



Oil and Gas Appeal Tribunal

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DECISION NO. 2017-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:	Canada Energy Partners Inc.	APPLICANT
AND:	Oil and Gas Commission	RESPONDENT
AND:	BC Hydro and Power Authority	INTERVENER
BEFORE:	A Panel of the Oil and Gas Appeal Tribunal Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on May 23, 2017	
APPEARING:	For the Applicant: Benjamin M. Jones For the Respondent: Sarah Gregory, Counsel For the Intervener: Jeff Christian, Counsel	

STAY APPLICATION

[1] This decision addresses an application by Canada Energy Partners Inc. ("CEP") for a stay of general order 2017-008 (the "Order") issued on March 16, 2017 by the Vice President, Compliance Operations, Oil and Gas Commission (the "OGC"). The Order requires CEP to suspend all disposal activities at well WA#22031 (the "Well"), which was being used to dispose of "produced water", a type of waste water from oil and gas activities, by injecting it into the Baldonnel formation, an underground geological unit. CEP holds the authorization to operate the Well, which is located in northeastern BC.

[2] On March 30, 2017, CEP appealed the Order to the Oil and Gas Appeal Tribunal (the "Tribunal"). In its Notice of Appeal, CEP requested a stay of the Order pending the Tribunal's decision on the merits of the appeal.

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

BACKGROUND

[4] In 2008, the OGC issued a special project disposal order (the "Special Project Order") authorizing use of the Well for the disposal of produced water into the Baldonnel formation. Disposal activities commenced in December 2008. CEP did

not own the Well at that time. The Well is located approximately 3.3 km from the Peace Canyon Dam, which is owned and operated by BC Hydro and Power Authority ("BC Hydro").

[5] In or around December 2009, BC Hydro contacted the OGC requesting information regarding the potential impacts of local well fracturing activities and water disposal, with respect to the integrity of the Peace Canyon Dam. According to the OGC's submissions, faulting exists in the area surrounding the Peace Canyon Dam, and the OGC has observed induced seismicity coincident with both hydraulic fracturing and water disposal activities. Also, according to the OGC, induced seismic events have been noted in association with Baldonnel water disposal in the Altares area, which is approximately 40 km north of the Well.

[6] In March 2010, the OGC amended the Special Project Order to include monitoring requirements and a "conservative" (according to the OGC) well injection pressure limit.

[7] In April 2010, disposal operations at the Well ceased voluntarily.

[8] In August 2011, operations at the Well were suspended.

[9] On March 3, 2014, the OGC amended the Special Project Order by adding conditions that had to be met before the Well could be used again for disposal. However, the Well was not re-activated at that time.

[10] Subsequently, CEP acquired the Well. In late 2016, CEP contacted the OGC regarding the requirements for re-activating the Well, and took steps to meet those requirements. On January 10, 2017, CEP re-commenced injection operations at the Well.

[11] Sometime in early 2017, BC Hydro staff noticed construction equipment working on the road access to the Well, and water trucks accessing the Well.

[12] On or about March 15, 2017, BC Hydro contacted the OGC, advising that the Peace Canyon Dam is susceptible to relatively low peak ground accelerations, and expressing concern about the potential impact of disposal operations at the Well on the Peace Canyon Dam. Shortly thereafter, the OGC initiated an evaluation of the disposal activities at the Well, including a review of technical information regarding the likelihood and magnitude of any potential impacts from the disposal activities on the Peace Canyon Dam.

[13] On March 16, 2017, the OGC issued the Order to CEP pursuant to section 49(1)(b) of the *Oil and Gas Activities Act* (the "*Act*"). The Order states, in part, as follows:

- v. Faulting is known in the area surrounding the Peace Canyon dam. Disposal activities have been known to trigger movement of pre-existing faults resulting in induced events.
- vi. The disposal zone in the Subject Well is the Baldonnel formation. Induced seismic events have been associated with Baldonnel water disposal in the Altares area to the north.
- vii. During the disposal activities occurring between December 2008 and April 2010 at the Subject Well, the Natural Resources Canada regional grid

was not sufficient to detect low level seismicity [and] as such there would be no record of whether or not those disposal activities did in fact cause low level seismicity.

- viii. BC Hydro informed the Oil and Gas Commission on March 15, 2017, that the Peace Canyon dam is susceptible to relatively low peak ground accelerations.
- ix. Increased volumes of disposal, including disposal operations at the subject Well, increases the risk of seismic events where faults exist.
- x. There is a risk of an induced event sufficient to generate the peak ground accelerations necessary to cause damage to the Peace Canyon dam. This level of ground motion has already been recorded in association with induced seismicity in other areas of north east BC. If such an event were to occur the consequences would be severe.
- xi. I am of the opinion that disposal activities must be suspended pending a review of additional technical information, including, if desired, a meeting with Canada Energy Partners Inc. as soon as practicable. In my opinion this action is necessary to mitigate a risk to public safety and to protect the environment.

[underlining added]

[14] On March 30, 2017, CEP appealed the Order to the Tribunal, and requested a stay of the Order pending the Tribunal's decision on the merits of the appeal. The grounds for appeal in the Notice of Appeal have been summarized by the Tribunal as follows:

- Contrary to the OGC's mandate, the Order was not fair or timely, in that the OGC issued the Order one day after receiving the complaint from BC Hydro and without giving CEP prior notice or an opportunity for input.
- No information was referenced in the Order as to what level of peak ground accelerations might cause some impact, or whether the impact would be to the integrity of the dam itself or to related operations.
- CEP asked the OGC for empirical evidence of increased seismic activity in proximity to the Well or BC Hydro's facilities, but the OGC advised that it has no empirical evidence of enhanced seismicity associated with the Well or in the immediate vicinity of the Peace Canyon Dam.
- The Well has been used to dispose of water in the past without any adverse effects on BC Hydro's facilities or any increased seismic activity in the vicinity of the Well or the Peace Canyon Dam.
- BC Hydro had no previous objections to the Well's authorization or the March 3, 2014 amendment to the Special Project Order.
- The Order was issued despite the fact that the OGC's 2014 seismic study in the Montney Trend showed that only two out of 104 active water disposal wells recorded seismic events associated with them, and recorded ground motions associated with those events were below the threshold for causing damage to structures, and no injuries or property damage were reported.

The induced seismic events recorded at two disposal wells occurred in marginal reservoir quality rock in proximity to existing faults, whereas the Well has good reservoir quality and there is no indication of faults nearby.

- The Order was issued despite the fact that the OGC already required lower maximum injection pressures for the Well compared to other water disposal wells in northeastern BC, and the Well has a large safety factor relative to other disposal wells in the region.
- BC Hydro has publicly declared that their dams are strong enough to endure much stronger earthquakes than those generated by fracking, and the OGC's 2014 seismic study confirmed that the induced seismicity from water disposal is of a lower magnitude than that induced by fracking.

[15] By a letter dated March 31, 2017, the Tribunal acknowledged CEP's Notice of Appeal and request for a stay of the Order, and invited the parties to provide written submissions on the stay application. All parties provided written submissions.

[16] On April 13, 2017, the OGC advised the Tribunal that the parties had consented to an extension of time for their submissions on the stay application, because they were attempting to resolve the appeal.

[17] On May 9, 2017, CEP advised that the parties' attempt to resolve the appeal through mediation was unsuccessful, and CEP requested that the appeal be heard in writing on an expedited basis.

[18] By a letter dated May 9, 2017, the Tribunal set out schedules for the parties to provide their written submissions on both the application for a stay, and the merits of the appeal. Although the written submissions on the merits of the appeal close on June 19, 2017, CEP advised that it still wanted to pursue a stay of the Order.

[19] CEP submits that a stay should be granted. CEP submits that the appeal raises serious issues, CEP will suffer irreparable harm if a stay is denied, and the potential harm to its interests, if a stay is denied, outweighs the risks of harm to other interests if a stay is granted.

[20] The OGC submits that CEP has failed to establish that CEP's interests will likely suffer irreparable harm if a stay is denied, and CEP has failed to demonstrate that the balance of convenience favours granting a stay.

[21] Similarly, BC Hydro submits that CEP's evidence does not support a conclusion that CEP's interests will likely suffer irreparable harm if a stay is denied, and the evidence does not support a conclusion that the balance of convenience favours granting a stay.

ISSUE

[22] The sole issue arising from this application is whether the Tribunal should grant a stay of the Order pending a decision on the merits of the appeal.

APPLICABLE LEGISLATION AND TRIBUNAL RULES

[23] 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.

[24] 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.

[25] The onus is on CEP, as the applicant for a stay, to demonstrate good and sufficient reasons why a stay should be granted.

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

DISCUSSION AND ANALYSISSerious Issue

[27] 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*").

[28] 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.

[29] 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.

[30] CEP submits that the appeal raises serious issues, including the OGC's lack of due process and procedural fairness before the Order was issued, and the lack of evidence that disposal activities at the Well have caused any adverse impacts.

[31] Both the OGC and BC Hydro agree that the appeal raises serious issues.

The Tribunal's Findings

[32] The Tribunal finds that CEP's Notice of Appeal and written submissions raise issues that are not frivolous, vexatious or pure questions of law. The Tribunal finds, and all parties agree, that the appeal raises serious issues, and therefore, the Tribunal has considered the next part of the test for a stay application.

Irreparable Harm

[33] The second factor to be considered is whether CEP, as 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.

[34] 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]

[35] CEP submits that the Well accounts for 100% of CEP's revenues, and the Order threatens CEP's viability as a business. CEP also submits that commercial water disposal activities are the prime driver of increases in the value of its publicly traded shares. Furthermore, CEP submits that it holds contracts to dispose of significant volumes of produced water which have been "neutralized and jeopardized" by the Order, and it is at risk of losing the skilled contractors who operate the Well.

[36] In support of those submissions, CEP provided a table titled "Water Disposal Well Economics" showing an average monthly disposal of 7,200 cubic metres of water over 84 months, gross monthly revenue of \$190,452, monthly "LOE" of

\$50,000, and net monthly cash flow of \$140,452. The table states that it is based on flat pricing and volume.

[37] The OGC submits that the Order temporarily suspends disposal operations at the Well to allow the OGC time to obtain and assess additional information regarding the susceptibility of the Peace Canyon Dam, and the potential for disposal activities to affect the Dam. In its submissions, the OGC advised that it expected to complete its technical review and communicate the results to the parties during the week of May 22, 2017, but the Tribunal has received no information about whether that has occurred.

[38] The OGC submits that, given the expedited process for hearing the appeal, and the temporary nature of the Order, any revenue loss by CEP will be temporary. The OGC maintains that CEP has provided insufficient evidence to show that any temporary revenue loss, pending completion of the appeal process, will cause CEP to suffer irreparable harm.

[39] Similarly, BC Hydro submits that CEP has provided insufficient evidence to show that CEP would suffer irreparable harm if a stay is denied, pending a decision on the merits of the appeal. BC Hydro submits that the harm to be considered at this stage of a stay application is the harm which would occur between the date when the Order was issued and when the Order might be reversed on appeal. The harm to be considered is not that which would arise if the Order is confirmed on appeal. BC Hydro argues that the harm that might arise during the four or five months until a final decision on the appeal is issued, presumably sometime during the summer of 2017, would not undermine CEP's viability, especially given that CEP has provided no evidence of its fixed costs or when its financial reserves might be exhausted.

[40] In addition, BC Hydro submits that there is no evidence of the actual effect of the Order on CEP's share price. In any case, BC Hydro argues that it is reasonable to assume that CEP's shares would rebound if the appeal was successful, given that its shares jumped when disposal operations commenced. There is also no evidence that any loss of contracts for water disposal, or loss of skilled contractors, would cause irreparable harm to CEP. Moreover, BC Hydro submits that the Well's history of operations shows that the disposal operations can be stopped and re-started with no degradation to the Well's long-term value.

[41] In reply, CEP submits that it began to suffer irreparable harm as soon as it suspended disposal operations in accordance with the Order. CEP maintains that the loss of 100% of its income is not speculative, those losses continue to grow, and the losses do not appear to be recoverable. In addition, CEP submits that even if the OGC's technical review concludes soon, there is no guarantee that the Order will be lifted. Moreover, CEP submits that its primary disposal contract is for 12-months, and the term of that contract is passing with each day of the suspension. CEP submits that it has a verbal agreement for a second disposal contract that is time constrained, but that agreement is probably "beyond recovery." CEP maintains that the Well has a useful life of seven years, and CEP has continuous overhead costs. With each cessation of disposal operations, the profit margin is reduced due to overhead costs, which reduces the value of the Well.

[42] In support of its reply submissions, CEP provided a one-page financial statement titled "Condensed Consolidated Interim Statements of Loss and Comprehensive Loss" for the three-month and six-month periods ending on October 31, 2015, and October 31, 2016 (the "Statement of Loss"). For all four of those periods, the Statement of Loss shows a net loss due to general and administrative expenses that were incurred during those periods, which was when the Well was not operating. For example, during the six month periods ended October 31, 2015 and October 31, 2016, respectively, CEP had net losses of \$351,489 and \$320,237.

The Tribunal's Findings

[43] The Tribunal finds that "irreparable harm" refers to the nature of the harm suffered, rather than its magnitude. Based on the legal test set out in *RJR-MacDonald*, irreparable harm 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." The onus is on CEP, as the applicant for a stay, to establish that it will likely suffer irreparable harm if a stay is denied, between the date when the Order was issued and when the Tribunal issues a final decision on the appeal.

[44] The Tribunal finds that, if a stay is denied, the Order will remain in effect until the Tribunal issues a final decision on the merits of the appeal. The hearing of the appeal is scheduled to conclude on June 18, 2017. The Tribunal's Practice Directive no. 1, which provides a non-binding guideline regarding the usual timeline for issuing a decision after a hearing concludes, indicates that a final decision may be expected within three months of the conclusion of a written hearing. Thus, the Tribunal may issue a decision on the merits of this appeal in approximately three months. If a stay is denied, disposal operations will remain suspended during that time, and therefore, CEP will have no revenues from disposal operations. CEP will also incur some fixed costs during that time, but the Tribunal finds that the issuance of the Order likely has no effect on fixed costs, which would be incurred regardless of whether the suspension was in force. The Tribunal finds that the loss of revenues for up to a few months, if a stay is denied but the appeal is ultimately successful, may cause financial hardship for CEP, but financial hardship does not necessarily equate to irreparable harm.

[45] The Tribunal finds that the loss of revenues during the suspension is temporary in nature, in the sense that denying a stay would result in a delay in receiving the revenue, rather than a permanent loss of the revenue, if the appeal is ultimately successful. The evidence is that CEP will be able to resume disposal operations at the Well if the appeal is successful, given that the Well has a history of operations being stopped for long periods of time, and then re-started. There is no evidence that the temporary suspension of disposal operations will affect the Well's future capacity or operability.

[46] Furthermore, the Tribunal finds that CEP has provided insufficient evidence for the Tribunal to conclude that the loss of revenue for up to a few months would likely cause CEP to go out of business, suffer permanent market loss, or suffer irrevocable damage to its business reputation. In fact, the Statement of Loss that CEP provided shows that CEP has continued to exist as a company during two

previous six-month periods when CEP operated at a significant net loss due to the general and administrative expenses incurred while the Well was not operating.

[47] Regarding any effects that the Order may have on CEP's share price, the Tribunal finds that it is logical that any loss in share value which may have occurred when the Order was issued would be re-gained if the Order is rescinded or the appeal is successful. As such, the Tribunal finds that any losses in share value that may be attributed to the Order are likely to be temporary and not permanent in nature, in the event that a stay is denied but the appeal is ultimately successful.

[48] Although CEP claims its current disposal contract is in jeopardy due to the Order, CEP has not specified when that contract expires or what the contract terms provide for in the event of a suspension arising from an Order of the OGC. The Tribunal finds, therefore, that it is unknown what effect the suspension may have regarding the contract while the contract remains in force, or whether the suspension is likely to affect the renewal of that contract. In addition, the Tribunal finds that any effects that the Order may have on the verbal contract that CEP mentioned are speculative, as this contract does not appear to have been signed or otherwise become binding before the Order was issued.

[49] In conclusion, the Tribunal finds that if a stay is denied, disposal operations will remain suspended for a few months, and CEP will have no revenues from disposal operations during that time. The temporary loss of revenues, if a stay is denied but the appeal is ultimately successful, may cause some financial hardship for CEP, but the revenue would simply be delayed rather than lost permanently, if the appeal is ultimately successful. Furthermore, CEP has provided insufficient evidence for the Tribunal to conclude that the delay in receiving that revenue would likely cause CEP to go of business, suffer permanent market loss, or suffer irrevocable damage to its business reputation. A stay is an extraordinary remedy, and without more detailed or compelling evidence showing how a suspension for a few months would likely cause irreparable harm to CEP's financial or business interests, the Tribunal concludes that any harm to CEP's financial or business interests, if a stay is denied, would be temporary in nature.

[50] For all of these reasons, the Tribunal finds that CEP has not established a likelihood of irreparable harm to its interests if a stay is denied. However, the Tribunal emphasizes that the findings above are made for the limited purpose of deciding the stay application, and have no bearing on the merits of the appeal.

Balance of Convenience

[51] The balance of convenience part of the three-part test requires the Tribunal to determine which of the parties will suffer greater harm from the granting of, or refusal to grant, a stay pending a final decision on the merits of the appeal.

[52] CEP submits that the balance of convenience favours granting a stay. CEP submits that there is no information about the likelihood that disposal operations at the Well may cause some adverse impact on the Peace Canyon dam. There is also no information about the Dam's alleged susceptibility to induced seismicity from disposal operations, and there is no evidence that past disposal operations at the

Well had any adverse effects on the Dam. In contrast, the Order's impacts on CEP are extreme and financially devastating.

[53] The OGC submits that the balance of convenience favours denying a stay. The OGC argues that although the likelihood of an induced seismic event sufficient to cause damage to the Dam may be low, such levels of ground motion have been recorded in association with induced seismicity in other areas in northeastern BC, and the potential consequences of such an event would be severe.

[54] In particular, the OGC submits that during the technical review, BC Hydro has advised, in part, as follows:

- The seismic design criteria when the Peace Canyon Dam was built for an aseismic area was for peak ground acceleration of $0.1g$ ¹ and a safety factor of $1.5g$.
- During construction of the Dam, low angle bedding planes were discovered at the foundation of the Dam.
- Construction mitigations included infilling between the powerhouse and the intake, increasing the base of the Dam with larger blocks, and installing two galleries (one upstream and one downstream) with a pumping system to keep the gallery level below the tail water.
- The pumping system uses two pumps and has a dedicated back-up pump.
- Between 2008 and 2012, BC Hydro undertook a probabilistic seismic hazard analysis for its dams, and found that for the Peace Canyon Dam, the 1:10,000 year natural earthquake would have an estimated peak ground acceleration of $0.17g$, which corresponds with the calculated "seismic withstand" of the Dam.
- Peak ground acceleration above 0.17 would not result in catastrophic dam failure but may result in the Dam sliding a few millimetres to a few centimetres, causing excessive leakage, damage and/or gate problems. If gallery pumping capability was lost through an incident, the water level in the galleries would rise after a couple of days to a level that would reduce "seismic withstand" of the dam to $0.07g$ and impact the Dam safety factor.
- If the Dam was damaged, there is a potential for impacts to public safety and the environment associated with draining the reservoir to respond to those impacts.

[55] BC Hydro submits that the balance of convenience favours denying a stay. BC Hydro argues that the Tribunal is obliged to assume that the basis of the Order is "correct", and that the Order is necessary to mitigate a risk to public safety and to protect the environment. BC Hydro submits the avoidance of risk of harm to public safety and the environment are important public interests that animate the *Act*, and there is no basis in law or fact to conclude that those public interests are outweighed by CEP's commercial interests.

¹ g = the acceleration due to Earth's gravity

[56] In reply, CEP submits that the record of operations at the Well for the periods from 2008 to 2010 and from January 4 to March 16, 2017, shows that 7,500 cubic metres of water can be injected into the Well without inducing seismic activity. In addition, CEP submits that the Peace Canyon Dam represents 6% of BC Hydro's total generation capacity, and there is excess generation to cover the loss of power generated by the Peace Canyon Dam. In addition, CEP submits that BC Hydro has stated in public documents related to the Site C Dam that "higher tailwater levels would not change the stability or spillway operation of the Peace Canyon Dam." BC Hydro officials have also publicly stated that seismic activity related to fracking poses no threat to BC Hydro's dams.

[57] Furthermore, CEP submits that all of the public safety and environmental concerns raised by BC Hydro in this case are predicated on the possibility of an induced seismic event damaging the Peace Canyon Dam in a non-catastrophic event that would require draw-down of Dinosaur Lake (the reservoir behind the Dam) and repair of the Dam. However, CEP argues that BC Hydro advised during the OGC's technical review that it intends to draw down Dinosaur Lake to perform repairs. CEP submits that BC Hydro is actually concerned about its own costs associated with the timing of scheduled maintenance operations, rather than any risk to public safety and environmental damage.

[58] In support of its reply submissions, CEP provided copies of public statements from BC Hydro senior executives stating that fracking poses no threat to BC Hydro's dams, including a March 27, 2017 media statement from BC Hydro regarding the Peace Canyon Dam. BC Hydro's March 27, 2017 media statement states that "While there is no immediate public safety risk associated with disposal wells, the discovery [of a water disposal well operating within a few kilometres of the Dam] raised concerns." It also states that "Disposal wells have been known to cause stronger seismic events over a larger area than those caused by fracking, so a 5-kilometre buffer [which was set by the OGC for fracking operations] will not be sufficient for these projects."

The Tribunal's Findings

[59] The Tribunal has already found that CEP has provided insufficient evidence to establish that its interests will suffer irreparable harm if a stay is denied. However, the Tribunal has found that denying a stay may cause some temporary financial hardship for CEP, as there will be a delay for up to a few months in CEP receiving revenues from the Well's disposal operations. CEP will continue to incur some fixed costs during that time, and therefore, it will likely incur a financial loss while the Order is in force. However, CEP provided insufficient evidence for the Tribunal to conclude that denying a stay is likely to cause CEP to suffer irreparable harm to its business or financial interests, especially given the evidence that CEP continued as a going concern while it incurred financial losses for periods of up to six months in 2015 and 2016, while disposal operations were voluntarily stopped.

[60] Regarding the potential harm if a stay is granted, the Tribunal agrees with CEP that there is no evidence that the Well's operations have caused any harm to the Dam in the past. However, this is not conclusive of whether the Well's recent

or future operations pose a risk of harm to the Dam, the environment, or public safety.

[61] Regarding the interests served by the Order, which may be affected if a stay is granted, the Tribunal notes that the Order was issued under section 49(1)(b) of the *Act*, which states as follows:

49 (1) An official may, in writing, issue to a person carrying out an oil and gas activity or a related activity an order under this section with respect to those activities or any of the person's obligations under the *Act* or the regulations or the person's permit or authorization, if any, if, in the opinion of the official,

...

(b) the order is necessary

(i) to mitigate a risk to public safety,

(ii) to protect the environment, or

(iii) to promote the conservation of petroleum and natural gas resources.

[62] Under section 49(4)(d), such an order may specify that a person suspend or an oil and gas activity or any aspect of an oil and gas activity.

[63] Consistent with the objectives of mitigating a risk to public safety and to protect the environment under section 49(1)(b) of the *Act*, the Order required CEP to suspend disposal operations at the Well. The Order gives a number of reasons for doing so. The Order states that "Increased volumes of disposal, including disposal operations at the subject Well, increases the risk of seismic events where faults exist." It also states that:

There is a risk of an induced event sufficient to generate the peak ground accelerations necessary to cause damage to the Peace Canyon dam. This level of ground motion has already been recorded in association with induced seismicity in other areas of north east BC. If such an event were to occur the consequences would be severe.

[64] The Order goes on to state that the official who issued it was of the opinion that disposal activities must be suspended pending a review of additional technical information, and that this action was "necessary to mitigate a risk to public safety and to protect the environment."

[65] Similarly, according to the OGC's submissions, faulting exists in the area surrounding the Peace Canyon Dam, and the OGC has observed induced seismicity coincident with water disposal activities. Also, according to the OGC, induced seismic events have been noted in association with Baldonnel water disposal in the Altares area, which is approximately 40 km north of the Well. There is no question that the Well disposes of water by injecting it under pressure into the Baldonnel formation.

[66] While CEP claims that BC Hydro has publicly stated that fracking poses no threat to BC Hydro's dams, the Tribunal finds that it is underground water disposal,

and not fracking, which is the basis for concern in the present case. According to CEP's evidence, induced seismic events caused by underground water disposal may pose a greater risk than those caused by fracking. Specifically, BC Hydro's March 27, 2017 media statement, which was submitted by CEP, states that "Disposal wells have been known to cause stronger seismic events over a larger area than those caused by fracking, so a 5-kilometre buffer [which was set by the OGC for fracking operations] will not be sufficient for these projects" [underlining added].

[67] According to BC Hydro's submissions, peak ground acceleration above 0.17 may result in the Dam sliding a few millimetres to a few centimetres, causing excessive leakage, damage and/or gate problems. If gallery pumping capability was lost, the water level in the galleries would rise after a couple of days to a level that would reduce the "seismic withstand" of the dam to 0.07g, which means that the Dam's safety factor would be reduced.

[68] Also, according to BC Hydro's submissions, there is a potential for impacts to public safety and the environment associated with draining the reservoir to respond to reduced safety of the Dam. Although CEP claims that BC Hydro already plans to lower the reservoir's water level to perform maintenance, the Tribunal finds that this is not the same as having to reduce the water level after it rose following a seismic event that caused the Dam to slide a few millimetres to a few centimetres, causing excessive leakage, damage and/or gate problems. In the latter circumstances, the main concern is that a series of events following an induced seismic event caused by underground water disposal may reduce the Dam's ability to withstand a future seismic event of 0.07g, which is lower than the original seismic design criteria when the Dam was built for peak ground acceleration of 0.1g. While the likelihood that this series of events will occur may be low, the potential consequences, in terms of the risk of harm to public safety and the environment, are significant, according to the evidence before the Tribunal.

[69] In weighing the balance of convenience under the *RJR MacDonald* test, the interests of the public should be taken into account in circumstances such as this. According to *RJR MacDonald*, when the purposes of the relevant legislation promote public interests, which may include protection of the environment or human health, it is generally presumed that the legislation has such an effect. As stated in *RJR MacDonald*:

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

...

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

[underlining added]

[70] In *RJR MacDonald*, the applicants challenged the constitutionality of legislation that regulated cigarette packaging. They sought a stay of the legislation on the basis that it would cause them to incur major expenses in altering their cigarette packaging and those expenses would be irrecoverable should the legislation be found unconstitutional. The Supreme Court of Canada held that the government passed the legislation with the intention of protecting public health and furthering the public good. In contrast, the only possible public interest in the continued application of the former packaging requirements was that the price of cigarettes for smokers would not increase. The Court held that any such price increase would not be excessive and did not carry much weight when balanced against the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

[71] In the present case, sections 49(1)(b) of the *Act* states that an OGC official may issue an order requiring a person to suspend an oil and gas activity if, in the opinion of the official, the order is necessary to mitigate a risk to public safety, or to protect the environment. On its face, the Order is consistent with the purpose of section 49(1)(b), which is to take proactive action to mitigate a risk to public safety or to protect the environment. Based on the language in the Order, the Tribunal finds that the Order was issued to allow the OGC time to assess and, if necessary, mitigate, the potential risks to public safety and the environment in the unlikely event that induced seismic activity from the Well's disposal operations caused the Peace Canyon Dam to slide a few millimetres to a few centimetres, which could trigger a series of events that pose serious risks to public safety and the environment, including the Dam's ability to withstand further seismic events. The suspension of disposal activities allows the OGC time to conduct its technical review without the risk that such an event may occur before the risk level is properly assessed. However, the Tribunal cautions that these findings are made for the limited purpose of deciding whether to issue a stay, and have no bearing on the merits of the appeal.

[72] Based on the evidence and information that has been provided by the parties, the Tribunal finds that granting a stay would cause a greater risk of harm to the public interests that are served by the Order, than CEP would likely suffer if a stay is denied, pending a final decision on the merits of the appeals of the appeal. Accordingly, the Tribunal concludes that the balance of convenience weighs in favour of denying a stay of the Order.

DECISION

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

[74] For the reasons provided above, the application for a stay of the Order is denied.

"Alan Andison"

Alan Andison, Chair
Oil and Gas Appeal Tribunal
June 5, 2017