Oil and Gas
Appeal Tribunal

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DECISION NO. 2012-OGA-002(b)

In the matter of an appeal under section 72 of the *Oil and Gas Activities Act*, S.B.C. 2008, c. 36.

BETWEEN:	Willis Shore	**APPLICANT**
AND:	Oil and Gas Commission	**RESPONDENT**
AND:	Murphy Oil Company Ltd.	**THIRD PARTY**
BEFORE:	A Panel of the Oil and Gas Appeal Tribunal Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on October 4, 2012	
APPEARING:	For the Appellant: J. Darryl Carter, Counsel For the Respondent: Sara Gregory, Counsel For the Third Party: Rick Williams, Counsel	

STAY APPLICATION

[1] This is an application by Willis Shore for a stay of the pipeline permit issued to Murphy Oil Company Ltd. ("Murphy Oil") on July 23, 2012 by the Oil and Gas Commission (the "OGC").

[2] The hearing of the stay application was conducted by way of written submissions.

BACKGROUND

[3] Mr. Shore owns three properties which are the subject of the permit at issue (collectively referred to in this decision as "the Lands"):

- The North West ¼ of Section 12, Township 78, Range 18, West of the 6th Meridian, Peace River District;
- Block A of the South West ¼ of Section 12, Township 78, Range 18, West of the 6th Meridian, Peace River District; and
- The South East ¼ of Section 12, Township 78, Range 18, West of the 6th Meridian, Peace River District.

[4] On July 23, 2012, the OGC issued a permit authorizing Murphy Oil to construct and operate a pipeline, subject to certain conditions, on the Lands. The pipeline consists of three flow lines, all of which would be situated within a fifteen metre right of way (with an additional ten metres of temporary work space). The permit was issued under 25 of *Oil and Gas Activities Act* following a consultation

and notification process between Murphy Oil and Mr. Shore as required by section 22 of that Act.

[5] On August 17, 2012, counsel for Mr. Shore filed an appeal against the issuance of the permit to this Tribunal. The grounds for appeal are that the OGC "failed to consider that Mr. Shore had presented a reasonable alternative for the pipeline route" and that the OGC "failed to require Murphy to fully consider all reasonable alternatives." The remedy requested is for the Tribunal to cancel the permit and direct the OGC to fully and fairly consider his position before any new decisions are made.

[6] As the appeal was filed after the 15-day statutory appeal period had expired, Mr. Shore applied for an extension of time to file his appeal. After receiving submissions from all parties on this application, the Tribunal granted the extension of time on September 17, 2012 (see *Shore v. Oil and Gas Commission*, Decision No. 2012-OGA-002(a)).

[7] While these preliminary matters were being addressed by the Tribunal, there were also applications and proceedings taking place before the BC Surface Rights Board. These applications and proceedings culminated in a Right of Entry Order being issued to Murphy Oil, by the Surface Rights Board, on September 26, 2012. This Right of Entry Order allowed Murphy Oil to carry out an oil and gas activity on the Lands; specifically, to construct, operate and maintain the three flow lines authorized by the permit.

[8] On the same day that the Right of Entry order was issued by the Surface Rights Board (September 26th), Murphy Oil provided notice to Mr. Shore that it intended to commence construction on the Lands on September 28, 2012, just two days later. Thus, in a letter dated September 27, 2012, Mr. Shore asked the Tribunal to order "an immediate stay" of the pipeline permit.

[9] Mr. Shore's application for an immediate stay was made on the basis that, allowing Murphy Oil to construct the flow lines before the appeal was heard and decided, would render the appeal moot and make a "mockery" of the appeal process. Murphy Oil objected to an immediate stay.

[10] Following a teleconference with all of the parties on September 28, 2012, the Tribunal issued an interim stay of certain activities under the permit to allow time for the Tribunal to receive full submissions on the stay application. The activities subject to the interim stay were described by the Tribunal as follows:

> The Permit Holder [Murphy Oil] may carry out any staking and surveying and material mobilization as required by the Permit on the Appellant's lands during the course of the interim stay. All other activities authorized under the Permit are stayed, as they pertain to the Appellant's lands only, pending a final decision from the Tribunal on the Appellant's stay application.

[11] With the consent of the parties, the Tribunal heard the stay application on an expedited basis.

[12] The following decision addresses Mr. Shore's application for a stay.

[13] The OGC takes no position on the application for a stay of the permit. Murphy Oil opposes the application.

ISSUE

[14] The sole issue arising from this application is whether the Tribunal should grant a stay of the permit.

APPLICABLE LEGISLATION AND TRIBUNAL RULES

[15] Section 72(3) of the *Oil and Gas Activities Act* grants the Tribunal the authority to order a stay:

> 72(3) Subject to subsection (4), the commencement of an appeal does not operate as a stay or suspend the operation of the determination or decision being appealed, unless the appeal tribunal orders otherwise.

[16] The Tribunal has made *Rules of Practice and Procedure* under section 11(1) of the *Administrative Tribunals Act*. Rule 22 states as follows:

Rule 22 – Stay (Suspend) the Determination or Review Decision

1. To apply for a stay pending a decision on the merits of an appeal, a party must deliver a written request to the Tribunal that explains:

    a. the reason(s) why a stay of the determination or review decision being appealed is required; and

    b. whether other parties agree to the stay (if known).

2. If the other parties do not agree, or this is not known, in addition to (1) above, the party applying for a stay must explain as follows:

    a. whether the appeal concerns a serious issue;

    b. whether the party applying for the stay will suffer irreparable harm if the stay order is denied; and

    c. whether the balance of convenience favours granting the application.

[17] The onus is on the Applicant to demonstrate good and sufficient reasons why a stay should be granted.

[18] The Tribunal will address each aspect of the three-part test in Rule 22(2) as it applies to this application.

DISCUSSION AND ANALYSIS

Serious Issue

[19] The test adopted by the Tribunal in Rule 22(2) is based on the three-part test set out in *RJR-Macdonald Inc*. v. *Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) ("*RJR-Macdonald*").

[20] 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.

[21] The Court also stated that, as a general rule, unless the case is frivolous or vexatious or is a pure question of law, the inquiry as to whether a stay should be granted should proceed to the next stage of the test.

[22] Mr. Shore submits that the appeal raises serious issues. He provided correspondence between himself and Murphy Oil that was exchanged during the consultation and notification process regarding the proposed pipeline.

[23] Mr. Shore's first comments to Murphy Oil on the proposed pipeline were in a submission made in or around January 24, 2012. This was followed by reply comments by Murphy Oil, which led to further responses and replies between Mr. Shore and Murphy Oil, ending in March of 2012. All of these documents were provided to the OGC with Murphy Oil's pipeline application. In addition, Mr. Shore made oral statements/presentations to the OGC in relation to Murphy Oil's proposed pipeline on the Lands. However, Mr. Shore points out that the OGC makes no reference to any of his submissions in its decision to issue the permit.

[24] The Tribunal notes that section 72(2) of the *Oil and Gas Activities Act* limits the grounds on which a landowner may appeal a decision of the OGC. It states as follows:

> (2) A land owner of land on which an oil and gas activity is permitted to be carried out under this Act may appeal a determination under this section only on the basis that the determination was made without due regard to
>
> (a) a submission previously made by the land owner under section 22 (5) or 31 (2) of this Act, or
>
> (b) a written report submitted under section 24 (1) (c) or 31 (6).
>
> [underlining added]

[25] The Tribunal has reviewed the Notice of Appeal and stay submissions. As there were clearly submissions made by Mr. Shore regarding Murphy Oil's proposed activity on the Lands, but no mention of these submissions in the OGC's decision, the Tribunal agrees that there is a serious issue raised that is within the Tribunal's jurisdiction; that issue being whether the OGC gave sufficient, or any, consideration (regard) to Mr. Shore's submissions. The issue is neither frivolous, vexatious or a pure question of law.

[26] Murphy Oil acknowledges that this first branch of the test for a stay has a low threshold and, to the extent that the appeal relates to whether or not the OGC had due regard to Mr. Shore's submissions, it concedes that the appeal concerns a serious issue.

Irreparable Harm

[27] The second factor to be considered is whether the applicant for a stay will suffer irreparable harm if the stay is denied. As stated in *RJR-MacDonald*, at page 405:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' 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.

[28] In assessing the question of irreparable harm, the Tribunal is guided by this statement from *RJR-MacDonald*:

> "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 (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid*, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin,* [1985] 3 W.W.R. 577 (B.C.C.A.)).
>
> [underlining added]

[29] Mr. Shore submits that the irreparable harm that he will suffer "is the sterilization that the proposed pipelines would create for the future development of the valuable gravel deposits on the land." He states that the Lands have valuable gravel deposits within the 15 metre right-of-way permitted for the flow lines, as well as within a "swath of over 23m outside the right of way on each side". In support of this assertion, he provided a one-page letter from Tryon Land Surveying Ltd. dated August 21, 2012, estimating the volume of gravel material within the pipeline corridor on the Lands, based upon numbers provided to them. Mr. Shore submits as follows:

> Without a stay, Murphy will install the proposed pipelines and, even if the OGC approval to operate the pipelines is later cancelled, the pipelines will still be in the ground causing the ongoing sterilization. There is no requirement that the pipelines would have to be removed by Murphy.

[30] Mr. Shore says that the total harm that he will suffer is unknown at this time because he will not be able to develop the gravel deposits for an indefinite period of time.

[31] Mr. Shore further states that no monetary award would fully cover future losses that he will suffer over the life of the flow lines on the Lands. He has been unable to come to an agreement with Murphy Oil and there is no assurance that he will be fully compensated by any ruling of the Surface Rights Board. Regarding the latter, Mr. Shore notes that the Surface Rights Board member who issued the Right of Entry order, advised that he will be looking for evidence of "damages" in any assessment of compensation. Mr. Shore submits that he "could not possibly provide evidence of "damages" at this point in time. It is the losses that will be suffered in the future that are important and the full extent of these losses are unknown."

[32] Mr. Shore further submits that, unlike the rental provisions in the *Petroleum and Natural Gas Act* that are subject to future reviews, landowners are not entitled to a rental provision if the right of way is for a "flow line", which is the nature of the pipelines in this case (per the Surface Rights Board ruling of September 13, 2012).

[33] In response, Murphy Oil submits that the harm alleged by Mr. Shore is not "irreparable" as it can be addressed through a monetary award. Murphy Oil points out that a mediation has now been set up with a member of the Surface Rights Board in an attempt to determine the reasonable compensation due to Mr. Shore for his loss of rights and any damage to the Lands. If the issue of compensation is not resolved through mediation, the next step is arbitration at which time the Board will determine the compensation owed to Mr. Shore.

The Tribunal's Findings

[34] The Tribunal notes that Mr. Shore is not required to establish with certainty that his interests will suffer irreparable harm if a stay is denied, but he is required to provide sufficient evidence to establish that there is a likelihood or reasonable possibility of irreparable harm to his interests. There is no such evidence before the Tribunal.

[35] To the contrary, throughout the documents that he provided in support of the stay, Mr. Shore refers to matters and harms which are, to use the words of the Supreme Court of Canada, capable of being "quantified in monetary terms". In addition, there is evidence that Mr. Shore himself has quantified the loss of his gravel deposits. In an email dated August 23, 2012, Mr. Shore advised Murphy Oil of the dollar value, per cubic yard, that would be required as compensation for the loss of his gravel deposits before he would allow Murphy Oil to proceed.

[36] While it is possible that Mr. Shore will not receive the exact amount of money that he believes is appropriate or fair for the gravel deposits or for Murphy Oil's use of the Lands, that is not the test set out by the Court in *RJR-MacDonald*. The Court was clear that irreparable harm "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." In this case, there is no evidence that Mr. Shore would be unable to "collect" from Murphy Oil.

[37] In conclusion, if a stay is denied, and if Murphy Oil's activities under the permit cause harm to Mr. Shore's interests as a land owner before the merits of the

appeal are decided, the Tribunal finds that the harm would not be "irreparable". Rather, it appears that the harm claimed by Mr. Shore is compensable.

[38] For these reasons, the Tribunal finds that Mr. Shore has not established a likelihood of irreparable harm to his interests if a stay is denied. However, the Tribunal cautions that these findings are limited to this preliminary application, and have no bearing on the merits of the appeal.

Balance of Convenience

[39] The balance of convenience portion of the test requires the Tribunal to determine which of the parties will suffer greater harm from the granting of, or refusal to grant, the stay pending a determination on the merits of the appeal.

[40] Murphy Oil submits that it will suffer the greater harm if a stay is granted. It submits that it will suffer prejudice in the form of lost revenue, financial penalties, increased construction costs and the risk of increased delay to the project if a stay is granted. In support, Murphy Oil provided an affidavit sworn on October 3, 2012 by Ryan Dick, P. Eng., Project Manager for Murphy Oil.

[41] Mr. Dick states that construction of the flow lines is expected to take approximately one month and will employ 25 to 30 people. Murphy Oil purchased the pipe for the flow lines in September of 2011 and the pipe has been sitting in a vendor's yard in Edmonton since then. He states that Murphy Oil is prepared to proceed with construction immediately and that it has already "lined up" the necessary contractors to do the work.

[42] Mr. Dick identifies the following harm to Murphy Oil should the permit be stayed pending a hearing and decision on the merits of the appeal:

- a delay of construction into mid-November or later will increase the risk of delays due to weather and result in increased costs to the project;
- contractors have been lined up to perform the work and they may lose those contractors if the project is delayed;
- the cost of winter construction is generally about 15% more than summer/fall construction for the same project; and
- if construction cannot commence before early to mid-February, it could be delayed until mid to late summer 2013 because construction in this area is not permitted during spring break up (generally from mid-March to the end of May).

[43] Mr. Dick also states that winter construction:

- increases the safety risk to workers, although he does not provide any details about those risks;
- means that land reclamation and reseeding would have to wait until the spring due to frozen ground conditions; and
- raises issues of subsidence of the right of way and soil degradation.

[44] In terms of the financial impact to Murphy Oil, Mr. Dick provided an estimate of the loss of revenue for each month that the flow lines are not connected to the

wells. In addition to this loss, he states that Murphy Oil has contractual agreements that require it to supply a set amount of gas, per day. If Murphy Oil does not meet those commitments, he states that there is a financial cost imposed on Murphy Oil. He states, "Currently, Murphy Oil is not able to make those commitments and is suffering lost revenue and the financial costs under the contract."

[45] If the permit is stayed and the appeal process takes four to six months to complete, Murphy Oil estimates that the loss of revenue, alone, will be in the range of two to three million dollars.

[46] Mr. Shore does not agree that the balance of convenience favours Murphy Oil. He submits that while granting a stay might "inconvenience" Murphy Oil for a matter of weeks or months, this is the "cost of doing business" - a cost which arises out of the ability of a landowner to appeal. Provided that the appeal is not frivolous, Mr. Shore submits that a pipeline company ought not to be able to say "let us go ahead never mind the appeal" because accepting such a position from a company makes the appeal moot.

[47] Further, Mr. Shore points out that the commodity to be carried in the flow lines is not perishable: it will still be there, in the same state, a few months from now. However, without a stay, Mr. Shore submits that his land would not be left in the same state. It would be changed forever.

[48] Mr. Shore submits that Murphy Oil's submissions highlight its desire to "go ahead never mind what it admits is an appeal regarding a serious issue." He suggests that Murphy Oil's stated concern with worker safety and soil issues are disingenuous, at best. He also states as follows:

> A good company would accept that the appeal process was legislated to protect landowners' rights. The process must be allowed to see a full and fair conclusion otherwise, as I have already argued, it would be a mockery.

[49] Therefore, he submits that when balancing the harms that will be suffered, the balance favours him: he is the party that will suffer the greatest harm if the stay is denied.

[50] In reply, Murphy Oil states that there is no evidence to support Mr. Shore's assertion that he will be "inconvenienced forever" from construction of the flow lines on his Lands. It states:

> The Legislature made it clear in drafting the Act that an appeal would not result in an automatic stay unless the Appellant can satisfy the onus to establish good and sufficient reasons why a stay is necessary. Proceeding with construction in a situation where any damages are capable of being remedied, through a monetary payment or award by the Surface Rights Board, does not constitute a "mockery of the appeal process" as has been suggested by the Appellant. To the contrary, Murphy Oil submits it is exactly what was envisioned when the legislation was drafted.

The Tribunal's Findings

[51] The Tribunal has already found that Mr. Shore has failed to establish that he will suffer irreparable harm if a stay is denied. That is the test set out by the Court for an applicant to meet in order to obtain a stay, which is considered by the courts to be an extraordinary remedy.

[52] Conversely, the Tribunal finds that Murphy Oil has established that it will suffer harm if a stay is granted. Although the harm is financial and business related, Murphy Oil is not required to establish that the harm is irreparable. This is because Murphy Oil has obtained this permit through the process established under the legislation from a properly qualified decision-maker. The idea is that it obtained a permit which, on the face of it, is valid. Consequently, it cannot be prevented from exercising its rights under the permit unless it will lead to "irreparable" harm to another person, in this case, to Mr. Shore. Mr. Shore has not satisfied this test. Accordingly, the balance of convenience weighs in favour of denying a stay.

[53] Despite Mr. Shore's concern with the appeal becoming moot, or a mockery, the Tribunal notes that, if Mr. Shore's appeal is successful and the permit is rescinded as it relates to the Lands, Murphy Oil will have no authority to be on the Lands. This is an obvious risk to Murphy Oil in proceeding with the lines when an appeal is outstanding.

DECISION

[54] In making this decision, the Tribunal has considered all of the relevant documents and evidence, whether or not specifically reiterated herein.

[55] For the reasons provided above, the application for a stay of the permit is denied. The interim stay is rescinded.

"Alan Andison"

Alan Andison, Chair
Oil and Gas Appeal Tribunal

October 9, 2012