Appeal No. 01-062-ID5

ALBERTA
ENVIRONMENTAL APPEAL BOARD

Decision

Date of Decision – July 23, 2002

IN THE MATTER OF sections 91, 92, 95, and 97 of the *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12;

-and-

IN THE MATTER OF an appeal filed by Imperial Oil Limited and Devon Estates Limited with respect to Environmental Protection Order #EPO-2001-01 issued on June 25, 2001, by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment.*

BY WRITTEN SUBMISSIONS: William A. Tilleman, Q.C., Chair.

PARTIES:

Appellants: Imperial Oil Limited and Devon Estates Limited, represented by Mr. Ken Mills and Ms. Bernadette Alexander, Blake, Cassels & Graydon.

Director: Mr. Jay Litke, Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, represented by Mr. William McDonald and Mr. Grant Sprague, Alberta Justice.

Intervenors: The City of Calgary, represented by Mr. Ron Kruhlak, McLennan Ross.

Calhome Properties Ltd., represented by Mr. Ted Helgeson, Helgeson & Chibambo Law Office.

The Lynnview Ridge Residents Action Committee, represented by Mr. Gavin Fitch, Rooney Prentice.

The Calgary Health Region, represented by Dr. Brent Friesen.

Rio Verde Properties Ltd., represented by Ms. Debbie Laing.

EXECUTIVE SUMMARY

This is a decision respecting a request for a Stay in relation to an appeal filed by Imperial Oil Limited and Devon Estates Limited (a wholly owned subsidiary of Imperial Oil) against an Environmental Protection Order (the EPO) issued to them with respect to the Lynnview Ridge residential subdivision in Calgary, Alberta.

The Board received a request for a Stay from Imperial Oil in response to two letters dated September 11 and 12, 2001, issued by Alberta Environment to Imperial Oil. The letters provide further directions in relation to remediation work to be carried out under the EPO. The Board determined Imperial Oil presented a prima facie case for a Stay and requested submissions from the other parties to the appeal as to whether a Stay should be granted.

The Board decided that, even though Imperial Oil had shown there was a serious issue to be determined, it did not convince the Board that a Stay should be granted.

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I. BACKGROUND

[1] This is a decision respecting the request for a Stay in relation to an appeal filed by Imperial Oil Limited ("Imperial Oil") and Devon Estates Limited ("Devon Estates") under the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (the "Act" or "EPEA").[1] Imperial Oil and Devon Estates (collectively the "Appellants") filed a Notice of Appeal respecting Environmental Protection Order #EPO-2001-01 (the "EPO") with the Environmental Appeal Board (the "Board") on July 3, 2001. The EPO was issued to the Appellants on June 25, 2001, by the Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment (the "Director) with respect to the Lynnview Ridge residential subdivision (the "Subdivision") in Calgary, Alberta.

[2] The EPO stated that Imperial Oil ran an oil refinery on the lands that are now the Subdivision between 1923 and 1975. The majority of lands that are now the Subdivision were then transferred to Devon Estates, a wholly owned subsidiary of Imperial Oil, who developed them in conjunction with another company. The EPO stated, that in 1999 and 2000, the City of Calgary undertook a review of the "…numerous environmental assessments that had taken place at the Subdivision…." The EPO stated that based on this information, the Director "…is of the opinion that a release of the Substances [(lead and hydrocarbons)] has occurred, and that the release of the Substances has resulted in an adverse effect…." Further, the EPO concluded that Imperial Oil and Devon Estates are "persons responsible" pursuant to section 1(ss)[2] (now section 1(tt)) of the Act.

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[1] As of January 1, 2002, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 replaced the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3.

[2] Section 1(ss) (now section 1(tt)) of the Act provides:

> "In this Act … 'person responsible', when used with reference to a substance or a thing containing a substance, means
>
> (i) the owner and a previous owner of the substance or thing,
>
> (ii) every person who has or has had charge, management or control of the substance or thing, including, without limitation, the manufacture, treatment, sale, handling, use, storage, disposal, transportation, display or method of application of the substance or thing,
>
> (iii) any successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in subclause (i) or (ii), and

[3] Among other things, the EPO directed the Appellants to prepare a remedial options report (the "Remedial Options Report") that reviews all of the options available to remediate the Substances and the associated adverse effects.[3] The EPO required that the Appellants carry out the option that is accepted by the Director.[4] Deadlines were set with respect to each of the requirements in the EPO. These deadlines were subsequently extended following discussions with the Director.[5]

[4] In the Notice of Appeal, the Appellants objected to the EPO in its entirety, and in particular, that the Director failed to "…name other persons known to him as persons responsible…." The Appellants also reserved "… the right to continue to challenge more specifically the terms of the Order in the event the appeal is dismissed in whole or in part…."

(iv) a person who acts as the principal or agent of a person referred to in subclause (i), (ii) or (iii)…."

[3] The EPO provides:

"4. The Parties shall submit a report containing all options to remediate the Substances and the adverse effects to the Subdivision Lands, and any off-site areas (the 'Remedial Options Report') to the Manager by Wednesday, July 18, 2001. [This date was subsequently extended to August 16, 2001.]

5. The Remedial Options Report shall include:

(a) A detailed summary of each remedial option (the 'Remedial Options') that may be considered to remediate, risk-manage and/or remove and dispose of the Substances and the resulting adverse effects to the Subdivision Lands, and to any off-site areas;

(b) Each Remedial Option shall contain:

(i) The proposed methodology for statistical and laboratory analysis, sampling, monitoring, testing and the proposed remedial procedures;

(ii) The remedial criteria for soils, surface and groundwater for each of the Substances;

(iii) A description of all measures that will be taken to ensure that there is no damage to undisturbed areas;

(iv) The results of the public consultation required by Clause 2(c) regarding that particular Remedial Option; and

(v) A schedule of implementation describing the work planned to implement the Remedial Option."

[4] The EPO provides:

"6. The Parties shall implement the work set out in the Remedial Option that is accepted by the Manager, in accordance with the applicable remedial criteria and schedule of implementation that are approved by the Manager."

[5] With respect to the matter of the deadlines specified in the EPO, the Appellants also initially requested a Stay from the Board. However, the request for this initial Stay was withdrawn when the Director and the Appellants were able to reach an "…understanding…" as to how these deadlines would be applied. See: Appellants' Letter, dated July 12, 2001.

[5] The Board acknowledged the appeal on July 3, 2001, and requested that the Director provide the records (the "Records") related to this appeal. The Board received the Records on July 5, 13, and 23, 2001, and subsequently provided copies to the Appellants and other Parties to this appeal.

[6] According to standard practice, the Board wrote to the Natural Resources Conservation Board and the Alberta Energy and Utilities Board asking whether this matter had been the subject of a hearing or review under their respective legislation. Both boards responded in the negative.

[7] In its letter of July 3, 2001, the Board requested that the Director and the Appellants identify other persons that may have an interest in this appeal. Among the other parties that were identified were the City of Calgary, Calhome Properties Limited ("Calhome"), and the Lynnview Ridge Residents Action Committee (the "Residents Committee"). The Board subsequently received intervenor requests from these parties and granted them full party status. The Board also received intervenor requests from the Calgary Health Region (the "CHR") and Rio Verde Properties Limited ("Rio Verde"). The Board also granted the Calgary Health Region full party status and granted Rio Verde intervenor status with the right to file written submissions only.[6] The Board subsequently set a hearing with respect to this matter for September 12 to 14, 2002.

[8] Pursuant to the terms of the EPO, Imperial Oil submitted its Remedial Options Report to the Director on August 16, 2001.[7] In a letter dated September 11, 2001 and addressed to Imperial Oil, the Director responded to the Remedial Options Report. The September 11, 2001 letter provided, among other things:

> "• Remove and replace the top 0.3 metres of soil on all private residential property, including townhouses, in the affected area, except for soil under houses, multi-family buildings and garages. This includes the removal of soil from beneath all decks, fences, gardens, trees and private residential driveways and sidewalks.

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[6] Intervenor Decision: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (July 23, 2002), E.A.B. 01-062-ID4.

[7] See: Letter from the Appellants, dated September 11, 2001. See also: Letter from the Director to "All Residents of Lynnview Ridge", dated September 11, 2001.

- In areas where the lead concentration exceeds the current national guideline of 140 parts per million (ppm), remove and replace soil at intermediate depths of 0.3 to 1.5 metres as required.
- Consult with all property owners who will be continuing to live in the neighbourhood on the removal and replacement of specific property features that will be affected by the remediation program. This could include decks, fences and any other unique landscaping features. …
- For all property – municipal and residential – where lead contamination exists at depths greater than 1.5 meters, Imperial Oil will apply site-specific remediation criteria and controls as proposed in the Remedial Options Report.
- Overall, upon completion of all remediation activities, Imperial Oil shall restore all of the properties to their pre-disturbance condition to the satisfaction of the landowner."[8]

The September 11, 2001 letter was then clarified by a letter from the Director to Imperial Oil dated September 12, 2001 (collectively the "September 11 and 12, 2001 Letters").

[9] On September 11, 2001, the Appellants wrote to the Board and requested an adjournment of the September 12 to 14, 2001 hearing in order to "…properly deal with all matters which Imperial [Oil] wishes to place before the Board." Imperial Oil indicated that this would "…include those aspects of the Director's letter of September 11, 2001 that Imperial [Oil] seeks to appeal."

[10] Following consultation with all of the Parties, and upon the Board understanding that some of the witnesses for some of the Parties would not be available for the September 12 to 14 hearing, the Board granted Imperial Oil's adjournment request.[9] The Board immediately requested new dates for the hearing and subsequently rescheduled the hearing for October 16 to 18, 2001.

[11] On September 17, 2001, the Board wrote to the Parties and requested that Imperial Oil provide any motions that it wished to bring regarding the September 11 and 12, 2001 Letters by September 18, 2001.

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[8] Letter from the Director to "All Residents of Lynnview Ridge", dated September 11, 2001. This letter summarized the contents of the Director's letter to Imperial Oil, dated September 11, 2001.

[9] During consultation with the Parties, the Board came to understand that some of the witnesses for the September 12 to 14, 2001 hearing may not be available for the hearing as their duties required them to be elsewhere as a result of the events of September 11, 2001 in the United States.

[12] On September 18, 2001, the Appellant submitted a number of preliminary motions including the request for a Stay that is the subject of this decision. The other preliminary motions sought, in various ways, to add the concerns of Imperial Oil with respect to the September 11 and 12, 2001 Letters to the hearing of this appeal.[10] The request for Stay stated:

> "The form of Notice of Appeal attached seeks a stay of the Director's Decision [(the September 11 and 12, 2001 Letters)] or alternatively of the entire EPO to the extent the Director's Decision forms an amendment to the EPO. Imperial seeks to have the stay application heard on an expedited basis subject to receipt and consideration of a response to Imperial's previous request to the Director for clarification of the Director's Decision."

[13] On September 19, 2001, the Board requested that the Appellants provide further comments on the following four points in respect of the Stay application:

> "1) What is the serious concern that the Appellants have 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 for the refusal of a Stay pending a decision of the Board on the appeal than the other parties would suffer from the granting of a Stay?
>
> 4) Would the overall public interest warrant a Stay?"

[14] On September 25, 2001, the Board advised that the Appellants had established a *prima facie* case for Stay. The Board provided a time line for the other Parties to submit written submissions with respect to the Stay application.

[15] On October 19, 2001, after the Board notified the Parties that, after reviewing all of the submissions, it had decided to deny the Appellants' request for a Stay. The Board indicated that reasons would follow. These are those reasons.

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[10] See: Preliminary Motions: *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (October 26, 2001), E.A.B. 01-063-ID.

II. SUBMISSIONS

A. Appellant

[16] The Appellants advised that the request for the Stay was in relation to the September 11 and 12, 2001 Letters, "…which directed that IOL [(Imperial Oil)] undertake certain actions in connection with Environmental Protection Order No. EPO-2000-1 issued on June 25, 2001."[11] The Appellants submitted that, based on the Appellants' previous submissions and filed affidavits, there was a serious issue to be tried, and therefore, "…the first branch of the test for a stay is easily met."[12]

[17] With respect to the second and third "branch" of the test for a Stay, the Appellants argued that:

> "…damages are inadequate because the Board will not be in a position to award damages against the Director in the event the Appeal is successful. Accordingly, there is no doubt that damages are inadequate as the same would not, in any event, be capable of being awarded by the Board."[13]

[18] Further, the Appellants submitted that the expected work would cause a health risk to the residents, and the Appellants would be responsible for the removal of the system proposed by the Director. The Appellants stated:

> "…this specific direction:
>
> (a) seeks to apply an approach to the removal of hydrocarbons which is inappropriate;
>
> (b) applies that method indiscriminately to all private residents regardless of the previous identification of hydrocarbon vapours;
>
> (c) requires the installation of the 'sub-slab depressurization system' to be installed on a completely unrealistic timetable which may otherwise jeopardize, delay and otherwise hinder any other remedial work to be required;
>
> (d) creates potential health concerns where none presently exist; and
>
> (e) substitutes an inappropriate method in place of the rational and effective method proposed and supported by environmental experts.

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11 Appellants' Submission, dated September 20, 2001, at paragraph 3.

12 Appellants' Submission, dated September 20, 2001, at paragraph 8.

13 Appellants' Submission, dated September 20, 2001, at paragraph 22.

> Further, if the Appellants are required to install the 'sub-slab depressurization system' and such direction is overturned as inappropriate because it presents, *inter alia*, a health risk, the Appellants will occur additional costs for the removal of such a system."[14]

[19] The Appellants also argued that if the Stay was not granted, "…the Appeal will be rendered nugatory." According to the Appellants, the directions of the Director pursuant to the September 11 and 12, 2001 Letters, if completed by the Appellants, could not be undone.[15]

[20] In reference to the issue of the "balance of convenience," the Appellants stated:

> "In the circumstances, it is clear that the losses that will be faced by the Appellants if a stay is not granted are significantly higher than if the impugned remedial work is simply delayed."[16]

[21] The circumstances the Appellants eluded to included:

> "(a) there is no imminent health risk that will be incurred if a stay is granted;
>
> (b) there exists a risk of potential of harm [*sic*] to the public, as indicated above, in the event the Appellants proceed with certain of the remedial work directed;
>
> (c) the hearing of the Appeal is scheduled, in any event, to be heard between October 16-18, 2001;
>
> (d) the Appeal will be rendered nugatory if a stay is not granted and, in particular, the various matters which the Appellants have been directed to perform cannot be undone if the Appeal is successful;
>
> (e) the Appellants have shown a high degree of cooperation and goodwill in completing remedial work which it otherwise does not object to and will continue to do so;
>
> (f) the timetable and onerous deadlines of the Director are impractical and otherwise interfere with the coordination of other remedial work; and
>
> (g) the granting of a stay will ensure that any remedial work proceeds on a realistic timetable and will ensure the effective, complete and expeditious completion of the same."[17]

[22] The Appellants further argued, "…Alberta jurisprudence favours the maintenance of the *status quo*."[18]

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[14] Appellants' Submission, dated September 20, 2001, at paragraphs 16 and 17.

[15] Appellants' Submission, dated September 20, 2001, at paragraph 21.

[16] Appellants' Submission, dated September 20, 2001, at paragraph 23.

[17] Appellants' Submission, dated September 20, 2001, at paragraph 25.

B. Rio Verde Properties Ltd.

[23] Rio Verde submitted that the Stay should not be granted, as "human health must be the primary concern … We believe that the Calgary Health Region is for [*sic*] better prepared to deal with the impact on public health and, in their letter of September 5th, 2001, there is clear support for prompt action."[19]

C. Lynnview Ridge Residents Action Committee

[24] The Residents Committee referred to the "…seven grounds for objecting to the Director's Remediation decision … [but] only two of these grounds are listed as being grounds for the Stay application. Specifically… the Appellants object to the deadlines set forth in the Remediation Decision and to the requirement to install a sub-slab depressurization system…."[20]

[25] The Residents Committee accepted that there is a serious question to be heard. However, it also stated that:

> "…the harm to the Appellants in carrying out these directions can be compensated for by damages…. The Appellants have failed to demonstrate that the nature of the harm is such that it would be irreparable…. [T]here is not any doubt as to the adequacy of damages as a remedy."[21]

[26] Further it stated:

> "…given that Imperial's lead remediation program is not scheduled to commence until April 2002, there can be no grounds for a stay of the Remediation Decision relating to the removal of lead contaminated soil nor to the remediation of the interior of the houses following remediation of lead contaminated soil."[22]

[27] The Residents Committee submitted that:

> "…the Appellants must demonstrate that the suspension of the Remediation Decision, which clearly was made to promote the public interest, is justified by a more compelling public interest. The Appellants have failed to do so. The only argument made by the Appellants in this regard is based on the opinion expressed by Imperial's own consultants that the sub-slab depressurization systems may

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18 Appellants' Submission, dated September 20, 2001, at paragraph 24.

19 Rio Verde's Submission, dated October 1, 2001.

20 Residents Committee's Submission, dated October 1, 2001, at page 2.

21 Residents Committee's Submission, dated October 1, 2001.

22 Residents Committee's Submission, dated October 1, 2001.

> actually draw vapours towards residences. With respect, the Residents Committee submits that this assertion in Imperial's evidence is clearly self-serving and should be accorded little weight."[23]

D. Calgary Health Region

[28] In its submission, the Calgary Health Region referenced studies that have been completed regarding the hydrocarbon vapour concentrations in the Subdivision lands. It stated that:

> "These undisputed facts show that the lead concentrations in the majority of the Subdivision are far above typical background concentrations in Calgary. As a result, there is a real, substantial and continuing threat to public health in which time is of the essence.
>
> We are fast approaching winter where the vapour migrates into homes. Most recently, we have evidence indicating that already a vapour breakthrough has occurred in the last two weeks."[24]

[29] In response to the Appellants' claim that the sub-slab depressurization system would draw hydrocarbon vapours towards residences, the Calgary Health Region briefly explained how the system works and summarized it by stating that "…the sub-slab systems do not increase public risk rather they are protective of public health. The CHR is not prepared to accept any delay in the installment of sub-slab depressurization systems due to the imminent winter season."[25]

[30] The Calgary Health Region emphasized the potential risk, particularly to children, if the contaminants were not removed from the site as soon as possible. It stated:

> "The CHR does not concur with the ground of the stay with respect to the lead and hydrocarbon contaminants in the surficial and deep soils in the Lynnview Ridge subdivision, formally the Imperial Oil Refinery. We hold the position that the lead and hydrocarbon contaminants pose a serious public health risk and these contaminants should be removed in an expedient manner and time is of the essence. Any delay in the remediation of the soils increases the potential for children to become adversely impacted."[26]

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23 Residents Committee's Submission, dated October 1, 2001.

24 Calgary Health Region's Submission, dated October 1, 2001.

25 Calgary Health Region's Submission, dated October 1, 2001.

26 Calgary Health Region's Submission, dated October 1, 2001.

E. Calhome Properties Ltd.

[31] Calhome stated that the issue of the Stay should be determined after the Board made its decision as to whether the Director's September 11 and 12, 2001 Letters were actually appealable. In the alternative, Calhome suggested that if the Stay was granted, that it remain in effect only until the hearing was held.[27] Essentially, Calhome stated that if the Appellants succeeded on the Appeal, the Appellants' concerns would be resolved. If the Appellant was unsuccessful in its Appeal, then the matter of the issues in the Appellants' September 18, 2001 letter could be dealt with.

F. City of Calgary

[32] The City of Calgary did not support the Appellants' Stay request. In its submission, the City of Calgary argued:

> "The City has reviewed the various examples of purported harm suggested by the Appellants. The City is of the view that none of these are of a nature such that they cannot be compensated for by damages. Clearly, the issue of costs and the attempt to avoid them or seek contribution for them appears to be the basis for the entire appeal….
>
> In weighing the balance of convenience, the Appellants suggest that they will suffer greater harm without the stay than any harm to other parties if a stay is granted. The harm suggested by the Appellants is inconvenience and additional costs. Against this must be weighed the current public health risks which have been identified by the Director and the Calgary Heath Region. The City recognizes the concerns raised by these parties and notes that the protection of human health are of the first identified purposes of the *Alberta Environmental protection and Enhancement Act* (section 2(a)).
>
> Finally, the Appellants have failed to incorporate in their argument any consideration of the public interest. Clearly, it is in the public interest that the necessary work proceed."[28]

G. Director

[33] The Director submitted that the "…Board should reject the application made by the Appellants for a Stay." The Director submitted that there was "…not much of a serious issue

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[27] See: Calhome's Submission, dated September 27, 2001.

[28] City of Calgary's Submission, dated October 1, 2001.

to be determined by this Board…" as based on a previous decision of the Board,[29] it was clear that the Appellants were liable. The Director submitted that the Appellants had "…provided no credible evidence to suggest that proceeding with the Order and the Director's implementation decision [in the September 11 and 12, 2001 Letters] will result in an increased risk to human health."

[34] In response to the Appellants' claim that the appeal would be rendered nugatory if the Stay was not granted, the Director submitted:

> "…in considering the potential to render the appeal nugatory, the Board should consider:
>
> a) the appeal is scheduled to be heard between 16 and 18 October,
>
> b) the Appellants indicate they are completing remedial work which it does not object to, yet appears to object to all of the significant remedial steps required to protect human health, and
>
> c) all of the work which may be done is compensable in damages."[30]

[35] With respect to the balance of convenience part of the test for a Stay, the Director stated:

> "In essence the Board must weight [*sic*] the competing claims of harm to establish which is greater. In this case, the question is whether the economic consequences to the Appellants of complying with the Order are more grave than the health and environmental effects that may result if the Appellants do not proceed to implement the Order.
>
> In the Director's submission, the answer to the question [regarding the balance of convenience] is self-evident."[31]

The Director continued:

> "On balance, the Director submits that in weighing the two potential harms, the Board should err on the side of protecting human health. The evidence of the Calgary Health Region is sufficiently clear and indicates serious and potentially irreversible harm to the health of the residents of Lynnview Ridge."

[36] The Director summarized his arguments by stating:

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[29] *Legal Oil and Gas Ltd.* v. *Director, Land Reclamation Division, Alberta Environmental Protection* (July 23, 1999), E.A.B. Appeal No. 98-009-R, affirmed by *Legal Oil and Gas Ltd.* v. *Alberta (Minister of Environment)* (2000), 84 Alta. L.R. (3d) 159 (Alta.Q.B.), Clackson J.

[30] Director's Submission, dated October 1, 2001.

[31] Director's Submission, dated October 1, 2001.

"In this case,

a) the Appellants have a weak case and do not appear to suggest that they are not persons responsible, rather that others should join them. This raises the question of whether there is a serious issue to be tried that relates to the Director's decision,

b) the Appellants claim of irreparable harm is actually only a concern about economic cost and given their weak case, should not be given much weight, and

c) the balance of convenience must weigh solidly in favour of the protection of human health."[32]

H. Appellants' Response Submission

[37] In the Appellants' rebuttal submission, they stated that they "…are appealing the entirety of the Decision as set out in their Notices of Appeal dated July 3 and September 18, 2001."

[38] In response to the other Parties' submissions, the Appellants argued that the submissions:

> "…are replete with argument, opinions, beliefs and conclusions which are unsupported by the evidence. The Submissions and related evidence filed in support of the Appellants' Submissions with respect to this matter have correspondingly been mischaracterized, ignored and summarily dismissed in the absence of any cogent evidence to the contrary. The Respondents have engaged in a course of needlessly raising fear, which is not supported on the evidence, in order to force the Appellants to undertake ill-conceived, unnecessary, costly and harmful remedial measures in derogation of the Appellants' rights of appeal."[33]

[39] The Appellants concluded by stating:

> "…there is no evidence (as distinct from mere speculation) that in the event a stay is granted the Respondents will suffer any harm whatsoever in the period of time it will take to render a decision on the merits of the appeal. The Appellants submit that the data to date indicates no evidence of any adverse health impacts on human health as a result of lead and hydrocarbons in the soil in the Subdivision Lands, therefore, the public would not be prejudiced by a stay in the period of time it will take to render a decision on the merits of the appeal. The studies and reports noted above in respect of lead and hydrocarbon vapour simply

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32 Director's Submission, dated October 1, 2001.

33 Appellants' Rebuttal Submission, dated October 5, 2001, at page 1.

> do not support the urgency which the Director and the CHR have falsely created."[34]

III. LEGAL BASIS FOR A STAY

[40] The Board is empowered to grant a Stay pursuant to section 89 (now section 97) of the Act. This section provides, in part:

> "(1) Subject to subsection (2), submitting a notice of appeal does not operate to stay the decision objected to.
>
> (2) The Board may, on the application of a party to a proceeding before the Board, stay a decision in respect of which a notice of appeal has been submitted."[35]

[41] The Board's test for a Stay, as stated in the case of *Przybylski*[36] and *Stelter*,[37] is based on the Supreme Court of Canada case of *RJR MacDonald.*[38] The steps in the test, as stated in *RJR MacDonald,* are:

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[34] Appellants' Rebuttal Submission, dated October 5, 2001, at paragraph 48.

[35] Section 89 (now section 97) of the Act, also provides:

> "(3) Where an application for a stay relates to the issuing of an enforcement order or an environmental protection order or to a water management order or enforcement order under the Water Act and is made by the person to whom the order was directed, the Board may, if it is of the opinion that an immediate and significant adverse effect may result if certain terms and conditions of the order are not carried out,
>
> (a) order the Director under this Act or the Director under the Water Act to take whatever action the Director considers to be necessary to carry out those terms and conditions and to determine the costs of doing so, and
>
> (b) order the person to whom the order was directed to provide security in accordance with the regulations under this Act or under the Water Act in the form and amount the Board considers necessary to cover the costs referred to in clause (a)."

The Board notes that none of the Parties suggested that the Board apply section 89(3) and no arguments on this question were presented.

[36] *Pryzbylski* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection* re: *Cool Spring Farms Dairy Ltd.* (June 6, 1997), E.A.B. No. 96-070.

[37] *Stelter* v. *Director of Air and Water Approvals Division, Alberta Environmental Protection*, Stay Decision re: *GMB Property Rental Ltd.* (May 14, 1998), E.A.B. No. 97-051.

[38] *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 ("*RJR MacDonald"*). In *RJR MacDonald*, the Court adopted the test as first stated in *American Cyanamid* v. *Ethicon*, [1975] 1 All E.R. 504 ("*American Cyanamid"*). Although the steps were originally used for interlocutory injunctions, the Courts have stated that the application for a Stay should be assessed using the same three steps. See: *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 30 ("*Metropolitan Stores"*) and *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 41.

> "First, a preliminary assessment must be made of the merits of the case that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."[39]

[42] The first step of the test has a very low threshold. Based on the evidence submitted, the applicant has to have some basis on which to present an argument. The applicant must show that there is a serious issue to be tried. As not all of the evidence will be before the Board at the time the decision is made regarding a Stay application, "…a prolonged examination of the merits is generally neither necessary nor desirable."[40]

[43] The second step in the test to determine whether a Stay is warranted requires the decision-maker to decide whether the applicant seeking the Stay would suffer irreparable harm if the Stay is not granted.[41] Irreparable harm will occur when the applicant would be adversely affected to the extent that the harm could not be remedied if the applicant should succeed at the hearing. It is the nature of the harm that is relevant, *not its magnitude*. The harm must not be quantifiable, the harm to the applicant *could not be satisfied in monetary terms*, or one party could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*,[42] 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."[43]

The party claiming that damages would be inadequate compensation must show that there is a real risk that harm will occur. It cannot be mere conjecture.[44] The damage that may be suffered by third parties may also be taken into consideration.[45]

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

40 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 50.

41 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110.

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

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

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

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

[44] The third step in the test is the balance of convenience – "…which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits."[46] The decision-maker is required to weigh the burden that the remedy would impose on the defendant against the benefit the plaintiff would receive. This is not strictly a cost-benefit analysis but rather a weighing of significant factors. The courts have considered factors such as the cumulative effect of granting a Stay,[47] third parties that may suffer damage,[48] or if the reputation and goodwill of a party will be affected.[49]

[45] It has also been recognized that any alleged harm to the public is to be assessed at the third stage of the test. In *Metropolitan Stores*, it was recognized that the public interest is a special factor in constitutional cases. [50]

[46] The mandate of this Board requires that the public interest be considered in appeals before the Board, and therefore the public interest should be considered in the balance of convenience.[51] The Board has, therefore, stated that the public interest is a separate step in the test when applying for a Stay. The applicant and the respondent are given the opportunity to show the Board how granting or refusing the Stay would affect the public interest. Public interest includes the "…concerns of society generally and the particular interests of identifiable groups."[52] The effect on the public may sway the balance for one party over the other.[53]

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46 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 36.

47 *MacMillan Bloedel* v. *Mullin*, [1985] B.C.J. No. 2355 (C.A.), at paragraph 121.

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

49 *Edmonton Northlands* v. *Edmonton Oilers Hockey Corp*., [1993] A.J. No. 1001 (Q.B.), at paragraph 79.

50 *Manitoba (Attorney General)* v. *Metropolitan Stores*, [1987] 1 S.C.R. 110, at paragraph 90.

51 The Court in *RJR MacDonald,* at paragraph 64, stated:

> "The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants."

52 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311, at paragraph 66.

53 The Court in *RJR MacDonald,* at paragraph 68, 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.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

IV. ANALYSIS

A. Serious Issue

[47] As indicated in *RJR MacDonald,* the first step in determining if a Stay should be granted has a very low threshold – there needs to be a serious issue to be tried. In this case, the concerns brought forward by the Appellants regarding the issuing of the EPO were valid concerns and within this Board's jurisdiction, and the Board acknowledged this in its September 25, 2001 letter.[54] The Board also acknowledged this in its August 22, 2001 decision[55] setting the issues to be considered in this matter when it stated:

> "The Appellants have been named in an EPO that requires them to undertake potentially extensive and costly remediation work of a residential Subdivision. The Appellants have appealed to ensure that they are only liable for obligations that the Act properly imposes upon them. The Board is prepared to accept, therefore, that these Appellants are entitled to advance all *reasonable* defenses to the EPO that are available to them. The Appellants may not win at the end of the day, but they are entitled to present arguments to the Board that are reasonable [*sic*] connected to the EPO and the stated grounds of appeal.
>
> The residents of the Subdivision are equally, if not more so, impacted by the work required by this EPO. The residents of the Subdivision want to ensure that their health and safety is protected. As well, they wish to preserve the economic value of their homes. There is also the general public interest to be considered in protecting the environment. As a result, it is clear the stakes are high for all parties in this matter and it is appropriate that the issue of adverse effects be argued."

Given the "stakes" in this matter of all of the Parties involved, the Board accepted that there is a serious issue to be tried, and the first part of the test for a Stay has been met.

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[54] See: Board's Letter, dated September 25, 2001, where it states:

> "…please be advised that the Board has reviewed Imperial Oil's Initial Submission regarding their Stay request and has determined that Imperial Oil has established a *prima facie* case."

[55] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), E.A.B. Appeal No. 01-062-ID, at paragraphs 37 and 38.

B. Irreparable Harm and Balance of Convenience

[48] With respect to the second and third parts of the test for a Stay, both the Appellants and the Director agreed that irreparable harm and the balance of convenience are linked and need to be considered together.[56]

[49] Under the heading of irreparable harm and balance of convenience, the Appellants argued that if the Stay was not granted its appeal would be "…rendered nugatory…" and that the "…Alberta jurisprudence favours maintenance of the *status quo*."

[50] The Board does not agree that if the Stay is not granted, the appeal will be "…rendered nugatory…". In its August 22, 2001 decision[57] the Board determined that it would consider four issues:

> "Issue 1: 'Are the Appellants persons responsible under section 102? This question is limited to the issues of whether section 102 has retroactive effect.'
>
> Issue 2: 'Has there been a release within the meaning of section 1(ggg) having regard to its 'historical nature' and has this release caused an adverse effect?'
>
> Issue 3: 'Does the Director have the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114? If the Director has the discretion to choose between issuing an EPO under section 102 and issuing an EPO under section 114, was that discretion exercised properly?'
>
> Issue 4: 'Did the Director exercise his discretion unreasonably by not naming others known to the Director as persons responsible under the EPO?'"

Having regard to these issues, and noting in particular Issue 3 and Issue 4, the cornerstone of which is that other parties should *also* have been included in the EPO in some way, the Board is of the view that the performance of the work will not have the effect of stripping the Appellants of any effective result in their appeal. As discussed below, and in balancing all of the various interests in considering these issues, the Board is of the view that any harm that is incurred by the Appellants is quantifiable as damages, and as such, its appeal is not rendered nugatory by not granting the Stay that has been requested.

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[56] See: Appellants' Submission, dated September 20, 2001, at paragraph 9, quoting the Alberta Court of Appeal in *Pocklington Finance Corp*. v. *Alberta Treasury Branches* (1998), 65 Alta. L.R. (3d) 283. The Director agreed. See: Director's Submission, dated October 1, 2001, where the Director stated: "As suggested by the Appellants, this issue [(irreparable harm)] and the following issue [(balance of convenience)] are interrelated."

[57] *Imperial Oil Limited* v. *Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment* (August 22, 2001), E.A.B. Appeal No. 01-062-ID, at paragraph 46.

[51] The argument that the "Alberta jurisprudence favours maintenance of the *status quo*…" can be interpreted in two different ways. The first would support the Appellants – leave the situation, as it was, without the directions included in the September 11 and 12, 2001 Letters. However, another interpretation is to have the Director's directions remain in effect as that is what the *status quo* was at the moment in time the Stay was requested. In this situation, the Board accepts the latter interpretation. The Director made the directions included in the September 11 and 12, 2001 Letters in an attempt to protect human health and the environment. The Board will not interfere with those directions on an interlocutory basis without strong evidence to the contrary and, as discussed below, the Board does not believe that the Appellants have presented sufficient evidence in this regard.

[52] The Appellants also argued that the harm that it would suffer would be irreparable "…because the Board will not be in a position to award damages against the Director in the event the appeal is successful."[58] The Appellants argued that the harm its would suffer would be irreparable if there was "…mere doubt as to the adequacy of the damages…."[59] The Appellants went on to argue that the "…losses that will be faced by the Appellants if a stay is not granted are significantly higher than if the impugned remedial work is simply delayed."

[53] The Board rejects these arguments. The Appellants want the Stay so that they do not have to do any of the work required under the September 11 and 12, 2001 Letters until after the appeal is determined. However, based on the evidence before us, it is the Board's view that any real harm the Appellants could suffer as a result of being required to perform this work is not irreparable – any harm suffered is quantifiable as damages. The Appellants surely must keep records of the work being done, and no doubt the costs associated with such work are meticulously recorded. If the Appellants were to seek damages after the fact, they are likely correct that the Board does not have the jurisdiction to award such damages. However, there are other avenues available for compensation such as a damages or contribution action which are in any event beyond this Board's purview.

[54] Further, in that the Board is of the view that any harm suffered by the Appellants is quantifiable as damages, the Board does not accept that any losses that will be faced by the

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[58] Appellants' Submission, dated September 20, 2001, at paragraph 22.

Appellants if the Stay is not granted will be significantly higher than if the remedial work is delayed. The concern that must be weighed on the other side of any such "losses," as discussed below, is the potential concerns for public health, which is probably the Board's biggest concern. In this regard, as stated by the Director, "…the answer to the question is self-evident."

[55] Finally, the Appellants further argued that, in its opinion, the work required by the September 11 and 12, 2001 Letters would cause a health risk to residents. The Director and the CHR strongly disagreed. The Director was of the view that the Appellants have "…provided no credible evidence to suggest that proceeding with the [work] … will result in an increased risk to human health."[60] And the CHR – whose function is to protect the public's health – appeared to be of the view that the any risks associated with the work required under the September 11 and 12, 2001 Letters outweighs the benefits to be gained in the protection of public health. The Appellants responded to this position with the view that the Director and the CHR expressed "…opinions, beliefs and conclusions which are unsupported by the evidence."[61]

[56] With these arguments, the Board is presented with two competing views of the evidence and being asked to grant a Stay. This is where considering the public interest, which will be discussed in further detail below, intersects with the balance of convenience. With respect to the balance of convenience and the public interest, the Board notes particularly the submissions of the Director and the Calgary Health Region. The Director and the Calgary Health Region argued "…the balance of convenience must weigh solidly in favour of the protection of human health."[62] For the purpose of this interlocutory motion, the Board is prepared to accept and rely on the evidence of the Director and the Calgary Health Region. Given the fact that the concern is public health, in order to convince the Board otherwise on an interlocutory basis, the Appellant would have to bring substantial strong evidence to the contrary. The Appellants have not done this – the evidence the Appellants have brought is insufficient to convince the Board otherwise.

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59 Appellants' Submission, dated September 20, 2001, at paragraph 10.

60 Director's Submission, dated October 1, 2001.

61 Appellants' Rebuttal Submission, dated October 5, 2001, at page 1.

62 Director's Submission, dated October 1, 2001.

C. The Public Interest

[57] On the question of the public interest, the Supreme Court 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.
>
> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant…. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."

[58] The Appellants submitted that the public could be harmed if it followed the directions included in the September 11 and 12, 2001 Letters. This argument related more to optional, possibly less expensive, methods of removing the contaminants and the possibility that hydrocarbon vapours could potentially be drawn down into unaffected areas, thus increasing the area where remediation efforts would have to be taken. With respect, when the Board considers these arguments and the arguments of the Appellants as a whole, while stated in terms that appear to speak to the public interest, really they are economic in nature. As a result, in accordance with the terms of *RJR MacDonald* it is clear to the Board that the Appellants have failed to demonstrate that the public interest would be served by granting their Stay.

[59] Further, in determining the public interest, the Supreme Court directs us to look to the "…authority that is charged with the duty of promoting or protecting the public interest…" and in this case the Board has not one but two public authorities – the Director representing Alberta Environment and the Calgary Health Region, responding to an impugned activity that is within their responsibilities - arguing that the Stay should be denied. On this basis, the Board concludes that the public interest is best served by denying the Stay.

D. Summary

[60] The Appellants have shown there is a serious issue to be decided and have, therefore, succeeded on the first element of the test. However, the Appellants failed to convince the Board that they could not be compensated with damages and therefore would suffer irreparable harm, or that on the balance of convenience they would suffer greater harm if the Stay was not granted than the other Parties would suffer if the Stay was granted. Most importantly, the Board is convinced, for potential health reasons, that granting the Stay would not be in the public interest. As a result, the Appellants application for a Stay must fail.

V. CONCLUSION

[61] Pursuant to section 89 (now section 97) of the Act, the Board denies the Appellants' request for a Stay.

Dated on July 23, 2002, at Edmonton, Alberta.

"original signed by"

William A. Tilleman, Q.C.
Chair