ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – March 19, 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, 216, 217, 219, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF appeals filed by Normand Menard and Normko Resources Inc., with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue Administrative Penalty No. PLA-19/09-AP-LAR-19/12.

Cite as: Stay Decision*: Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (19 March 2020), Appeal Nos. 19-0245-0246-ID1 (A.P.L.A.B.), 2020 ABPLAB 2

BEFORE: Mr. Gordon McClure, Chair.

SUBMISSIONS BY:

Appellants: Mr. Normand Menard, Normko Resources Inc., represented by Mr. Bradley Smith, Verhaeghe Law Office.

Director: Mr. Simon Tatlow, Compliance Manager, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Normko Resources Inc. (Normko) holds Departmental Miscellaneous Lease DML 080226 (the DML). Mr. Normand Menard is a director, majority shareholder, and the primary decision-maker on behalf of Normko. Alberta Environment and Parks (AEP) issued an Administrative Penalty to Normko and Mr. Menard (the Appellants) for allegedly subleasing the DML 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 invited and received submissions from the Appellants and the Director. After reviewing the submissions and the legislation, the Board determined the Appellants met the test for a stay as set by the Supreme Court of Canada in *RJR-MacDonald* v. *Canada*: (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, and (4) it is 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 of Environment and Parks makes a decision regarding the appeal.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding the application by Mr. Normand Menard and Normko Resources Inc. (the "Appellants"), for a stay of Administrative Penalty PLA-19/09-AP-LAR-19/12 (the "Administrative Penalty"). The Administrative Penalty was issued by the Director, Mr. Simon Tatlow, Compliance Manager, Lower Athabasca Region, Alberta Environment and Parks (the "Director") to the Appellants for alleged contraventions of the *Public Lands Act* (the "Act") and the *Public Lands Administration Regulation* ("PLAR").

II. BACKGROUND

[2] Normko Resources Inc. ("Normko") is a corporation registered in Alberta. Mr. Menard is a director, majority shareholder, and the primary decision-maker on behalf of Normko.

[3] On July 17, 2009, Alberta Environment and Parks ("AEP") issued DML 080226 (the "DML") to Normko for use as a storage site. The DML was west of Conklin, Alberta, on public lands located at SE 10-77-08-W4M and SW 11-77-06-W4M. The DML was amended on September 23, 2009, to allow for the site to be used as a storage site and fuel card lock.

[4] On November 15, 2019, the Director issued the Administrative Penalty to the Appellants for $583,448.21. The Director alleged the Appellants subleased the DML without authorization from AEP and received money for allowing access to public land.

[5] On December 6, 2019, the Appellants filed a Notice of Appeal with the Board appealing the Administrative Penalty.

[6] On December 6, 2019, the Board acknowledged receipt of the Notice of Appeal and requested the Director provide the Director's record.

[7] On December 13, 2019, the Appellants requested the Board grant a stay of enforcement of the Administrative Penalty. The Board wrote the Director on December 17, 2019, inquiring if the Director consented to a stay. The Director responded on December 20,

2019, advising the Board that he did not consent to a stay.

[8] On December 20, 2019, the Board requested the Appellants answer the following questions in regards to the stay request:

1. What are the serious concerns of the Appellants that should be heard by the Board?
2. Would the Appellants suffer irreparable harm if the stay is refused?
3. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay?
4. Would the overall public interest warrant a stay?

[9] Submissions on the four questions were received from the Appellants on January 3, 2020. On January 14, 2020, the Director provided a response, and the Appellants provided rebuttal submissions on January 21, 2020.

[10] The Board considered the submissions, the case law, and the legislation, and decided to grant a stay of the Administrative Penalty. The stay will remain in effect until the Board lifts the stay or until the Minister makes a decision regarding the appeals. The Board's reasons follow below.

III. SUBMISSIONS

A. Appellants

i. What are the serious concerns of the Appellants that should be heard by the Board?

[11] The Appellants stated they intended to provide detailed and further submissions at a later date during the appeal process. The Appellants submitted the Administrative Penalty was out of proportion to the seriousness of the transgression. The Appellants noted serious penalties have been imposed in cases of fraud, but the Appellants maintained it was inappropriate to impose such penalties in their situation where there was no fraudulent activity and the infraction was a result of inadvertence. The Appellants submitted the Act does not grant the Director the authority to grant such heavy penalties in the case of non-intentional conduct.

[12] The Appellants said the Act must be read as a whole, including limitations on fines, and cannot be rightly interpreted to grant the Director the authority to impose administrative penalties of an unlimited amount.

[13] The Appellants stated the Notice of Administrative Penalty did not provide reasons as to why, and under what authority, the Administrative Penalty was imposed upon Mr. Menard personally.

ii. Would the Appellants suffer irreparable harm if the stay is refused?

[14] In regards to the question of irreparable harm suffered if the stay was refused, the Appellants submitted they do not have the means to pay the Administrative Penalty and they would experience "devastating financial problems" if a stay was not granted. The Appellants stated their reputations in the community, including the business community would suffer irreparable harm.

[15] The Appellants further submitted that Mr. Menard would be in jeopardy of losing his professional credentials within the Association of Alberta Forest Management Professionals, and his certification as Certified Technician Engineering within the Association of Science and Engineering Technologists.

iii. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay?

[16] The Appellants submitted the inconvenience of the Director not collecting the Administrative Penalty prior to the hearing of the appeal is small compared to the financial consequences and loss of reputation immediately suffered by the Appellants if the stay was not granted.

iv. Does the overall public interest warrant a stay?

[17] The Appellants submitted if a stay was not granted and the Appellants were successful in a hearing of the appeal, the Director would incur administrative costs from having to pay the Administrative Penalty amount back to the Appellants. The Appellants submitted it

was in the public interest to avoid such "throw away" costs.

B. Director

[18] The Director submitted that the test established by the Supreme Court of Canada in *RJR-MacDonald Inc.* v. *Canada* ("*RJR-MacDonald*")[1] 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.

i. What are the serious concerns of the Appellants that should be heard by the Board?

[19] The Director submitted the Appellants have appealed the issuance of the Administrative Penalty, which is an appealable decision under PLAR and sufficient to satisfy the test of whether there is a serious question to be heard.

ii. Would the Appellants suffer irreparable harm if the stay is refused?

[20] The Director submitted that the Appellants would not suffer irreparable harm if the Board refuses to grant the stay.

[21] The Director noted the Alberta Court of Appeal in *Modry* v. *Alberta Health Services* ("*Modry*"), stated an applicant for a stay must show evidence of irreparable harm that is clear and not speculative.[2]

[22] The Director submitted the Appellants provided no evidence about specific harm they would suffer without the stay. The Director said there is no evidence to support the Appellants' claims devastating financial problems would occur immediately or the Appellants' reputation in the community and business community would suffer irreparably between now and the resolution of the appeal.

[23] The Director stated there is no evidence Mr. Menard is at jeopardy of losing his professional credentials between now and the resolution of the appeal without a stay.

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

2 *Modry* v. *Alberta Health Services*, 2015 ABCA 265, at paragraph 82.

[24] The Director said the Administrative penalty consists of two parts that are assessed separately:

(a) the base penalty, which is the punitive part of the penalty, based upon the Appellants' contravention of the Act; and

(b) the money that the Appellants earned directly from activities carried out in contravention of the Act.

The Director submitted the seriousness of the Appellants' contraventions is irrelevant to the proceeds assessment in the second part of the Administrative Penalty.

[25] The Director stated the primary goal of the proceeds assessment was deterrence, the fair and equitable treatment of other regulated parties to level the playing field, communication of the appropriate educational message, and ultimately the resolution of non-compliance with the Act's regulatory regime.

iii. Would the Appellants suffer greater harm if the stay was refused pending a decision of the Board on the appeal, than the harm that could occur from the granting of a stay?

[26] The Director submitted the Appellants bear the onus of establishing they will suffer greater harm if the stay was refused than the harm that would occur if the stay was granted.

[27] The Director stated the Board must balance the burden granting a stay would have on the public interest in the administration of public lands and effective enforcement of the Act versus the benefit to be gained by the Appellants from a stay of the Administrative Penalty.

[28] 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.

iv. Does the overall public interest warrant a stay?

[29] The Director submitted private applicants for a stay, such as the Appellants, are presumed to be focused upon their interests. The Director stated the Appellants' claim the Director will incur "administrative costs" or "throw away" costs are unproven and speculative.

[30] 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."[3]

[31] The Director submitted public interest could suffer harm when a stay prevents AEP from exercising its statutory authority. The Director said: "[t]here 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 and the proceeds portion of the Administrative Penalty until the issuance of a Ministers Order."[4]

[32] The Director stated it is in the public interest to deny the Appellants' stay application.

C. Appellants' Rebuttal

[33] The Appellants submitted that the Director failed to differentiate between evidentiary requirements of administrative tribunals and that of "formal" courts. The Appellants stated *Modry*, and cases like *Modry*, mostly originate in Queen's Bench, where the formal rules of evidence are a requirement, as opposed to administrative tribunals, where the formal rules of

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

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

evidence are not strictly adhered to.

[34] The Appellants said that to apply *Modry* in the context of administrative tribunals would require appellants to present expert evidence to support their application. The Appellants submitted holding parties to that degree of evidentiary burden is contrary to the nature and purpose of administrative tribunals, which decide matters in a less cumbersome and expensive manner compared to the "formal" courts.

IV. ANALYSIS

[35] The Board emphasizes that its decision regarding the stay is not a decision on the merits of the appeal.

[36] 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."

[37] The Board's test for a stay is based on the Supreme Court of Canada's decision in *RJR-MacDonald*.[5] 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.

[38] 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 agreed the Appellants met the first part of the test.

[39] 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

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[5] 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."

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.

[40] 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*, 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."[6]

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.[7]

[41] If the Board did not grant a stay of the Administrative Penalty, the Appellants claimed they would face "devastating" financial problems that would occur immediately and a loss of reputation in the community, including the business community. The Appellants said Mr. Menard would potentially lose his professional credentials with the Association of Alberta Forest Management Professionals and his designation as a Certified Technician Engineering, C.Tech (ENG) with the Association of Science and Engineering Technologists.

[42] The Director said the Appellants' evidence was speculative and insufficient to support the claim of financial disaster. The Appellants stated the standard of proof Director sought was not the standard required by administrative tribunals.

[43] Standard of proof can be defined as whether something has been adequately

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

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

proven.[8] Unless the legislation specifies otherwise, the standard of proof applied by administrative tribunals to matters within its jurisdiction is proof on a balance of probabilities, which means the tribunal must find the contested fact to be probable.

[44] The Board notes the Supreme Court of Canada addressed the issue of the standard of proof in *Nelson (City)* v. *Mowatt* when it wrote:

> "This Court said… that "evidence must always be sufficiently clear, convincing and cogent". Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced."[9]

[45] The Board notes the evidence provided by the Appellants is not conclusive, as many of the harms the Appellants are concerned may happen can only be proven after the fact. The Board finds it unreasonable to require the Appellants to face potentially devastating financial problems and loss of professional reputation in order to prove irreparable harm has occurred. Evidence is not required to be conclusive in administrative matters, only "clear, convincing and cogent."

[46] If the Appellants pay the Administrative Penalty and are latter successful in the appeal, the Director would be required to return the amount of the Administrative Penalty. However, the Appellants would be deprived of the penalty amount and the opportunity to utilize those monies during the time it took to conclude the appeal and refund the penalty. There is no compensation available to cover losses the Appellants may incur from not having the Administrative Penalty amount available for use during the appeal process.

[47] The Board notes if the Appellants are ultimately successful in their appeal, section 232(3) of PLAR[10] prevents the Appellants from obtaining costs against AEP, and the *Proceedings Against the Crown Act*,[11] restricts civil action for damages against AEP. The

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8 Robert W. Macauly and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada: 2017), at page 17-64.

9 *Nelson (City)* v. *Mowatt*, [2017] 1 SCR 138, at paragraph 40.

10 Section 232(3) of PLAR provides:

"No direction for the payment of costs may be made against the Crown, a Minister, a director, an officer or any employee or official of the Government of Alberta."

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

Appellants would have virtually no realistic chance of recovering losses if they pay the Administrative Penalty and subsequently succeed in the appeal.

[48] There is no compensation for the loss of professional reputation or reputation in the community. Such losses are unquantifiable.

[49] The Board finds the evidence is clear, convincing and cogent that the Appellants would most likely 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.

[50] 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.

[51] The Appellants submitted the irreparable harm they would suffer without a stay of the Administrative Penalty is significantly greater than any harm the Director would experience if a stay was granted. The Director said staying the Administrative Penalty would negatively impact the Director's and AEP's authority to take enforcement action in 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.

[52] 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.[12] To determine the public interest in the context of the stay application, the Board must consider the Act and PLAR.

[53] 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

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

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 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."

[54] The ability of an appellant to appeal a director's decision and seek a stay places a "pause" on the decision. It enhances the efficiency and effectiveness in the process of resolving matters under appeal, for all parties to the appeal. The Board considers it important that a stay is only effective until the Board makes its report and recommendations to the Minister, and the Minister issues his decision.

[55] In the Act, the Legislature specifies the Board has the responsibility to provide stays where it deems appropriate based on the legislation and administrative law principles. 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. Just as a director has a legislative duty to fulfill, the Board has a duty to promote or protect the public interest within the appeal provisions of the Act.

[56] The Board finds 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. A stay is merely an interruption to the flow of penalty monies to the Government, possibly temporarily. The Board notes the penalty money is not the Director's or Government's monies to begin with and, therefore, there is no financial loss in staying an Administrative Penalty.

[57] Penalties may provide a deterrence when a party is found guilty of a contravention. However, when an appellant appeals an administrative penalty the presumption of guilt is set aside until the appeal concludes and the Board provides its report and recommendations to the Minister. To apply a penalty to an appellant that is later found blameless of a contravention, and when that appellant could suffer irreparable harm from paying the penalty before the appeal is resolved, is punitive and against the public interest. It

demonstrates to the public they can be severely impacted for an offence they are not guilty of under the Act. The ability of an appellant to seek redress is limited by PLAR and other legislation, preventing an appellant from seeking sufficient redress from the impacts of the harm suffered should the penalty be varied or reversed.

[58] 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. 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.

V. CONCLUSION

[1] The Board finds the Appellants have met the requirements of the stay test. Therefore, the Board grants a stay of the Administrative Penalty until the Board lifts the stay or until the Minister makes a decision regarding Appeal Nos. PLAB 19-0245 and 19-0246.

Dated on March 19, 2020, at Edmonton, Alberta.

Gordon McClure
Chair