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AER Proceeding 444

By email only

August 9, 2024

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Vern Emard

Re: Northback Holdings Corporation ("Northback")
Applications 1948657, A10123772, and 00497386 (the "Applications")
Panel Decision on Stay Motion Filed by the Municipal District of Ranchland No. 66 ("Ranchland")

Dear Counsel:

As the panel of Alberta Energy Regulator (AER) hearing commissioners presiding over this proceeding (the panel), we write to you to provide our decision on Ranchland's request for a stay of the AER's decision to accept the Applications (the Decision) and set them down for a hearing, pending the outcome of Ranchland's application for permission to appeal the Decision before the Alberta Court of Appeal. Following review and consideration of the submissions provided by Ranchland and Northback, as well as Blood Tribe/Kainai, Piikani Nation, Stoney Nakoda First Nations, the Livingstone Landowners Group (LLG), and the Municipality of Crowsnest Pass (Crowsnest Pass), we have decided to deny Ranchland's stay request for the reasons set out below.

BACKGROUND

Northback submitted the Applications to the AER in August and September of 2023. By letter on February 22, 2024, the AER's General Counsel advised the Chief Hearing Commissioner that the AER had accepted the Applications and determined that they should be decided by a panel of Hearing Commissioners. The Chief Hearing Commissioner convened this panel, and we issued a notice of hearing on April 10, 2024.

On March 21, 2024, Ranchland filed an application for permission to appeal the Decision to the Alberta Court of Appeal. The permission application was heard on August 1, 2024. The Court of Appeal's decision on the application is expected shortly. Should the Court grant permission, a hearing of Ranchland's appeal will be scheduled for a future date.

Ranchland filed its motion for a stay on June 17, 2024. The panel had previously indicated, on June 5, 2024, that we would only consider motions and other hearing matters after all participation decisions had been issued. The last participation decision was issued on June 27, 2024. On July 3, the panel wrote to Northback and the parties granted full participation in the hearing – Blood Tribe/Kainai, Piikani Nation, Siksika Nation, Stoney Nakoda First Nations, Vern Emard, LLG, and Crowsnest Pass – providing them with an opportunity to respond to the Motion.

On July 10, 2024, the panel received submissions from Blood Tribe/Kainai, Piikani Nation, Stoney Nakoda First Nations, LLG, and the Crowsnest Pass. Northback filed a response to the Motion on July 16, 2024, and Ranchland filed a reply on July 24, 2024.

REASONS FOR DECISION

Under section 45(5) of the *Responsible Energy Development Act* (*REDA*), the AER may suspend the operation of (or stay) a decision that has been appealed to the Court of Appeal:

> **45(5)** A decision of the Regulator takes effect at the time prescribed by the decision, and its operation is not suspended by any appeal to the Court of Appeal or by any further appeal, but the Regulator may suspend the operation of the decision or part of it, when appealed from, on any terms or conditions that the Regulator determines until the decision of the Court of Appeal is rendered, the time for appeal to the Supreme Court of Canada has expired or any appeal is abandoned.

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR-MacDonald*.[1]

The onus is on the applicant for the stay to demonstrate it meets each of the following elements of the three-part test:

1. **Serious Issue to be Tried** – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the regulatory appeal.

2. **Irreparable Harm** – They will suffer irreparable harm if the stay is not granted.

3. **Balance of Convenience** – The balance of convenience favours granting a stay.[2]

1. Serious Question

The first step in the test requires the stay applicant to establish that there is a serious issue to be tried. The applicant must demonstrate that there is some basis on which to present an argument on the regulatory appeal. This is a very low threshold. The stay applicant need only show that the regulatory appeal is not frivolous or vexatious.

Submissions

For this part of the test, Ranchland submits that its application for permission to appeal to the Court of Appeal raises numerous serious issues that have merit and are not frivolous or vexatious. Among these are the proper interpretation of the term "advanced coal project" in the Ministerial Order and the AER's treatment of a November 16, 2023, letter from the Minister of Energy and Minerals providing the Minister's interpretation of that term (the Minister's Letter), going to the question of whether the AER should have accepted the Applications in the first place.

[1] *RJR-MacDonald Inc v Canada (Attorney General),* [1994] 1 SCR 311 (*RJR-MacDonald*).
[2] *Ibid* at 334.

In favour of the stay motion, Blood Tribe/Kainai submits that it supports and echoes the arguments made by Ranchland that its appeal raises serious questions to be tried.

The LLG submits that it agrees with Ranchland that the Appeal raises serious questions.

In response, Northback acknowledges that this branch of the test typically has a low threshold but submits that Ranchland failed to establish that the permission to appeal application raises a serious issue to be tried. Northback states that Ranchland's first ground of appeal – that the AER improperly delegated or fettered its decision-making authority by referencing the Minister's Letter in determining that the Grassy Mountain Project is an advanced coal project – has no reasonable prospect of success on appeal and does not raise a serious issue to be tried. In Northback's view, the AER had no authority to determine the meaning of "advanced coal project," so it could not have fettered its discretion by not engaging in its own analysis of the meaning of "advanced coal project." Rather, Northback submits that the AER was only required to determine whether the Applications were on lands subject to an advanced coal project, which the AER did after carefully considering the Ministerial Order and the Minister's Letter.

Northback submits that Ranchland's second ground for appeal – that the AER failed to consider the facts and arguments advanced by Ranchland in its statement of concern with respect to the interpretation of the Ministerial Order – also does not have a reasonable prospect of success on appeal. Northback submits that Ranchland failed to adduce any evidence or otherwise demonstrate that the AER failed to consider Ranchland's concerns, and Ranchland had no procedural right to have its views on the Ministerial Order considered by the AER anyway. Moreover, Northback notes that the AER set the Applications down for a hearing and granted Ranchland the highest level of participation, so the purpose for which Ranchland submitted its statement of concern was achieved.

Northback further submits that Ranchland's third ground of appeal – that the AER relied on improper or irrelevant evidence by considering the Minister's Letter – has no reasonable chance of success on appeal. Northback states that the Minister's Letter provided clarity on the Minister's interpretation of its own Ministerial Order, so the Minister's Letter was directly relevant to the AER's determination of whether to accept the Applications.

Northback also submits that Ranchland's fourth and fifth grounds of appeal – that the AER erred in finding the Minister's Letter to be a "written notice" or "guidelines" – is without merit. Northback states that Ranchland misunderstood the Decision. Northback submits that the Decision referred to the

Ministerial Order rather than the Minister's Letter as "binding direction," and only noted that the Ministerial Order specifies that written notice may be given by the Minister to the AER to accept applications on Category 3 and 4 lands. In Northback's view, that does not mean that the AER considered the Minister's Letter such "written notice."

Finaly, Northback submits that Ranchland's sixth ground of appeal – that the AER erred in finding that the term "advanced coal project" includes projects that have been rejected by the AER – has no chance of success on appeal. Northback states that the Decision was consistent with the Ministerial Order, which states that "the lands subject to an advanced coal project" are exempt from the pause on coal exploration and development, not the advanced coal project itself.

Stoney Nakoda, also opposed to the stay motion, did not address this branch of the test.

Piikani submits that Ranchland's complaint is solely that the Decision was not in its favour and it is unhappy the AER decided to permit the Applications to proceed to a public hearing. Piikani states that these are not serious issues to be tried.

Crowsnest Pass submits that it supports the submissions of Northback on this part of the test.

Panel's Findings

Given the differing views on each side of this matter and the low threshold that must be met for this branch of the test, we find that the issues raised by Ranchland are arguable and, thus, there is a serious issue to be tried. Accordingly, we are satisfied that the first part of the stay test has been met. This conclusion does not make any assessment or predetermination of the issues that would be the subject of the hearing of this proceeding.

2. Irreparable Harm

The second step in the test requires the stay applicant to establish it will suffer irreparable harm if the stay is not granted. Irreparable harm will occur if the stay applicant will be adversely affected by the conduct the stay would prevent if the applicant ultimately prevailed on the regulatory appeal.

We must consider the nature of the harm and not its magnitude.[3] The harm must be of the sort that cannot be quantified in monetary terms or otherwise cured.[4] The stay applicant must provide clear and nonspeculative evidence that it will suffer irreparable harm if its application is denied.[5] Allegations of hypothetical or speculative harm will not suffice. The stay applicant must prove that actual harm will occur if the stay is not granted.[6]

Submissions

For this part of the test, Ranchland submits that, if it is successful on appeal, Ranchland would experience irreparable harm in wasted time, energy, and tax-payer money to participate in this proceeding needlessly. It states that there is no method by which Ranchland could obtain damages, or any other form of redress, in relation to the unnecessary time, expense, and resources spent preparing for and attending a hearing of the Applications. Ranchland relies on *Canadian Natural Resources Limited v Wood Buffalo (Regional Municipality)*, in which Justice Martin (as she then was) held that "when the issue to be tried is not only serious but affects the very fairness of the administrative proceeding more is at stake than non-recoverable costs and inconvenience."[7] Ranchland argues that the issues raised in its application for permission to appeal affect the fairness of the administrative proceeding and the AER's jurisdiction to entertain the Applications in the first place.

In favour of the stay motion, Blood Tribe/Kainai submits that it supports Ranchland's arguments on this part of the test. It states that to deny the motion would lead to a loss of confidence in the AER's processes and a loss of Kainai's capacity to participate in other regulatory processes in its territory. Kainai submits that neither loss could be recovered through damages. It states that it must consult with the Crown, engage with proponents, and otherwise participate in dozens of regulatory processes each year. Kainai submits to do this in a cost-effective way requires certainty of process and that it cannot go through the

[3] *Ibid* at 341.
[4] *Ibid*.
[5] *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at para 29 (*Amnesty International*).
[6] *Ibid* at para 30.
[7] 2011 ABQB 220 at para 66 (*Wood Buffalo*).

expensive and time-consuming stages of an AER hearing to subsequently learn that it was unnecessary because the AER can reconsider projects that have previously been subject to a regulatory process.

Kainai further submits that its consultation department has finite capacity and resources to review and evaluate projects. If the AER does not suspend the Decision pending the Appeal, Kainai and other participants will have to weigh whether to participate in the hearing with the risk that the Appeal may be successful, which would mean significant time, resources, and expenses wasted on the hearing. This would also prevent Kainai from participating more fully in other regulatory processes and initiatives in its territory. Kainai submits that this does not lend itself to a meaningful and robust examination of the substantive aspects of the Applications and does not align with the honour of the Crown.

The LLG submits that if the appeal is successful, the Decision would be quashed, and the proceeding would be declared void. If the proceeding has not been stayed, a tremendous amount of time, money, and effort will have been wasted by all parties, including Northback and its supporters. Accordingly, the LLG agrees with Ranchlands that it and other participants in the proceeding, including the LLG, would suffer irreparable harm if the stay is not granted.

In response, Northback notes that the onus is on Ranchland, as the stay applicant, to adduce clear and non-speculative evidence that demonstrates a real probability that unavoidable irreparable harm will result unless the stay is granted. Northback submits that Ranchland's expenditure of time, resources, and funds to exercise the participatory rights it voluntarily sought cannot constitute irreparable harm. Further, Northback states that the harms alleged by Ranchland are precisely the type of harms that can be quantified and remedied monetarily through the AER's established costs process. Moreover, Northback submits that the harms alleged by Ranchland are speculative in nature, as the costs of participating in a hearing can vary dramatically and are largely in the participant's control.

Northback also submits that Ranchland's reliance on wasted time, resources, and funds associated with participating in the hearing to establish irreparable harm is misplaced, as the permission to appeal application concerns the AER's decision to accept the Applications, not its decision to set them down for a hearing. Northback argues that the decision in *Wood Buffalo* is distinguishable, as the preliminary decisions at issue in that case restricted Canadian Natural Resources Limited's ability to tender certain evidence and prevented Canadian Natural from obtaining a full, fair, and proper merit's hearing. Conversely, Northback submits, the Decision here does not limit Ranchland's ability to tender evidence or otherwise participate in the hearing.

Stoney Nakoda submits that there is no irreparable harm warranting a stay of the proceeding. It states that Ranchland has failed to acknowledge that costs are recoverable in the AER's hearing process and that the AER holding a hearing does not mean the Applications will be approved. Northback and the various other participants will have the opportunity to provide evidence and make submissions as to whether the Applications ought to be approved.

Piikani also submits that Ranchland has not demonstrated it is likely to suffer irreparable harm if the stay is not granted. Piikani echoes Northback that there is a high threshold for establishing irreparable harm, and that alleged harms that are speculative, hypothetical, or only arguable do not qualify. Piikani submits that Ranchland has put forth no evidence of any special circumstances to show that the ordinary costs it will incur by participating in the hearing will result in irreparable harm. In particular, Piikani notes that the Decision did not approve the Applications or place any limits on the evidence or arguments Ranchland may assert at the hearing. Piikani states that the harm alleged by Ranchland is entirely financial, quantifiable in monetary terms, and potentially recoverable.

Crowsnest Pass submits that Ranchland is only one of seven full participants in this proceeding and, like the other participants, voluntarily sought and was granted the ability to participate in the AER approval process. Crowsnest Pass states that the consequences of benefitting from such participatory rights do not constitute irreparable harm. Moreover, Crowsnest Pass submits that Ranchland has not demonstrated that it is likely to suffer irreparable harm due to its failure to particularize any cost of the alleged harm. Crowsnest Pass cites a decision of the Federal Court of Appeal in which the Court held that "[m]ere administrative inconvenience, without more, does not qualify as irreparable harm."[8] Crowsnest Pass submits that the harms alleged by Ranchland are exactly the types of harms that can be remedied monetarily, and that there is an established process by which AER hearing participants may seek the recovery of certain costs incurred as a result of participating in AER hearings.

In reply, Ranchland submits that the costs awarded by the AER following a hearing are not intended to, nor will they, fully indemnify any hearing participant for the amounts that they have expended in relation

[8] *Laperrière v D & A MacLeod Company Ltd*, 2010 FCA 84 (*Laperrière*) at para 20.

to their participation in a hearing. So, at least some of Ranchland's expenses would be unrecoverable regardless of any costs award, and those expenses would constitute irreparable harm. Ranchland submits that the idea that its expenses would be fully covered by a costs award at the end of the proceeding is itself speculative.

Ranchland also states that where the issue is whether the Applications should have been accepted at all (and therefore whether there should be a hearing at all), the principles in *Wood Buffalo* apply with greater force. Ranchland submits that its substantive rights are engaged because it must now participate in a hearing to determine whether Northback's coal exploration activities should occur within Ranchland's borders, whereas the Ministerial Order on its face blocks such applications from even being considered. Ranchland states that the public's confidence in the integrity of the AER's administrative processes is squarely in issue in the permission to appeal application.

Panel's Findings

We find that Ranchland has not provided sufficient evidence to demonstrate that it will suffer irreparable harm if the stay is denied. First, the harms Ranchlands submits it will suffer if the proceeding is not stayed and it is successful on appeal are time, resources, and money. These amount to administrative inconvenience and harms that can be quantified in monetary terms, neither of which constitutes irreparable harm.[9] Ranchland argues that the AER's *Directive 031* sets out the flat maximum rates of costs and disbursements that parties can expect to receive after appearing before the AER, but that is not accurate. *Directive 031* includes a scale of costs that the AER generally applies when awarding costs, but the AER retains discretion to award costs in amounts greater than stated in the scale of costs where it is satisfied that the scale is inadequate given the circumstances of the case.[10]

Second, the alleged harms are, at least in part, speculative. Ranchland states that it is *likely* that numerous experts will be retained to provide evidence and reports in relation to the potential negative effects of

[9] *RJR-MacDonald*, *supra* note 1 at 341; *Fawcett v College of Physicians and Surgeons of Alberta (Complaint Review Committee)*, 2022 ABCA 416 at para 23; *Laperrière*, *supra* note 8 at para 20.
[10] *Directive 031: REDA Energy Cost Claims* (February 2016), Schedule D at 17.

Northback's coal exploration programs but does not provide any detail. We are not satisfied that this rises to the level of clear, non-speculative evidence of irreparable harm that is required.[11]

Finally, in our view the situation in *Wood Buffalo* is distinguishable from the situation before us. In *Wood Buffalo*, the tribunal had issued a preliminary decision in which it determined, among other things, that it did not have jurisdiction to receive evidence and hear argument in respect of a certain issue. Canadian Natural sought and obtained a stay pending judicial review of that decision. In granting the stay, Justice Martin noted that the preliminary decision under review had "clear and profound implications for how the hearing on the merits [would] be conducted."[12] Specifically, it limited what could be argued, what disclosure and reports could be tendered, who could be called as witnesses, what evidence would be admissible, and the scope of permissible cross-examination.[13] And if Canadian Natural was successful before the court, the remedy would be for it to have a new hearing before the tribunal, which would be a waste of resources and time.

In our view, the issues raised by Ranchland are markedly different. The questions in Ranchland's application for permission to appeal go to whether the AER erred in accepting the Applications, not whether this hearing process is fair. If Ranchland is successful this proceeding may become moot, but in the meantime, nothing prevents Ranchland from arguing its position before this panel, adducing whatever evidence it deems necessary to support its position, and participating fully in the hearing.

We also note that the potential harms that Kainai and the LLG submit they will suffer if the stay is not granted are of the same nature as the harms identified by Ranchland – loss of time, money, and resources – and for the same reasons do not qualify as irreparable harm. Moreover, it is only the harm that may be suffered by the stay applicant that is relevant at this stage.[14]

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[11] *Amnesty International Canada*, *supra* note 5 at paras 29-30.
[12] *Wood Buffalo*, *supra* note 7 at para 54.
[13] *Ibid*.
[14] *RJR-MacDonald*, *supra* note 1 at 341; *Dreco Energy Services Ltd v Wenzel*, 2008 ABCA 290 at para 33.

In sum, we find that Ranchland has not demonstrated that it will suffer irreparable harm if the stay is not granted. As a result, Ranchland has not satisfied the second part of the *RJR-MacDonald* test.

3. Balance of Convenience

As set out above, an applicant for a stay must demonstrate that it meets each of the elements of the three-part test. Having found that Ranchland has not demonstrated that it will suffer irreparable harm if the stay is not granted, there is no need for us to consider the balance of convenience.

CONCLUSION

We dismiss Ranchland's stay motion because Ranchland has not demonstrated that it will experience irreparable harm if the stay is not granted.

Parand Meysami, Presiding Member

M.A. (Meg) Barker, Panel Member

Shona Mackenzie, Panel Member

cc: Thomas Machell, Bennett Jones LLP, counsel for Northback
Angela Beattie and Sarah Nossiter, Northback Holdings Corporation
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Michael Custer, Carscallen LLP
Meighan LaCasse, Alana Hall, Shauna Gibbons, AER counsel for the panel
Tara Wheaton and Elaine Arruda, AER hearing coordinators
Limited Participants, as identified in the attached 'Schedule of Participants for AER Proceeding 444'

Schedule of Participants for AER Proceeding 444

Full Participants

Blood Tribe/Kainai ("Kainai")
Livingstone Landowners Group
Municipal District of Ranchland No. 66
Municipality of Crowsnest Pass
Piikani Nation
Siksika Nation
Stoney Nakoda First Nations
Vern Emard

Limited Participants

Josefine Singh
Kevin Watson
Chad Petrone
Kara Potts (Potts Painting Inc)
Pat Rypien
Clayton Bezzeg (Tig Contracting)
Don Forsyth (Tig Contracting)
Kim Cunningham
Gary Clark (Crowsnest Pass Quad Squad)
Rob MacGarva (Southwest Alberta Skateboard Society)
Monica Field
David McIntyre
Kurt Weiss (Blairmore Lions Club)
Troy Linderman (CNP EMS Industrial Safety Services)
Rick Sharma (Davis Dodge)
Lucas Michalsky (Darkhorse Services Inc.)
Kendall Toews (South West Waste Management)
Andy Vanderplas
Ken Allred
Brandy Fehr
John Clarke
Colt Lazzarotto
Brent Koinberg (Crowsnest Adventures Ltd)
Darcy Wakaluk (Diggers Bobcat Service)
Allan Garbutt
Dirk Gillingham
Koral Lazzarotto
Dale Linderman
Tanya hill
Jim Swag (Piikani Employment Services)
William (Randy) Cartwright
Shar Cartwright
Mitchell Withrow

Heidi McKillop
Katrina Shade (Piikani Resource Development Ltd)
Daylu Grier (Piikani Security Services Interest)
Liz Insley (Piikani Travel Center)
Alberta Wilderness Society
Canadian Parks and Wilderness Society
Citizens Supportive of Crowsnest Coal
Coal Association of Canada
Corb Lund
Crowsnest Conservation Society
Gold Creek Grazing Cooperative
Pekisko Group
Timberwolf Wilderness Society