
ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – August 24, 2022

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

-and-

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

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

BEFORE:

Mr. Gordon McClure, Appeals Co-ordinator and Board Chair, Dr. Nick Tywoniuk, Board Member, and Ms. Barbara Johnston, Board Member.

SUBMISSIONS BY:

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

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

EXECUTIVE SUMMARY

This is the Public Lands Appeal Board's (the "Board") decision regarding the request of Syncrude Canada Inc. ("Syncrude") for a stay of the decision by the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the "Director"), to require Syncrude to pay royalties on sand and gravel extracted from its oil sands operations (the "Director's Decision") north of Fort McMurray in the Regional Municipality of Wood Buffalo.

Syncrude has appealed the Director's Decision.

The Board granted Syncrude's request for a stay. The stay will be effective until the Minister makes a decision on the appeal and issues a Ministerial Order, or until the Board removes the stay.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 1

III. SUBMISSIONS 3

 A. Director 3

 B. Appellant..... 3

IV. ANALYSIS..... 4

V. CONCLUSION..... 8

I. INTRODUCTION

[1] This is the Public Lands Appeal Board's (the "Board") decision regarding the request of Syncrude Canada Inc. ("Syncrude") for a stay of the decision by the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the "Director"), to require Syncrude to pay royalties on sand and gravel extracted from its oil sands operations (the "Director's Decision") north of Fort McMurray in the Regional Municipality of Wood Buffalo. Syncrude has appealed the Director's Decision.

[2] The Board grants Syncrude's request for a stay. The stay will be effective until the Minister makes a decision on the appeal and issues a Ministerial Order, or until the Board or Minister removes the stay.

II. BACKGROUND

[3] On June 14, 2021, Syncrude filed a Notice of Appeal with the Board appealing the Director's Decision requiring Syncrude to pay royalties on materials previously exempt under an Agreement of Understanding ("the royalty exemption provisions") and requested a stay of the Director's Decision pending the outcome of the appeal. On July 9, 2021, the Board granted an interim stay pending the Director's motion to dismiss the appeal. On July 29, 2021, the Director filed a motion requesting the Board dismiss the Notice of Appeal for being outside the Board's jurisdiction. In a letter dated September 9, 2021, the Board extended the interim stay until the Board made its decision on the Director's jurisdiction motion and until the Board considered the submissions from the Director and Syncrude on the stay.

[4] On December 13, 2021, Syncrude wrote to the Board and alleged that Alberta Environment and Parks ("AEP") appeared to be contravening the Board's stay by issuing new invoices to Syncrude that calculated and applied interest to the amounts in dispute. Syncrude requested the Board direct AEP to comply with the Board's stay of the Director's Decision.

[5] On December 17, 2021, the Board requested the Director respond to Syncrude's

letter and indicated that Syncrude would be provided an opportunity to provide further response. On January 10, 2022, the Director responded and denied that AEP had breached the interim stay. However, the Director stated he would not challenge the interim stay or take any steps to collect the disputed amounts while the matters before the Board, and that if the Director's Decision was confirmed by the Minister, the Director would make a request that any interest calculated on the disputed amounts be waived.

[6] On January 14, 2022, the Board determined it had jurisdiction to hear the appeal.

[7] On January 17, 2022, Syncrude responded that the Director was effectively taking steps to collect the disputed amounts, and that Syncrude should not have to rely on the discretion of the Minister to waive the interest charges.

[8] On January 18, 2022, the Board advised that it would provide a decision regarding the stay as soon as possible.

[9] On March 14, 2022, the Board wrote Syncrude and the Director stating:

“The Board expects the interim stay to be honoured until it has received and rendered a decision on the stay application. The Board is prepared to proceed with receiving and considering stay submissions. Should the parties wish to forego making stay submissions and reach an agreement regarding the interim stay, the Board is willing to proceed to hearing the matter under appeal... [I]n regards to the enforcement of stays, the Board is reliant upon the honour of the Crown as there is no mechanism established under the legislation for the Board's to enforce a stay. In this regard, the Board requests the Director to cease calculation of interest on the Disputed Amounts. Should the Director refuse the Board's request to cease calculation of the interest on the Disputed Amounts the Appellant may wish to seek remedy through the Courts.”¹

[10] The Director requested an extension of time until March 25, 2022 to provide a response regarding the stay. On March 24, 2022, the Director informed the Board the parties had discussed an approach to addressing the issue of interest accruing under the disputed invoices and requesting additional time to implement the proposal. The Board granted the request and

¹ Public Lands Appeal Board, letter to Syncrude and Director, March 14, 2022

asked the parties to provide their response to the Board on April 8, 2022. The Director requested an extension on April 8, 2022 to April 14, 2022 to provide a further update. The Board provided the parties until April 22, 2022 to provide a further update regarding the stay.

[11] On April 22, 2022, the Director advised that he was awaiting Syncrude's confirmation regarding his proposal and requested a further extension.

[12] On May 25, 2022 the Director informed the Board that the Syncrude accepted the Director's proposal. On June 21, 2022, Syncrude was asked to confirm if the issue of accrual of interest had been resolved. Syncrude wrote the Board on June 21, 2022, stating, "Syncrude has no further concerns about the accrual of interest at this time."²

[13] On June 28, 2022, the Board asked Syncrude if it was seeking to continue the interim stay. On July 6, 2022, Syncrude confirmed it was requesting the stay remain in place. The Board requested the Director provide a response. On July 15, 2022, the Director advised he was taking no position on whether the stay should be extended. On July 15, 2022, the Board advised it would provide further correspondence regarding the stay.

[14] On August 4, 2022, the Panel of the Board met to consider whether to grant a stay of the Director's Decision.

III. SUBMISSIONS

A. Director

[15] The Director submitted AEP did not intend to collect the disputed royalty payments while the Appeal is ongoing.

[16] The Director further stated he takes no position about if the interim stay should be extended.

B. Appellant

[17] Syncrude confirmed it desires to have the interim stay remain in place pending

² Syncrude, letter to the Public Lands Appeal Board, June 21, 2022

resolution of the appeal, submitting the interim stay suspends the decision to remove the royalty exemption provisions from Syncrude's dispositions and relieves Syncrude of the requirement to pay the amounts as invoiced by AEP while the stay is in place.

[18] Syncrude submitted that the discussions between it and the Director were limited to interest and payment of the full invoices was not a live issue.

[19] The stay is broad and for the certainty of the proceedings provides appropriate clarity and direction for all parties notwithstanding any understandings related to interest.

[20] Syncrude requested the stay remain in place so the parties had clarity on the Board's expectations and was not reliant on the AEP's discretion to avoid compliance and enforcement concerns.

IV. ANALYSIS

[21] 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."

[22] Syncrude's request for the stay is a new stay request as the matters to which the interim stay pertained have been addressed. The stay request before the Board is a new application.

[23] The Board bases its test for a stay on the Supreme Court of Canada decision in *RJR MacDonald Inc. v. Canada (Attorney General)*.³ The Board considers four aspects when determining whether to grant a stay:

- (1) Is there a serious concern for the Board to hear?
- (2) Will the applicant suffer irreparable harm if a stay is not granted?
- (3) Which party does the balance of convenience favour? and
- (4) Does the public interest influence the balance of convenience?

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

[24] 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.

[25] Syncrude submitted the effect of the Director's Decision was to vary the terms of the dispositions and the royalty agreement between Syncrude and AEP. Syncrude claimed the Director 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 when making the Decision. These are sufficiently serious matters for the Board to find that Syncrude meets the first part of the stay test.

[26] 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*, 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.”⁴

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.⁵

[27] Syncrude submitted that if a stay was not granted it would need to pay the disputed amount immediately, depriving it of those funds until the appeal was concluded. Syncrude also argued that the additional administrative and accounting complexity arising if Syncrude is required to pay the disputed amount immediately would lead to additional costs that would not be recoverable if Syncrude was successful in the appeal. Syncrude noted that the Board is not authorized to award costs against the Director.

⁴ *Ominayak v. Norcen Energy Resources*, [1985] 3 W.W.R. 193 (Alta. C.A.), at paragraph 30.

⁵ *Edmonton Northlands v. Edmonton Oilers Hockey Corp.*, [1993] A.J. No. 1001 (Q.B.), at paragraph 78.

[28] In *Normand Menard and Normko Resources Inc. v. Director*,⁶ the Board found that if the appellants paid the administrative penalty that was assessed against them, and was then later successful in the appeal, the Director would be required to return the amount of the administrative penalty. However, the appellants would not have access to the penalty amount and would lose the opportunity to utilize those monies during the time it took to conclude the appeal and refund the penalty. The Board also noted that there is no compensation available to an appellant to cover losses that may incur from not having the penalty amount available for use during the appeal process time.

[29] In addition, the Board notes that section 232(3) of PLAR⁷ prevents the appellants from obtaining costs against AEP. The Board therefore finds that Syncrude would suffer financial losses if required to pay the disputed amount pending hearing of the appeal that it would not be able to recover from the Director or AEP, which constitutes an irreparable harm that meets the second part of the stay test.

[30] 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 Syncrude's position with that of the Director in assessing the balance of convenience. The effect on the public interest may sway the balance for one party over the other.

[31] Syncrude submitted there was no risk or prejudice to the Director if the stay was granted as Syncrude complies with its obligations under the Act and PLAR, which includes making payments of surface material royalties. Syncrude argued the irreparable harm it would

⁶ 19-0245-0246-ID1 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.

⁷ Section 232 (3) of PLAR states: "No direction for the payment of costs may be made against the Crown, a Minister, a skirt director, an officer or any employee or official of the Government of Alberta."

suffer if a stay was not granted tilts the balance of convenience in Syncrude's favour.

[32] As the Director took no position on whether the stay should be granted, the Board has only Syncrude's submissions to consider whether the balance of convenience is in favour of Syncrude. The Board notes that a stay of the Decision would not cause damage to public land or the environment, and the Government of Alberta will not suffer financially due to a potential delay in collecting the disputed amount. The Board finds the balance of convenience favours the Syncrude.

[33] 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.

[34] 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.”⁸

Syncrude submitted that granting a stay would be consistent with the public interest. Syncrude stated that the public interest requires considering the importance of disposition holders being able to rely on the terms and conditions of dispositions until those dispositions are amended in a manner consistent with procedural fairness. Syncrude acknowledged that there is also a public interest in AEP being able to collect amounts properly due on behalf of the Government of Alberta.

[35] The Board finds that it is in the public interest for an appellant not to be penalized unjustly by having to pay the disputed amounts pending the outcome of the appeal. The Legislature provided for an appeal process and the ability to stay a decision until it can be determined if a disputed decision is justified. While there is significant public interest in AEP being able to collect monies owed in a timely fashion, in this situation the Board finds that the

⁸ *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at paragraph 43.

greater public interest is served by staying the decision until the appeal is determined and the Minister makes a decision.

V. CONCLUSION

[36] The Board finds that Syncrude meets the test for granting a stay. Therefore, the Board grants a stay of the Director's Decision to require Syncrude pay the disputed amounts. For so long as the stay is in effect, no interest shall accrue on the disputed amounts. The stay will be in effect until the Minister makes a decision on the appeal and issues a Ministerial Order, or until the Board removes the stay.

Dated on August 24, 2022, at Edmonton, Alberta.

"original signed by"
Gordon McClure
Appeals Co-ordinator and Chair

"original signed by"
Dr. Nick Tywoniuk
Board Member

"original signed by"
Barbara Johnston
Board Member