ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – October 26, 2020

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

-and-

IN THE MATTER OF appeals filed by CRC Open Camp & Catering Ltd., Collette Benson, and Albert Benson, with respect to the decision of the Director, Regional Compliance, Regulatory Assurance Division-North Region, Alberta Environment and Parks, to issue No. PLA-20/02-AP-NR-20/01 to CRC Open Camp & Catering Ltd., Collette Benson and Albert Benson.

Cite as: Stay Decision: *CRC Open Camp & Catering Ltd. et al.* v. *Director, Regional Compliance, Regulatory Assurance Division-North Region, Alberta Environment and Parks* (26 October 2020), Appeal Nos. 20-0003-ID1 (A.P.L.A.B.), 2020 ABPLAB 18.

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

SUBMISSIONS BY:

Appellants: CRC Open Camp & Catering Ltd., Ms. Collette Benson, and Mr. Albert Benson, represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.

Director: Mr. Simon Tatlow, Director, Regional Compliance, Regulatory Assurance Division-North Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

CRC Open Camp & Catering Ltd. (CRC) is the leaseholder of a Department Miscellaneous Lease (the DML). Ms. Colette Benson is the sole Director of CRC. Ms. Benson and Mr. Albert Benson are 99% shareholders of CRC (collectively, the Appellants). Alberta Environment and Parks (AEP) issued the DML to CRC for an Industrial Campsite and Access Road. The Director issued an Administrative Penalty for $6,798,862.85 to 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 asked for submissions from the Parties. The Director requested the Board dismiss the stay application.

The Appellants requested confidentiality regarding an affidavit they wished to submit in support of the stay application. The Director opposed the confidentiality request. The Board requested a non-confidential summary of the information the Appellants proposed to submit in confidence. After the Appellants provided the summary to the Director and the Board, the Board received submissions on the admissibility of the summary from the Appellants and the Director.

After reviewing the submissions and the legislation, the Board determined the information in the summary was not relevant to the Board's decision on the stay application. The Board found the Appellants met the three-part test for a stay as set by the Supreme Court of Canada in *RJR-MacDonald*:* (1) there was a serious issue to be heard; (2) the Appellants would likely suffer irreparable harm without a stay of the Administrative Penalty; and (3) the burden on the Appellants if the Board were to refuse the stay was far greater than the burden imposed on the Director by granting the stay. The Board also found it was in the public interest to grant the stay.

The Board granted a stay of the Administrative Penalty until the Board lifts the stay or until the Minister of Environment and Parks makes a decision regarding the appeal.

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

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding a preliminary motion by CRC Open Camp & Catering Ltd. ("CRC"), Ms. Collette Benson, and Mr. Albert Benson (collectively, the "Appellants"), for a stay of Administrative Penalty No. PLA-20/02-AP-NR-20/01 (the "Administrative Penalty"), issued to them in the amount of $6,798,862.85 by the Director, Regional Compliance, Regulatory Assurance Division–North Region, Alberta Environment and Parks, (the "Director"), The Administrative Penalty was issued by the Director on May 20, 2020, for alleged contraventions of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act") and the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR"). Specifically, the Appellants allegedly sublet public land without authorization.

II. BACKGROUND

[2] CRC is the leaseholder of Department Miscellaneous Lease No. 090102 (the "DML"). Ms. Colette Benson is the sole Director of CRC. Ms. Benson and Mr. Albert Benson are 99% shareholders of CRC.

[3] On May 7, 2010, the Director issued the DML to CRC authorizing the use of public land near Conklin, Alberta, for an industrial campsite and access road.

[4] On May 20, 2020, the Director issued the Administrative Penalty to the Appellants for $6,798,862.85. The Director stated the Appellants contravened the Act and PLAR, and assessed the penalty at $35,000.00. This included three counts of subleasing the DML without authorization at $5,000.00 per count, three counts of receiving money for allowing access to public land at $5,000.00 per count, and $5,000.00 for one count of failing to furnish all information that an officer reasonably required for the exercising of powers and duties required under the Act or PLAR. The Director determined the Appellants received $6,763,862.85 for proceeds (economic benefit) from the alleged contraventions (the "Proceeds Assessment").

[5] On May 27, 2020, the Appellants filed a Notice of Appeal with the Board appealing the Administrative Penalty. On May, 28, 2020, the Board wrote to the Director and the Appellants (collectively the "Parties") acknowledging receipt of the Notice of Appeal, and

requesting the Director provide the Department's Record consisting of all documents and electronic media that were available to the Director when making his decision and the applicable policy documents (the "Department's Record). The Department's Record was received by the Board on July 9, 2020, and provided to the Appellants on July 13, 2020.

[6] On July 8, 2020, the Appellants requested the Board grant a stay of enforcement of the Administrative Penalty. The Appellants provided an affidavit from Ms. Benson in support of the request. The Board set out a schedule for submissions from the Parties on whether a stay should be granted.

[7] On July 15, 2020, the Director advised he wished to "exercise his right to cross-examine" Ms. Benson on her affidavit. On July 17, 2020, the Board set out a process for the Director to ask questions regarding Ms. Benson's affidavit. The Director submitted questions on July 24, 2020, and the Appellants provided answers on July 30, 2020.

[8] On August 6, 2020, the Director provided a response to the stay application, which included a motion to strike the evidence of Ms. Benson in her affidavit and in the response to the Director's questions. Alternatively, the Director requested the Board strike paragraphs 6, 10, and 11 of Ms. Benson's affidavit for being argument and not evidence. The Director's submission also included an affidavit from Joan Torstensen, a Legal Assistant with the Alberta Justice and Solicitor General. The affidavit provided information regarding title searches for various properties said to be owned by Mr. and Ms. Benson.

[9] On August 9, 2020, the Appellants advised they were preparing further affidavit evidence in response to the Director's submissions. The Appellants noted the submissions included sensitive information, and requested the Board allow the Appellants to provide confidential submissions and evidence to the Board and a redacted copy of the same submissions to the Director.

[10] On August 12, 2020, the Board advised the Parties it was denying the Director's motion to strike Ms. Benson's affidavit, but granting the alternative motion to strike paragraphs 6, 10, and 11. In a separate letter, also dated August 12, 2020, the Board responded to the Appellants' confidentiality request. The Board granted a sealing order of all records filed by the Parties with the Board with respect to the stay application. The Board asked for comments from

the Parties regarding the Appellants' request to provide an unredacted copy of the Appellants' submissions to the Board, and a redacted copy of the same materials to the Director.

[11] On September 11, 2020, after hearing from the Parties regarding the Appellants' confidentiality request, the Board requested "the Appellants make and disclose to the Board and the Director a non-sensitive, non-confidential, summary of the information they intended to provide in the proposed confidential affidavit."[1]

[12] On September 21, 2020, the Appellants provided a summary of the information they desired to keep confidential (the "Summary"), along with their written submissions in support of a stay of the Administrative Penalty.

[13] On September 29, 2020, the Director responded and requested the Board refuse to admit the information in the Summary as the information was irrelevant and not material to the appeal. In the alternative, if the Board decided to admit the Summary, the Director requested the Board give the Summary no weight. On October 2, 2020, the Appellants wrote to the Board and disagreed with the Director's submissions regarding the Summary.

III. ISSUES

[14] The Board asked the Parties to address the admissibility of the Appellants' Summary and the weight the Board should assign to it.

[15] The Board's test for a stay is based on the Supreme Court of Canada's four-part test found in *RJR-MacDonald*.[2] The Board requested the Parties address each of the following questions in their written submissions:

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?

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[1] Board's Letter, September 11, 2020, at page 2.

[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 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."

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?

IV. SUBMISSIONS

A. Appellants

[16] The Appellants stated the test in *RJR-MacDonald* is determined on a balance of probabilities, and not proof beyond a reasonable doubt.

[17] The Appellants said the first part of the *RJR-MacDonald* test is whether there is a serious issue involved in the appeal and all the Appellants must establish is that the appeal is not frivolous or vexatious. The Appellants stated that the grounds of appeal are sufficiently serious to meet the first part of the test.

[18] The Appellants stated the second part of the test requires the Appellants to show that they would suffer irreparable harm if a stay was not granted. The Appellants said "irreparable" referred to the nature of the harm suffered rather than its magnitude. The Appellants stated irreparable harm cannot be qualified in monetary terms or cannot be cured, usually because damages cannot be collected from one of the parties.

[19] The Appellants noted the amount of the Administrative Penalty is $6,798,862.85, plus interest. The Appellants stated they would need financing to pay the Administrative Penalty. The Appellants submitted the poor economy and the financial difficulties brought on by the COVID-19 pandemic caused significant financial problems for CRC. The Appellants said enforcement of the Administrative Penalty would likely result in bankruptcy.

[20] The Appellants stated that if they were to obtain financing to pay the Administrative Penalty, the loan's interest rate would be substantial. The Appellants noted the prime rate for bank loans is currently 2.45% per annum, and interest costs for a single month would be $13,881.00. The Appellants acknowledged the Director offered to repay the Administrative Penalty to the Appellants if the Appellants are successful in the appeal. However, the Appellants stated the offer does not include interest on a loan or any other losses resulting from the payment of the Administrative Penalty.

[21] The Appellants noted section 232(3) of PLAR[3] prevents them from obtaining costs against Alberta Environment and Parks ("AEP"), and the P*roceedings Against the Crown Act*[4] restricts civil actions against AEP and the Director, except for certain circumstances. The Appellants submitted there is no realistic chance of recovering losses if they pay the Administrative Penalty and then succeed in the appeal.

[22] The Appellants noted the third part of the stay test is to determine who would suffer the greater harm if a stay was granted or refused. The Appellants stated the Board has held the impact on public interest may move the balance towards one party or the other. The Appellants submitted they would suffer a far greater burden if the Board did not grant a stay. The Appellants said the Director would not suffer undue financial loss and no loss or damage to public land, if the stay was granted.

[23] The Appellants quoted the Board in *JMB Crushing Systems ULC* v. *Director, Alberta Environment and Parks*, 2019 ABPLAB 4:

> "Regardlesss of the outcome of the appeal, the Appellant is deprived of the Penalty amount during the course of the appeal, which may result in economic hardship and possibly irreparable harm, and AEP will have to expend scarce resources and valuable time to process the refund if the appeal is successful. In assessing the balance of convenience, the Board finds it would be in the public interest if neither party had to expend money and resources when it may be unnecessary."[5]

[24] The Appellants stated the Board must consider the interests of the society for which the legislation was intended. The Appellants noted the appeal provisions in the Act and PLAR indicate the Legislature considered situations where it would be in the public interest to grant a stay of a director's decision until the appeal is resolved. The Appellants said it would be in the public interest to grant a stay, particularly given the Administrative Penalty amount, pending the resolution of the appeal.

[25] The Appellants submitted they satisfied the *RJR-MacDonald* test for granting a stay until the appeal is resolved.

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[3] Section 232(3) of PLAR states: "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."

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

B. Director

[26] The Director stated the Appellants have the onus to demonstrate they meet all the parts of the stay test. The Director acknowledged the Appellants' appeal of the Administrative Penalty is sufficient to satisfy the first part of the test.

[27] The Director stated that to meet the second part of the test, the Appellants must show there is a real risk of irreparable harm without a stay. The Director noted proof of irreparable harm cannot be inferred but must be clear, not speculative, and must show irreparable harm will flow from the Administrative Penalty. The Director submitted the Appellants' claims are unproven, speculative, and without any evidentiary foundation to prove there is a real risk of irreparable harm.

[28] The Director said Ms. Benson's affidavit was speculative and subjective and contained opinions she was not qualified to give. The Director stated there is no evidence the Appellants would be required to obtain financing to pay the Administrative Penalty. The Director referred to the evidence in the Department's Record, which the Director stated demonstrated Ms. Benson and Mr. Benson have sufficient assets to pay the Administrative Penalty. The Director stated Ms. Benson and Mr. Benson own at least "1,675 acres of land made up of 11 properties in Lac La Biche County…."[6] The Director estimated the value of the land owned by Ms. Benson and Mr. Benson to be $1,600,000.00 to $7,100,000.00. The Director said none of the properties had a mortgage. The Director noted Ms. Benson and Mr. Benson's principle residence was purchased for $3.5 million.

[29] The Director submitted that when the Director asked Ms. Benson to provide details of properties owned in the United States, she advised they owned a house in Arizona. The Director argued Ms. Benson failed to provide any particulars requested by the Director, and Ms. Benson was not truthful about the extent of the property owned by her and Mr. Benson. The Director submitted the Board should find the evidence provided by Ms. Benson is not reliable or credible.

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5 *JMB Crushing Systems ULC* v. *Director, Alberta Environment and Parks*, 2019 ABPLAB 4, at page 2.

6 Director's Response Submission, August 6, 2020, at page 4.

[30] The Director stated the Appellants did not provide evidence to support Ms. Benson's claim CRC was struggling due to the economy and the COVID-19 pandemic.

[31] The Director submitted Ms. Benson and Mr. Benson have sufficient assets to use as collateral to obtain financing to pay the Administrative Penalty.

[32] The Director said in 2016, CRC sold property located at NE 31-66-13 W4M for $3.5 million, and that CRC owns five trucks and four pieces of heavy equipment. The Director stated CRC sold assets with a value of $13.5 million at an auction conducted by Ritchie Brothers.

[33] The Director submitted the Board should draw an adverse inference against the Appellants for each of the following:

(a) the Appellants need to obtain financing to pay the Administrative Penalty;

(b) it would be extremely difficult for the Appellants to borrow sufficient funds to pay the Administrative Penalty; and

(c) the financial situation of CRC and the possibility of receivership;

The Director stated:

> "I am advised by the Director that if the Appellants pay the Administrative Penalty now, AEP is willing to give a written undertaking to pay any accrued interest on the Administrative Penalty from now until the resolution of these appeals at the rate AEP receives from its financial institution in the event that the Appellants are partially or wholly successful on their appeals."[7]

The Director said all necessary approvals were obtained from the Treasury Board to make the interest rate offer.

[34] The Director stated the third part of the test is determining which party will suffer the greater harm from granting or refusing the stay, referred to as the "balance of convenience." The Director said, "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 *Public Lands Act* versus the benefit to be gained by the Appellants if the stay is granted."[8]

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7 Director's Response Submission, August 6, 2020, at page 9.

8 Director's Response Submission, August 6, 2020, at page 10.

[35] The Director submitted a stay of the Administrative Penalty would have a negative impact on the Director's and AEP's authority to take enforcement action on contraventions of the Act.

[36] The Director stated the Appellants are focused on their own interests, whereas the "Director's regulatory role satisfies the onus that there will be irreparable harm to the public interest if the stay is granted."[9] The Director quoted form *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."[10]

[37] The Director said the public interest could be harmed when AEP is prevented from exercising its statutory authority. The Director stated:

> "There is a greater public interest in safeguarding the Director's ability to effectively enforce environmental legislation such as the Public Lands Act to deter unlawful behaviour such as subletting public land without AEP's consent than in allowing the Appellants to avoid paying the penalty portion and the proceeds portion of the Administrative Penalty until the issuance of a Minister's Order."[11]

[38] The Director submitted the Appellants did not meet the test for the Board to grant a stay.

C. Appellants' Rebuttal

[39] The Appellants submitted the evidence establishes the prospect of irreparable harm to the Appellants without a stay, and is more than speculative. The Appellants stated:

> "Contrary to the Director's assertions in his response submissions, Ms. Benson has been entirely truthful regarding the nature and extent of the assets owned by

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9 Director's Response Submission, August 6, 2020, at page 11.

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

11 Director's Response Submission, August 6, 2020, at page 11.

> the Appellants, and any allegations that her evidence is somehow less worthy of belief are utterly unsubstantiated."[12]

[40] The Appellants said the twelve properties referred to by the Director are owned by the AC Benson Family Trust (the "Trust"). The Appellants stated Ms. Benson and Mr. Benson are not "at liberty to dispose of trust assets or to somehow pledge those assets as collateral for a loan which would benefit themselves alone, as they are not the owners of that property."[13]

[41] The Appellants submitted the remaining assets the Bensons personally own have a value of approximately $2,500,000.00. The Appellants stated that if they were to dispose of their assets, the value would be much less as they would be subject to taxes, fees, and other expenses. The Appellants questioned whether they would obtain the assessed value of the assets in the current financial environment. The Appellants noted that to partially pay the Administrative Penalty the Bensons would be required to sell their family home. The Appellants submitted selling their home would be a significant and irreparable harm to them if the appeal is allowed and the Administrative Penalty reversed.

[42] The Appellants said CRC has substantial debt, which is slightly less than the value of its assets. The Appellants stated CRC's total retained earnings are $500,000.00. The Appellants submitted RBC bank refused CRC's application for a $7,000,000.00 loan due to CRC's financial situation. The Appellants said out of approximately $13,000,000.00 in proceeds from the auction, CRC received just $7,000,000.00, most of which was used to partially discharge CRC's debts. The Appellants submitted CRC is in no position to pay the Administrative Penalty.

[43] The Appellants noted:

> "The Board has previously held that it would be unreasonable to require the Appellants to face potentially devastating financial problems in order to prove irreparable harm has occurred. Evidence is not required to be conclusive in administrative matters, only 'clear, convincing and cogent.'"[14]

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12 Appellants' Rebuttal Submission, September 21, 2020, at page 2.

13 Appellants' Rebuttal Submission, September 21, 2020, at page 2.

14 Appellants' Rebuttal Submission, September 21, 2020, at page 3.

[44] The Appellants stated that in similar appeals, the Board determined appellants would suffer irreparable harm if they were unable to use the penalty amount during the time it takes to resolve the appeal and refund the penalty. The Appellants noted the Director did not provide any evidence of authorization to repay accrued interest if the Appellants paid the Administrative Penalty now. The Appellants said the Director did not provide evidence that the interest rate AEP receives from its financial institution is the same as the Appellants would pay on a loan for the Administrative Penalty.

[45] The Appellants submitted it was in the public interest that the Administrative Penalty's enforcement is stayed until the appeal is resolved. The Appellants noted the Board has already stated that the Director's argument that he faces a low bar in showing a stay would harm the public interest is inapplicable to non-Charter or constitutional matters.

[46] The Appellants stated they cannot rely on the Director's claim that AEP would return the money paid for the Administrative Penalty should the Appellants succeed in the appeal, as the Director still holds the Appellants' security deposits on two separate leases.

[47] The Appellants said any potential damage to the Director's or AEP's regulatory authority is an important factor, but the Director provided no evidence supporting this claim. The Appellants note such evidence cannot be mere speculation or conjecture.

[48] The Appellants stated a stay of the Administrative Penalty "enhances the efficiency and effectiveness in the process of resolving matters under appeal, for all parties to the appeal."[15] The Appellants submitted they had met the test for the granting of a stay of the Administrative Penalty.

D. Comments on the Summary

[49] The Appellants stated that the disclosure of the personal financial information in the Summary was necessary because the Director's submissions sought to "impugn Ms. Benson's credibility and veracity."[16] The Appellants said that neither Ms. Benson nor Mr.

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15 Appellants' Rebuttal Submission, September 21, 2020, at page 4.

16 Appellants' Response Submissions, September 4, 2020, at page 2.

Benson had any concerns with being transparent with the Director, however they wished to ensure third-party information was kept confidential.

[50] The Appellants noted the Director refused to undertake to use the information for no other purpose other than the stay application. The Appellants submitted the Director's refusal to undertake to use the information only for the purposes of the stay application weighs heavily in favor of protecting third-party privacy rights.

[51] The Director stated the Appellants' Summary was not relevant or probative. The Director said the Summary did not prove any of the facts alleged by the Appellants in their submissions. The Director stated that if the Board decided to admit the information in the Summary, it should give it no weight because:

(a) the information was not relevant;

(b) the Appellants failed to identify the author of the document;

(c) information in the Summary was not tendered through a witness on behalf of the Appellants; and

(d) the Director was not given the opportunity to cross-examine the author of the document or witness of the Appellants who tendered the document.

V. ANALYSIS

A. Appellants' Summary Evidence

[52] In the Board's letter dated September 11, 2020, the Board said:

> "It is a fundamental principle of procedural fairness that proceedings before administrative tribunals be as open and accessible to the public as possible. The Board has adopted the presumption that its proceedings will be open unless there are extraordinary circumstances that would require confidentiality to be exercised."[17]

By requesting the Appellants provide the Summary, the Board was trying to find the right balance between the necessity of open and transparent proceedings and the need for personal information to be kept private.

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[17] Board's Letter, September 11, 2020, at page 1.

[53] After reviewing the Summary, the Board has determined the information the Appellants would have provided in a confidential affidavit is not required for the Board to accomplish its statutory mandate. The Board also found the information was not necessary for the Appellants to make their case for a stay. The evidentiary standards of a tribunal are not as strict as that of the Courts. The Board evaluates evidence on the balance of probabilities. The Board finds the Summary is not relevant to the Board's consideration of the stay application.

B. Stay Application

[54] 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."

[55] As already discussed, the Board's test for a stay is based on the Supreme Court of Canada's decision in *RJR-MacDonald*.[18] There are four aspects the Board considers when considering a stay:

(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.

All four parts of the test must be met for the Board to grant a stay.

[56] The Appellants have the onus of proof and must provide evidence in support of the stay application. Although the Director does not carry the onus of proof, the Director may provide evidence to support the Director's position on the stay. In making its determination on the stay application, the Board will weigh the evidence before it on a balance of probabilities and determine whether the Appellants have met the test.

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[18] 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."

[57] The first part of the test is whether there is a serious concern that should be heard by the Board. The Courts have specified the threshold for this question is relatively low. In an appeal before the Board, section 216(1)(e) of PLAR requires an appellant to "set out the grounds on which the appeal is made." In this appeal, the Appellants' grounds as listed in their Notice of Appeal 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.

[58] 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. The Alberta Court of Appeal stated in *Ominayak* v. *Norcen Energy Resources*:

> "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."[19]

[59] The party claiming that financial compensation would be inadequate to remedy the harm must show a real risk that harm will occur. It cannot be mere conjecture.[20] The Appellants claim that without a stay of the Administrative Penalty, CRC would likely become insolvent, and the Bensons would suffer serious financial harm, including possibly losing their home. The Director said the Appellants did not provide sufficient evidence to support their claim of financial disaster.

[60] If the Appellants pay the Administrative Penalty and later are successful in the appeal, the Director has offered to return the amount paid by the Appellants with the interest AEP would have received from its own financial institution. While the Board recognizes the

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

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

Director's offer was made in good faith to resolve the Appellants' concerns, the Director provided no evidence or information to support the offer. The Director did not state what the interest rate amount the Appellants would receive and provided no documentation to prove the Treasury Board supports the offer. The Board recognizes the onus is on the Appellants to provide evidence supporting their stay application, however, the Director cannot make statements without credible supporting evidence and assume the Board will accept them. The Board found no evidence the Director had authorization from the Treasury Board to make the offer.

[61] The Board notes if the Appellants are ultimately successful in their appeal, section 232(3) of PLAR[21] prevents the Appellants from obtaining costs against AEP and the Director. Additionally, the *Proceedings Against the Crown Act*,[22] restricts civil action for damages against AEP and the Director except in certain circumstances. The Board finds the Appellants would have virtually no realistic chance of recovering losses if they pay the Administrative Penalty and subsequently succeed in the appeal.

[62] The Appellants would have to sell all their property, including their home, to pay the Administrative Penalty, even though the Appellants have appealed the Director's decision. Such an approach is akin to finding a person guilty before a trial is even held. At the conclusion of this appeal, the Minister of Environment and Parks will either confirm, reverse, or vary, the decision of the Director to issue the Administrative Penalty. It is unacceptable to the Board that an appellant should suffer irreparable harm to pay a penalty before the outcome of the appeal is determined.

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

[64] 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

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[21] 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."

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.

[65] The Appellants submitted CRC could go bankrupt and the Bensons could suffer financial harm and lose their home without a stay of the Administrative Penalty. 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.

[66] The definition of "public interest" is dependent 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.[23] To determine the public interest in the context of the stay application, the Board must consider the Act and PLAR.

[67] The Board finds AEP's regulatory responsibilities under the Act are a vital function. The Director has a key role in the regulatory system, but the Act has also made provision for the Board to assume a quasi-judicial function in the regulatory process. Under the Act and PLAR, persons may appeal certain decisions of the Director to the Board and may request the Board grant a stay of the decision under appeal. 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." In the Board's view, the inclusion in the Act of the right to request a stay of a director's decision is evidence the Legislature considered circumstances where a stay would be in the public interest.

[68] The Director stated a stay would constrain the ability of the Director and AEP to take enforcement actions against contraventions of the Act. However, the Director provided no evidence or even an explanation of how a stay would negatively impact enforcement. The Board would be very concerned if a stay hindered enforcement, but the Board does not see any rational

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

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

evidence a stay of the Administrative Penalty will negatively impact the Director's or AEP's ability to fulfill their regulatory responsibilities.

[69] 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.

[70] The Board finds, in this appeal, it is in the public interest to grant a stay of the Administrative Penalty until the appeal is resolved. A stay of the appeal prevents irreparable damage to the Appellants without impeding AEP's enforcement responsibilities. A stay is in keeping the legislation's intent to ensure an appellant is provided a fair opportunity to present its case without suffering irreparable harm while doing so.

VI. CONCLUSION

[71] The Board determined the Summary is not relevant to its decision on the stay application. The Board finds the Appellants have met the requirements of the stay test. The Board grants the Appellants' application for a stay of the Administrative Penalty until the Board lifts the stay or until the Minister makes a decision regarding the appeal.

Dated on October 26, 2020, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Nick Tywoniuk
Board Member

"*original signed by*"
Line Lacasse
Board Member