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ALBERTA  
PUBLIC LANDS APPEAL BOARD  
  
DECISION

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Date of Decision – April 20, 2023

**IN THE MATTER OF** sections 121, 122, 124, of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 228, and 235 of the *Public Lands Administration Regulation*, A.R. 187/2011;

**-and-**

**IN THE MATTER OF** an appeal filed by Syncrude Canada Ltd., with respect to the decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Forestry, Parks and Tourism, to amend a disposition issued under the *Public Lands Act* and the variation under the *Public Lands Act* of a term or condition of a disposition, specifically the dispositions are Surface Material Leases 000002 and 000033.

Cite as: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Forestry, Parks and Tourism* (20 April 2023), Appeal No. 21-0003-ID6 (A.P.L.A.B.), 2023 ABPLAB 6.

**BEFORE:**

Barbara Johnston, Panel Chair and Board Member, and Dr. Nick Tywoniuk, Board Member.\*

**SUBMISSIONS BY:**

**Appellants:** Syncrude Canada Ltd., represented by Mr. Dan Collins, Dentons Canada LLP.

**Director:** Mr. Brendan Hemens, Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Forestry, Parks and Tourism, represented by Mr. Larry Nelson, Alberta Justice.

\* Mr. Gordon McClure, Board Chair and Appeals Coordinator, was unavailable as a member of the Panel for the purposes of this decision.

## EXECUTIVE SUMMARY

Syncrude Canada Ltd. (Syncrude) operates two oil sands mines and an upgrader located on public land in the Northeast area of Alberta. In 1979 and in 2000, the provincial government department responsible for public lands at the time, provided letters to Syncrude that granted an exemption from paying royalties on aggregate extracted from the mines. To claim the exemption Syncrude had to use the aggregate for specific purposes listed in the letters.

In 2019, the Auditor General alleged royalty exemptions to several companies were improperly granted. In response, Alberta Environment and Parks issued invoices to Syncrude for the aggregate Syncrude had previously claimed as exempt from royalties. In 2021, Syncrude filed a Notice of Appeal with the Public Lands Appeal Board (the Board) appealing the removal of the royalty exemptions. In October 2022, Forestry, Parks and Tourism (FPT) replaced Alberta Environment and Parks as the department responsible for public lands and the Syncrude appeal.

The Board set two issues for the hearing of the appeal. FPT requested a third issue be added, which the Board refused. FPT applied to the Court of King's Bench of Alberta for a judicial review of the Board's decision refusing to add the third issue. FPT also applied to the Board to postpone the hearing until the judicial review was completed.

The Board received submissions from Syncrude and FPT on the appropriateness of postponing the hearing. The Board considered the factors in the Board's rules regarding postponement of a hearing, and determined it was not appropriate to postpone the hearing. The Board denied FPT's application.

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## I. INTRODUCTION

[1] This is the preliminary motion decision of the panel (the “Panel”) appointed by the Public Lands Appeal Board (the “Board”) to hear an appeal filed by Syncrude Canada Ltd. (“Syncrude”).

[2] The Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Forestry, Parks and Tourism (the “Director”), filed a preliminary motion with the Board to postpone the hearing for PLAB No. 21-0003 (the “Appeal”) until the completion of a judicial review (the “Judicial Review”).<sup>1</sup> The Director applied to the Court of King’s Bench of Alberta for the Judicial Review of the Board’s decision regarding the issues for the hearing of the Appeal.<sup>2</sup>

[3] The Board determined it would be inappropriate to postpone the Appeal. The Board denies the Director’s preliminary motion.

## II. BACKGROUND

[4] Syncrude is the holder of the following dispositions issued by the predecessors to Forestry, Parks and Tourism (“FTP”) under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”), and the *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”):

- (a) Mineral Surface Lease 352 (“MSL 352”);
- (b) Mineral Surface Lease 973220 (“Aurora MSL”) (MSL 352 and Aurora MSL are collectively, “MSLs”);
- (c) Surface Material Lease 000002 (“SML 02”); and
- (d) Surface Material Lease 000033 (“SML 33”) (SML 02 and SML 33 are collectively the “SMLs”).

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<sup>1</sup> Responsibility for public lands dispositions was transferred to Alberta Forestry, Parks and Tourism from Alberta Environment and Parks, in October 2022.

<sup>2</sup> *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (27 July 2022), Appeal No. 21-0003-ID3 (A.P.L.A.B.), 2022 ABPLAB 6.

[5] Syncrude operates a bitumen mine and upgrader on MSL 352 located at Mildred Lake and a bitumen mine on the Aurora MSL, both of which are north of the urban service area of Fort McMurray, in the Regional Municipality of Wood Buffalo. The MSLs each contain terms and conditions governing Syncrude's use of sand and gravel extracted from the leased area (the "Surface Material Provisions"). The SMLs were issued to Syncrude to regulate the extraction of the aggregates from the MSLs.

[6] In a letter dated March 23, 1979, from Alberta Energy and Natural Resources, FTP's predecessor, exempted Syncrude from paying royalties on aggregates extracted from MSL 352 if those aggregates were used for certain purposes.<sup>3</sup> A letter dated May 31, 2000, to Syncrude from Alberta Environment, which was also a predecessor of FTP, likewise exempted Syncrude from paying certain royalties for aggregates extracted from the Aurora MSL (the exemptions are collectively, "Royalty Exemptions").<sup>4</sup>

[7] In November 2019, the Auditor General released a report that alleged royalty exemptions were improperly granted to various energy companies for the use of aggregate extracted from oil sands mine sites.<sup>5</sup>

[8] In response to the Auditor General's report, AEP issued several invoices to Syncrude between February and June 2021 (the "Invoices"). The Invoices did not include the Royalty Exemptions in the calculation of royalties owed for aggregates taken from the SMLs in 2019 and 2020.

[9] Throughout early 2021, AEP and Syncrude discussed the Royalty Exemptions and their applicability to the SMLs. On May 26, 2021, the Director wrote to Syncrude and advised of the requirements for claiming royalty exemptions for SMLs, reaffirmed the Director's

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<sup>3</sup> Director's Record, at Tab 25.

<sup>4</sup> Director's Record, at Tab 26.

<sup>5</sup> *Management of Sand and Gravel Follow-up*, Report of the Auditor General, November 2019, Director's File, at Tab 31, online: <<https://www.AG.ab.ca/reports/alberta-environment-and-parks-management-of-sand-and-gravel-pits-followup-nov-2019>>.

position that the amounts payable in the Invoices were correct, and confirmed a royalty exemption was not applicable to the SMLs.

[10] On June 14, 2021, Syncrude filed a Notice of Appeal (the “Appeal”) with the Board, appealing the Director’s decision requiring payment of the invoices (the “Decision”).

[11] The Board has issued seven written decisions since the Appeal was filed; six decisions on preliminary motions from the Director and Syncrude (the “Parties”), and one decision that was required to extend the time for the Appeal to be resolved. For each decision the Board requested and received written submissions from the Parties. The decisions are listed below:

1. The Director applied to have the Notice of Appeal dismissed for allegedly being filed late. On September 3, 2021, the Board refused the Director’s application and found Syncrude filed the Notice of Appeal within the legislated timelines.<sup>6</sup>
2. Syncrude applied for a stay of the Director’s Decision. On July 9, 2021, the Board granted an interim stay pending the outcome of the Director’s application to dismiss the Notice of Appeal.
2. The Director applied to dismiss the Appeal for not being properly before the Board and not within the Board’s jurisdiction. On January 14, 2022, the Board denied the Director’s application and found the Invoices varied the terms and conditions of the SMLs, which was an appealable matter under PLAR, therefore, the appeal was properly before the Board and within the Board’s jurisdiction.<sup>7</sup>
3. On February 17, 2022, the Appeals Co-ordinator advised the Parties<sup>8</sup> it was necessary to extend the Appeal past the one-year timeframe prescribed in section 236(1)(b) of PLAR.<sup>9</sup>

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<sup>6</sup> See: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (3 September 2021), Appeal No. 21-0003-ID1 (A.P.L.A.B.), 2021 ABPLAB 18.

<sup>7</sup> See: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (14 January 2022), Appeal No. 21-0003-ID2 (A.P.L.A.B.), 2022 ABPLAB 1.

<sup>8</sup> See: Public Lands Appeal Board’s letter, February 17, 2022, at page 4.

<sup>9</sup> Section 236(1)(b) of PLAR states:

“An order under section 124 of the Act must be made in respect of an appeal ...

- (b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal...”

4. The Director requested the Board add a third issue to the hearing of whether the Director's Decision amended the SMLs (the "Variation Question"). On May 2, 2022, the Board's Appeals Co-ordinator agreed to the request by the Director to add the third issue to the hearing.<sup>10</sup>
5. Syncrude requested the Board revert to the two original issues for the hearing. On July 27, 2022, the Panel granted Syncrude's request and deleted the third issue for the hearing. The Panel found that once appointed, only the Panel has jurisdiction to set the issues for the hearing.<sup>11</sup>
6. As the interim stay had expired upon the Board deciding on the Director's application to dismiss the Notice of Appeal, Syncrude applied for a stay of the Director's Decision. On August 24, 2022, the Board granted Syncrude's request to stay the Director's Decision.<sup>12</sup>
7. Syncrude applied to have an affidavit and exhibits admitted as evidence in the hearing. On December 3, 2022, the Board decided to:
  - (a) admit the affidavit and exhibits as evidence in the hearing;
  - (b) provide an opportunity for the Director to examine Syncrude on the affidavit and exhibits by written questions;
  - (c) determine the weight to assign the affidavit and exhibits as part of its deliberations in the hearing; and
  - (d) advise the Parties they may address the question of weight in their written submissions for the hearing.<sup>13</sup>

[12] On October 5, 2022, the Director applied to the Court of King's Bench of Alberta for the Judicial Review of the Board's July 27, 2022, decision on issues for the hearing. On

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<sup>10</sup> Public Lands Appeal Board's letter, May 4, 2022, at page 2.

<sup>11</sup> See: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (27 July 2022), Appeal No. 21-0003-ID3 (A.P.L.A.B.), 2022 ABPLAB 6.

<sup>12</sup> See: *Stay Decision: Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (24 August 2022), Appeal No. 21-0003-ID4 (A.P.L.A.B.), 2022 ABPLAB 9.

<sup>13</sup> See: *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Forestry, Parks and Tourism* (13 December 2022), Appeal No. 21-0003-ID5 (A.P.L.A.B.), 2022 ABPLAB 12.



October 12, 2022, the Director requested the Board postpone the written hearing of the Appeal until after the Judicial Review is complete.<sup>14</sup>

[13] The Board set a schedule for the Parties to provide written submissions on the Director's request, and received the submissions from December 9, 2022, to January 9, 2023.

### **III. ISSUES**

[14] The matter before the Board is whether it is appropriate to grant a postponement of the Appeal proceedings until the Judicial Review is completed.

### **IV. SUBMISSIONS**

[15] The Parties provided the Board with written submissions on the request for a postponement of the proceedings, which the Board has summarized as follows.

#### **A. Director**

[16] The Director noted the Board's Rules<sup>15</sup> permit a party to request a postponement of a hearing. The Director referred to four of the eight factors listed in the Rules that the Board considers when determining whether to grant a postponement:

- (a) the degree and likelihood of inconvenience, prejudice or cost to the other parties if the request is granted;
- (b) the degree and likelihood of inconvenience, prejudice or cost to the requester if the request is denied;

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<sup>14</sup> Syncrude Letter to the Board, October 12, 2022.

<sup>15</sup> The Board notes the Director and Syncrude referenced Rule 16 of the "Revised Draft Appeals Procedure for Complex Appeals" (the "Draft Rules"), a draft of the Board's rules not in circulation or used by the Board. The Board's official rules are the "Interim Appeals Procedure Rules for Complex Appeals" (the "Rules"). Rule 18 of the Rules uses the same wording as Rule 16 of the Draft Rules, with a few minor exceptions, which are irrelevant to the Director's application for a postponement of the hearing. In this Decision, The Board will substitute Rule 18 of the Rules wherever the Director refers to Rule 16 of the Draft Rules. Because the wording is identical the Board did not identify any material difference in what the Parties were citing.

- (c) the timelines for hearings and decisions set out in the Public Lands Administration Regulation; and
- (d) any other factor the Board or panel deems relevant.

[17] The Director submitted that if the Board granted the postponement, Syncrude would not suffer unreasonable inconvenience, prejudice, or cost. The Director noted the Board previously granted a stay of the Director's Decision, which remains in effect until the Minister makes a decision on the Appeal or until the Board removes the stay. The Director stated the stay would continue during the Judicial Review and there would be no requirement for Syncrude to pay the invoices or the interest accrued.

[18] The Director submitted he would suffer irreparable harm if the Board did not grant the postponement. The Director stated:

“At this point, there is uncertainty on which issues will be considered at the Hearing. This uncertainty will not be resolved until the Judicial Review is complete. If the Judicial Review is successful, the issues to be considered at the Hearing will change. If the Hearing had already proceeded, the matter would have to be reheard by the Board and resubmitted to the Minister for a second decision. This would result in the first Hearing being a waste of effort. The Director will have spent a significant amount of time and resources to complete duplicative hearings on the same matter.”<sup>16</sup>

[19] The Director said that, as the Board already extended the timelines for the one-year period for the hearing, there is no requirement in the legislation to conclude the hearing before the Judicial Review is completed.

[20] The Director submitted the Board should consider the following factors to be relevant in its decision:

- (a) if the hearing concludes before the Judicial Review, and the Director is successful in the Judicial Review, then the Board would have to complete a second set of recommendations for the Minister, who would have to review the file and recommendations again before issuing a second decision; and

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<sup>16</sup> Director's Submission, December 9, 2022, at page 3.

- (b) if the Minister issues a second decision that is different from the first decision, there would be a potential for confusion and inconsistency, which the Courts have cautioned against.<sup>17</sup>

**B. Syncrude**

[21] Syncrude noted the Board controls its own process and is not required to postpone the hearing. Syncrude stated that the central question for the Board to determine is, "... whether it is just and equitable in the circumstances of this case for the Board to exercise its discretion to grant a stay of the Appeal."<sup>18</sup> Syncrude noted the Court of King's Bench is scheduled to hear the Judicial Review on February 29, 2024, more than 18 months from when the Judicial Review was filed. Syncrude submitted the Director had "... not provided any credible justification for the extraordinary disruption to the Board's hearing process that would result from granting the stay..."<sup>19</sup> and, therefore, the Board should deny the request for postponement of the hearing. Syncrude stated:

"... the premature nature of the Judicial Review Application is sufficient for the Board to exercise its discretion to deny the stay request, without the need to assess whether the Director has satisfied the applicable test for granting a stay."<sup>20</sup>

[22] Syncrude submitted the Director's Judicial Review application is premature and an abuse of process, noting that the Federal Court of Appeal stated in *Canada (Border Services Agency v. C.B. Powell Limited*: "The normal rule is that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted."<sup>21</sup> Syncrude also quoted the Federal Court as follows:

"Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

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<sup>17</sup> The Director referred to *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at paragraph 38; *Skehar v. Bonavista Energy Corporation*, 2022 ABQB 136, paragraphs 18 and 26; and *Alberta Treasury Branches v. Leahy*, 2000 ABCA 61, at paragraph 24.

<sup>18</sup> Syncrude's Response Submission, December 23, 2022, at page 1.

<sup>19</sup> Syncrude's Response Submission, December 23, 2022, at page 1.

<sup>20</sup> Syncrude's Response Submission, December 23, 2022, at page 2.

<sup>21</sup> *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, at paragraph 30.

This prevents fragmentation of the administrative process and piecemeal court proceedings, eliminates the large costs and delays associated with premature forays to court and avoids the waste associated with hearing an interlocutory judicial review when the applicant for judicial review may succeed at the end of the administrative process anyway.”<sup>22</sup>

[23] Syncrude also quoted the Court in *Al-Ghamdi v. Alberta*, where the Court stated: “[i]t is an abuse of process to pursue judicial proceedings without exhausting the administrative regime.”<sup>23</sup>

[24] Syncrude submitted there must be “exceptional circumstances” to justify court intervention before the completion of the administrative process. Syncrude referred to the Court’s decision in *Al-Naami v. College of Physicians and Surgeons of Alberta*,<sup>24</sup> where the Court found “exceptional circumstances” existed in a situation where a physician was unable to practice medicine due to the College’s interlocutory decisions and would suffer serious financial hardship. The Court found the “exceptional circumstances” justified bifurcating the administrative process.

[25] Syncrude argued the Director provided no “exceptional circumstances” to justify the Director’s premature application to the Court. Syncrude stated:

“The Director’s Submission did not address the premature nature of the Judicial Review Application, nor did it provide any ‘extraordinary circumstances’ that could justify early recourse to the Court. The Director simply does not like a decision made by the Board in the ordinary course that resulted from an interlocutory motion that the Director introduced.”<sup>25</sup>

[26] Alternatively, Syncrude submitted the Board had broad discretion to consider the Supreme Court of Canada decision in *RJR-MacDonald v. Canada* (“*RJR-MacDonald*”)<sup>26</sup> when

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<sup>22</sup> *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, at paragraphs 31 to 32.

<sup>23</sup> *Al-Ghamdi v. Alberta*, 2017 ABQB 684, at paragraph 126.

<sup>24</sup> *Al-Naami v. College of Physicians and Surgeons of Alberta*, 2021 ABQB 549.

<sup>25</sup> Syncrude’s Response Submission, December 23, 2022, at page 4.

<sup>26</sup> *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 SCR 199.

determining whether to postpone the Appeal. Syncrude noted the *RJR-MacDonald* test requires the Director to meet the three-part test:

- “1. there is a serious issue to be tried;
2. the Director will suffer irreparable harm if the stay is not granted; and
3. the balance of convenience favours granting a stay.”<sup>27</sup>

Syncrude argued the Director failed in all three aspects of the test.

[27] The first part of the *RJR-MacDonald* test requires the applicant for a stay to prove there is a serious issue requiring a stay. Syncrude submitted that, as the Judicial Review is premature, it is an abuse of process and, therefore, there is no serious issue justifying a stay of proceedings.

[28] For the second part of the *RJR-MacDonald* test, Syncrude noted the Director alleged irreparable harm from the potential wasted effort and duplicative hearings on the same matter. Syncrude said a rehearing following a judicial review is a common part of the process and is not irreparable harm. Syncrude stated:

“... the practical result of refusing the Director's stay request would simply be to allow the Board to discharge its mandate by completing the administrative process prescribed by the *Public Lands Act*. If necessary, following the conclusion of the Appeal, the Director would have the opportunity to apply for judicial review and could raise any concerns about the Issues List Decision at that time. That approach would allow the Director's concerns about the Issues List Decision to be addressed. It would not result in any ‘duplicative hearings’ or ‘wasted effort.’”<sup>28</sup>

[29] Syncrude noted the objective of the Judicial Review is to add the Variation Question to the issues for the hearing. Syncrude stated: “If the Director is forced to follow the proper process for seeking judicial review and is ultimately successful, the remedy would not be an entirely new hearing on all issues...”<sup>29</sup> and could be decided without a rehearing. The Board could receive submissions on the Variation Question and revise its recommendations

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<sup>27</sup> Syncrude's Response Submission, December 23, 2022, at page 2.

<sup>28</sup> Syncrude's Response Submission, December 23, 2022, at page 5.

accordingly, with the Minister making a new determination based on the Board's revised report and recommendations. "Any duplication in this process would be minimal and does not constitute irreparable harm."<sup>30</sup>

[30] Syncrude submitted staying the Appeal pending the outcome of the Judicial Review does not increase efficiency, but rather increases the risk of wasted resources and unnecessary litigation. Syncrude stated:

"Granting a stay now and allowing the Judicial Review Application to be decided would not preclude further applications for judicial review following the conclusion of the Appeal, resulting in the Parties and the Board being subjected to multiple judicial review proceedings respecting the same administrative process. That is the precise inefficiency and waste that the rule against premature judicial review guards against. Efficiency considerations militate strongly in favor of denying the stay request."<sup>31</sup>

[31] The third part of the *RJR-MacDonald* test requires the Director to demonstrate the Director would suffer greater harm if a stay were not granted than Syncrude would if a stay was granted. Syncrude noted the Director implied that, because the Appeals Co-ordinator extended the Appeal past the one-year deadline, that the Board does not need to be concerned about completing the proceedings in a timely manner. Syncrude argued providing an expeditious and inexpensive appeal process is a part of the Board's mandate. Syncrude stated: "The decision to extend the appeal process beyond the 1-year statutory timeline does not mean that the Board should abandon efforts to complete the Appeal expeditiously."<sup>32</sup>

[32] Syncrude submitted the balance of convenience favours them for the following reasons:

1. Granting the stay would delay the Appeal to mid to late 2024, which would be a significant disruption of the Board's appeal process and increase the cost of participating in the Appeal.

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<sup>29</sup> Syncrude's Response Submission, December 23, 2022, at page 5.

<sup>30</sup> Syncrude's Response Submission, December 23, 2022, at page 5.

<sup>31</sup> Syncrude's Response Submission, December 23, 2022, at page 5.

<sup>32</sup> Syncrude's Response Submission, December 23, 2022, at page 6.

2. The Director's Decision created uncertainty for Syncrude regarding its dispositions, which would continue if the Appeal were stayed.
3. Syncrude is uncertain whether it can rely on royalty exemptions before 2019 due to an audit conducted by FTP which is on hold pending the outcome of the Appeal. Uncertainty about whether the Director can retroactively vary the terms of Syncrude's dispositions to recover amounts covered by the royalty exemptions "constitutes substantial inconvenience."<sup>33</sup>
4. FTP staff advised Syncrude that SML 000002 would not be renewed because of the Appeal. The SML expired and Syncrude is now an overholding tenant. Syncrude stated: "Granting a stay and allowing this situation to continue for the next 18 months while the Director pursues the premature Judicial Review Application is unreasonable."<sup>34</sup>

[33] Syncrude submitted the significant inconvenience and prejudice to Syncrude and the disruption to the Board's process compared to the lack of prejudice or inconvenience to the Director favours denying the stay request.

[34] Syncrude noted the Director expressed concern that if the Board refused to stay its process the result could be inconsistent decisions. Syncrude stated:

"The premature application for judicial review means that, without a stay, the Director would be unable to have a final decision of the Minister set aside, even if successful on judicial review. The Director is therefore raising concern about how a hypothetical decision by the Court to set aside the Issues List Decision would affect the Board's report and recommendation and the Minister's final decision."<sup>35</sup>

[35] Syncrude submitted the Director's concern is "... the result of the Director's choice to pursue a premature application for judicial review of an interlocutory decision."<sup>36</sup> Syncrude said the Director could resolve his own concern by waiting until the Appeal's conclusion before deciding whether to seek relief from the Court. Syncrude stated: "It is not

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<sup>33</sup> Syncrude's Response Submission, December 23, 2022, at page 7.

<sup>34</sup> Syncrude's Response Submission, December 23, 2022, at page 7.

<sup>35</sup> Syncrude's Response Submission, December 23, 2022, at page 7.

<sup>36</sup> Syncrude's Response Submission, December 23, 2022, at page 7.

reasonable for the Director to pursue a course of action which creates confusion and then to rely on that very confusion to seek a stay of the Appeal.”<sup>37</sup>

**C. Director’s Rebuttal**

[36] The Director submitted Syncrude was incorrect to characterize the Director’s application for a postponement as injunctive relief. The Director noted the Act specified the Board’s jurisdiction for granting injunctive relief as staying a “... decision in respect of which a notice of appeal has been submitted.”<sup>38</sup> Therefore, the Director argued the Board should not apply *RJR-MacDonald* test to the Director’s application, but rather the Board should consider the factors provided in the Board’s Rules.

[37] The Director noted the question of whether the Judicial Review is premature is not something the Board may determine, “as that is clearly within the court’s jurisdiction and would be considered as part of the Judicial Review.”<sup>39</sup>

[38] The Director submitted Syncrude would “... face the same uncertainty from even if the postponement is not granted, since the Board’s decision does not affect the Judicial Review.”<sup>40</sup> The Director argued Syncrude “... is not paying any royalties or interest on the royalties and therefore is not facing any unreasonable prejudice while the Hearing is postponed.”<sup>41</sup>

**V. ANALYSIS**

[39] The Judicial Review is a matter before the Court of King’s Bench of Alberta. Whether the Judicial Review is premature is not for the Board to determine.

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<sup>37</sup> Syncrude’s Response Submission, December 23, 2022, at page 7.

<sup>38</sup> Section 123(1) of the *Public Lands Act*.

<sup>39</sup> Director’s Rebuttal Submission, January 9, 2023, at page 2.

<sup>40</sup> Director’s Rebuttal Submission, January 9, 2023, at page 2.

<sup>41</sup> Director’s Rebuttal Submission, January 9, 2023, at page 2.



[40] The Board has a responsibility to conduct fair and impartial hearings of appeals under the Act and PLAR, in an efficient and expeditious manner, and make the best possible recommendations to the Minister. Like similar tribunals, the Board controls its own procedures within the principles of procedural fairness and the bounds set by the governing legislation, in the Board's case, the Act and PLAR. Section 210(2) of PLAR states:

“The appeals co-ordinator may establish rules respecting procedures for the hearing of appeals by an appeal body and for mediation processes under section 226.”

[41] The Board agrees with the Director that the proper test to apply to the postponement request is Rule 18.2 of the Board's Rules. Rule 18.2 sets out factors the Board will consider when determining a postponement application (the “Postponement Test”):

“The Board will consider the following factors as relevant to deciding postponement requests:

- (a) The degree and likelihood of inconvenience, prejudice or cost to other persons if the request is granted,
- (b) The degree and likelihood of inconvenience, prejudice or cost to the applicant, if the request is denied,
- (c) The number of persons affected by the delay,
- (d) The likelihood of unreasonable disruption to the Board's schedule,
- (e) Where the request is based on relevant pending Board or Court decisions
  - (i) Whether the decisions are expected within 30 days, and
  - (ii) Whether the relevant proceedings have been pursued expeditiously,
- (f) Legislated timelines for hearings and decisions; and
- (g) Any other factor the Board deems relevant.”

The Board will consider each of the above factors in making its decision regarding the Director's application to postpone the hearing.

[42] The Board notes Syncrude used the *RJR-MacDonald* test in its submissions. Although the *RJR-MacDonald* test is intended for injunctive relief, the Board finds the test considers some of the same factors as the Board's Postponement Test. The Board is not bound

by *RJR-MacDonald* in deciding on a postponement, but where *RJR-MacDonald*'s factors are in harmony with the Postponement Test, the Board will consider Syncrude's submissions as applicable to the Postponement Test.

**(a) The degree and likelihood of inconvenience, prejudice, or cost to other persons if the request is granted.**

[43] If the Board postpones the hearing, Syncrude submitted it may suffer continued uncertainty regarding the SMLs. Syncrude stated it became an overholding tenant on SML 02 when FTP refused to renew it because of the Appeal. The Board notes that under section 20(3) of PLAR an overholding tenant has fewer rights than a leaseholder and could be subject to enforcement actions, disposal of chattels and improvements, or have its interest in the land offered for sale by public tender or auction. Alternatively, the legislation allows the Director to issue a formal disposition to replace the expired SML.<sup>42</sup> The Board finds the uncertainty faced by Syncrude as an overholding tenant would be prolonged by a postponement of the hearing.

[44] Syncrude submitted that uncertainty exists in the unresolved question of whether Syncrude will have to pay the Invoices and how far retroactively the Director will seek to collect payment if Syncrude is unsuccessful in the Appeal. The Director dismissed Syncrude's argument, stating that even if the hearing is not postponed Syncrude will face the same uncertainty as the Board's decision does not affect the Judicial Review.

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<sup>42</sup> Section 20(3) of PLAR states:

“Where a disposition expires without being renewed and the former holder of the disposition does not vacate the subject land, the former holder is deemed to be an overholding tenant on a month-to-month basis in respect of the subject land, and the director may do one or more of the following as the director considers appropriate in the circumstances:

- (a) take one or more enforcement actions in respect of the subject land or any activity on it;
- (b) issue a formal disposition to the holder of the expired disposition in place of the expired disposition, whether or not an application has been made for the formal disposition;
- (c) issue an authorization to the holder of the expired disposition to carry out any work on the subject land that the director considers necessary, whether or not an application has been made for the authorization;
- (d) dispose of chattels and improvements in accordance with section 62 of the Act;
- (e) direct that any interest of the holder in the subject land be offered for sale by public tender or auction.”

[45] The Board does not control or influence the Judicial Review process and cannot base its postponement decision on speculation regarding the Judicial Review. The Board finds the overholding tenancy status of Syncrude's SML renewals and the potential retroactivity of FTP's collection actions, create uncertainty for Syncrude. The Board finds uncertainty for a business operation, such as Syncrude, is a significant hindrance for its financial planning and operations. The Board finds there would be a high degree and likelihood of inconvenience, prejudice, or cost for Syncrude if the Board postponed the hearing.

**(b) The degree and likelihood of inconvenience, prejudice or cost to the applicant, if the request is denied.**

[46] The Director submitted the uncertainty on the issues for the hearing would cause irreparable harm if the Director was successful in the Judicial Review. In such a situation, the Director said the Board would have to rehear the matter and provide a new report and recommendations to the Minister, resulting in a waste of resources. Syncrude disagreed that the Board would have to rehear the matter, noting that the Variation Question does not impact the Board's findings on the other issues for the hearing and if the Court found in favour of the Director in the Judicial Review the Board could consider the Variation Question separately without requiring a rehearing of the entire appeal. Syncrude submitted it is not uncommon for a judicial review or any appeal of a tribunal decision to result in a partial rehearing or reconsideration of a decision.

[47] The Board finds it would not be necessary to hold a full rehearing of the appeal should the Judicial Review be decided in the Director's favour. As suggested by Syncrude, the Board could invite the Parties to make written submissions on the Variation Question if needed. The Board could consider the matter and determine its impact, if any, on the Board's Report and Recommendations to the Minister. Regardless of the Board's findings, the Board could issue a focused Report and Recommendations addressing the matter for the Minister's consideration.

[48] The Board notes section 125 of the Act provides the Board "may reconsider, vary or revoke any report made by it." The Board has previously found this section refers to the Board's ability to reconsider the Report and Recommendations the Board provides to the

Minister at the conclusion of a hearing.<sup>43</sup> The Board finds the legislation permits the Board to reconsider its Report and Recommendations after the Minister has issued a Ministerial Order regarding an appeal.

[49] The Board finds there is nothing extraordinary about the Appeal that would warrant a postponement to avoid a potential “rehearing” of the Appeal when such a procedure was already anticipated in the legislation. The Director would be no more inconvenienced by a “rehearing” of the Appeal than by a reconsideration of any other appeal before the Board. It is reasonable for the Board to assume the Legislature considered the implications of a reconsideration and determined the use of resources in a reconsideration were appropriate. If, as a result of the Judicial Review, the Court were to order the Board to consider again the Variation Question, the Board would likely follow a similar process and proceed as it would for a reconsideration of its Report and Recommendations.

[50] The Board finds the Director’s concerns that the Director would be inconvenienced or prejudiced by the Board having to hold another hearing are unfounded for the following reasons:

- (a) there are alternatives that would not require a full rehearing; and
- (b) the legislation already accepts and provides for a process for the Board to reconsider its Report and Recommendations to the Minister, which would be a similar process if the Director were successful in the Judicial Review.

[51] The Board finds the Director has not made the case that if the postponement was denied the Director would suffer significant inconvenience, prejudice, or cost.

**(c) The number of persons affected by the delay.**

[52] The Parties did not address this factor with any substantial analysis. The Board finds there is no reason to consider this matter or assign it any significant weight.

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<sup>43</sup> *Syncrude v. Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (27 July 2022), Appeal No. 21-0003-ID3(A.P.L.A.B.), 2022 ABPLAB 6, at paragraph 26.

**(d) The likelihood of unreasonable disruption to the Board's schedule.**

[53] The Board's interpretation of the legislation indicates the Legislature intended for the Board to consider appeals as expeditiously and cost effectively as possible. The Board schedules existing appeals in a purposeful manner that allows it to accomplish this responsibility. Section 236(1)(b) of PLAR<sup>44</sup> provides for one year from the day a Notice of Appeal is served on the Board for the Minister to issue an order under section 124 of the Act.<sup>45</sup> During this one-year period, the Board typically follows certain steps to ensure procedural fairness and efficiency in the appeal process. The Board:

- (a) determines the Board's jurisdiction to hear the appeal;
- (b) requests the Department's Record and distributes it to the parties in the appeal;
- (c) considers and decides any preliminary motions;
- (d) schedules a mediation meeting if appropriate;
- (e) provides a schedule for submissions on the issues of the appeal for a hearing if the mediation does not resolve the appeal;
- (f) holds a hearing of the appeal; and
- (g) after the conclusion of the hearing, provides its Report and Recommendations to the Minister.

The Board's appeal process can be completed within the one-year period, provided there are not unforeseen disruptions that affect the Board or the parties.

[54] The longer the Appeal takes to resolve the more it impinges on the scheduling and processing of other appeals. The Board, the panel members, and the parties, would have to keep dates open in case a rehearing is required. Depending on what the Court may order, the Board

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<sup>44</sup> Section 236(1)(b) of PLAR states:

"An order under section 124 of the Act must be made in respect of an appeal ...

(b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal..."

<sup>45</sup> Section 124(3) of the Act provides:

"On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

may have to reschedule other appeals, disrupting the Board and those parties in the other appeals. With no firm dates for the Court's decision on the Judicial Review, and no way of knowing the details of the Court's decision, the Board finds granting the postponement would cause a significant and unreasonable disruption to the Board's schedule.

**(e) Where the request is based on relevant pending Board or Court decisions:**

- (i) Whether the decisions are expected within 30 days, and**
- (ii) Whether the relevant proceedings have been pursued expeditiously.**

[55] The 30-day period indicated in the Rules for decisions to be issued is a guideline for what the Board would find acceptable for a postponement. The Judicial Review will not be heard until February 29, 2024, well beyond the 30 days envisioned in Rule 18. The Court will likely require time to make its decision, therefore, the Judicial Review may not be resolved for some time after February 29, 2024.

[56] On the question of whether the relevant proceedings have been pursued expeditiously, the Board notes it made the decision on the issues for the hearing on July 27, 2022. The Director filed for the Judicial Review on October 5, 2022, 70 days after the Board made its decision. The Board finds the Director did not pursue the Judicial Review in an expedited manner.

**(f) Legislated timelines for hearings and decisions.**

[57] As noted previously, section 236(1)(b) of PLAR states:

“An order under section 124 of the Act must be made in respect of an appeal ...

- (b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal...”<sup>46</sup>**

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<sup>46</sup> The Appeals Co-ordinator determined the Appeal was a “complex” appeal under section 209(e)(ii), which states:

“‘complex appeal’ means

[58] The Appeals Co-ordinator has the legislative authority to extend the one-year period if appropriate, as was done in this Appeal. However, the Board's interpretation of its governing legislation indicates the intent is for appeals to proceed in an efficient and expeditious manner, and extensions to the one-year period are to be granted only in extraordinary circumstances.

[59] Even when the Appeals Co-ordinator extends the one-year period, the wording of Section 236(4) does not relieve the Board of its responsibility to resolve the Appeal efficiently. Section 236(4) states:

“Despite sections 221(1)(a) and (b) and 233(3), an appeal to which subsection (3) applies must proceed or be continued under this Part as if the applicable time period under subsection (1)(a), (b) or (c) had not expired.”

[Emphasis is the Board's.]

[60] The Board interprets section 236(4) to mean that, when the Appeals Co-ordinator extends the one-year timeline, the Board must continue with the appeal process as intended in the legislation, which includes the responsibility to proceed efficiently and expeditiously. The tone set throughout the sections of the Act and PLAR that address the appeals process is one of efficiency and timeliness. The Board will only grant a postponement where it does not interfere with the legislative intent of an expeditious process.

[61] The Board finds postponing the Appeal for over a year is not in keeping with the legislative timelines for hearings and decisions.

**(g) Any other factor the Board deems relevant.**

[62] As mentioned earlier, the Board considered Syncrude's submissions on the *RJR-MacDonald* test where applicable. The Board found no correlation in the Rules with the first part of the *RJR-MacDonald* test, but the second part of the test, whether the Director will suffer irreparable harm if the Postponement is not granted, and the third part of the test, the balance of

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any other appeal that, in the opinion of the appeals co-ordinator, should be treated under this Part as a complex appeal...”

convenience, correlates with part (a) and (b) of the Postponement Test. As the Board already addressed those aspects of the Postponement Test, no further comment is required.

**VI. DECISION**

[63] The Board finds its governing legislation requires the Board to proceed with the Appeal unless there are compelling reasons for a postponement. After considering the submissions of the Parties, the legislation, and the Board's Rules, the Board finds the Director has not provided compelling reasons for the Board to postpone the hearing for over a year while the Director pursues a Judicial Review.

[64] The Board denies the Director's request to postpone the hearing.

Dated on April 20, 2023, at Edmonton, Alberta.

**Barbara Johnston**

Signed with ConsignO Cloud (2023/04/21)  
Verify with [verifio.com](https://www.verifio.com) or Adobe Reader.

**Barbara Johnston**  
Panel Chair and Board Member

**Nick Tywoniuk**

Signed with ConsignO Cloud (2023/04/26)  
Verify with [verifio.com](https://www.verifio.com) or Adobe Reader.

**Dr. Nick Tywoniuk**  
Board Member