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DECISION NOS. 2018-EMA-043(a), 2018-EMA-044(a) and 2018-EMA-045(a) [Group File: 2018-EMA-G03]

In the matter of three appeals under section 100 of the *Environmental Management Act,* S.B.C. 2003, c. 53

BETWEEN:	Canadian National Railway Company Canadian Pacific Railway Company BNSF Railway Company	**APPLICANTS (APPELLANTS)**
AND:	Delegate of the Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Alan Andison, Chair	
DATE:	Conducted by way of written submissions concluding on November 26, 2018	

APPEARING: For the Applicants:

Canadian National Railway Company	Nicholas Hughes, Counsel
Canadian Pacific Railway Company	Nicholas Hughes Counsel
BNSF Railway Company	R.R.E. DeFilippe, Counsel
For the Respondent:	Jeff Van Hinte, Counsel

STAY APPLICATIONS

[1] On September 28, 2018, the Director, Environmental Emergency Program, Ministry of Environment and Climate Change Strategy (the "Ministry"), issued Spill Response Information Orders to Canadian National Railway Company ("CN"), Canadian Pacific Railway Company ("CP"), and BNSF Railway Company ("BNSF")[1] (collectively, the "Orders").

[2] The Orders were issued under Division 2.1 of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). They compel each of the railway companies to provide information to the Director about their respective transportation of crude oil (by volume and route) through the province for the years 2018 to 2020 in

[1] Previously known as Burlington Northern Santa Fe, LLC.

accordance with a schedule set out in the Orders. Of relevance to these applications, the information for the period January 1, 2018 to September 30, 2018 is required by midnight on November 30, 2018[2].

[3] Each of the railway companies appealed the order issued to it and applied for a stay pending the Board's final decision on the merits of the appeal. No hearing on the merits has yet been scheduled.

[4] These applications for a stay have been conducted by way of written submissions.

BACKGROUND

General

[5] CN and CP are Class 1 federally regulated railways. BNSF is a U.S. Class 1 rail carrier which is also federally regulated in Canada: it operates approximately 30 kilometres of track in the Lower Mainland.

[6] In Canada, federally regulated railways are subject to a safety and transportation of dangerous goods regime embodied in the *Canada Transport Act*, the *Railway Safety Act* and the *Transportation of Dangerous Goods Act, 1992*, and all of the regulations and Protective Directions issued under them.

[7] In October of 2017, the Government of British Columbia brought into force new spill preparedness, response and recovery requirements which apply to certain federally regulated railways operating in BC. The new requirements are set out in Division 2.1 of the *Act* and in a new regulation made under the *Act*; i.e., the *Spill Preparedness, Response and Recovery Regulation*, B.C. Reg. 185/2017 (the "*Regulation*"). The new provincial requirements apply to a "regulated person", which is defined to include a person in possession, charge or control of crude oil and bitumen transported by railway in a quantity of 10,000 litres or more.[3]

[8] One of the new requirements in the *Act* relates to the disclosure of information. Section 91.11(5) of the *Act* states:

(5) If ordered by a director, a regulated person must provide to the director, at the regulated person's own expense and in the time and manner specified by the director,

(a) a copy of the regulated person's spill contingency plan,

(b) information relating to

(i) the operations or activities of the industry, trade or business, or

[2] The deadline in the Orders was October 30, 2018. However, upon application by each of the Applicants, the Director extended the deadline in the Orders to November 30, 2018 to allow their stay applications to be heard and decided.

[3] Division 2.1 of Part 7 of the *Act* titled "Spill Preparedness, Response and Recovery" was brought into force on October 30, 2017 by OIC 392/17. The substances transported by railway that are regulated under this Division, are set out in section 2 of the *Regulation* and in Column 2 of the Schedule to the *Regulation.*

(ii) substances used, stored, treated, produced or transported by the regulated person,

(c) prescribed declarations in respect of spill preparedness and response capability, and

(d) prescribed information.

The Orders

[9] On September 28, 2018, the Director issued the Orders to the Applicants which state, in part, as follows:

> This Spill Response Information Order is being issued under Section 91.11(5) of the *Environmental Management Act*, which authorizes the director to request information relating to substances transported by regulated persons. The purpose of collecting information on crude oil transport by rail in British Columbia (B.C.) is to enhance spill preparedness and response in the province.

[10] The Orders require the Applicants to provide the following volume and route information for the years 2018, 2019 and 2020:

> Volumes of regulated substances as listed under Item 3 of Schedule 1 of the Spill Preparedness Response and Recovery Regulation
>
> a) Identify and provide:
>
> - The number of railcars used to transport crude oil and diluted bitumen by railway in B.C. per week.
> - The volume of crude oil and diluted bitumen transported by railway in B.C. per week. Volumes to be provided as a total volume (m^3).
>
> b) Identify and provide:
>
> - The number of railcars used to transport crude oil and diluted bitumen by railway in B.C. *per route* per week.
> - The volume of crude oil and diluted bitumen transported by railway in B.C. *per route* per week. Volumes to be provided as a total volume (m^3).
>
> [Italics in original]
>
> Route
>
> c) Provide an electronic map displaying the locations of all railways currently transporting either crude oil or diluted bitumen in B.C.
>
> - For shipments that originate outside of B.C., include the location where the shipment enters the province. Provide locations by common name and by latitude

and longitude geographic coordinates in decimal degrees.

- For shipments that are transported out of B.C., include the location where the shipment exits the province. Provide locations by common name and by latitude and longitude geographic coordinates in decimal degrees.
- For shipments that originate from or are received at facilities within B.C., indicate the location by latitude and longitude geographic coordinates in decimal degrees, and, by name of the facility.
- For each facility, provide loading and offloading volumes for each product type, expressed as a total volume (m^3).

[11] The Applicants must submit the information by specified dates each year. The Orders state that failure to comply with the requirements by the specified date is a contravention of the *Act* and may result in legal action; specifically, the Orders quote section 120(10) of the *Act* which states that, upon conviction for contravention of an order made under the *Act*, the person is liable to a fine not exceeding $300,000 or imprisonment for not more than 6 months, or both.

[12] Finally, the Orders state that the Ministry "plans to publish, at regular intervals, reports on crude oil transport in British Columbia, similar to the Washington State Department of Ecology's *Crude Oil Movement by Rail and Pipeline Quarterly Report*." The Orders further state that the railway companies will be given at least 14 days prior written notice of the Ministry's intent to publish the regulatory documents, and that it will not publish any information that could not be disclosed if it were subject to a request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FOIPPA*").

The Appeals

[13] On October 19, 2018, the Applicants filed separate Notices of Appeal but with identical grounds for appeal. They all note that the dissemination of information regarding the shipment of dangerous goods by rail, including crude oil and bitumen, is regulated under Protective Direction No. 36 ("PD 36"), issued by the Federal Minister of Transport on April 28, 2016 under section 32 of the federal *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34. The Applicants state that PD 36 mandates that federally regulated railways provide information respecting the transportation of dangerous goods through the province. It also provides that generalized information respecting the transportation of dangerous goods be made available to the public, and that more detailed specifics respecting the transportation of such goods (specific volumes and routes) be provided *only* to those in charge of emergency response activities in the province, and be provided on a strictly confidential basis. [This direction replaced a previous direction issued in 2013 (PD 32), which contained similar confidentiality provisions.]

[14] In particular, the Applicants state that the confidentiality provisions of PD 36 dictate that detailed information respecting routes and volumes in a given jurisdiction are to be disclosed only to an Emergency Planning Official for that jurisdiction, and then only if the Emergency Planning Official is:

(a) registered in the federal Canadian Transportation Emergency Centre (known as CANUTEC); and

(b) provides specified undertakings, including to "keep the information confidential and ensure that all that receive the information keep it confidential to the maximum extent permitted by law".

[15] The Panel was provided with a copy of PD 36.

[16] All of the Applicants argue that the Director lacked the constitutional jurisdiction to issue the Orders. Their specific grounds for appeal are summarized as follows:

- The sections of the *Act* and *Regulation* relied upon as authority for the Orders are *ultra vires* the provincial legislature as being outside of the province's legislative authority under sections 92(13) and 92(16) of the *Constitution Act, 1867*.
- The sections of the *Act* and *Regulation* relied upon as authority for the Orders are constitutionally inapplicable to federal railways (i.e., the Applicants) on the grounds of interjurisdictional immunity because the sections seek to regulate and manage federally regulated railway operations.
- The sections of the *Act* and *Regulation* relied upon as authority for the Orders are constitutionally inoperable on the basis of paramountcy, in that compliance with the Orders would conflict with, and abrogate, the purpose and intent of the confidentiality provisions contained in PD 36.
- Even if the Orders are constitutionally valid, the Applicants cannot comply with certain information requests contained therein.

[2] The Applicants advise that, prior to appealing the Orders, they wrote to the Ministry advising of their intent to appeal the Orders and request a stay. At that time, they offered to voluntarily disclose the information to the Ministry on confidentiality terms; specifically, they offered to provide the information sought in the Orders on a voluntary basis if the Ministry agreed to accept the information in accordance with the strict confidentiality requirements set out in PD 36.

[3] The following day the railway companies appealed the Orders and applied for a stay.

The applications for a stay of the Orders

[17] In general, the Applicants submit that the circumstances favour granting a stay. They submit that the confidentiality of the information regarding the volume and routing of dangerous goods transported by the railways is "heavily guarded by

a robust federal regime" and that, if this information was made public, it could be used to plan and execute a malicious attack on the railways. Should a stay be denied and they are required to comply with the Orders, the Applicants warn that the consequences "could be dire".

[18] In contrast, the Applicants argue that the Ministry will suffer no harm if the Orders are stayed pending a decision on the merits of the appeals. They submit that the people who need this information for emergency response and planning in the province already receive it under the federal regime. CN and CP state:

> Virtually all of the information sought by the Ministry in the Orders is already being provided by [CN and CP] to Emergency Planning Officials in British Columbia, but, as mandated in PD 36, it is being provided on a confidential basis.

[19] The Director submits that the spill provisions under which the Orders were made are an important feature of the legislation. He submits that "sound emergency planning begins with obtaining relevant information to get the full picture of what substances are being moved where in the province."

[20] In terms of the disclosure of information to the public, Director proposes an alternative to the Applicants' offer (above) which, in his view, will keep the information confidential pending the outcome of the appeals. Specifically, the Director will consent to a voluntarily stay the Orders on the following conditions:

- the Applicants voluntarily provide the information described in the Orders in accordance with the schedule set out in the Orders; and
- the Director "will keep the information confidential and to not disclose it, except as required by law, until: a resolution of the appeals in favour of the respondent [the Director]; the appeals are withdrawn; or as otherwise agreed to by the parties."

ISSUE

[21] The sole issue arising from these applications is:

> Whether the Panel should grant a stay of the Orders, pending a decision from the Board on the merits of the appeals.

RELEVANT LEGISLATION AND CASE LAW

[22] Section 25 of the *Administrative Tribunals Act*, which applies to the Board under section 93.1 of the *Act*, empowers the Board to order stays:

Appeal does not operate as stay

25 The commencement of an appeal does not operate as a stay or suspend the operation of the decision being appealed unless the tribunal orders otherwise.

[23] In *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environmental Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997), [1997] B.C.E.A. No. 42 (Q.L.), the Board concluded that the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR MacDonald*] applies to applications for stays before the Board. That test requires an applicant for a stay to demonstrate the following:

1. there is a serious issue to be tried;
2. irreparable harm will result if the stay is not granted; and
3. the balance of convenience favors granting the stay.

[24] The onus is on the applicant(s) for a stay to demonstrate good and sufficient reasons why a stay should be granted. In this appeal, the Applicants bear that onus.

[25] The Applicants made submissions on each branch of the test.

[26] In his responding submissions, the Director states that, for the limited purpose of these applications, he does not contest the first two elements of the stay test. In his view, the deciding factor in this case lies within the balance of convenience which, he submits, clearly favours a stay on the conditions that he proposed.

DISCUSSION AND ANALYSIS

Whether the Panel should grant a stay of the orders pending a decision from the Board on the merits of the appeals.

Serious Issue

[27] In *RJR MacDonald* the Supreme Court of Canada 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.

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

The Parties' submissions

[29] The Applicants submit that their appeals raise serious issues concerning the constitutionality of the impugned provincial legislation.

[30] Although the Director submits that there is no merit to the appeals, or any of the constitutional grounds raised in the Notices of Appeal, he concedes that there are serious issues raised by the appeals.

The Panel's findings

[31] The Panel finds that there are serious issues raised by the appeals.

Irreparable Harm

[32] At this stage of the *RJR MacDonald* test, the Applicants must demonstrate that their interests will likely suffer irreparable harm if a 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 Association's own interest that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
>
> …
>
> 'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision…; where one party will suffer permanent market loss or irrevocable damage to its business reputation…; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined ….

The Applicants' submissions

[33] The Applicants state that, if they are forced to disclose the requested information without the robust confidentiality protections put in place by the federal government, that disclosure can never be undone. They submit that this, alone, constitutes irreparable harm to each of them. In support, they reference two cases: *O'Connor v. Nova Scotia (Deputy Minister of the Priorities & Planning Secretariat)*, 2001 NSCA 47 [*O'Connor*], and *Gillespie v. Paterson*, 2006 NSCA 133 [*Gillespie*].

[34] In *O'Connor*, Cromwell J.A. (as he then was) held at paragraph 20 that, in the context of an access to information request, "the forced disclosure of information, if subsequently proved to have been wrongful, itself constitutes irreparable harm". In *Gillespie*, Cromwell J.A. explained that this is so because "[o]nce the disclosure has been made the right of appeal becomes academic" (paragraph 8).

[35] Further, the Applicants submit that the federal government's main purpose or objective in tightly controlling the access to, and confidentiality of, information regarding the routes and volumes of dangerous goods transported by rail is public safety. PD 36, and its predecessor PD 32, were made under the authority of the *Transportation of Dangerous Goods Act, 1992*, which states:

32(1) The Minister may, if satisfied of the conditions described in subsection (2), direct a person engaged in importing, offering for transport, handling or transporting dangerous goods, or supplying or importing standardized means of containment, to cease that activity or to conduct other activities to reduce any danger to public safety.

(2) The Minister may not make the direction unless the Minister is satisfied that the direction is necessary to deal with an emergency that involves danger to public safety and that cannot be effectively dealt with under any other provision of this Act.

…

[Emphasis added]

[36] Thus, before making PD 36, the Applicants submit that the federal Minister had already determined that the direction was necessary to deal with an emergency that involved a "danger to public safety". To address that danger, the direction dealt with the disclosure of certain information, directed who the information could be given to (e.g., Emergency Planning Officials), and the limited use to which that information could be put by the Emergency Planning Official, i.e., "… only for emergency planning or response …" (section 15).

[37] As an example of the risks associated with access to this information, the Applicants state that, if the details of the volume and routing of their dangerous goods are not kept strictly confidential as required by the federal regime, that information could be used to execute an attack on the railroads, the consequences of which would be devastating. In support of this assertion, they refer to a June 24, 2017 statement by Transport Canada titled *Transportation of Dangerous Goods by Rail Security Regulations: Regulatory Impact Statement* that:

> Freight trains transporting dangerous goods can be particularly vulnerable to misuse or sabotage, given the harmful nature of the goods and the extensive and accessible nature of the railway system.

[38] This document from Transport Canada also referred to the 2013 derailment of a train carrying light crude oil in downtown Lac-Mégantic, Quebec to underscore the "devastating impact that rail incidents can have on public safety". The explosions and fire from that derailment killed 47 people, destroyed 40 buildings and caused serious environmental damage to the downtown area and adjacent river and lake. Transport Canada notes that, while this was safety-related, it highlights what could happen if the transport of such goods was the subject of a terrorist attack.

[39] As evidence that this risk is not speculative, the Applicants note that two men were found guilty of conspiring to derail a VIA passenger train in 2015, and provide an article written in the Globe and Mail discussing new security measures aimed at protecting Canada's rail system. They also refer to the explosion of a pipeline carrying natural gas and resulting fire in northern BC as highlighting the irreparable harm that can be caused should the information be disclosed in accordance with the Orders, and that information be used for malevolent purposes.

[40] In recognition of the vulnerability of railways, the Applicants state that PD 36 was created with input from the Railway Association of Canada and the Applicants. In their view, PD 36 "protects the confidentiality of this information in recognition of the security risk faced by railways. Not only would the Railways' infrastructure, assets, and business be heavily implicated, but most importantly, their employees, the general public, and the environment would be placed directly in harm's way." While the probability of such an event is impossible for them to quantify, the Appellants argue that the consequences of such an event are such that no level of risk should be tolerated.

The Director's submissions

[41] As noted earlier, the Director states that he does not contest this stage of the test. However, despite this statement, the Director takes issue with many of the Applicants' submissions.

[42] The Director states that the Applicants' submissions are "peppered with speculation and hyperbolic claims about terrorist attacks on railways". Further, he "does not see how the intended publication of *high-level*, *aggregated* and *historical* information (which is currently being made public in places like Washington State), could possibly result in the harms alleged by the Railways" [Director's emphasis]. He submits that:

- The location of the railway tracks in the province is not confidential;
- The fact that the railways transport crude oil or diluted bitumen is not confidential;
- A train moving down the tracks with tanker cars with placarding is plainly visible to the public and is not confidential;
- The information sought is historical (i.e., the information relates to rail transport that has already occurred); and
- Information on when individual trains will be running is not being sought.

[43] Given these facts, the Director argues that the Applicants' position on irreparable harm is "completely disconnected from the Ministry's proposed action."

[44] Moreover, the Director notes that the Applicants main focus in their stay applications is on maintaining confidentiality, not on providing the information. As he is prepared to consent to a stay of the publication aspect of the Orders until the appeals are decided, the Director submits that the Applicants will not suffer any irreparable harm if they provide the required information. He submits that, if the Board orders a stay pending the disposition of the appeals on the proposed condition that the province "keep the information confidential and to not disclose it, except as required by law", this should provide a sufficient level of assurance for the Applicants. The Director submits that the harm alleged by the Applicants with respect to the Director receiving the information outside of the PD 36 regime is simply not compelling.

[45] Accordingly, the Director submits that the Board ought to grant a stay on the conditions that he proposed in order to mitigate the harm to both parties.

The Applicants' reply

[46] The Applicants advise that the Director's proposal does not give the information the same level of protection as PD 36 and, therefore, they cannot agree to his proposal. Specifically, they are concerned with the application of the provincial *FOIPPA* and the presence of the words "except as required by law" in the Director's proposal. In their view, for the proposed conditions to achieve their stated objectives, the conditions imposed by the Board would need to adequately protect the information from disclosure under the *FOIPPA*. However, they note that the Director "pointed to no authority, and the Railways have been unable to find any authority for the proposition that the Board has the jurisdiction or power to trump or modify the disclosure obligations under *FOIPPA*."

[47] The Applicants ague that, unless the information given to the Director is protected under the federally mandated process embodied in PD 36, compliance with the Orders pending a decision on their appeals may result in irreparable harm: they should not be required to provide any of the information until their appeals are decided unless that disclosure is in accordance with the strict confidentiality requirements set out in PD 36.

The Panel's findings

[48] At this stage of the *RJR MacDonald* test, the Panel must determine whether any of the Applicants have demonstrated that they are likely to suffer irreparable harm if a stay is denied. According to *RJR MacDonald, "*irreparable harm" is harm that either cannot be quantified monetarily or cannot be cured, and includes non-compensable harm to human health, a permanent loss of natural resources, an applicant suffering permanent business loss, or an applicant suffering permanent market loss or irrevocable damage to its business reputation.

[49] The Panel finds that there is a reasonable basis to believe that compliance with the Orders pending a decision on the merits of the appeals may result in irreparable harm to the Appellants, to the public and/or the environment. This finding is supported by *O'Connor* and *Gillespie*. *O'Connor* involved an order for disclosure of documents under Nova Scotia's freedom of information and protection of privacy legislation. *Gillespie* involved a judge-made order to produce documents in a custody proceeding. Although the legal basis for the production of information/documents was different in those cases than in the present case, the Panel finds that the Courts' rationale for finding irreparable harm applies to the present case. In particular, the Panel agrees with the following analysis in *O'Connor*:

> 12. The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *RJR — MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 312 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.

> 13. However, in situations like this one which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, "... irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."
>
> 14. It is, therefore necessary to consider the risk of harm in the specific context of an access to information case in which an order granting access has been made and is being appealed. In that situation, the risk if a stay is not granted pending appeal is that the information will be released and thereafter, if the appeal succeeds, that release will be found to have been unlawful. In my view, such wrongful release may constitute irreparable harm in at least three ways.
>
> 15. First, the release of the information may injure the persons affected by its release in ways which cannot be compensated by money.
>
> 16. Second, once access to information is granted, it cannot be undone if the order for access is subsequently reversed on appeal. The harm is irreparable in the sense that a legal wrong has been committed which cannot be compensated or reversed. In some cases, the injury resulting from disclosure will be minimal, but that does not detract, in my view, from the proper characterization of the wrongful disclosure as constituting irreparable harm. As Cory and Sopinka, JJ. said in *RJR — MacDonald*, *supra*, irreparable refers to the nature of the harm rather than its magnitude. The essence of the concept is a wrong which cannot be undone or cured. The unlawful disclosure of information, even where it does not injure anyone, is a wrong which cannot be undone or cured and is, therefore, capable of being "irreparable" for the purposes of a stay pending appeal. [Emphasis added]
>
> ...

[50] Finally, like the Applicants', the Board is not convinced that ordering the Director's proposed condition would protect the information in the Ministry's possession from a request under the *FOIPPA*.

Balance of Convenience

[51] This branch of the *RJR MacDonald* test requires the Panel to determine which party will suffer the greater harm from the granting or the denial of the stay applications.

The Applicants' submissions

[52] The Applicants submit that the balance of convenience clearly favours a stay of the Orders. They submit that the public has a significant interest in maintaining the security of the rail system and avoiding catastrophic events. They submit that the public interest is reflected and protected in the federal legislative regime and weighs in favour of a stay pending a decision on the merits of the appeals.

[53] In contrast, they submit that there is no immediate need to enforce the Orders: the information at issue is already shared with Emergency Planning Officials charged with spill response planning and emergency services in municipalities. They submit that "[t]he people who need this information already have it." They further note that the Ministry can also have the information provided it is obtained under the confidential federal regime.

[54] Finally, they submit that the suspension of governmental power is not detrimental to the public interest when a "discrete and limited number of applicants are exempted from the application of certain provisions of a law": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 346. They maintain that this is such a case.

The Director's submissions

[55] The Director submits that the environmental danger posed by a catastrophic oil spill through train derailment in BC far outweighs any harm to the Applicants' from compliance with the Orders.

[56] The Director submits that the Ministry has a legitimate interest in obtaining the information sought in the Orders for emergency planning and preparedness purposes in the province.

[57] In an affidavit sworn by the Director on November 19, 2018, he explains his reasoning for issuing the Orders, as follows:

> 5. As the Ministry explores opportunities to improve the spill response regulatory framework, data on the movements of crude oil and bitumen is critical. This data is necessary for the Ministry to effectively carry out its mandate to ensure the province is prepared to respond to hazardous material spills.
>
> 6. The Ministry intends to use the information to:
>
> - Support catastrophic planning, so that when Ministry responders are dealing with the consequences from a large scale natural disaster the plans prepared to support their work will contain information about where crude oil and bitumen are typically transported within the province.
> - Evaluate the effectiveness of how rail companies are meeting new provincial requirements to prepare and test spill contingency plans for the substances being transported. In particular, the Ministry needs to

know the volumes of regulated substances being transported, and applicable routes, to ensure an adequate response is available.

- Evaluate changes in the volumes of dangerous goods being transported in the province over time to ensure the program is ready to respond effectively.
- Support the development of future regulation.

[58] Regarding publication of the information, the Director states that public transparency is an important component of environmental protection. He states:

> Providing aggregated information on the transport of crude oil and diluted bitumen can help protect people living and working in areas near transportation routes. Informed members of the public are in a good position to support the Ministry's objectives in reporting spills and in engaging with companies about the risk of spills and strategies to mitigate that risk.

[59] The Director appends the Washington State Department of Ecology's "Crude Oil Movement by Rail and Pipeline Quarterly Report" to his affidavit as an example of the type of report that the Ministry intends to publish using the information from the Orders.

[60] The Director submits that granting a full stay of the Orders would significantly and unnecessarily prejudice the ability of the Director to exercise his oversight responsibilities under the *Act* in the public interest until the appeals are decided. Not receiving any information would prejudice the Ministry "on a very real level with respect to emergency planning and preparedness and discharge of its public duties." He also submits that the assertion that the Director can have the information under the PD 36 regime until the appeals are heard and decided is not satisfactory because, if the Director is successful, the information provided in the interim period under PD 36 could not be used for the public transparency component of environmental protection.

[61] Conversely, refusing to grant a stay would expose the Applicants to the alleged harms of disclosure as outlined in their stay application. Therefore, providing the information under Board-mandated condition of confidentiality would, at most, result in the loss of the Applicant's argument regarding the interplay between PD 36 and the provincial *FOIPPA* legislation in the intervening period which, the Director submits, is speculative at best.

The Applicants' reply

[62] In reply, the Applicants submit that the Director has completely disregarded the existence of the comprehensive federal dangerous goods and spill response regime under which the railways currently operate. The Applicants note that the federal regime includes comprehensive provisions respecting railway safety, the transportation of dangerous goods, and the mandatory obligation on all railways to have in place government approved Emergency Response Assistance Plans that outlines the response to a release or anticipated release of the dangerous goods while in transport. Transport Canada explains this regime in a document titled "Our

response to British Columbia's Policy Intentions Paper for Engagement: Activities related to spill management", dated April 26, 2018, attached to the affidavit of Carrolyn Rimes, sworn in November of 2018.

[63] The Applicants also emphasize that this federal regime predates the province's new legislation by a number of years. They note that PD 36 was issued in 2016, but it was predated by a similar direction issued in 2013. Thus, there is no gap in the area of emergency planning.

[64] The Applicants submit that the confidentiality concerns they raise in their submissions are not just their concerns, they are the concerns of the federal government as manifested in the directions issued by the Minister. BNSF states:

> 12. Given that the directions have been in force for some considerable period of time, on one hand, and coupled with the comprehensive, detailed and existing federal regulatory framework that deals specifically with the '… protection of the environment in relation to spills …' throughout Canada, it is the Province, through the legislation, which has upset the *status quo* and before the matter proceeds any further, the balance of convenience shifts away from any conditions at all.

[65] Given the above, the Applicants submit that a stay of the Orders will not result in a regulatory vacuum. Moreover, the existence of a "robust pre-existing federal regime that both governs the issues in dispute … and occupies the field of the transportation of dangerous goods and spill response planning for federal undertakings", tips the balance of convenience in favour of the Applicants.

[66] The Applicants also note that the federal government has decided that some information must be provided to the general public respecting the transportation of dangerous goods; however, the type of information to be published is set out in PD 36. Specifically, section 6 of PD 36 requires each carrier to publish on their website a report that includes the percentage of dangerous goods transported by rail and the percentage of each top 10 dangerous good transported in the province (which includes crude oil), and provides an illustration of the manner in which the information may be presented. The Applicants have published on their websites the dangerous goods information that they are required to publish under PD 36. A copy of the relevant webpages was attached to the affidavit of Ms. Rimes.

[67] BNSF also submits that, in addition to the information publicly available on the Applicants' websites, the role of information gathering and spill preparedness has been discharged by the municipal Emergency Planning Officials as well as the representatives of CANUTEC.

[68] Although the provincial government is understandably interested in spill preparedness and response capability, the Applicants submit that the Director has provided no explanation for why the Ministry requires the detailed information sought in the Orders pending the outcome of the appeals. As stated earlier, they note that emergency planning has been at the forefront of the existing federal regulatory regime for years, and there is no evidence – and no compelling reason given – to suggest that the information would enhance the current emergency

planning regime. Nor is there any credible reason why the Ministry requires the information before the appeals are decided.

[69] Regarding the Washington State quarterly report, the Applicants note that this document simply reflects the decision made to publish information in another jurisdiction outside of Canada. They submit that the policy decision to publish certain information by a foreign government has no bearing on the balance of convenience in this case.

[70] Finally, BNSF concludes by stating that there is an "active, robust, detailed and comprehensive emergency planning and preparedness regime already in place that involves, in many aspects, the Ministry itself for obvious reasons." Contrary to the Director's assertion above, there is no indication that the aggregate information that is already available to the Ministry and the public as contemplated by PD 36, is not sufficient, at least on an interim basis pending the outcome of the appeals, to allow the Ministry "to exercise its oversight responsibilities over EMA in the public interest."

The Panel's findings

[71] The Panel finds that the balance of convenience favours granting a stay of the Orders, and maintaining the *status quo*. As argued by the Applicants, once the information is disclosed, such disclosure cannot be reversed.

[72] Regarding the Director's proposal, there is no authority provided for the proposition that a Board order could prevent disclosure of information in the Ministry under the *FOIPPA*.

[73] More importantly, the Panel finds that there is no – or no appreciable - prejudice to the Director from a stay of the Orders without the proposed conditions until the constitutional issues raised by the appeals can be decided.

[74] As the Director notes, the location of the railway tracks in the province is not confidential, the fact that the railways transport these dangerous goods is not confidential, tanker cars with placarding is plainly visible to the public and not confidential, and the information sought is historical. Further, high level information about the dangerous goods transported by rail in the Province and the percentage of the shipments that are crude oil is public information on the railways' websites. High level maps of the railway locations are also publicly available on either the railway companies' websites or on other websites. As a result, the Panel finds that the Director has access to sufficient information to "get the full picture of what substances are being moved where in the province." Having more detailed information may be helpful to the Province during the interim period while the appeals are being heard and decided, but any additional value obtained from that information during that period of time does not outweigh the harm from providing that information before the appeals are decided.

[75] Regarding the Director's focus on informing the public, as he has observed, people living or working in areas near railways that carry dangerous goods generally know that this is happening as the tracks are visible, as are the placards.

There is no evidence of an urgent need to inform the public as anticipated in the Orders before the constitutional issues raised in the appeals are decided.

[76] For these reasons, and the reasons clearly put forward by the Applicants, the Panel agrees that there is no emergency preparedness void that must be filled in the province. The transport of the dangerous goods is covered by federal legislation and by federal directions. Information is provided to designated individuals within other government agencies and approved groups such as CANUTEC. For the limited purposes of these stay applications, the claim that the Director requires this information to support the Ministry's objectives of emergency planning and preparedness has simply not been substantiated.

[77] The Panel finds that, for all of these reasons, the balance of convenience favours granting the stay and maintaining the *status quo* of regulatory oversight by the federal legislative regime, and PD 36, pending the Board's final decision on the merits of the appeals. As argued by the Applicants, once the information is disclosed, such disclosure cannot be reversed.

DECISIONS

[78] The Panel has considered all of the submissions and arguments made by the parties, whether or not they have been specifically referenced herein.

[79] For the reasons provided above, the applications for stays of the Orders are granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

December 3, 2018