BRITISH COLUMBIA
The Best Place on Earth

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

APPEAL NO. 2009-EMA-009(b)

In the matter of an appeal under the *Environmental Management Act*, S.B.C. 2003, c. 53.

BETWEEN:	Worthington Mackenzie Inc. Daniel Alexander White	**APPELLANTS**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Province of British Columbia	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on January 6, 2010	

APPEARING:

For the Appellants:	
Worthington Mackenzie Inc.:	Jonathan S. McLean, Counsel
Daniel Alexander White:	Gary Letcher, Counsel
For the Respondent:	Brian J. Wallace, Counsel
For the Third Party:	Elizabeth Rowbotham and Anthony Dalmyn, Counsel

STAY DECISION

[1] Worthington Mackenzie Inc. ("WMI") and Daniel Alexander White have appealed a decision and certificate issued on September 8, 2009, by Ian Sharpe, Director, *Environmental Management Act* (the "Director"), Ministry of Environment. The Director's decision and certificate address the reasonableness of, and responsibility for, costs of the spill response actions incurred by the Province of British Columbia (the "Province") at the Mackenzie Pulp Mill (the "Mill"), located in Mackenzie, BC. The Director concluded that WMI and Mr. White are jointly and severally liable for the Province's costs of $4,485,505.

[2] Shortly after the appeal was filed, the Appellants applied to the Board for a stay of the Director's decision and certificate, pending a decision by the Board on the merits of the appeal. The Board offered all parties an opportunity to comment on whether a stay should be granted.

[3] This preliminary application was conducted by way of written submissions.

BACKGROUND

[4] The Mill was originally built in the 1970's. When operating, the Mill uses wood fibre, typically wood chips, to produce northern bleached softwood kraft pulp.

[5] In May 2008, the Mill's then owner, Pope & Talbot Ltd., went into receivership, and the BC Supreme Court appointed a receiver for the Mill and its related assets.

[6] On August 15, 2008, 0832498 B.C. Ltd., now WMI, entered into an asset purchase agreement for the Mill and its related assets. The sale was approved by a Court order on August 21, 2008, and the sale was completed on September 22, 2009. According to WMI, as part of that transaction, the real property in relation to the Mill was transferred to 0834921 B.C. Ltd., now called Worthington Mackenzie Land Holdings Inc., and all other assets were transferred to WMI. WMI and Worthington Mackenzie Land Holdings Inc. obtained financing from CVM Holdings Ltd. ("CVM") to fund the asset purchase. That financing was intended to be short-term, and WMI was pursuing options for longer-term financing.

[7] Mr. White was a director of WMI when the sale was completed. In or about December 8, 2008, he ceased to be a director of WMI, and D. Nino Puskaric became a director of WMI.

[8] During the fall and early winter of 2008, the Mill was being kept in a state of 'warm storage' with a staff of approximately 50 employees. Also during that time, WMI failed to obtain either long-term financing or a buyer for the Mill, the price for northern bleached softwood kraft pulp dropped, and WMI was unable to obtain a secure long-term supply of wood fibre for the Mill's operations.

[9] In January 2009, WMI began to default on its salary, wage and expense obligations. WMI's failure to pay employees at the Mill resulted in employees eventually refusing to continue working.

[10] In January 2009, WMI notified the Province that it had exhausted its resources and an environmental emergency was imminent. WMI requested that the Province assist it with adequate resources so as to avoid a release of any chemicals into the environment.

[11] On January 22, 2009, a representative for the Mill's unionized employees also notified the Ministry that unionized workers intended to begin an orderly shut down of the Mill's boiler and would be leaving the Mill that evening, if payroll was not met.

[12] On January 24, 2009, the Mill's General Manager advised the Ministry that he and all other non-union staff at the Mill would be leaving the Mill on January 26, 2009, and the Mill's Chief Power Engineer would be taking steps to depressurize the Mill's boiler. Without staff to run the boiler and provide heat to the Mill during the cold winter weather, equipment such as pipes and tanks would cool and could crack, potentially causing the release of poisonous chemicals.

[13] On January 25, 2009, the Minister of Environment declared that an environmental emergency existed at the Mill, pursuant to section 87 of the *Environmental Management Act* (the "*Act*"). According to the Minister's written declaration, there was an imminent spill or release of potentially dangerous

chemicals stored at the Mill which presented an environmental emergency requiring immediate action.

[14] The government retained Tim Roots and his company, MacKenzie Pulp Mill Environmental Management Inc. ("MPMEMI"), to manage the Mill, including handling and containing chemicals at the Mill site.

[15] On February 9, 2009, Mr. Roots determined, pursuant to his authority as an officer under section 80(2) of the *Act*, that there was an imminent threat of a chlorine dioxide spill at the Mill which posed a threat to health and the environment, and that action was necessary to address that threat.

[16] Section 80(2) of the *Act* states as follows:

80 (2) If an officer considers that

(a) a spill that has occurred may pose a hazard to health or the environment, or that there is an imminent threat of a spill that may pose such a hazard, and

(b) action is necessary to address the hazard or threat,

the government may carry out actions to address the perceived hazard or threat and the long term impacts on the environment resulting from the spill.

[17] In mid-February 2009, over the course of several days, there was a leak of approximately 1000 gallons of chlorine dioxide from a valve on a tank at the Mill. The tank was repaired on February 22, 2009.

[18] The Appellants allege that Mr. Roots and MPMEMI chose methods and procedures for handling and containing substances at the Mill that were neither cost effective nor reasonable in the circumstances, and which increased the Province's spill response costs. In particular, the Appellants submit that the chlorine dioxide leak caused increased costs which should have been prevented.

[19] In August 2009, the Director held an oral hearing to determine liability and costs for the spill response actions carried out by the Province. The hearing was attended by WMI's representatives, Mr. White, and the Province's representatives. All of the parties were represented by legal counsel. The Director was also represented by legal counsel; namely, Brian Wallace, Q.C., and Marli Rusen.

[20] Mr. Wallace and Ms. Rusen also represented Mr. Roots and MPMEMI in the spill response actions carried out by the government. MPMEMI was not a party to the cost recovery proceedings before the Director. However, during the hearing before the Director, Mr. Roots testified in his capacity as an officer under the *Act* and on behalf of MPMEMI. Mr. Roots gave evidence regarding the costs of the spill response actions.

[21] During the hearing, WMI and Mr. White raised an issue of bias respecting the Director. They alleged that the Director's involvement with the spill response actions, and his representation by Mr. Wallace, created a reasonable apprehension of bias for which he should have recused himself. The Director decided during the hearing that there was not a reasonable apprehension of bias that would disqualify him from exercising his authority under the *Act*.

[22] The Director's decision and certificate were issued on September 8, 2009, under section 80(4) of the *Act*, which states:

80 (4) If the government carries out spill response actions, a director may,

(a) subject to the regulations, issue a certificate

(i) setting out the reasonable costs of the spill response actions,

(ii) identifying one or more persons who had possession, charge or control of the substance referred to in subsection (2) or (2.1), and

(iii) specifying all or part of those costs as payable by one or more of the persons identified in the certificate, and

(b) by serving notice of the certificate on a person identified in it, require the person to pay all or part of the costs as specified in the certificate.

[23] The Director's certificate, which is included in the September 8, 2009 decision, states as follows:

I HEREBY CERTIFY PURSUANT TO SECTION 80(4)(a) OF THE EMA,

- THAT $ 3,588,404 of the costs incurred by the province in carrying out actions to address the perceived threat of a spill, plus $897,101, being 25% of $3,588,404, for its administrative overhead, for a total of $4,485,505 are the reasonable costs of the spill response actions at the Mackenzie Pulp Mill;
- AND THAT Worthington Mackenzie Inc. and Daniel Alexander White are persons who had possession, charge or control of the substances which gave rise to the need for the spill response actions;
- AND THAT Worthington Mackenzie Inc. and Daniel Alexander White are jointly and severally liable for 100% of the costs of $4,485,505.

[24] On October 2, 2009, WMI and Mr. White filed an appeal with the Board against the Director's decision and certificate. In their notice of appeal, they submit that the Director made errors in determining the reasonable costs of the spill response actions. They also submit that the Director's appointment as the decision-maker, and his representation by Mr. Wallace, created a reasonable apprehension of bias. In addition, the Appellants submit that the Director erred in concluding that Mr. White should be held jointly liable for the Province's costs.

[25] Also on October 2, 2009, the Province filed a petition in the BC Supreme Court seeking an order to recover judgement of $4,485,505 against WMI and Mr. White, jointly and severally. Alternatively, the Province seeks an order that the Director's certificate be filed in the Court's registry, and the Court issue a declaration that, upon filing in the registry, the certificate has the same effect as a Court judgement for recovery of debt in the amount stated in the certificate. The Appellants oppose the Province's petition, and allege that filing the certificate offends section 96 of the *Constitution Act, 1867*. That matter is scheduled for a one-day hearing before the Court on February 26, 2010.

[26] On October 13, 2009, the Province applied to the Board for full party status in the appeal, and for an order that the appeal be conducted as an appeal on the record conducted by the exchange of written submissions. On October 14, 2009,

the Board granted the Province full party status, and offered all parties an opportunity to comment on the Province's application.

[27] On November 13, 2009, the Appellants applied to the Board for an order staying the Director's decision and certificate, pursuant to section 104 of the *Act*. By a letter dated November 17, 2009, the Board offered all parties an opportunity to make submissions on the Appellants' application for a stay.

[28] In a decision dated January 5, 2010, the Board denied the Province's application that the hearing be conducted in writing and on the record. The Board ordered that the appeal would proceed as a new hearing of the matter, conducted as an oral hearing. The Board also concluded that a new hearing of the matter before the Board would cure any errors in the proceedings conducted by the Director (*Worthington Mackenzie Inc. and Daniel Alexander White v. Director, Environmental Management Act*, Appeal No. 2009-EMA-009(a)).

[29] Regarding the stay application, WMI and Mr. White submit that the application should be granted because the appeal raises serious issues to be tried, each of them will suffer irreparable harm if a stay is denied, and the balance of convenience favours granting a stay. WMI and Mr. White provided separate submissions on the stay application, but Mr. White relied on WMI's submissions.

[30] The Province opposes the application for a stay. The Province submits that there is no serious issue to be tried, and that the Appellants have provided insufficient evidence to establish that they will suffer irreparable harm if a stay is denied. The Province also submits that the balance of convenience favours denying a stay.

[31] In support of their submissions, the Appellants and the Province each referred to various judicial decisions, previous Board decisions, and affidavit evidence.

[32] The Director provided no submissions on the application for a stay.

ISSUE

[33] The sole issue arising from this application is whether the Panel should grant a stay of the Director's decision and certificate, pending a decision on the merits of the appeal.

RELEVANT LEGISLATION AND CASE LAW

[34] Section 104 of the *Act* empowers the Board to order stays:

Appeal does not operate as stay

104 The commencement of an appeal under this Division does not operate as a stay or suspend the operation of the decision being appealed unless the appeal board orders otherwise.

[35] In *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5,

1997), [1997] B.C.E.A. No. 42 (Q.L.), the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR MacDonald*] applies to applications for stays before the Board. That test requires an applicant for a stay to demonstrate the following:

1. there is a serious issue to be tried;

2. irreparable harm will result if the stay is not granted; and

3. the balance of convenience favours granting the stay.

[36] The onus is on the applicants, in this case WMI and Mr. White, to demonstrate good and sufficient reasons why a stay should be granted.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the Director's decision and certificate, pending a decision on the merits of the appeal.

Serious Issue

[37] In *RJR MacDonald*, the Court stated as follows:

> What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one.

[38] The Court also stated that, unless the case is frivolous or vexatious, or is a pure question of law, the inquiry generally should proceed onto the next stage of the test.

[39] WMI submits that there are serious issues to be tried in this case, including the reasonableness of the costs incurred by the Province, whether those costs were incurred to address an imminent threat of a chemical spill, whether it was appropriate for the Director to include an amount for overhead costs, and who should be held liable for the reasonable costs incurred.

[40] Mr. White submits that the appeal raises serious issues to be decided. He argues that, in addition to the issues identified by WMI, there are factually and legally complex issues relating to whether Mr. White should be held liable for the costs incurred by the Province. In particular, Mr. White raises issues regrding whether he had possession, charge or control of the substances creating the threat of a spill, and whether the acts of WMI can be distinguished from the acts of its directing minds.

[41] The Province submits that there is no serious issue to be tried. It argues that the appeal is frivolous, and is an attempt to delay the Province's recovery of the spill response action costs.

Panel's findings

[42] The Panel has reviewed the applicants' grounds for appeal. They raise issues regarding what constitutes the "reasonable" costs of the Province's spill response

actions, the fairness of the proceedings before the Director, and whether Mr. White should be held liable for the spill response action costs. As previously noted in the Board's decision issued on January 5, 2010, the parties have indicated that they intend to submit complex and contradictory evidence, including expert evidence on the issue of the reasonable costs of the spill response actions. They also intend to provide evidence regarding the nature of Mr. White's relationship with WMI and his involvement with the Mill and its management during the period leading up to January 2009. The Panel finds that the applicants have raised serious issues to be decided, which are not frivolous, vexatious, or pure questions of law.

Irreparable Harm

[43] At this stage of the *RJR MacDonald* test, the applicants must demonstrate that their interests will suffer irreparable harm if a stay is not granted. As stated in *RJR MacDonald*, at p. 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the Association's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> …
>
> 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision…; where one party will suffer permanent market loss or irrevocable damage to its business reputation…; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined…

[44] WMI submits that the Province is seeking to file the certificate in the BC Supreme Court as soon as possible, and once filed, the certificate has the same effect as a Court judgment. WMI maintains that the Province will then take proceedings to execute (i.e. enforce the certificate) against the Appellants. WMI submits that its only assets are the physical plant and assets that make up the Mill infrastructure, including machinery, equipment and supplies. WMI maintains that it does not own the land on which the Mill is situated; rather, the land is owned by Worthington Mackenzie Land Holdings Inc. WMI submits that, without the land on which the Mill is situated, the Mill's assets would be seized and sold for salvage or scrap value if the Province executes against the Appellants.

[45] WMI submits that the seizure and sale of the Mill's assets would cause WMI to suffer irreparable harm, because it would destroy WMI's only business asset. Furthermore, the Mill's potential value as an operating business would be lost forever, and it would be sold for a fraction of its replacement cost. In addition, seizure of the assets would destroy current efforts to market the Mill as a viable operation.

[46] In addition, WMI argues that seizure and sale of the Mill's assets would result in WMI breaching its loan agreement with CVM. WMI maintains that this would

cause it irreparable harm, because CVM would be entitled to demand immediate repayment of the loan, which WMI would be unable to pay, and CVM could then initiate proceedings that would almost certainly lead to WMI's bankruptcy. WMI submits that it owed approximately $13.8 million to CVM by January 2009, and further interest has accumulated since then. WMI submits that bankruptcy proceedings would destroy its efforts to find an owner and operator for the Mill.

[47] WMI submits that, at paragraph 59 of *RJR MacDonald*, the Court stated that irreparable harm includes "instances where one party will be put out of business by the court's decision."

[48] WMI also submits that the chain of events proposed above would cause irreparable harm to Mr. White to the extent that his assets could be taken to satisfy the Province's debt.

[49] Finally, WMI submits that, if a stay is denied but the Appellants are successful in the appeal, such that the certificate is overturned or reduced, there is no certainty that the Appellants could recover anything from the Province for any damages suffered as a result of the Province seeking to enforce the certificate. WMI submits that, in those circumstances, it may have to commence court proceedings to seek the recovery of damages from the Province.

[50] Mr. White submits that he will suffer irreparable harm if a stay is denied. He submits that, if his assets are seized and sold but he is successful in his appeal, his assets such as land and shares cannot be reassembled, and he cannot be readily compensated in damages. He also argues that, as an entrepreneur, his business reputation is at risk. He submits that, in cases where allegations of bias are raised, courts have found that a stay should be granted to prevent irreparable harm to reputation and career.

[51] In addition, Mr. White submits that execution on the certificate may put him in breach of his contractual obligations to his lenders, who could then accelerate payment and execute against his assets.

[52] The Province submits that the Appellants have provided insufficient evidence to support their contention that they will suffer irreparable harm if a stay is denied. The Province acknowledges that, based on evidence provided by the Province, the Appellants appear to be in financial difficulties, but the Province submits that those difficulties existed before the Director issued his decision and certificate, and are the result of matters that are beyond the Board's control. Moreover, the Province submits that the Appellants are attempting to equate the consequences of having to pay a debt with irreparable harm.

[53] The Province acknowledges that financial loss can, in some circumstances, constitute irreparable harm, but it submits that the party claiming such harm must provide evidence in support, and WMI and Mr. White have failed to do so. Alternatively, the Province submits that WMI's business interests are already significantly compromised, and delaying the government's ability to execute on the certificate will not materially alter that fact. The Province submits that WMI has already breached its loan agreement with CVM by abandoning the Mill site, among other things. Furthermore, the Province submits that WMI's assertion that the Mill may be dismantled and sold for scrap is speculative, because the holder of the

mortgage granted by WMI could take possession and/or assert its interests in the chattels, and sell the plant as a whole.

[54] The Province also argues that prompt enforcement of orders for payment of spill recovery action costs will encourage respect for the requirements of the *Act*, and hence, promote environmental protection.

[55] Regarding Mr. White, the Province submits that he has provided no evidence on the state of his financial affairs or the details of his contractual obligations to lenders. Based on corporate and Land Title searches, the Province submits that Mr. White is a director and shareholder of several inter-related corporate entities which all appear to be in financial jeopardy. The Province set out the details of those searches in its affidavit evidence, which shows that several properties owned by those companies have judgments registered against them, and in some cases, lending creditors have filed certificates of pending litigation on the property title. The Province argues that Mr. White's business reputation has already been harmed by execution proceedings taken by other creditors.

Panel's findings

[56] Satisfying this branch of the test requires the applicants to show that their interests will suffer irreparable harm between now and the time when the appeal is decided, unless a stay is granted. This requires that they provide credible evidence in support of the claim for irreparable harm. That evidence need not be so strong as to be irrefutable, but there should be some evidence in support of the harm alleged.

[57] The Panel finds that WMI has provided sufficient evidence to establish that its financial interests will suffer irreparable harm between now and the time when the appeal is decided, if a stay is denied. Although WMI has not provided detailed information about its financial situation, the Panel finds that Mr. Puskaric's affidavit provides sufficient evidence to support WMI's claim for irreparable harm. In his affidavit, Mr. Puskaric attested that WMI's sources of finances were exhausted in early January 2009, and WMI owed CVM just under $15 million as of the end of 2009. Although the Panel finds that WMI's business interests have already been compromised by factors that are unrelated to the Director's decision and cerificate, the Panel finds that denying a stay would cause further financial harm to WMI, and this harm would not be recoverable as damages if WMI succeeds in the appeal. In particular, the Panel finds that if the Province succeeds in registering the certificate, and a writ of execution is brought against WMI, the Province would be in a position to seize the Mill's assets, which are WMI's only assets, and this would likely force WMI into bankruptcy. In *RJR MacDonald* at paragraph 59, the Court stated that irreparable harm "includes instances where one party will be put out of business by the court's decision".

[58] Similarly, the Panel finds that Mr. White has provided sufficient evidence to establish that his financial interests will suffer irreparable harm between now and the time when the appeal is decided, if a stay is denied. Although Mr. White has not provided detailed information about his financial situation, the Panel finds that his affidavit provides sufficient evidence to support his claim for irreparable harm. In his affidavit, he attests that registration and execution of the certificate against him personally would be very damaging to his business reputation, and very

detrimental to his livelihood as an entrepreneur. He states that a writ of execution would put him in breach of various loan agreements for his current businesses, which could result in lenders demanding immediate repayment and Mr. White losing his assets to secured creditors. He states that it is unknown whether he could obtain any contribution and indemnity from WMI.

[59] Based on this evidence, the Panel finds that denying a stay until the Board decides the merits of the appeal will cause Mr. White to suffer financial harm that would be, in part, noncompensable if he succeeds in his appeal. In particular, if the Province registers the certificate and brings a writ of execution against Mr. White, he would be in breach of certain loan agreements and he may lose his assets to secured creditors. The Province's evidence shows that Mr. White is a director and shareholder of several corporate entities which are already in financial difficulty. Although the Panel finds that Mr. White's business interests and reputation may already have been harmed by proceedings that have nothing to do with the Director's decision and certificate, the Panel finds denying a stay would cause further harm to his business interests and reputation, and some of this harm could not be remedied by damages if he is successful in his appeal. In *RJR MacDonald* at paragraph 59, the Court recognized "irrevocable damage to [the applicant's] business reputation" as a form of irreparable harm.

[60] For all of these reasons, the Panel finds that the applicants have established that their interests will suffer irreparable harm between now and the time that the appeal is decided unless a stay is granted.

Balance of Convenience

[61] This branch of the test requires the Panel to determine which party will suffer the greatest harm from the granting or the denial of the stay application.

[62] WMI submits that it will suffer greater harm, if a stay is denied, than the Province will suffer if a stay is granted. Specifically, WMI submits that the Province's pursuit of execution proceedings, if a stay is denied, will lead to the end of WMI, whereas the Province will not suffer if a stay is granted and there is a moderate delay in enforcement while the appeal proceeds.

[63] In addition, WMI submits that there is no risk of harm to the environment if a stay is granted, but there may be a risk of harm to the environment if a stay is denied and the Mill assets are liquidated without a planned and methodical decommissioning.

[64] Mr. White submits that this is not a case where a stay will postpone or delay remediation or betterment of the environment; rather, it is a case about the amount of payment and who should be responsible for it. He further submits that his case is very strong, and this should be taken into account in the balance of convenience. He argues that, given the strength of his case and his contention that he will suffer irreparabel harm if a stay is denied, the balance of convenience favours granting a stay.

[65] The Province submits that the Board has previously accepted that orders issued by a director under the *Act* are in the public interest. The Province argues that the government undertook the spill response actions in this case for the protection of health and the environment, both of which are in the public interest.

Furthermore, the Province submits that recovery of those costs is also in the public interest. In addition, the Province maintains that granting a stay in this case would effectively be giving the Appellants an interest-free loan at taxpayers' expense, and it could significantly compromise the Province's ability to realize on the certificate.

Panel's findings

[66] The Panel finds that the applicants have demonstrated that they will suffer irreparable harm to their financial interests if a stay is denied. The Panel also finds that denying a stay in this case will not delay the remediation of a risk of harm to the environment or human health, pending a decision on the merits of the appeal. The Director's decision and certificate do not have a direct effect on the environment and human health. The environmental and health risks that were posed by the imminent spill of dangerous chemicals at the Mill in early 2009, and any harm that arose from the chlorine dioxide spill that occurred in February 2009, have already been addressed. This appeal involves questions around the quantum of costs that should be paid to the Province, and who should be responsible for those costs.

[67] Although it is in the public interest for the Province to be able to collect its reasonable costs of the spill response actions from the person or persons who had possession, charge or control of the substances at the Mill, the Panel finds that a delay in doing that until the merits of the appeal are decided will not significantly impair the Province's ability to collect, if the Province is successful in the appeal. The Board has proposed that the appeal be heard in June 2010. Given the amount of time that has already passed since the costs of the spill response actions were incurred in 2009, a stay that may last until sometime in the latter half of 2010 will not cause unreasonable prejudice to the Province, especially compared to the potential for significant prejudice to the applicants if a stay is denied.

[68] The Panel finds that there is conflicting evidence on the main issues raised in the appeal. In these circumstances, the Panel will not comment in this preliminary decision on the strength of any party's case.

[69] Under these circumstances, the Panel finds that the balance of convenience weighs in favour of granting a stay of the Director's decision and certificate.

DECISION

[70] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated here.

[71] For the reasons stated above, the Appellants' application for a stay of the Director's September 8, 2009 decision and certificate is granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

January 19, 2010