ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – November 29, 2004

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 section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF an appeal and Stay filed by Michael Monner with respect to *Water Act* Approval No. 00136848-00-00 issued to the New Dale Hutterian Brethren by the Director, Southern Region, Regional Services, Alberta Environment.

Cite as: Stay Decision: *Monner* v. *Director, Southern Region, Regional Services, Alberta Environment* re: *New Dale Hutterian Brethren* (29 November 2004), Appeal No. 03-010-ID1 (A.E.A.B.).

BEFORE: Dr. Frederick C. Fisher, Q.C., Chair.

PARTIES:

Appellant:	Mr. Michael Monner.
Approval Holder:	New Dale Hutterian Brethren Colony, represented by Mr. David Decker and Mr. George Decker, New Dale Hutterian Brethren Colony.
Director:	Mr. Dave McGee, Director, Southern Region, Regional Services, Alberta Environment, represented by Ms. Charlene Graham, Alberta Justice.
Intervenors:	Siksika Nation, represented by Mr. Brian Barrington-Foote and Mr. Leonard Andrychuk, Q.C., MacPherson Leslie & Tyerman; Alberta Transportation, represented by Mr. Terry W. Becker, Operations Manager; and Vulcan County, represented by Mr. Gary Buchanan, County Administrator.

EXECUTIVE SUMMARY

Alberta Environment issued *Water Act* Approval No. 000136848-00-00 to the New Dale Hutterian Brethren authorizing them to operate the drainage works on an unnamed water body, a tributary to Indian Lake, near Milo, Alberta.

The Board received a Notice of Appeal from Mr. Michael Monner appealing the Approval and requesting a Stay.

Upon review of Mr. Monner's reasons for his Stay request, the Board concluded that no irreparable harm would take place on Mr. Monner's land as a result of activities authorized under the Approval. The request for a Stay was denied.

A mediation meeting was held on August 6, 2003, but was unsuccessful in reaching an agreement. A hearing was held on January 27, 2004, with the Siksika Nation, Alberta Transportation, and the Vulcan County participating as intervernors. At the hearing, the Siksika Nation raised jurisdictional issues. The Board heard arguments on the substantive issues and set a schedule to receive arguments on the jurisdictional matter.

As the Board had to determine the jurisdictional matter before making its final decision on the substantive matters, both Mr. Monner and the Siksika Nation requested a Stay of the Approval.

Based on the submissions and arguments of the parties and intervenors, the Board determined a Stay was not warranted as there would be no irreparable harm to the applicants and the public interest did not support the Stay.

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I. BACKGROUND

[1] On July 25, 2003, the Director, Southern Region, Regional Services, Alberta Environment (the "Director"), issued Approval No. 00136848-00-00 (the "Approval") under the *Water Act*, R.S.A. 2000, c. W-3, to the New Dale Hutterian Brethren (the "Approval Holder") authorizing them to operate the drainage works on an unnamed water body, a tributary to Indian Lake, at NW 15-20-21-W4M, 16-20-21-W4M, and 17-20-21-W4M, near Milo, Alberta.

[2] On June 30, 2003, the Environmental Appeals Board (the "Board") received a Notice of Appeal from Mr. Michael Monner (the "Appellant") appealing the Approval.

[3] On July 2, 2003, the Board wrote to the Appellant, the Approval Holder, and the Director (collectively the "Parties") acknowledging receipt of the Notice of Appeal and notifying the Approval Holder and the Director of the appeal. The Board also requested the Director provide the Board with a copy of the records (the "Record") relating to this appeal, and that the Parties provide available dates for a mediation meeting or hearing. The Record was received on July 24, 2003 and subsequently provided to the Appellant and Approval Holder..

[4] 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.

[5] On July 2, 2003, the Board received a letter from the Appellant requesting a Stay. On July 4, 2003, the Board asked the Appellant to respond to a number of questions in relation to his Stay request, and on July 7, 2003, the Board received his response.

[6] The Board notified the Parties on July 14, 3003, that, after reviewing the Appellant's initial submission, a Stay would not be granted.[1]

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[1] The Board stated:

> "The Board has determined that Mr. Monner has not presented a sufficient case to warrant a further consideration of his Stay request at this time. In addition, the Board is not yet in receipt of the record from Alberta Environment, and as such has not been able to review it. Once the record has been received from Alberta Environment, and has been distributed to the parties, Mr. Monner can make a further application for a Stay at that time, if he chooses."

[7] On July 15, 2003, the Appellant provided names of other persons who may have an interest in the appeal, and he identified the Siksika Nation, Ducks Unlimited, the Minister of Indian Affairs and Northern Development, and Vulcan County. On July 31, 2004, the Appellant notified the Board that Alberta Transportation also wanted to be informed of the appeal.

[8] A mediation meeting was held on August 6, 2003, with Mr. Ron Hierath, Board member, acting as mediator. There was no resolution at the mediation meeting, but the Parties agreed to continue discussions and a further mediation meeting was scheduled for October 7, 2003. The October 7, 2003 mediation meeting was cancelled by the Parties.

[9] On October 30, 2003, the Appellant provided a status report to the Board, indicating that settlement discussions were continuing. The Board notified the Parties on November 5, 2003, that it intended to proceed with the appeal and schedule a hearing.

[10] The Board notified the Parties on November 24, 2003, that the issues to be heard at the hearing would be:

> "1. the changing direction of waterflows so that the applicants water drains onto Mr. Monner's property;
> 2. no recourse if conditions of the Approval are not met;
> 3. the increased waterflow will raise the water level on Mr. Monner's property thereby compromising his ability to raise crops. When this happened in 1997 Mr. Monner lost the use of this land for six years;
> 4. perennial weeds/grasses that have built up since last unauthorized flooding; and
> 5. Mr. Monner would like the Approval revoked and all licenced drainage canals returned to original topographical state."

[11] On December 9, 2003, the Board received a letter on behalf of Vulcan County, stating that it wanted to participate in the hearing of the appeal. On December 12, 2003, Alberta Transportation requested it be allowed to make a representation before the Board on this appeal. On December 15, 2003, the Siksika Nation requested that it be permitted to intervene in the appeal. The Board requested the Parties provide comments on the participation of the Vulcan County, Alberta Transportation, and the Siksika Nation.

[12] On December 15, 2003, the Board notified the Parties that the Hearing would be held on January 27, 2004. It further stated:

> "Further to the telephone conversation between Board staff and Mr. George Decker on December 15, 2003, the Board understands that Mr. David Decker has retired, and that Mr. George Decker does not intend to attend the hearing scheduled for January 27, 2004. Mr. Decker is advised that the Board must proceed with the hearing as the appeal has not been withdrawn. The Board stresses the importance of Mr. Decker ensuring that he is either present at the hearing or is represented at the hearing as the Board has the authority to confirm, reverse or vary the Approval in his absence.
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> If no representative of the New Dale Hutterian Bethren is present at the hearing, the Board reserves the right to proceed in their absence and make its decision without their participation." (Emphasis omitted.)

[13] In letters received on December 18 and 19, 2003, the Appellant and the Director stated they did not have any concerns with the Vulcan County, Alberta Transportation, and the Siksika Nation participating in this appeal. No response was received from the Approval Holder.

[14] On December 22, 2003, the Board notified the Parties that the Siksika Nation, Alberta Transportation, and Vulcan County (collectively, the Intervenors") would have full party status, and therefore, they would be allowed to file a submission and present evidence, be subject to cross-examination, and cross-examine if they wish to do so.

[15] The Hearing was held on January 27, 2004.

[16] At the Hearing, the Siksika Nation raised additional issues regarding jurisdiction. The Board continued with the Hearing and stated it would receive written submissions regarding the Board's jurisdiction to hear the appeal. The Board acknowledged these issues in its January 30, 2004 letter to the Parties and Intervenors, summarizing the jurisdictional matters as follows:

> "1. that the Director, Alberta Environment did not have any right to issue the Approval to the New Dale Hutterian Brethren without first consulting with the Siksika Nation; and
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> 2. that the Environmental Appeals Board does not have the right to hear this appeal because the Approval should not have been issued and because Federal land (Siksika Nation) is involved."

[17] In a letter dated January 30, 2004, the Board noted the Appellant and the Siksika Nation had requested a Stay of the Approval at the Hearing. The Board set a submission schedule for the Parties and Intervenors to respond to the following questions:

> "1. What are the serious concerns of Mr. Monner and Mr. Owlchild that should be heard by the Board?

2. Would Mr. Monner and Siksika Nation suffer irreparable harm if the Stay is refused?
3. Would Mr. Monner and Siksika Nation suffer greater harm if the Stay was refused pending a decision of the Board than the New Dale Hutterian Brethren would suffer from the granting of a Stay?
4. Would the overall public interest warrant a Stay?
5. Does the Siksika Nation, as an intervenor in this appeal, have the right to request a Stay?"

[18] On March 11, 2004, the Board notified the Parties and the Intervenors the Stay was denied. The following are the Board's reasons.

II. SUBMISSIONS

A. Appellant

[19] The Appellant stated the unauthorized ditches were in place in 1997 when the flooding caused several long-term problems on his property including salinity issues. He argued water drained from the Approval Holder's lands was entrapped, creating a ponding situation. The Appellant stated he has gradually reclaimed use of the affected area to its use prior to 1997.

[20] The Appellant also argued the water quality of Indian Lake could be negatively impacted by increased salts and contamination.

[21] The Appellant argued the Director failed to recognize the cumulative effect of the substantial number of auxiliary ditches.

[22] As to the question regarding irreparable harm, the Appellant stated that with today's technologies and enough dollars, almost anything could be remedied. He questioned whether it was not worth waiting by granting the Stay instead of dealing with the potential negative effects on his property and on Indian Lake.

[23] The Appellant argued the Approval Holder has never quantified any loss of production, but he has shown his loss of production. He stated the relative ability for him to absorb a loss compared to the Approval Holder is huge, as well as the ability to pursue any cost recovery through civil action.

[24] The Appellant argued the implications of allowing the Approval Holder to drain their property as fast as possible does have implications that affect the Vulcan County and Alberta Transportation. He stated it would not be in the public interest if the Stay was denied without a full understanding of the negative impacts.

[25] The Appellant submitted all the Intervenors, including the Siksika Nation, who believe they are directly affected by the Approval, have an equal right to request a Stay.[2]

B. Siksika Nation

[26] The Siksika Nation advised the Board they the Director lacks the jurisdiction to issue the Approval, and the Board lacks jurisdiction to uphold, vary, or amend the Approval. They argued Indian Lake, the body of water that is impacted and affected by the Approval, is federal lands as defined by the *Canadian Environmental Assessment Act*, R.S.C. 1992, c. 37 ("CEAA").

[27] The Siksika Nation listed a number of issues they considered must be fully and finally determined by the Board prior to the Approval being acted upon, including whether the Director had jurisdiction to issue the Approval; the Board has the jurisdiction to uphold, vary, or amend the Approval, in so far as it may impact their lands; their petition to the federal Minister of Environment under CEAA impacts the Board's ability to determine the appeal; the Director and the Board must adhere to the same trust and fiduciary obligations that Her Majesty the Queen in Right of Canada must adhere to when dealing with the Siksika Nation; the Director, Approval Holder or both had an obligation to fully consult with and seek the consent of the Siksika Nation; there are impacts in the Approval if the Approval Holder fails to obtain written approval of the Siksika Nation and Her Majesty the Queen in Right of Alberta; and the impact on the Director's jurisdiction to issue the Approval without consulting with and seeking the consent of the Siksika Nation.[3]

[28] The Siksika Nation argued all of the environmental assessments completed and relied on when issuing the Approval focused on the potential impact on non-reserve lands and

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2 See: Appellant's submission, dated February 8, 2004.

3 See: Siksika Nation's submission, dated February 9, 2004, at paragraph 10.

did not study the impact on the Siksika Nation's lands and their use of the lands. They stated the Director did not advance any evidence that he had any information regarding their plans to use the lands for residential housing. Therefore, according to the Siksika Nation, the Board must Stay the Approval until an environmental impact assessment is completed that fully addresses their concerns, including: recent and historical water levels in Indian Lake; the impact of the drainage scheme on the water levels in Indian Lake; the impacts of the project on the watertable on the Reserve Lands; whether the project would impact their ability to develop and use the lands in the vicinity of Indian Lake for residential housing; current water quality of Indian Lake; forms and quantities of pollutants and contaminants that would be transported and diverted to the Siksika Nation's land and Indian Lake and the impacts they would have on the Siksika Nation's ability to use and develop the lands for residential housing; and the impacts of additional quantities of pollutants and contaminants would have on the watertable and existing and future wells on the Siksika Nation's lands.[4]

[29] The Siksika Nation argued that, based on the findings of the environmental impact assessment, the Board must suspend, vary, or amend the Approval to minimize, alleviate, or eliminate potential adverse impacts to the satisfaction of the Siksika Nation, and only then can the Stay be removed.

[30] The Siksika Nation submitted the water testing requirements included in the Approval are vague and inadequate. They argued the Stay must remain until the Board determines, or the Director in conjunction with the Siksika Nation, determines minimum testing requirements; methods for testing water quality and changes to the watertable; frequency of testing; minimum water quality standards that must be adhered to; and remedies available in the event that minimum water quality standards are not met.[5]

[31] The Siksika Nation submitted the Approval should be stayed until it is determined whether Condition 15 of the Approval[6] is to be amended such that all information collected by

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4 See: Siksika Nation's submission, dated February 9, 2004, at paragraph 11.

5 See: Siksika Nation's submission, dated February 9, 2004, at paragraph 11.

6 Condition 15 of the Approval states:

"The approval holder shall provide the information collected under conditions 13 and 14 to the Director within 30 days after the release of water is complete or upon request by the Director or an Inspector."

the Approval Holder and the Director will be provided to the Siksika Nation and Her Majesty the Queen in Right of Canada.

[32] The Siksika Nation stated there needs to be a determination of whether the Approval should be amended to include an additional condition that the Director can suspend the Approval at the request of the Siksika Nation or Her Majesty the Queen in Right of Canada if the activity approved adversely impacts the Siksika Nation's ability to use and occupy their lands or affects the watertable or water quality.

[33] The Siksika Nation argued that, if the Director and the Board lack jurisdiction in dealing with the Approval, and "…in so far as such Approval may impact upon Siksika Nation Reserve Lands, then such an Approval is null and void and of no effect. By necessary implication any activity performed under such a non-Approval constitutes irreparable harm to Siksika Nation."[7]

[34] The Siksika Nation argued the Director, Approval Holder, and the Board did not have any direct knowledge of whether there will be irreparable harm to the Siksika Nation's lands or the extent of such irreparable harm. Therefore, according to the Siksika Nation, "…the Board must Stay the Approval and maintain the status quo until the extent of any adverse impacts are identified and adequate safeguards are in place to minimize and monitor any adverse impacts."[8]

[35] The Siksika Nation stated that, if a Stay is granted, the status quo is maintained, which on balance would impact and harm all affected Parties to a far lesser degree than if the Approval is implemented without a proper environmental impact assessment or adequate safeguards in place to monitor and ensure adverse impacts are controlled, minimized, and monitored.

[36] The Siksika Nation stated the Reserve Lands are for their exclusive use and benefit, and Her Majesty the Queen in Right of Canada has a trust and fiduciary obligation to ensure any use of the Reserve Lands are in the best interest of the Siksika Nation and its members. They submitted as trustee of the Reserve Lands, Her Majesty the Queen in Right of

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7 Siksika Nation's submission, dated February 9, 2004, at paragraph 12.

8 Siksika Nation's submission, dated February 9, 2004, at paragraph 14.

Canada is not compelled to consider the overall public interest. They submitted "…that in order to fulfill and properly give effect to the special relationship between the Crown and Siksika Nation, the Board must give greater weight and consideration to what is in the best interests of Siksika Nation as opposed to considerations of public interest in determining whether a Stay of the Approval should be granted…."[9]

[37] The Siksika Nation argued that, since the Approval is null and void, it is irrelevant the jurisdictional issue was raised by means of an intervention. The Siksika Nation submitted the Board must determine the jurisdiction matter regardless of which Party raised the issue. They stated the deficiencies they noted can be remedied, but only if the Board issues a Stay of the Approval until such time as the Director takes the required steps to remedy the deficiencies.[10]

C. Alberta Transportation

[38] In response to the question as to whether there is a serious concern to be heard, Alberta Transportation stated the Appellant demonstrated a severe flood event has long lasting effects, but the salinity concern exists with or without a Stay. It stated the Siksika Nation raised concerns regarding water quality, and as no base information is available, it cannot be proved or disapproved. Alberta Transportation submitted a problem could persist if agricultural practices are not closely monitored.[11]

[39] Alberta Transportation stated there is an opportunity to suffer harm if the drainage works are not operated with minimal impact in mind, but "irreparable" harm may be strong. It also stated the Siksika Nation could suffer irreparable harm with water quality if agricultural practices are not strictly controlled.[12]

[40] Alberta Transportation submitted the greater harm would result if the Stay was not granted. It stated the Approval Holder did not provide information on how many acres that are farmed because of the drainage or any indication of salinity concerns. Alberta Transportation

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9 Siksika Nation's submission, dated February 9, 2004, at paragraph 20.

10 See: Siksika Nation's submission, dated February 9, 2004, at paragraph 25.

11 See: Alberta Transportation's submission, dated February 3, 2004.

12 See: Alberta Transportation's submission, dated February 3, 2004.

submitted that without the drainage, the land would be wet, and in a drought climate that is probably good.

[41] Alberta Transportation argued the public interest warrants the Stay, as "…an increased flow duration increases the duration of the road ban because of soft sub grade. The result is extended trips and associated costs to the traveling public, a real public interest."[13]

[42] Alberta Transportation submitted the Siksika Nation is "…affected by water quality, [and] until a watershed-based source protection plan is provided the project should be stayed…"[14] and as anybody affected has a right to request a Stay, the Siksika Nation should be able to ask for a Stay.

[43] Alberta Transportation believed a topographic survey would establish the natural drainage patterns and end the dispute. It stated no information was provided to indicate whether the Approval Holder's lands are affected annually or only during flood years, but it believed the loss would occur annually as the topographic maps show the area to be border marshland.

[44] Alberta Transportation stated the evidence presented indicated "…only a small percentage of the 12.02 km drainage basin naturally flows across [Secondary Highway] 842 at the culvert being utilized as the point of outlet…. Mr. Decker has a divergent opinion."[15]

D. Vulcan County

[45] The Vulcan County stated it was unable to answer whether the Appellant and the Siksika Nation had a serious concern that should be heard by the Board. It stated the evidence at the Hearing indicated the Appellant's land has already suffered harm from previous drainage activities, and it likely that additional harm may occur without the Stay.

[46] The Vulcan County argued "…that requiring a landowner to retaining (*sic*) water that collects naturally on their land would cause less harm than draining such water across another landowner's property who is claiming that such drainage is causing harm."[16]

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13 Alberta Transportation's submission, dated February 3, 2004.

14 Alberta Transportation's submission, dated February 3, 2004.

15 Alberta Transportation's submission, dated February 23, 2004.

16 Vulcan County's submission, dated January 30, 2004.

[47] The Vulcan County stated, "…given that the dispute has gone on for six years it would seem very reasonable on the Board's part to Stay the project for the short period of time that the Board requires to make a decision."[17]

[48] The Vulcan County stated a survey of sections 16 and 17 would be useful as it may confirm there is a closed, natural slough on the Approval Holder's property, and the amount of land that would be under water during wet periods could be quantified.

[49] The Vulcan County submitted it would be "…prudent, sensible, and appropriate for the Board to Stay the project…"[18] until the matter of the Board's jurisdiction to deal with the matter is resolved. It stated the public interest warrants a Stay given the concerns regarding the impacts to Highway 842, Township Road 202, and the Appellant's lands, as well as the jurisdictional issues raised by the Siksika Nation.

[50] The Vulcan County stated it seems appropriate the Siksika Nation has the right to request a Stay as the proposed drainage project involves the Siksika Nation's lands.

E. Approval Holder

[51] The Approval Holder stated they do not agree a Stay should be granted, as the Director found no adverse conditions regarding the Appellant, and the drainage ditch is a natural watercourse that has been there before the Appellant purchased the land.[19]

[52] The Approval Holder explained the water flows from the Siksika Nation's lands to the north, onto the Approval Holder's land, on towards Secondary Highway 842, exiting through the existing culvert into the natural channel on the Appellant's land, and into Indian Lake, and then into the Bow River when the lake exceeds its capacity.

[53] The Approval Holder argued the Appellant's loss would be negligible compared to their loss. They stated it concerns many acres of land that supports 33 families.

[54] The Approval Holder argued a survey of the lands would show why the water from their property ends up in Indian Lake, and the ditch they dug allows the water to flow

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17 Vulcan County's submission, dated February 24, 2004.

18 Vulcan County's submission, dated February 24, 2004.

19 See: Approval Holder's submission, dated February 2, 2004.

where it was meant to go. They stated that if they built a berm adjacent to the west of Secondary Highway 842, water would be held from coming onto their property from the Siksika lands to the north and other lands from the west.

[55] The Approval Holder stated 60 percent of all the water flowing onto the Appellant's land and the Siksika Nation's lands originates from the south, and he questioned what the difference on water quality would be whether the water came from the west or the south. They stated they lived with water coming from the Siksika Nation to the north of their property.

[56] The Approval Holder explained they will have gated valves to control the amount of water and that would be governed by the culvert on Secondary Highway 842. They questioned whether the Siksika Nation would control the water from their lands to the north of the Approval Holder's lands.

[57] The Approval Holder explained the slough on their property can only get so full, and then it drains to the north. They stated the same is applicable to Indian Lake, as it can only get so full before it flows into the Bow River. The Approval Holder stated a berm was built on Indian Lake years ago, but a portion on the south end was washed away, and therefore, Indian Lake will never reach its intended capacity.

[58] The Approval Holder stated water that flows from the south would create the same salinity concerns as the water that flows from their property. They stated they have salinity issues on some of their lands as a result of water flowing from the south that cannot be stopped.

[59] Regarding the Stay application, the Approval Holder argued they would suffer more as they would have six times the amount of land under water compared to the Appellant. They stated they would not remove the plug and allow the water to run into the ditch until the matter concerning the Approval has been straightened out.[20]

F. Director

[60] The Director took no position regarding the Stay application.

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[20] See: Approval Holder's submission, dated February 11, 2004.

[61] The Director stated the Board granted the Siksika Nation full party status, and therefore, the Siksika Nation is able to bring the Stay application.[21]

III. ANALYSIS

A. Preliminary Issue

[62] The Board requested the Parties provide their comments on whether the Siksika Nation, as an Intervenor, has the authority to file a Stay request. Under section 97 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"), only a party to an appeal has the authority to file a Stay request.

[63] The Board, in its letter dated December 22, 2003, granted the Siksika Nation full party for this appeal. As the Siksika Nation has been given full party status, they have the same rights and obligations, as do the Appellant, Approval Holder, and Director. Therefore, the Siksika Nation has the ability to file a Stay request.

B. Legislation

[64] The Board is empowered to grant a Stay pursuant to section 97 of EPEA. 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."[22]

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21 See: Director's submission, dated February 17, 2004.

22 Section 97 of EPEA 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,
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> (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
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> (b) order the person to whom the order was directed to provide security in

[65] The Board's test for a Stay, as stated in its previous decisions of *Pryzbylski*[23] and *Stelter*,[24] is based on the Supreme Court of Canada case of *RJR MacDonald.*[25] The steps in the test, as stated in *RJR MacDonald,* are:

> "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."[26]

[66] 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."[27]

[67] 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.[28] 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

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> 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)."

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

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

[25] *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.

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

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

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

could not collect damages from the other. In *Ominayak* v. *Norcen Energy Resources*,[29] 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."[30]

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.[31] The damage that may be suffered by third parties may also be taken into consideration.[32]

[68] 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."[33] 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,[34] third parties that may suffer damage,[35] or if the reputation and goodwill of a party will be affected.[36]

[69] 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.[37]

[70] The environmental mandate of this Board requires that the public interest be considered in appeals before the Board, and therefore the public interest will be considered in the balance of convenience.[38] The Board has, therefore, stated that the public interest is a separate

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

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

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

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

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

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

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

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

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

38 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

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."[39] The effect on the public may sway the balance for one party over the other.[40]

IV. STAY ANALYSIS

A. Serious Issue

[71] As indicated in *RJR MacDonald,* the first step in determining if a Stay should be granted has a low threshold – there needs to be a serious issue to be tried and the claim is not frivolous or vexatious.

[72] The Board has held a hearing on the substantive matter, and therefore, the issue cannot be considered frivolous or vexatious.

[73] The jurisdictional issue is an important issue, and the arguments need to be heard. Therefore, the first step of the test has been met by the Appellant and the Siksika Nation.

B. Irreparable Harm

[74] In assessing irreparable harm, the Supreme Court of Canada states that it must be determined "…whether the refusal to grant relief could so adversely affect the applicant's own

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weighed in the balance, along with the interests of the private litigants."

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

40 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."

interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application."[41]

[75] To determine if the harm is irreparable, the Board must look at whether any harm that may result from the Approval Holder proceeding as allowed under the Approval could be reversed or corrected. The onus is on the Appellant and the Siksika Nation to demonstrate they will suffer irreparable harm, if the Stay is not granted, during the period of time the Board requires to determine the jurisdictional matter.

[76] The drainage ditches have been in place since the 1970s. The Board will make its decision regarding the Approval as soon as possible, but there would be, at a maximum, one additional year of spring runoff until the decision is released. If the Appellant's lands are affected, it is likely the effects can be reversed. The Appellant explained how, since the flood in 1997, he has been able to reclaim the area that was flooded back into productivity. Also, any losses he may have, are quantifiable. Although it has taken time, the Appellant cannot argue the effect of the flooding was irreversible. It is also important for the Appellant to note the Board has not made a determination as to whether the drainage system on the Approval Holder's lands caused or contributed to the 1997 flooding. The Board will look at the Approval as issued by the Director.

[77] Indian Lake has received runoff from the Approval Holder's lands for decades, as well as runoff from neighbouring properties, including the Appellant's lands. Considering the size of Indian Lake, the contribution of runoff from the Approval Holder's lands would be negligible. As the decision will be released as soon as possible, there will be minimal additional affect on Indian Lake unless there are significant changes in management practices on the Approval Holder's lands. There is no indication the Approval Holder intends to make these types of changes, but if there are environmental consequences, there are mechanisms available in the legislation to deal with the issues.

[78] The Approval, as issued, requires the Approval Holder to ensure the water quality leaving their land is as good as the receiving water body. This will prevent contaminated water from entering Indian Lake. Under the Approval, water can only be released when the lake level

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41 *RJR MacDonald Inc.* v. *Canada (Attorney General),* [1994] 1 S.C.R. 311 at paragraph 58.

is not more than 10 cm above full supply level. This will minimize the possibility of flooding occurring on the Siksika Nation's lands as a result of the Approval Holder's drainage system. Again, if the Appellant or the Siksika Nation encounter problems as a result of this Approval, they can notify the Director who will take the appropriate steps to correct and prevent further detrimental effects.

[79] The Approval allows for the control of water flow from the Approval Holder's lands to Indian Lake. If the Appellant or the Siksika Nation is successful in the appeal, the structures controlling the flow of water can be removed or filled in. Basically, the work can be reversed if necessary.

[80] Based on the above, the Board does not believe the granting of a Stay would benefit the Appellant or the Siksika Nation.

C. Balance of Convenience

[81] The Board must look at which Party would suffer the greatest harm.

[82] The Appellant is concerned about the possibility of flooding re-occurring on his property.

[83] The Board intends to make its decision regarding the jurisdictional matter as soon as possible. At most, there would only be one spring runoff that would flow through the drainage works prior to the Board making its final determination. The drainage system has been in place for a number of years without any control mechanisms in place.

[84] The Siksika Nation had not expressed any concern regarding the ditches on the Approval Holder's land or any effect the drainage system has had on Indian Lake prior to the notice of this Hearing. As the ditches have been in place since the 1970s, if there were concerns, it seems reasonable the Siksika Nation would have contacted Alberta Environment. The Approval, if the conditions are followed, requires greater control as to when the water can be released from the Approval Holder's land, both in terms of time and quality. It would appear the balance of convenience favours the Approval remaining in effect.

[85] The Approval Holder uses the ditches to drain water from their property during spring runoff and major rainfall events. If the ditches had to be made inoperable, more of their land would be flooded than what the Appellant has experienced in the past.

[86] If there is damage to the Appellant's or the Siksika Nation's properties, the extent of the damage can be easily assessed and any change in property value determined. This also holds for any damage to the Approval Holder's property. Therefore, the balance of convenience does not favour one Party over the other, but it would appear the conditions in the Approval would reduce the potential of flooding occurring on the adjacent lands.

D. The Public Interest

[87] 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."

[88] 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…"

[89] One of the public interest elements in this appeal is the potential effect the ponded water might have on the roadbeds of Secondary Highway 842 and Township Road 202. Alberta Transportation and the Vulcan County participated as intervenors to ensure these concerns were brought to the Board.

[90] Although the Board recognizes this is an issue that must be dealt with, the major problem raised was the inconvenience to travelers for a period in the spring, should runoff be sufficient to cause water ponding by the roadways. It is also a problem Alberta Transportation and Vulcan County have encountered in the past, and they have the ability to minimize the impacts on the public, if necessary.

[91] The Siksika Nation argued the Board "…must give greater weight and consideration to what is in the best interests of Siksika Nation…" when determining whether a Stay should be granted. It is the Board's responsibility to consider the public interest, which includes all Albertans, whether they are First Nations or not. In this particular case, the Board considers the implementation of the Approval will actually assist the Siksika Nation, as the water can only enter into Indian Lake when the water is at a certain level, and the water must be tested to ensure water quality is as good as or better than the receiving waters. Without the Approval in place, the waters will flow from the Approval Holder's lands to the Siksika Nation's lands uncontrolled. The ditches are in place, and have been in place for a number of years. Staying the Approval does not require the Approval Holder to fill in the ditches, therefore the water would flow as it has for the last few years, uncontrolled, if the Stay was granted.

[92] In reviewing the goals of the Approval, primarily to control the flow of water off of the Approval Holder's lands, the Board believes the public interest does not warrant the granting of a Stay.

V. CONCLUSION

[93] The Appellant and the Siksika Nation have shown there is a serious issue to be decided and have, therefore, succeeded on the first element of the test. However, they have failed to convince the Board they could not be compensated for damages and would suffer irreparable harm if the Stay was not granted. They did not show they would suffer greater harm if the Stay was not granted than the Approval Holder would suffer if the Stay was granted. The Appellant and the Siksika Nation have not convinced the Board that granting a Stay would be in the public interest.

[94] As a result, the applications for a Stay, on these facts, cannot succeed.

Dated on November 29, 2004, at Edmonton, Alberta.

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Dr. Frederick Fisher, Q.C.
Chair