Act,[3] the Board has included in its Interim Appeals Procedure Rules for Complex Appeals (the "Rules") procedures for dealing with reconsideration requests. The relevant Rules are 26.5 and 26.6. These Rules state:

> "26.5 The Board will not exercise its powers under section 125 of the Public Lands Act in the absence of the following:
>
> (a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
>
> (b) A procedural defect during the hearing which prejudiced one or both of the parties,
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> (c) Material errors that could reasonably change the outcome of the decision, or
>
> (d) Any other circumstance the Board considers reasonable and substantive.
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> 26.6 The following are not sufficient grounds for a review:
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> (a) disagreement with a decision;
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> (b) failure to provide related case authority; or
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> (c) present available evidence."

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[2] Section 125 of the Act states: "The appeal body may reconsider, vary or revoke any report made by it."

[3] Section 123(9) of the Act provides: "Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it."

[15] The Director's legal counsel, in her letter dated September 27, 2019, requested "that the Board's decision to stay the administrative appeal be suspended until the Respondent [the Director] has been given a reasonable opportunity to respond to the application, including consider whether cross-examination on the affidavit is appropriate." Under Rule 26.5(d) of the Rules, the Board considers this request to be reasonable and substantive reason for a reconsideration of its decision to grant a stay of the Administrative Penalty.

IV. SUBMISSIONS

A. Appellants

[16] The Appellants submitted the appropriate test for a stay of enforcement of the Administrative Penalty is the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald Inc.* v. *Canada* ("*RJR-MacDonald*"):[4]

1. Is there an arguable issue to be determined on appeal?
2. Will the applicants suffer irreparable harm if the stay is not granted? and
3. Does the balance of convenience favour granting a stay?

[17] The Appellants stated establishing the appeal is not frivolous or vexatious is sufficient to satisfy the first part of the test. The Appellants said they intended to submit evidence to support one of their grounds of appeal, which is confirmation of a serious issue to be determined. The Appellants noted the Courts, in *RJR-MacDonald*, stated "irreparable" refers to the nature of the harm suffered rather than its magnitude. The Appellants submitted irreparable harm cannot be quantified in monetary terms or cannot be cured, usually because one party cannot collect damages from the other party.

[18] The Appellants stated the amount of the Administrative Penalty, including interest, is significantly high enough that the Appellants would require financing to pay it. The Appellants acknowledged that if they are successful in their appeal, the government will pay the amount of the Administrative Penalty back to the Appellants. However, the Appellants noted there is no statutory

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[3] Section 123(9) of the Act provides: "Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it."

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

provision requiring the government to compensate the Appellants for the interest which would accrue on any loan taken out by the Appellants to pay the Administrative Penalty.

[19] The Appellants said Mr. King noted in his affidavit that taking out a loan to pay the Administrative Penalty would prevent him from obtaining any additional financing for his other business operations, which would likely result in incurable adverse consequences for him and his businesses.

[20] The Appellants submitted Alberta Environment and Parks ("AEP" or "Department") and the Director would not be prejudiced by a stay of the Administrative Penalty, whereas the Appellants would suffer irreparable harm without a stay. The Appellants stated the balance of convenience favours granting the stay.

B. Director

[21] The Director agreed the *RJR-MacDonald* test was appropriate for the stay application. The Director stated the Applicants must satisfy all three steps of the *RJR-MacDonald* test for the Board to grant a stay.

[22] The Director said the appeal of the Administrative Penalty under PLAR was sufficient to satisfy the first part of the test.

[23] The Director stated evidence of irreparable harm cannot be inferred. The evidence must be clear, not speculative, and must show that irreparable harm will occur without a stay of the Administrative Penalty. The Director submitted the Appellants' claims of irreparable harm are unproven and speculative, and the Appellants have not provided any clear evidence of the specific harm they would suffer without a stay. The Director said there is no evidence to support the existence of any real risk of the harm claimed by the Appellants.

[24] The Director referred to the cross-examination of Mr. King on his affidavit, and submitted Mr. King did not provide documents or clear evidence to support his statement that the payment of the Administrative Penalty would:

(a) be beyond the Appellants' capacity to pay;
(b) disrupt the Appellants' and related businesses' daily activities;
(c) cause irreparable harm to the Appellants;

(d) require financing to pay, which would prevent the Appellants from obtaining finances for related businesses; and

(e) adversely impact the Appellants to the extent that an award of damages could not remedy the harm.

[25] The Director stated that if the Appellants paid the Administrative Penalty now, AEP would provide a written undertaking to pay any accrued interest on the Administrative Penalty from now until the resolution of the appeals, at the rate AEP receives from its financial institution. The payment of interest would occur if the Appellants were successful in the appeal.

[26] The Director submitted the balance of convenience does not favour granting the stay as the harm to the public interest from granting a stay is greater than any potential harm to the Appellants if the stay is refused. The Director stated a stay would negatively impact the Director's and AEP's authority to take enforcement action that is fundamental to the Act's regulatory regime, which outweighs any potential inconvenience the Appellants might suffer without a stay.

[27] The Director stated his regulatory role under the Act satisfies the low bar the Courts set to prove a stay would harm the public interest. The Director quoted the Supreme Court of Canada in *RJR-MacDonald*:

> "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."[5]

[28] The Director submitted public interest could suffer harm when a stay prevents the Director from exercising his statutory authority. The Director said, "There is a greater public interest in safeguarding the Director's ability to effectively enforce environmental legislation such as the *Public Lands Act* than in allowing the Appellants to avoid paying the penalty portion

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5 *RJR-MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 76.

and the proceeds portion of the Administrative Penalty until the issuance of a Ministers Order."[6]

[29] The Director requested the Board decide the Appellants' stay application before proceeding further in the appeal and deny the stay of the Administrative Penalty.

C. Appellants' Rebuttal

[30] The Appellants disputed the Director's assertion that the Appellants have not provided documents or clear evidence in support of their statement that payment of the Administrative Penalty would be beyond their capacity. The Appellants submitted that while nothing in business is ever entirely certain, payment of the Administrative Penalty would most likely have the effect of putting Kingdom into receivership, Mr. King into personal bankruptcy, and put more than forty employees out of work. The Appellants stated that the Director would not suffer consequences of similar magnitude if the Board granted the stay for the duration of the appeal.

[31] The Appellants reiterated that Mr. King is not in a position to obtain financing to pay the Administrative Penalty. The Appellants noted Mr. King, in his answers to the Director's cross-examination questions, offered to provide records related to his evidence to the Board in confidence. The Appellants stated the Director did not request any records and did not ask additional questions.

[32] The Appellants submitted the test in *RJR-MacDonald* is determined on a balance of probabilities, not proof beyond a reasonable doubt. The Appellants noted the Board has gone beyond the strict *RJR-MacDonald* test and considered what is just, equitable, and reasonable for all parties. The Appellants quoted the Board in *JMB Crushing Systems ULC* v. *Director*:

> "Regardless of the outcome of the appeal, the Appellant is deprived of the Penalty amount during the course of the appeal, which may result in economic hardship and possibly irreparable harm, and AEP will have to expend scarce resources and valuable time to process the refund if the appeal is successful. In assessing the balance of convenience, the Board finds it would be in the public interest if neither party had to expend money and resources when it may be unnecessary."[7]

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6 The Director's response submission, January 17, 2020, at page 6.

7 *JMB Crushing Systems ULC* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (1 April 2019), Appeal No. 18-0023-DL1 (A.P.L.A.B.), 2019 APLAB 4, at page 2.

[33] The Appellants submitted that based on the evidence provided by Mr. King, the Appellants had satisfied the test for a stay.

V. ANALYSIS

[34] The Board's authority to grant a stay is found in section 123(1) of the Act, which reads: "The appeal body may, on the application of a party to a proceeding before the appeal body, stay a decision in respect of which a notice of appeal has been submitted."

[35] The Board's test for a stay is based on the Supreme Court of Canada's decision in *RJR-MacDonald*.[8] The four aspects the Board considers with respect to a stay are: (1) whether there is a serious concern; (2) whether the applicant would suffer irreparable harm; (3) the balance of convenience; and (4) the public interest. An applicant for a stay must meet all four conditions for the Board to grant a stay.

[36] The first part of the test is whether there is a serious concern that should be heard by the Board. The courts have indicated the threshold for this question is relatively low. The Appellants and the Director agree the Appellants met the first part of the test.

[37] In the Notice of Appeal, an appellant is required under section 216(1)(e) of PLAR to "set out the grounds on which the appeal is made." Section 213 of PLAR lists the grounds for an appeal. For their appeal, the Appellants' grounds were that the Director, issuing the Administrative Penalty, erred in the determination of a material fact on the face of the record, erred in law, and exceeded the Director's jurisdiction or legal authority. The Board finds the grounds of appeal to be a serious concern for the Board to consider in an appeal. Therefore, the Appellants have satisfied the first part of the test for a stay.

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[8] See: *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 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."

[38] The second part of the test is whether the Appellants will suffer irreparable harm without a stay of the Administrative Penalty. Irreparable harm occurs when the person requesting the stay would be adversely affected to the extent the harm could not be remedied if that person succeeds 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 person cannot be fairly dealt with by the payment of money. 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 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."[10]

The party claiming that financial compensation would be inadequate to remedy the harm must show there is a real risk that harm will occur. It cannot be mere conjecture.[11]

[39] The Appellants claimed they would face bankruptcy resulting in the loss of more than forty jobs if the Board did not grant a stay of the Administrative Penalty. The Director said the Appellants did not provide sufficient evidence to support their claim of financial disaster. The Appellants stated the standard of proof they must meet is a balance of probabilities, not the "beyond a reasonable doubt" standard.

[40] If the Appellants pay the Administrative Penalty and later are successful in the appeal, the Director has offered to return the amount paid by the Appellants with the interest AEP would have received from its own financial institution. While the Board recognized the Director's offer was made in good faith to resolve the Appellants' concerns, it left questions unanswered, such as what is the interest amount the Appellants would receive and does the Treasury Board support the offer? The Board found no evidence the Director had authorization from the Treasury Board for such an undertaking.

[41] The Board notes if the Appellants are ultimately successful in their appeal, section 232(3) of PLAR[12] prevents the Appellants from obtaining costs against AEP and the Director,

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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 Section 232(3) of PLAR provides: "No direction for the payment of costs may be made against the Crown,

and the *Proceedings Against the Crown Act*,[13] restricts civil action for damages against AEP and the Director except in certain circumstances. The Appellants would have virtually no realistic chance of recovering losses if they pay the Administrative Penalty and subsequently succeed in the appeal.

[42] Much of the evidence sought by the Director as proof the Appellants would suffer irreparable harm can only be proven after the fact. The Board finds it unreasonable to require the Appellants to go into bankruptcy to prove irreparable harm. Although the Appellants' evidence must not be speculative and without basis, it is not required to be conclusive or beyond doubt.

[43] The Board, in its Decision Letter, noted if the Appellants pay the Administrative Penalty, they would be deprived of the penalty amount for the duration of the appeal, which could result in economic hardship and irreparable harm. The evidence of the Appellants is sufficient to confirm the Board's initial assessment.

[44] The Board finds it most likely the Appellants would suffer irreparable harm if they were to pay the Administrative Penalty and then succeed in the appeal. The Board finds the Appellants have met the second part of the stay test.

[45] The third part of the *RJR-MacDonald* test is the balance of convenience. For the Appellants to satisfy this part of the test, they must demonstrate that they would suffer greater harm from the refusal of a stay than the Director would suffer if a stay was granted. The Board must weigh the burden the stay would impose on the Director against the benefit the Appellants would receive. Weighing the burden is not strictly a cost-benefit analysis but rather a balancing of significant factors. The effect on the public interest may sway the balance for one party over the other.

[46] The Appellants submitted they could go bankrupt without a stay of the Administrative Penalty, which would result in the loss of employment for more than forty people. The Appellants stated the stay would not prejudice the Director as the stay would be lifted at the conclusion of the appeal. The Director said staying the Administrative Penalty would negatively impact the Director's and AEP's authority to take enforcement action in

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a Minister, a director, an officer or any employee or official of the Government of Alberta."

[13] *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25.

response to contraventions of the Act. The Director submitted it would not be in the public interest if AEP is "constrained" from exercising its statutory authority.

[47] The definition of "public interest" depends on the context it is considered in, but generally, it can be defined as what is in the best interests of the society for which the particular legislation was designed.[14] To determine the public interest in the context of the stay application, the Board must consider the Act and PLAR.

[48] The Board views AEP's regulatory responsibilities under the Act very seriously. The Director has a key role in the regulatory system, but the Act has also made provision for the Board to assume a quasi-judicial function in the regulatory process. Under the Act and PLAR, appellants may appeal certain decisions of the Director to the Board and may request the Board grant a stay of the decision being appealed. As already noted, section 123(1) of the Act states: "The appeal body may, on the application of a party to a proceeding before the appeal body, stay a decision in respect of which a notice of appeal has been submitted." The inclusion in the Act of the right to appeal and the right of an appellant to request a stay of a director's decision indicates the Legislature considered circumstances where it would be in the public interest to grant an appellant a stay of a decision made by a director until an appeal is resolved.

[49] A stay of the Administrative Penalty will not cause damage to public land or the environment, and the Alberta Government will not suffer financially due to a potential delay in collecting the penalty amount. The Board does not see any rational evidence a stay of the Administrative Penalty will "constrain" or harm the Director's or AEP's ability to fulfill their regulatory responsibilities.

[50] The Board finds the burden imposed on the Appellants if the Board were to refuse the stay is far greater than any burden imposed on the Director by granting the stay. The Board finds the balance of convenience favours the Appellants, and it is in the public interest to grant a stay of the Administrative Penalty pending the resolution of the appeal.

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[14] Robert W. Macauly and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada: 2017), at page 1-22.

VI. CONCLUSION

[1] The Board finds the Appellants have met the requirements of the stay test. The Board grants the Appellants' application for a stay of the Administrative Penalty until the Board lifts the stay or until the Minister makes a decision regarding Appeal Nos. PLAB 19-0005-0006.

Dated on March 31, 2020, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Nick Tywoniuk
Board Member

"*original signed by*"
Line Lacasse
Board Member