

Via Email

October 4, 2021

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Mandell Pinder LLP

Bonavista Energy Corporation

www.aer.ca**Attention: Tarlan Razzaghi, Counsel****Attention: Nicole Mungo**

Dear Mesdames:

**RE: Late Filing of Request for Regulatory Appeal of Approval No. RTF 216384
Request for Stay by Lac Ste. Anne Métis
Bonavista Energy Corporation (Bonavista)
Application Nos.: 31287902 & 1933916
Approval No.: RTF 216384 & F52326
Request for Regulatory Appeal No.: 1934267**

The Alberta Energy Regulator (AER) has considered the September 10, 2021 request of the Lac Ste. Anne Métis community (LSAM) for an extension of the timeline to file a request for regulatory appeal (RRA) of the Approval No. RTF 216384 (Temporary Access Disposition).

The AER has also considered the LSAM's request under section 39(2) of the *Responsible Energy Development Act (REDA)* for a stay of the Approval No. 1934267 (the Facility Licence).¹

For the reasons that follow, the AER approves LSAM's request for an extension to file the request for regulatory appeal of the Temporary Access Disposition.

The AER however, denies LSAM's request to stay the Facility Licence.

REASONS FOR DECISION***Late Filing***

The AER has reviewed the submissions from the parties about the late request for regulatory appeal and have determined that LSAM's motion to file its request for regulatory appeal of the temporary field authorization late, should be granted. The applications were submitted as routine and were therefore approved expeditiously (TFA approved on August 5, 2021); this significantly reduced LSAM's opportunity to file a Statement of Concern (SOC Deadline for the TFA was September 3, 2021). In these circumstances LSAM proceeded with dispatch and filed their TFA request for regulatory appeal only 7 days late; a delay that Bonavista has not alleged would prejudice them. Moreover, this delay also allowed for the Facility Licence and the TFA to be filed together, which is more efficient administratively.

¹ The Facility Licence was filed on time.

Stay Request

Under section 38(2) of *REDA*, the filing of a request for regulatory appeal (RRA) does not operate to stay an appealable decision. The AER may, however, grant a stay on the request of a party to the regulatory appeal under section 39(2).

The AER's test for a stay is adopted from the Supreme Court of Canada's decision in *RJR MacDonald*.² The onus is on the applicant for the stay to demonstrate that they meet each of the following criteria:

1. Serious question to be tried – Based on a preliminary assessment of the merits of the case, they have an arguable issue to be decided at the requested 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.³

Parties' Submissions on the Stay Request

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 requested appeal. This is a very low threshold. The stay applicant need only show that the requested appeal is not frivolous or vexatious.

The AER finds that there is a serious issue to be tried.

Part of this finding is that because the applications were submitted as routine, even though it appears – based on LSAM's objection and the filing of Request for Regulatory appeal – that Directive 056 participant involvement requirements might not have been met. The AER is unable to properly determine whether participant involvement requirements have been met in this case as Bonavista only provided a bare assurance that the application was submitted based on their “compliance with all Directive 56 consultation and notification requirements.” Bonavista did not provide any details or a timeline on how they met their Directive 056 obligations, which means that participant involvement remains a serious issue to be tried, in this case.

Further, in the Request for Regulatory Appeal, LSAM asserted several concerns, including:

- The Appealable decisions occur in a culturally important area, with a high potential for heritage resource value;
- Members of LSAM hunt in the area of the TFA and the Facility Licence;
- Members of LSAM also trap for food in proximity to the TFA and the Facility Licence;

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

³ *Ibid* at 334.

- The TFA and the Facility Licence allow oil and gas activity within, and in proximity to areas that are known to LSAM members as critical for food and traditional food and medicinal plant gathering; and
- The TFA and the facility licence occur in an area where LSAM is worried about industries' cumulative effects on fishing and domestic water use and air quality.

In reply, Bonavista submitted that none of the foregoing concerns are site specific concerns and that the proposed Bonavista facility is completely contained within the existing MSL, and as such, Bonavista is only utilizing pre-disturbed lands for construction.

While Bonavista's concerns are legitimate – especially regarding whether LSAM's concerns are site specific – the simple fact that Bonavista's activities occur in proximity to critically important areas for LSAM members are enough to satisfy the very low threshold that there is a serious issue to be tried.

2. Irreparable Harm

The second step in the test requires the applicant for the stay to establish that they 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 prevails on the regulatory appeal. It is the nature of the harm and not its magnitude that is considered. The harm must be of the sort that cannot be remedied through damages (i.e., monetary terms) or otherwise cured.⁴ As noted by the Alberta Court of Appeal, irreparable harm is “of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the [stay] would be a denial of justice.”⁵

The Federal Court of Canada has described the onus that rests upon the stay applicant to meet the irreparable harm test as follows:

The burden is on the party seeking the stay to adduce clear and non-speculative evidence that irreparable harm will follow if their motion is denied.

That is, it will not be enough for a party seeking a stay to show that irreparable harm *may arguably result* if the stay is not granted, and allegations of harm that are merely hypothetical will not suffice. Rather, the burden is on the party seeking the stay to show that irreparable harm *will result*.⁶

For this part of the test, LSAM submits that it will suffer harm without a stay as its RRA will be rendered nugatory as the impacts of the concern to LSAM will proceed and construction completed by the time the RRA is determined. Therefore, without a stay, LSAM's concerns with the facility could not properly be addressed by stakeholder engagement or addressed by the AER through a hearing process as the facility will already be built and operating, effectively making the RRA moot. LSAM further submits that this is

⁴ *Ibid* at 341.

⁵ *Ominayak v Norcen Energy Resources Ltd*, 1985 ABCA 12 at para 31, citing *High on The Law of Injunction*, 4th ed, vol 1 at 36.

⁶ *Canada (Attorney General) v Amnesty International Canada*, 2009 FC 426 at paras 29 and 30 [citations omitted] [emphasis in the original].

against the public interest, especially because the Appealable Decision was issued on an expedited basis which prevented LSAM from filing a SOC; and that LSAM has no legal recourse to obtain damages for such impacts.

Bonavista submits that the approved multi-well gas battery licence is for works to be completely contained within the existing Bonavista MSL, utilizing pre-disturbed lands only for all construction activities related to the Facility Licence and that Bonavista respectfully declines the Stay Request.

The AER finds that LSAM has failed to demonstrate any harm they *may* suffer, let alone any *irreparable* harm that they *will* suffer as a result of the stay not being granted. Accordingly, the LSAM have not satisfied the second branch of the stay test and the request for a stay is denied. This is for two reasons:

1. LSAM did not adduce any evidence on how the facility would cause irreparable harm, especially considering the facility licence would simply be added to an existing MSL, with two wellheads already drilled. LSAM has only made general arguments as to how industry activity might affect traditional land uses; arguments where it is unclear as to why they were not made against the original MSL and well applications. LSAM has failed to delineate how the facility application would affect their traditional land uses, separate and apart from what has already been approved and built on the lands in question.
2. While LSAM's traditional land use rights could be affected by the *permanent* installation of the facility, LSAM failed to adduce any evidence that the facility was a permanent fixture of the land that could not be uninstalled and remediated, if LSAM was ultimately successful in its appeal.

3. Balance of Convenience

As explained above, an applicant for a stay must satisfy each element of the three-part test for the stay to be granted. LSAM has failed to satisfy the second part of the test (demonstrating irreparable harm), so consideration of the third part of the test (balance of convenience) is not strictly necessary.

Nevertheless, the AER does find that in addition to failing to demonstrate irreparable harm, LSAM has not established that a balance of convenience favours the AER granting the stay.

The balance of convenience involves examining which party will suffer more harm from granting or refusing the stay. The Regulator must weigh the burden the stay would impose on Bonavista against the benefit LSAM will receive from a stay. This requires the AER to consider significant factors and not just perform a cost-benefit analysis.

While Bonavista did not make any submissions on the balance of convenience, the AER notes that a stay on the facility licence would require changes to how the existing wells on the lease would be produced. Further, as already noted, Bonavista's facility licence will occur on pre-disturbed lands and within an existing MSL. It is difficult to see how the facility's construction, pending the result of the regulatory appeal, will substantively affect LSAM's rights any more than Bonavista's previously existing industrial development on this site already has.

CONCLUSION

Consequently, the AER has decided to accept the late filing of the request for a regulatory appeal, as it relates to the temporary access disposition.

The stay request is dismissed because LSAM has failed to demonstrate irreparable harm and that the balance of convenience favours granting the stay.

Further correspondence will be issued to the parties regarding written submissions on the merits of the request for regulatory appeal.

Sincerely,

<Original signed by>

Jeff Moore
Associate General Counsel

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Candace MacDonald
Director, Field Operations North

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Jennifer Zwarich
Senior Advisor, External Innovation &
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