PUBLIC LANDS
APPEAL BOARD

306 Peace Hills Trust Tower
10011 - 109 Street
Edmonton, Alberta T5J 3S8
Telephone: 780-427-6207
Fax: 780-427-4693
Email: PLAB@gov.ab.ca

2019 APLAB 5

April 2, 2019

Via E-Mail

Ms. Tara Hamelin
Mr. Josh Fortier
Bishop and McKenzie LLP
2300 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 1V3
(*Counsel for Appellants*)

Ms. Vivienne Ball
Alberta Justice and Solicitor General
Environmental Law Section
8th Floor, Oxbridge Place
9820 – 106 Street
Edmonton, AB T5K 2J6
(*Counsel for Director, AEP*)

Ms. Colette Benson
CRC Open Camp and Catering Ltd.
PO Box 2100
Lac La Biche, AB T0A 2C0
(*Appellants*)

Dear Ladies and Mr. Fortier:

Re: Decision Letter – Colette Benson and CRC Open Camp and Catering Ltd./Administrative Penalty No. PLA-18/06-AP-LAR-18/10
Our File No.: PLAB 18-0015*

This is the decision of Marian Fluker, Acting Chair of the Public Lands Appeal Board (the "Board"), regarding the request by Ms. Colette Benson and CRC Open Camp and Catering Ltd. (the "Appellants") for a stay of Administrative Penalty No. PLA-18/06-AP-LAR-18/10 (the "Penalty").

On December 19, 2018, the Compliance Manager, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director") issued the Penalty in the amount of $1,415,572.50 to the Appellants. The Director alleges the Appellants contravened DML 090101 between November 2013 and June 30, 2018 by subletting the land without written consent of the Director; received money or other consideration as monthly payments for the purpose of allowing access to and use of the public lands without authority; and received money in the form of proceeds from the public auction sale of the DML or other consideration for the purpose of gaining access to the public lands, all of which came to the attention of Alberta Environment and Parks ("AEP") on May 23, 2016. The Appellants filed a Notice of Appeal with the Board on January 4, 2019.

*Cite as: *Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (1 April 2019), Appeal No. 18-0015-DL1 (A.P.L.A.B.), 2019 APLAB 5.

The Board's authority to grant a stay is found in section 123(1) of the *Public Lands Act*, R.S.A. 2000, c. P-40, 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."

When a stay application is filed, the Board generally applies the test from the Supreme Court of Canada decision in *RJR MacDonald Inc.* v. *Canada (Attorney General)* ("*RJR MacDonald*").[1] The *RJR MacDonald* test requires the Board to consider three aspects with respect to a stay: (1) whether there is a serious concern; (2) whether the appellant would suffer irreparable harm; and (3) the balance of convenience.[2] An appellant seeking a stay must meet all three conditions in order for the Board to grant a stay.

All appeals of administrative penalties meet the first step of the *RJR MacDonald* test, which is whether there is a serious issue to be tried. The appellant is usually appealing the amount of the penalty or the fact the administrative penalty was issued. An administrative penalty is appealable to the Board as of right and meets the threshold of a serious issue that needs to be determined.

Most appellants seeking a stay of an administrative penalty would not meet the second part of the *RJR MacDonald* test of suffering irreparable harm if the stay is not granted. This is because this part of the test requires the irreparable harm to be unquantifiable; that is, the harm to the person cannot be fairly compensated by the payment of money. In most cases, the "harm" caused by an administrative penalty is the monetary amount of the fine and any interest on these monies, which is obviously quantifiable.

The Notice of Administrative Penalty instructed the Appellants to forward payment to the Regulatory Approvals Centre of AEP, within 30 days of the date of service of the notice. Without making any judgement on the merits of the appeal, the Board notes if the Appellants pay the Penalty and are subsequently successful or partially successful in the appeal, the Director must notify AEP to issue a refund to the Appellants of all or part of the Penalty amount. Any Penalty amount returned to the Appellants does not include interest accumulated while the Board addresses the appeal. It is time consuming to arrange for AEP to return money. Regardless of the outcome of the appeal, the Appellants are 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.

The *RJR MacDonald* test does not bind the Board in every stay application. The Saskatchewan Court of Appeal stated in *Potash Corp. of Saskatchewan Inc.* v. *Mosaic Potash Esterhazy Ltd. Partnership*:

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

2 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 to ensure that there is a serious question to be tried. Secondly, it must be determined whether the appellant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."

> "... [The] strength of [the] case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments."[3] (Emphasis added.)

The Board finds consideration of "the justice and equity of the situation" means that in some cases, such as when a stay of an administrative penalty is requested, it is appropriate for the Board to depart from the *RJR MacDonald* test and consider what is just, equitable, and reasonable for all parties involved. To be clear, the Board is not abandoning the *RJR MacDonald* test for all stay applications. However, for the purposes of administrative penalties, it would not be the correct choice to apply that test strictly.

The Board considers a more reasonable approach, for this appeal and similar appeals, is to stay the Penalty until the Board has heard the appeal and the Minister has made a decision. Staying the Penalty until the appeal is complete benefits both the Appellants and AEP. The Appellants are able to retain the Penalty money pending the outcome of the appeal, and AEP avoids the extra time and resources required to issue a refund if necessary. Further, both parties benefit from not having to file written submissions on the application for a stay. This allows legal counsel for AEP and the other parties to focus on aspects of the appeal that are more important. In the Board's view, AEP and the Director are not prejudiced in any way by this approach. However, if the Director has concerns, it is always open for the Director to request a reconsideration of this decision.

Based on the foregoing, the Board grants the Appellants' request for a stay of the Penalty. The stay is to remain in effect until the Board hears the appeal filed by the Appellants in this matter and the Minister issues an order, or until the Board directs otherwise.

Please do not hesitate to contact the Board if you have any questions. We can be reached toll-free by first dialing 310-0000 followed by 780-427-6207, by e-mail at PLAB@gov.ab.ca, or by fax at 780-427-4693.

Yours truly,

Marian Fluker
Acting Chair

Any information requested by the Public Lands Appeal Board is necessary to allow the Board to perform its function. The information is collected under the authority of the *Freedom of Information and Protection of Privacy Act*, section 33(c). Section 33(c) provides that personal information may only be collected if that information relates directly to and is necessary for the processing of this appeal. The information you provide will be considered a public record.

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3 *Potash Corp. of Saskatchewan Inc.* v. *Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, at paragraph 26.