



# Oil and Gas Appeal Tribunal

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## DECISION NO. 2015-OGA-003(a)

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

**BETWEEN:** Brian Derfler

**APPELLANT**

**AND:** British Columbia Oil and Gas Commission

**RESPONDENT**

**AND:** Encana Corporation

**THIRD PARTY**

**BEFORE:** A Panel of the Oil and Gas Appeal Tribunal  
Brenda Edwards, Panel Chair

**DATE:** Conducted by way of written submissions  
concluding on August 11, 2015

**APPEARING:** For the Appellant:

Brian Derfler  
Dr. Judi Krzyzanowski, Agent

For the Respondent:

Andrea Jarman, Counsel

For the Third Party:

Lars Olthafer, Counsel

## STAY APPLICATION

[1] This is an application by Brian Derfler for a stay of the Oil and Gas Commission's (the "OGC") decision to grant a pipeline permit to Encana Corporation ("Encana").

[2] On May 19, 2015, the OGC issued Pipeline Permit No. 9708141 (the "Permit"). On June 4, 2015, Dr. Judi Krzyzanowski, on behalf of Mr. Derfler, filed a Notice of Appeal of the OGC's decision with the Oil and Gas Appeal Tribunal (the "Tribunal"). Although the appeal was not filed within the time limits set out in the *Oil and Gas Activities Act* (the "Act"), neither the Respondent nor Encana objected to the Tribunal granting Mr. Derfler or his agent, Dr. Krzyzanowski, an extension of time to appeal.

[3] On July 17, 2015, Mr. Derfler applied to the Tribunal for a stay, pending the Tribunal's decision on the appeal.

[4] The hearing of the stay application was conducted by way of written submissions. Encana opposes the stay application. The OGC takes no position on the stay application.

## **BACKGROUND**

[5] On July 7, 2014, Encana applied to the OGC for a permit to construct a pipeline project within a right of way. The right of way is 4240 m long, and extends from a well site located at 13-29-79-17 to a compressor site located at 15-27-79-17 (the "Pipeline"). The Pipeline consists of five lines: one natural gas pipeline, one natural gas fuel line, one sales gas pipeline, and two emulsion/frac water lines. The width of the right of way varies. According to Encana's construction plans, the Pipeline will be within an 18 m wide right of way, but temporary work spaces on either side will make the total width up to 58 m in some places. In addition, in some locations, the temporary work space areas extend further, and will be up to 115 m by 237 m.

[6] But for a small portion of Crown land, the Pipeline is to be constructed almost entirely on private cultivated lands, including lands owned by Mr. Derfler, which are identified as SE 1/4 SEC 33-79-17 and SW 1/4 SEC 34-79-17 (the "Lands"). The Pipeline will cover 0.11 hectares of Crown land, and 16.41 hectares of private land. The latter will consist of 9.03 hectares of new clearing for the Pipeline right of way, and 6.54 hectares of new clearing for workspace. Mr. Derfler also owns other parcels of land which were located in the radius of the area covered by the consultation and notification for the Permit, but not directly in the authorized Pipeline operating area.

[7] The permitted Pipeline is adjacent to three other pipeline right of ways which are, in part, on Mr. Derfler's land parcels at NE 1/4 SEC 29-79-17 and NW 1/4 SEC 28-79-17. In addition, one of the adjacent right of ways traverses north from land identified as NE 1/4 SEC 18-79-17 along the western boundary of Mr. Derfler's property at SE 1/4 SEC 33-79-17.

[8] Mr. Derfler cultivates grain crops on his land. He also operates an automotive repair business. The entire area covered by the Pipeline is located within the Agricultural Land Reserve.

[9] On July 10, 2014, Encana provided the OGC with a Consultation and Notification Report dated June 27, 2014, as required under section 24 of the *Act* and the *Consultation and Notification Regulation*. The report includes a table describing the consultation that Encana carried out with landowners, including Mr. Derfler. Under the report, Encana asserted that it had completed its consultation and notification requirements by November 5, 2013.

[10] The Consultation and Notification Report cover sheet indicated that no written submissions associated with the application had been received by Encana, and there were no outstanding concerns associated with the application. A table titled "Encana Corporation - BC OGC Consultation & Notification Line List" lists attempts to contact Mr. Derfler, and dates of meetings which occurred between Encana and Mr. Derfler to discuss his concerns and compensation. Under "Outstanding Concerns", Encana has noted "Encana has been unable to reach

agreement with the landowner and will be seeking right of entry, *no project specific concerns have been raised*" [italics added].

[11] On September 4, 2014, Mr. Derfler filed a Written Submission Form under section 22(5) of the *Act* with the OGC, setting out his concerns regarding the Pipeline, in which he stated that he had sought information from Encana a year prior, during the consultation phase of the project, and had not yet been provided with certain pipeline specific information including information about the contents of the water lines, the nature of an emulsion line, and whether a certain type of valve would be used on the pipeline. He also raised the unresolved issues that he had with Encana regarding flooding/erosion and road damage on his adjacent lands, as well as compensation for crop loss due to loss of access to a field.

[12] Encana applied to the Surface Rights Board ("SRB") for a right-of-entry order ("ROE" order), and provided a draft copy of that order to Mr. Derfler on November 6, 2014. Counsel for Encana asserts that, at some point, the SRB canvassed dates from the parties for a telephone conference to consider Encana's application for the right-of-entry order. Mr. Derfler did not respond. (There is some evidence that the SRB may have held a teleconference with Encana and other landowners on July 7, 2015).

[13] On May 19, 2015, Mohamed Farah, the Commission delegated decision-maker on behalf of the OGC, issued the Permit to Encana, subject to certain conditions, to construct and operate the pipeline. One of those conditions required that Encana conduct an Archaeological Impact Assessment for the proposed development area prior to any development activities taking place.

[14] The SRB granted Right of Entry Order No. 1844-1 sometime after the Permit was issued.

[15] On June 5, 2015, the Tribunal received Mr. Derfler's Notice of Appeal, which lists the following grounds for appealing the Permit:

- Mr. Derfler's crops are his livelihood. The loss of land is detrimental enough. He needs to know and understand all and any risks or potential for contamination.
- Have not received information [that Mr. Derfler] requested [from Encana] in previous submissions regarding the chemical make-up of gas and water [in the Pipeline].
- Did not accommodate Mr. Derfler's proposed route change (a straight line) to eliminate and/or manage flooding, while reducing the potential for ground or surface water contamination.
- Was denied access to report submitted under sections 24(1) and 31(6) [of the *Act*].

[16] On July 16, 2015, Dr. Krzyzanowski copied the Tribunal on an email to Robert Fraser of the SRB in response to questions put to her by Mr. Fraser.

[17] The Chair of the Tribunal wrote Dr. Krzyzanowski on July 17, 2015, acknowledging receipt of the email and noting that, in her email, she appeared confused as to the respective jurisdiction of the Tribunal and the SRB. In

particular, the Chair noted that Dr. Krzyzanowski appeared confused about the effect of an appeal to the Tribunal on Encana's ability to begin construction of the Pipeline.

[18] The Chair informed Dr. Krzyzanowski that under section 72 of the *Act*, commencing an appeal does not operate as a stay or suspension of the operation of the decision being appealed. The Chair provided Dr. Krzyzanowski with information on the process for applying for a stay.

[19] On July 17, 2015, the Tribunal received an email including a letter from Mr. Derfler dated July 16, 2015, requesting a stay of the OGC's decision pending the Tribunal's decision on the merits of the appeal.

[20] On July 20, 2015, the Chair of the Tribunal wrote to the OGC and Encana asking whether they would consent to a voluntary stay of the Permit until either: a) the appeal could be heard and decided; or b) the Tribunal decides the stay application on an expedited basis. This request was made as Mr. Derfler stated in his July 16, 2015 letter that there was some urgency to having the stay application decided quickly as he had been advised that Encana would be commencing work the week of July 20, 2015, as it had obtained a ROE order from the SRB.

[21] By email of July 20, 2015, counsel for Encana advised the Tribunal that Encana would not consent to a voluntary stay of the OGC's decision until either: a) the appeal could be heard and decided; or b) the Tribunal decides the stay application on an expedited basis.

[22] Counsel for the OGC wrote to the Tribunal on July 20, 2015, noting that since Encana was not providing its consent, the OGC would accommodate an expedited hearing of the stay application.

[23] On July 21, 2015, the Chair of the Tribunal granted a temporary stay of the permitted activities under Permit (the "Temporary Stay") until the stay application could be decided on an expedited basis; however, Encana was permitted to carry out necessary non-invasive archaeological and soil work to satisfy conditions under the Permit.

[24] At the request of Mr. Derfler, the SRB held a teleconference with Encana and Mr. Derfler on July 24, 2015, on the basis that Mr. Derfler asserted that he had not received the earlier request for a teleconference to discuss Encana's application for the order. After the call, the SRB confirmed the ROE order.

## **ISSUE**

[25] The sole issue arising from this application is whether the Tribunal should grant a stay of the Permit pending the Tribunal's decision on the merits of the appeal, except for the activities under the Permit which were permitted to continue under the Temporary Stay.

## **APPLICABLE LEGISLATION AND TRIBUNAL RULES**

[26] Section 72(3) of the *Oil and Gas Activities Act* grants the Tribunal the authority to issue 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 tribunal orders otherwise.

[27] 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.

[28] The onus is on Mr. Derfler to demonstrate good and sufficient reasons why a stay should be granted.

[29] 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

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

[31] In *RJR-MacDonald*, the Court stated as follows at page 337:

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.

[32] The Court also stated that unless the case is frivolous, vexatious, or is a pure question of law, the decision-maker should proceed past this first stage to consider the second and third parts of the test.

[33] Mr. Derfler and his agent, Dr. Krzyzanowski, submit that this case raises issues that are not frivolous or vexatious, as the appeal raises concerns that Encana and the OGC have not even attempted to address prior to issuing the Permit.

[34] Dr. Krzyzanowski submits that Encana repeatedly noted in its reporting to the OGC that "no concerns were identified" or that "no project specific concerns have been raised" by Mr. Derfler, when this was not the case.

[35] Dr. Krzyzanowski submits that Mr. Derfler raised his concerns with Encana verbally, throughout the consultation process, and provided a written submission to the OGC under section 22(5) of the *Act*. He was under the impression that his concerns would be considered, if not fully accommodated.

[36] Mr. Derfler submits that he proposed an alternate route for the Pipeline through his property along the right of way of an existing Encana pipeline, which he says would lessen the impact on the seasonal drainage area of his land, and which was acceptable to the other landowners involved.

[37] Mr. Derfler asserts that the alternate route would not have an increased impact on other landowners, as suggested by the OGC, and that, in fact, one of the landowners adjacent to him offered to testify to the OGC in support of the alternate route which, Mr. Derfler says, was actually the route first proposed by Encana during the consultation period.

[38] Mr. Derfler notes that another company has already approached him regarding a pipeline on his property, and that when he raised concerns regarding the machinery and heavy loads that he would need to transport in the area at harvest time, that company decided to reroute elsewhere on the property. This has added to his concern regarding the proposed route that is permitted for Encana's Pipeline.

[39] Mr. Derfler is also concerned that he will have to change his farming practices in a way that will be less efficient to accommodate the presence of the Pipeline. He notes that he is continuing to suffer a decrease in crop yields, five years after another pipeline was installed on his land, due to soil loss and mixing being hampered by changes to the land contours.

[40] In addition, Dr. Krzyzanowski submits that Mr. Derfler's concerns regarding the chemical characteristics of the water and gas that would flow through the Pipeline have not been adequately addressed. This is information which, he says, may affect his rates for farm insurance and may impact his land's resale value. In any event, he wants the information in order to take precautionary measures in the event of a spill, to protect the health of the soil and its future potential for crop productivity.

[41] Dr. Krzyzanowski further submits that Mr. Derfler's concerns regarding soil handling and management and seasonal drainage were not addressed, particularly considering the erosion and runoff already occurring in and around the SW 1/4 SEC 33-79-17. Dr. Krzyzanowski argues that, in the past, the OGC has provided more protective conditions in permits, including provisions for emergency management and leak detection surveys and protocols for pipeline abandonment - an issue which Mr. Derfler submits he raised with Encana in verbal discussions.

[42] Still further, Dr. Krzyzanowski submits that Mr. Derfler has already planted crops in fields which he will not be able to access should construction begin before harvest time. He is concerned with the loss of his crop value, the cost and time

associated with seeding and caring for the crop, and damage to his land. He is also concerned about harm to his reputation, should he be unable to meet demands for his grain in this drought year. He fears that all of these impacts could put his grain farm out of business.

[43] Encana submits that Mr. Derfler has failed to meet his onus of establishing that there is a serious issue to be decided in this case. Encana argues that under section 72(2) of the *Act*, a qualifying landowner may only appeal a determination of the OGC on certain grounds; i.e. that the determination was made without due regard to a submission previously made by the landowner, or a written report submitted (such as the Consultation and Notification Report).

[44] Encana submits that Mr. Derfler has not asserted that the OGC issued the Permit without due regard to any submissions or reports.

[45] Encana submits that the OGC considered Mr. Derfler's submissions, and rejected his proposed Pipeline route "in part because of the impacts it would have on other landowners".

### **The Tribunal's Findings**

[46] The Tribunal finds that the question of whether the OGC gave sufficient regard to Mr. Derfler's submissions before it issued the Permit is, on its own, a serious issue. Although not necessary for the purposes of this stay application, the Tribunal finds that there are other serious issues to be decided in this appeal.

[47] The Tribunal notes that the OGC, in its Rationale for Decision dated May 19, 2015, rejected Mr. Derfler's submission regarding an alternate route on an existing pipeline right of way, which he had proposed to Encana and which he asserts was the route which Encana first proposed in its consultation with landowners. The OGC does not address Mr. Derfler's assertion that the proposed route was also supported by an adjacent landowner.

[48] The Tribunal also notes that neither the OGC's Rationale for Decision nor Encana's submissions to the Tribunal referred to any evidence to support the OGC's finding that "the proposed route may have increased the impact on other landowners in the area".

[49] The Tribunal finds that the issue of a proposed alternate route in an existing right of way which may have a lesser impact on landowners is a serious issue.

[50] Further, the Tribunal finds that the issue of the chemical makeup of the contents of the pipelines and its potential impact, in the event of a leak or spill, on the rate of farm insurance and the resale value of land is a serious issue.

[51] Still further, the Tribunal finds that the potential harm to Mr. Derfler's grain farming business, occasioned by a loss of access to his crops prior to harvest and on an ongoing basis due to changes he may be required to make to his farming practices, is a serious issue.

[52] For all of these reasons, the Tribunal finds that there are serious issues to be decided in this appeal, that are neither frivolous, vexatious, nor pure questions of law.

[53] The Tribunal turns next to the second part of the test regarding irreparable harm.

Irreparable harm

[54] The second factor to be considered in a stay application is whether Mr. Derfler 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 applicant'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.

[55] In considering the issue of irreparable harm, the Tribunal takes guidance from this finding of the Court in *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 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 Cyanid, 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]

[56] Dr. Krzyzanowski submits that Mr. Derfler will suffer irreparable harm to his reputation or career, due to the stress of dealing with the process involving Encana's pipeline application and his concerns being "ignored or trivialized with incorrect and misleading information." This stress has left him unable to deal with the automotive repair business which he operates in addition to his farming.

[57] Dr. Krzyzanowski further submits that the publishing of information from Encana to the SRB online, coupled with the OGC decision stating that the Mr. Derfler had raised no concerns during the consultation process, harmed his reputation as a community advocate and leader.

[58] Dr. Krzyzanowski also submits that the chemical characteristics of the water and gas running through the Pipeline may impact the rate of his farm insurance, both before and after a spill or leak. Furthermore, the contents of the Pipeline are important to Mr. Derfler's ability to maintain soil health and crop productivity, on which his livelihood is based. Similarly, she argues that the Permit fails to adequately address the concerns Mr. Derfler expressed to the OGC about seasonal drainage issues, including erosion and runoff causing gully and topsoil loss, that are occurring near the existing pipeline. She submits that denying a stay, especially during the harvest season, would affect his ability to access and harvest his standing crops. She argues that there will be high demand for grain this fall due to a drought in the Prairie provinces, and Mr. Derfler will suffer irreparable harm to his business and livelihood if he is unable to sell the grain he has planted.



[59] In addition, Dr. Krzyzanowski submits that Mr. Derfler will suffer loss of quiet enjoyment of his land as hunting, walking and biking will be impacted by construction and land-clearing for the Pipeline.

[60] Finally, Dr. Krzyzanowski asserts that Mr. Derfler was unable to accompany his wife on a trip to Ireland to spread her father's ashes, because he was dealing with the pipeline project.

[61] Mr. Derfler provided further submissions regarding how the Pipeline will adversely affect his farming operations. He submits that an existing Encana well site that will be connected by the Pipeline has contributed to flooding, erosion and leaching of the adjacent land. He advises that his primary point of entry to the affected land will cross the proposed right of way, such that he will need to drive and park on the right of way every time he seeds and harvests crops from this portion of his land. He is concerned that, with the flooding problem in this area, heavy farm equipment could get stuck over the Pipeline. He submits that, as a result, he may have to change his farming practices to avoid driving across the Pipeline, which will result in reduced efficiency. He maintains that he could also lose crops due to increased flooding and erosion as a result of the Pipeline. He further submits that Encana's signage will inhibit access with farm equipment to his farm land, which will cause land to be left unseeded. He advises that, five years after the previous pipeline was installed, he is still experiencing a decrease in crop yield due to soil loss and hampering of soil mixing due to land contour problems. Finally, he submits that he could lose up to half of his annual income and suffer serious harm to his farming reputation if he cannot deliver grain during this drought year when others are reliant upon him.

[62] Encana submits that all of the harms that Mr. Derfler asserts in his stay application can be addressed through compensation, and as a result, he has failed to show that there is the potential for him to suffer any irreparable harm if the stay is not granted.

[63] Encana further submits that the alleged harm to Mr. Derfler's automotive repair business and reputation are not alleged to result from the construction of the Pipeline on his lands.

[64] Encana also submits that any harm alleged as a result of loss of quiet enjoyment of his land, decreased efficiency to avoid crossing the right of way, or crop loss are compensable through the SRB's process or through a civil claim in the courts. Encana argues that the potential for damage arising from flooding is speculative, and in any event, would be compensable.

[65] Still further, Encana submits that Mr. Derfler has not explained whether the loss of the trip to Ireland arose because of the proposed project or because of his own actions. Regardless, Encana argues that the loss has already occurred, and is not attributable to the upcoming construction.

[66] Encana notes that it was the OGC, and not Encana, that expressed the opinion that the alternate route proposed by Mr. Derfler would have increased impacts on other landowners.

The Tribunal's Findings

[67] At this second stage of the test, the question is whether Mr. Derfler has established that he will suffer irreversible harm if a stay is not granted.

[68] The Tribunal has already found that there are serious issues to be decided. The Tribunal has considered the serious issues identified by Mr. Derfler and his agent, Dr. Krzyzanowski, whether or not they were repeated under their submissions regarding "irreparable harm".

[69] The Tribunal finds that Mr. Derfler has not established that he will suffer any irreparable harm to his reputation as a community leader or to his automotive business if a stay is not granted prior to the appeal being decided on the merits. Any stay would result only in prohibiting future activities under the Permit, (other than the non-invasive activities authorized under the Temporary Stay), until the appeal is decided on the merits.

[70] Any loss of reputation that Mr. Derfler may have suffered because of information that was posted online by the SRB or included in the OGC's Decision Rationale has already occurred and would not be prevented by a stay. Further, Mr. Derfler has not provided any evidence that his reputation in the community has suffered. Similarly, Mr. Derfler has failed to provide any evidence of loss to his automotive business that is, in any way, related to either the Pipeline application, the consultation process, the appeal of the Permit, or the impending construction.

[71] The Tribunal also finds that Mr. Derfler has provided no evidence with respect to his loss of a travel opportunity; he has not indicated when this opportunity occurred, why he missed the opportunity, and what relationship the travel had to either the Permit application process or the impending appeal. Regardless, the travel appears to have already occurred, and therefore, denying the stay application would not result in the harm alleged.

[72] The Tribunal accepts that Mr. Derfler and his family may suffer a loss of quiet enjoyment of his property due to the construction and the clearing of the land that will occur during construction. That loss may be temporary or permanent. The Tribunal finds that a loss of this nature is something that Mr. Derfler may find difficult to quantify in monetary terms, but it is a type of harm that may be addressed by compensation through the SRB's process.

[73] The Tribunal finds, however, that this appeal raises issues of serious harm to Mr. Derfler's interests which may not be compensable.

[74] The Tribunal notes that the Temporary Stay was issued on the basis that this stay application would be decided on an expedited basis, because the construction of the Pipeline is imminent. If the construction proceeds as presently planned, Mr. Derfler's concerns regarding whether the Pipeline could be constructed in another location that might have less impact on him and other landowners would likely be moot. It is very unlikely that Encana would build the Pipeline across Mr. Derfler's and other landowner's land along one route, only to dismantle, remove, and relocate the Pipeline if the Tribunal finds (or Encana later concedes) that there is a more appropriate location. Even if Encana could and would relocate the Pipeline after it was constructed, it unclear whether the harm that would have occurred to

Mr. Derfler's land and business interests in the meantime could be remediated and/or compensable. For the reasons provided below, the Tribunal finds that some of Mr. Derfler's interests could suffer permanent and non-compensable harm if a stay is denied but he is ultimately successful in the appeal.

[75] The Tribunal finds that Mr. Derfler has established that there is the potential for irreparable harm to his farming business as a result of the presence of the Pipeline. Mr. Derfler has identified changes to how he may access his property and to his land's productivity, based on his experience with the presence of another pipeline on his land. On that basis, the Tribunal finds that his concerns for his land after construction of this Pipeline, based in part on his previous experience, are not speculative; rather, they are well founded. The Tribunal finds that some of the changes that may arise from the Pipeline, particularly the increased potential for flooding, topsoil loss, and reduced productivity on his cultivated land, are potentially permanent. Although Encana submits that either the SRB, or the courts in a civil action, would take these considerations into account when determining the amount of compensation and/or damages that Encana might owe to Mr. Derfler, the Tribunal finds that Encana provided no examples of decisions from the SRB or the courts to support that assertion.

[76] The Tribunal further finds that Mr. Derfler has established the potential for harm to his farming business that could include being out of business if he is unable to access and deliver this year's crop at harvest time. He asserts that he could lose up to half of his annual income and suffer serious harm to his farming reputation if he cannot deliver grain during this drought year when others are reliant upon him. The Supreme Court of Canada, in *RJR-MacDonald*, identified this type of loss as an example of irreparable harm.

[77] The *RJR-MacDonald* test states that "irreparable" harm is harm that "could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application". In the circumstances of this case, the Tribunal finds that Mr. Derfler has established that there is the potential for irreparable harm to his interests between now and when the appeal is decided on the merits, if a stay is denied.

#### Balance of Convenience

[78] This third stage of the test requires the Tribunal to determine which party will suffer the greatest harm from granting or denying the stay application.

[79] Mr. Derfler submits that he will suffer the greater harm if the stay is denied and construction of the Pipeline is permitted to proceed before the appeal is decided on its merits. He is a grain farmer whose crops are already in the ground. This is his livelihood. He risks the loss of this year's crop if he cannot access it at harvest time, and he risks permanent damage to his land. Further, he risks harm to his reputation as a grain farmer if he cannot deliver grain to those who are reliant on him in this drought year, and ultimately, he risks going out of business.

[80] Encana provided an affidavit from Jason Blanch, Surface Land Lead responsible for coordinating infrastructure in British Columbia. Mr. Blanch's evidence is that Encana will experience increased construction and reclamation costs if the stay is granted. He states that construction costs will be greater in the

winter than in the summer/fall (as presently planned). Further, if construction does not occur in the winter, the project might be delayed until summer 2016, as construction in the vicinity of the approved route for the Pipeline is not permitted during spring break up, which runs from approximately mid-March to late May.

[81] Mr. Blanch also asserts in his affidavit that winter construction would delay reclamation, as landowners might not be able to seed the right of way when they might otherwise.

[82] Finally, Mr. Blanch asserts that Encana will suffer a loss of revenue and will incur financial penalties under a contract with Spectra Energy, if a stay is granted. Specifically, he advises that this contract requires Encana to make fixed monthly payments to Spectra Energy for capacity on the Spectra South Peace Pipeline and at the McMahon Gas Plant, regardless of whether those services are used. If Encana fails to deliver gas to the Spectra South Peace Pipeline, Encana must still make those monthly payments. He attests that:

If the Stay Application is granted and the Project's in-service date is further delayed, Encana will continue to experience a loss of approximately \$44,250.00 per day in revenue and a daily out of pocket expense of \$22,800 under the Contracts [with Spectra Energy]. As of the date of this affidavit, Encana has experienced a total loss of \$1,609,200.00 in connection with the Project's delayed in-service date.

[83] In response to Encana's submissions and Mr. Blanch's affidavit, Mr. Derfler submits that Encana will have its revenue from gas sales, though possibly at a later date. He says that any contractual penalties that Encana might occur are its own doing, as it has failed to address his concerns and has ignored an opportunity to move ahead with the Pipeline by an alternate route 100 metres south of its currently planned route.

[84] Mr. Derfler submits that if the temporary stay is lifted and the proposed route is permitted to proceed, only the "sales line" should be permitted to proceed and the water lines should not be permitted at this time, as piped water is not essential and his concerns regarding the content, installation, maintenance and abandonment of these lines have not been addressed. He notes that water has been traditionally trucked to the location where it is needed.

### **The Tribunal's Findings**

[85] The Tribunal has already found that Mr. Derfler's interests may suffer irreparable harm if a stay is denied, and the Pipeline is permitted to be constructed along the planned route before the merits of the appeal are decided.

[86] Specifically, the Tribunal has found that Mr. Derfler is a grain farmer who may suffer irreparable harm to his farming business if the stay application is denied and the construction of the pipeline is permitted to proceed in the immediate future. The potential loss of this year's crop, combined with the changes he will have to make to his farming practices going forward, and considering the damage to his reputation if he is unable to deliver grain to those who need it during this drought year, is such that he could be put out of business.

[87] In contrast, Encana may suffer increased costs if construction of the Pipeline is delayed until the merits of the appeal are decided. The merits of the appeal are currently scheduled to be heard on October 23, 2015, which is approximately two months away, and the Tribunals' Practice Directive states that a final decision will generally be issued within three months after all final submissions are received where a hearing lasts two days or less. Based on this timeline, Encana submits that construction of the Pipeline would not be completed until the beginning of the second quarter of 2016 at the earliest, if a stay is granted. Encana currently expects to begin construction of the Pipeline in August 2015, and complete the construction in November 2015.

[88] Encana has provided evidence that it will also incur costs associated with its contractual obligations with Spectra Energy, and a loss of revenue from the sale of gas that relies on the Pipeline. The Tribunal accepts that Encana will incur the fixed costs associated with its contracts with Spectra Energy, if a stay is granted. In regard to lost revenue from gas sales, whether some or all of that loss will materialize, and the extent to which Encana will actually suffer a financial loss rather than a deferral of revenue, is uncertain at this point.

[89] The Tribunal notes that as of the date of the Temporary Stay, Encana had not completed all of the preconditions to construction of the pipeline. For example, under the terms of the Permit, it is required to complete an Archaeological Impact Assessment for the proposed development area "prior to any development activities taking place". If an archaeological site is discovered, it must be reported to the OGC, and mitigation measures must be approved before construction can proceed. In addition, soil work is still to be completed.

[90] The Tribunal finds that Encana knew or ought to have known that the Permit had pre-conditions to construction, and that the Permit was subject to appeal and that a stay pending a determination of the merits of any such appeal was a possibility. If it entered into contracts on assumptions that the preconditions would all be met, there would be no appeals or stays, and Encana would be able to deliver gas by a set date (which date has not identified to the Tribunal), it did so at its own risk.

[91] The Tribunal also finds that the nature of the "losses" suffered by Mr. Defler, as compared to Encana, are significantly different. Mr. Derfler risks losing his income, his business, and his livelihood if a stay is denied; these are not purely financial losses. This farm has been in his family for generations, and he fears that it will be irreparably harmed and that the farming business may not survive. Encana will suffer financial losses, some of which may not be recoverable, if a stay is granted, but Encana has not submitted that a stay would put Encana out of business or irreparably harm its business reputation. Moreover, some the financial losses that Encana would suffer as a result of a stay appear to stem from its own business decision to proceed with certain contracts, despite the known risk of an appeal of the Permit which could result in delays in completing the Pipeline.

[92] The Tribunal finds that any delay in the Pipeline construction schedule, and any risk of financial harm to Encana if the stay is granted, does not outweigh the risk of irreparable harm to Mr. Derfler if the stay is denied; the loss for him could be catastrophic.

[93] In these circumstances, the Tribunal finds that the balance of convenience weighs in favour of granting a stay of the Permit, as it pertains to the Lands owned by Mr. Derfler, except for the preliminary, non-invasive work that was allowed to be completed under the Temporary Stay.

[94] Finally, the Tribunal emphasizes that the findings made in this decision are solely for the purpose of deciding the preliminary stay application, and are not based on a full hearing of the merits of the appeal. As such, these findings have no bearing on the Tribunal's final decision on the merits of the appeal.

### **DECISION**

[95] In reaching this decision, the Tribunal has considered all of the submissions and arguments made by Mr. Derfler and his agent, the OGC, and Encana, whether or not they have been specifically referenced.

[96] For all of the reasons stated above, the application for a stay is granted as described in paragraph 93, above.

"Brenda L. Edwards"

Brenda L. Edwards, Panel Chair  
Oil and Gas Appeal Tribunal

August 14, 2015

Corrigendum released August 20, 2015

Paragraph 6 on page 2 of the decision dated August 14, 2015 is amended by adding the words **(the "Lands")** so that the paragraph now reads as follows:

[6] But for a small portion of Crown land, the Pipeline is to be constructed almost entirely on private cultivated lands, including lands owned by Mr. Derfler, which are identified as SE ¼ SEC 33-79-17 and SW ¼ SEC 34-79-17 (the "Lands").

The remainder of paragraph 6 does not change.

Paragraph 93 on page 14 of the decision dated August 14, 2015, is amended by adding the words **"as it pertains to the Lands owned by Mr. Derfler"** so that the paragraph now reads as follows:

[93] In these circumstances, the Tribunal finds that the balance of convenience weighs in favour of granting a stay of the Permit, as it pertains to the Lands owned by Mr. Derfler, except for the preliminary, non-invasive work that was allowed to be completed under the Temporary Stay.