ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – February 15, 2019

IN THE MATTER OF sections 121, 123, and 125 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 216, 217, 219, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Kath Rothwell with respect to the decision of the Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, to issue Temporary Field Authorization TFA 184940, to Scenic Sands Community Association.

Cite as: Stay Decision: *Rothwell* v. *Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Scenic Sands Community Association* (15 February 2019), Appeal No. 18-0014-D (A.P.L.A.B.).

BEFORE:	Ms. Marian Fluker, Acting Board Chair.
SUBMISSIONS BY:	
Appellant:	Ms. Kath Rothwell.
Temporary Field Authorization Holder:	Scenic Sands Community Association.
Director:	Mr. Robert Shorten, Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks, represented by Ms. Aurelia Nicholls, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

The Scenic Sands subdivision is located on the shores of Buffalo Lake in the County of Stettler. The Scenic Sands Community Association (SSCA) represents some of the lot owners in the subdivision.

In 2018, Alberta Environment and Parks (AEP) issued a Temporary Field Authorization (the "TFA") to the SSCA for widening and repair of walking trails, and the installation of a gate at the entrance to the Right of Way (ROW).

Ms. Kath Rothwell appealed AEP's decision and applied for a stay of the TFA until the Board heard her appeal. Ms. Rothwell said she was directly affected by the TFA and alleged the TFA had not expired and further work could damage environmentally sensitive shoreline habitat and impact her privacy and property values. The SSCA opposed the stay application, stating Ms. Rothwell was not directly and adversely affected by the issuance of the TFA, and the work authorized under the TFA had already been completed. AEP took no position regarding the stay.

After reviewing the written submissions of the participants, the Board determined Ms. Rothwell was directly and adversely affected by the issuance of the TFA. The Board determined the matter was not moot as the TFA does not expire until August 29, 2019, and further work could be done on the ROW. The Board also found Ms. Rothwell met the test for a stay and, therefore, the Board granted a stay of the TFA.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding the preliminary motion by Ms. Kath Rothwell (the "Appellant") requesting the Board grant a stay of Temporary Field Authorization TFA 184940 (the "TFA"), issued by the Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (the "Director"), to the Scenic Sands Community Association (the "SSCA"), for shoreline modification.

II. BACKGROUND

[2] The Scenic Sands subdivision is located on the shores of Buffalo Lake in the County of Stettler. The SSCA was established in 1996 to represent lot owners in the subdivision. The SSCA is the holder of a Licence of Occupation for the beach area along Buffalo Lake adjacent to the subdivision (the "Right of Way" or "ROW").

[3] On May 23, 2018, Senior Managers of Alberta Environment and Parks and the SSCA agreed the TFA would be issued for "interim maintenance work," which consisted of "replacing the current access gate with a better quality gate, repairing berm ruts at the gate location, using lake rakings to fill in low areas on main trails, and widening a narrow section of the walking trail deemed an emergency hazard."[1]

[4] On August 30, 2018, the Director issued the TFA, which included standard terms and conditions, along with a map identifying:

1. community access paths;
2. 50 meter area to be mulched and levelled;
3. area of ruts to be filled with sand; and
4. low spots to be filled with debris.

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1 Merit Rationale, Director's Record at Tab 39.

[5] On September 28, 2018, the Appellant filed a Notice of Appeal with the Board, and requested the Board grant a stay of the TFA. The Board granted an interim stay until the Board could receive submissions from the participants and make a decision on the stay application. The Board received written submissions from the Appellant, the SCCA, and the Director (collectively, the "Participants") regarding the stay application and the question of whether the Appellant is directly and adversely affected by the Director's decision to issue the TFA.

[6] The Board requested the Participants answer the following questions:

1. What are the serious concerns of the Appellant that should be heard by the Board?
2. Would the Appellant suffer irreparable harm if the stay is refused?
3. Would the Appellant suffer greater harm if the stay was refused pending a decision of the Board, than Scenic Sands Community Association would suffer if the Board granted the stay?
4. Would the overall public interest warrant a stay?

[7] The Board also asked the Participants to answer the following question:

> "Is Ms. Rothwell a person who is adversely affected by the TFA? In other words, how are the environmental impacts under the TFA directly and adversely affecting Ms. Rothwell?"

This question was asked because the Board can only grant a stay where it is requested by a party to the appeal. In order to be a party, an appellant must be directly and adversely affected by the Director's decision.

III. SUBMISSIONS

A. Appellant

[8] The Appellant submitted there were serious issues the Board should hear. The Appellant stated the TFA facilitated access for unauthorized ATVs and other vehicles along the ROW by authorizing the installation of a gate, widening the access trail, and repairing the berm ruts. The Appellant said vehicular access was a problem in the past and resulted in disturbance

to the shoreline. The Appellant expected unauthorized vehicular access would occur again and create further ruts on the ROW.

[9] The Appellant stated she would suffer irreparable harm if the stay was refused. The Appellant said further signage or widening of the pathway would result in a loss of privacy and decreased property value.

[10] The Appellant believed the work under the TFA would reduce wildlife viewing opportunities, as the loss of shoreline vegetation and increased foot traffic and vehicular access would drive waterfowl and other species away.

[11] The Appellant submitted no harm would come to the Director or the SSCA if the stay was granted until the Board could hear the appeal, as there was no immediate need for the work outlined in the TFA. If the stay was not granted, the Appellant said she would suffer irreparable harm due to loss of privacy, decreased property value, and reduced wildlife viewing opportunities.

[12] The Appellant stated there is public interest in upholding the intentions of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"), which the Appellant submitted is being ignored in the issuance of the TFA.

[13] The Appellant stated the irreparable damage to the shoreline, property values, and the environment is sufficient evidence to prove she is directly and adversely affected by the Director's issuance of the TFA to the SSCA.

[14] The Appellant noted the TFA does not expire until August 29, 2019, and the SSCA could still do more work on the ROW as long as it met the terms and conditions outlined in the TFA. The Appellant stated the SSCA could still add more fill to cover the existing or newly formed ruts, add more fill to build up a low lying area, and could increase the signage on the public pathway.

B. SSCA

[15] The SSCA submitted the Appellant's application for a stay is without merit. The SSCA disagreed with the Appellant's concerns regarding the installation of a new gate, widening the access trail, and repairing berm ruts.

[16] The SSCA argued the new gate is superior to the old gate and will do more to discourage unauthorized access to the ROW. The SSCA noted the widening of the walking path was to facilitate access for emergency vehicles to allow for safe travel along the length of the ROW. The SSCA stated the newly installed gate is chained, but not locked, to enable access for emergency vehicles.

[17] The SSCA explained the ruts are usually naturally created, but in 2018 the ruts were formed by an ice fishing hut that washed ashore on the ROW. To remove the ice fishing hut, the SSCA brought in a large tow truck, which made deep ruts on the beach. The SSCA stated it consulted the Director regarding removing the ruts, and the Director indicated he preferred the SSCA use sand to repair the ruts. The SSCA said it complied with the Director's request.

[18] The SSCA disputed the Appellant would suffer irreparable harm if the TFA was not stayed. The SSCA submitted the Appellant failed to prove her property value would be negatively affected by the repair of the ruts along the ROW and the widening of the pathway. The SSCA stated the improved access to the ROW is intended to increase walking traffic to the lakefront, but there is no evidence this would result in a loss of privacy or decreased property value for the Appellant.

[19] The SSCA submitted there were no negative public interest outcomes from the issuance of the TFA. The SSCA stated lakes are a public resource and should be managed for the public good, and not for the benefit of a few people.

[20] The SSCA said the work under the TFA has been completed and that no further work is required or planned.

[21] The SSCA stated the Appellant is not adversely affected by the TFA, and the Board should dismiss the Appellant's Notice of Appeal.

C. Director

[22] The Director took no position on the Appellant's stay application.

[23] The Director said the activities covered by the TFA have already been completed and no further activity remained to be done. Therefore, the stay application was moot, and the rights of the Participants to the appeal would be unaffected whether or not a stay was granted.

D. Appellant's Rebuttal

[24] The Appellant explained that, in 2013, she discussed access by emergency vehicles to the ROW with the fire department and ambulance services. The Appellant said she was told that even if the path was widened, access by emergency vehicles was dependent on ground conditions and whether there is adequate space for a vehicle to turn around. The Appellant stated she was also told emergency services could walk down the ROW to reach a patient.

[25] The Appellant noted the SSCA claimed the purpose of the TFA was berm restoration, but she questioned whether tree removal and recontouring of the beach area accomplished actual berm restoration. The Appellant submitted the actions allowed under the TFA do not improve lakeshore erosion control, particularly in the event of a flood or ice pushing onshore during spring breakup.

[26] The Appellant stated the signs installed at access points to the ROW will not deter unauthorized vehicles from using it, and widening the trail will only facilitate improper access.

[27] The Appellant submitted the cumulative impact of the work done under the TFA will affect wildlife habitat and reduce her opportunities to view birds and other wildlife.

IV. ANALYSIS

[28] The Board has three matters which must be considered:

1. Is the Appellant directly and adversely affected?
2. Is the appeal moot?
3. Should the Board grant the stay application?

A. Directly Affected

[29] The *Public Lands Administration Regulation*, AR 187/2011 ("PLAR"), section 212, states a person who is "directly and adversely affected" by an appealable decision of the Director has standing to appeal that decision.[2] The *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and the *Water Act*, R.S.A. 2000, c. W-3, require a person seeking standing to appeal to be "directly affected," omitting the "adversely affected" qualification required in PLAR. Despite this difference, it is worthwhile to refer to the Court of Queen's Bench decision in *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)*,[3] which provided guidance to the Environmental Appeals Board regarding the interpretation of "directly affected."

[30] In the *Court* decision, Justice McIntyre summarized the following principles regarding standing before the Board.

> "First, the issue of standing is a preliminary issue to be decided before the merits are decided... Second, the appellant must prove, on a balance of probabilities, that he or she is personally directly affected by the approval being appealed. The appellant need not prove that the personal effects are unique or different from those of any other Albertan or even from those of any other user of the area in question... Third, in proving on a balance of probabilities, that he or she will be harmed or impaired by the approved

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2 Section 212(1)(b) provides:

"The following persons have standing to appeal a prescribed decision: ...

(b) a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision."

3 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.).

> project, the appellant must show that the approved project will harm a natural resource that the appellant uses or will harm the appellant's use of a natural resource. The greater the proximity between the location of the appellant's use and the approved project, the more likely the appellant will be able to make the requisite factual showing... Fourth, the appellant need not prove, by a preponderance of evidence, that he or she will in fact be harmed or impaired by the approved project. The appellant need only prove a potential or reasonable probability for harm."[4]

Justice McIntyre concluded by stating:

> "To achieve standing under the Act, an appellant is required to demonstrate, on a prima facie basis, that he or she is 'directly affected' by the approved project, that is, that there is a potential or reasonable probability that he or she will be harmed by the approved project. Of course, at the end of the day, the Board, in its wisdom, may decide that it does not accept the prima facie case put forward by the appellant. By definition, prima facie cases can be rebutted...."[5]

[31] When the Board assesses the directly affected status of an appellant, the Board looks at how the appellant uses the public land that is the subject of the Director's decision, how the Director's decision will affect the public land, and how the effect on the public land will impact the appellant's use of the public land. The closer these elements are connected (their proximity), the more likely the appellant is directly affected.

[32] To determine whether an appellant is "adversely affected," the Board must find the director's decision could potentially have a negative impact on the appellant, and there must be a reasonable possibility it will occur. When claiming to be directly and adversely affected, the onus is on the appellant to demonstrate to the Board there is a reasonable possibility he or she will be directly and adversely affected by the decision of the director.[6] It is not enough for an appellant to show he or she is possibly affected, it must also be shown the possibility is reasonable. For the Board to find an appellant is directly and adversely affected, the effect

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4 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.), at paragraphs 67, 69, 70, and 71.

5 *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.), at paragraph 75.

6 See: *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)*, 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.), at paragraph 71.

cannot be too remote or speculative. Both the reasonableness and the possibility of the effect must be shown.

[33] The Appellant in this appeal owns land and a cabin in close proximity to the ROW. In addition to alleging impacts on her property value, privacy, and security, the Appellant stated if further work was done under the TFA it would cause environmental damage to the shoreline wildlife habitat that would adversely affect the Appellant's use and enjoyment of the lake and the ROW. The Board finds it is reasonably possible further work under the TFA could result in damage to the public lands, which include the bed and shore of the lake and the inland vegetation along the ROW. Such damage could negatively affect the Appellant's interests and use of the ROW. The Board finds the Appellant is directly and adversely affected by the Director's decision to issue the TFA.

B. Mootness

[34] The issue of mootness has been thoroughly analyzed by the Courts. The Supreme Court of Canada, in the case of *Borowski* v. *Canada (Attorney General) (No. 2)*,[7] stated a hypothetical or abstract question may result in the Court declining to decide or hear a case due to the question being moot. The Alberta Court of Appeal, in *Resurgence Asset Management LLC* v. *Canadian Airlines Corp.*,[8] stated an appellate court cannot order a remedy which could have no effect, as such a remedy would be moot. The Environmental Appeals Board also addressed the issue of mootness in *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited*, stating:

> "An appeal is moot when an appellant requests a remedy that the Board cannot possibly grant because it is impossible, not practical, or would have no real effect."[9]

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7 *Borowski* v. *Canada (Attorney General) (No. 2)*, [1989] 1 S.C.R. 342 ("*Borowski*") at paragraph 15.

8 *Resurgence Asset Management LLC* v. *Canadian Airlines Corp.*, [2000] A.J. No. 1028 at paragraph 30.

9 *Kadutski* v. *Director, Northeast Boreal Region, Natural Resources Service, Alberta Environment re: Ranger Oil Limited* (28 August 2001), Appeal No. 00-055-D (A.E.A.B.), at paragraph 36.

[35] Based on the above decisions, the issues before the Board regarding mootness are whether the Appellant's application for a stay is a hypothetical or abstract question, and whether the application is moot because the Board cannot grant the remedy requested as it is "impossible, not practical, or would have no real effect."

[36] The Board notes the TFA does not expire until August 29, 2019. Although the SSCA stated the work authorized under the TFA has been completed, further ruts in the sand along the ROW could be created by the winter ice or vehicular traffic. The Board finds the TFA is an active authorization, and the question of whether there exists a possibility of further work on the ROW is not hypothetical or abstract. Therefore, the Board finds the appeal is not moot.

C. Stay

[37] 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."

[38] The Board's test for a stay is based on the Supreme Court of Canada decision in *RJR MacDonald.*[10] 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. These four steps are reflected in the questions posed by the Board. An applicant for a stay must meet all four conditions in order for the Board to grant a stay.

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10 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."

[39] 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.

[40] The Appellant, in her Notice of Appeal, has raised several concerns regarding the work done under the TFA, including damage and environmental impacts resulting from repairing the berm and trail with sand and beach debris, widening the walking trail, and installing a gate at the access road. In reviewing the submissions from the Participants, the Board finds the alleged damages to public lands is a serious concern for the Board to consider in an appeal. Therefore, the Appellant has satisfied the first part of the test for a stay.

[41] The second part of the test is whether the Appellant will suffer irreparable harm if the stay is denied. 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*,[11] 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."[12]

The party claiming that money damages would be inadequate compensation for the harm done, must show there is a real risk that harm will occur. It cannot be mere conjecture.[13]

[42] The Appellant raised the concern that further signage or widening of the pathway could lead to a loss of privacy, decreased property value, and damage to the lake's shoreline, resulting in birds and other wildlife avoiding the ROW, thereby decreasing viewing opportunities. The SSCA argued the Appellant had not provided any evidence the work authorized by the TFA would result in a loss of privacy or decreased property value for the

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

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

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

Appellant. The Director took no position on the stay other than to state the work outlined in the TFA had been completed.

[43] The Board finds there is potential for irreparable harm to the Appellant if further work under the TFA were to be done and, therefore, the second step of the test is met. The Board notes it is difficult to repair damage done to the environment, particularly water bodies such as Buffalo Lake. If the appeal proceeds to a hearing, the Board may recommend the Minister reverse or vary the TFA. If this occurs, the SSCA would be required to restore the ROW to its previous condition, or at least to its current condition. If the SSCA should undertake additional work under the TFA, this would result in additional restoration of the area, which can be very difficult in wetland areas. The Board notes it would be the SSCA who would be responsible for remediating the site if the SSCA should decide to do additional work under the TFA prior to the Minister making her decision.

[44] In addition, without making any findings as to the merits of the appeal, the Board finds the lake and shoreline could be irreparably harmed if further work under the TFA were to be done.

[45] The third part of the test is the balance of convenience. To satisfy this part of the test, the applicant for a stay must demonstrate that he or she would suffer greater harm from the refusal of a stay than the other parties would suffer if a stay was granted. The Board is required to weigh the burden the stay would impose on the other parties against the benefit the applicant would receive. This is not strictly a cost-benefit analysis but rather a balancing of significant factors. Here, the Board must assess and compare the Appellant's position with that of the SSCA and the Director in assessing the balance of convenience. The effect on the public interest may sway the balance for one party over the other.

[46] The Appellant stated there was no urgency to the work authorized in the TFA, and the granting of a stay until the Board heard the appeal would not result in any harm to the Director or the SSCA. The SSCA argued the work approved in the TFA was completed and no further work was required or planned. The Director submitted as the work in the TFA had been

completed, the rights of the Participants to the appeal would be unaffected whether or not a stay was granted.

[47] As both the SSCA and the Director acknowledged no further work under the TFA is intended, there is no harm to them if a stay of the TFA is granted until the Board has heard the appeal, whereas the Appellant could potentially experience harm if future work is done prior to the expiry of the TFA. Therefore, the balance of convenience favours the Appellant.

[48] With respect to the fourth part of the test, the Board must consider the public interest and whether granting the stay until the Board hears the appeal would benefit or harm the public interest.

[49] The Supreme Court of Canada in *RJR MacDonald* stated:

> "When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large.... Rather, the applicant must convince the court of the public interest benefits which flow from the granting of the relief sought."[14]

[50] The Board considers the responsibility of the Director to uphold the legislation as a significant factor in determining the public interest portion of the stay test. In *RJR MacDonald*, the Supreme Court stated:

> "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.... 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."[15]

In this situation, the Director has taken no position with regards to the stay application. The SSCA's arguments regarding public interest are more suitable for a hearing of the matter than a preliminary application for a stay. Therefore, the Board turns to consider whether the Appellant has shown the existence of a benefit to the public interest if the stay is granted.

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

15 *RJR MacDonald Inc.* v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311 at paragraph 44.

[51] The Board finds the Appellant's concerns regarding the environmental integrity of the ROW to be reasonable, and a significant factor in the Board's considerations. The Board has not been presented with sufficient evidence to determine whether damage to the environment has occurred, and such evidence at this stage of the appeal is not necessary or appropriate. Based on the evidence the Board has before it now, there is potential for damage to the lakeshore and vegetation should further work on the ROW be done under the terms of the TFA. As already noted, any damage to the shoreline and surrounding public lands would be difficult to restore.

[52] A second factor the Board has considered is the assurance of both the Director and the SSCA that no further work will be done under the TFA. If this is the case, then granting a stay of the TFA would have no negative impact on the Director or the SSCA.

[53] The Board finds the public interest is best served by granting the Appellant's application for a stay.

V. CONCLUSION

[54] The Board finds the Appellant is directly and adversely affected by the Director's decision to issue the TFA.

[55] The Board finds the request for a stay by the Appellant is not moot as the TFA does not expire until August 29, 2019, and further work could be undertaken before the TFA expires.

[56] The Board finds the Appellant has met the requirements of the stay test. Therefore, the Board grants the Appellant's application for a stay of TFA 184940 until the Board lifts the stay or until the Minister makes a decision regarding Appeal No. PLAB 18-0014.

Dated on February 15, 2019, at Edmonton, Alberta.

Marian Fluker
Acting Board Chair