Environmental Appeal Board

Citation: *ʔakisq̓nuk First Nation v. Assistant Water Manager*, 2025 BCEAB 6

Decision No.: EAB-WSA-24-A014(b)

Decision Date: 2025-01-27

Method of Hearing: Conducted by way of written submissions concluding on January 17, 2025

Decision Type: Preliminary Stay Application Decision

Panel: Darrell Le Houillier, Chair

Appealed Under: *Water Sustainability Act*, SBC 2014, c. 15

Between:

ʔakisq̓nuk First Nation

Appellant

And:

Assistant Water Manager

Respondent

And:

Tretheway Beach Society

Third Party

Appearing on Behalf of the Parties:

For the Appellant:	Jessica Buhler and Katie Lawless, Counsel
For the Respondent:	Benamm Maughn, Michaela Merryfield, and Aaron Francis, Counsel
For the Third Party:	Glen A. Purdy and Layla Chouchene, Counsel

PRELIMINARY STAY APPLICATION DECISION

Introduction

[1] This preliminary decision concerns an appeal of a Change Approval (the "Approval"), issued by Allanah Gallus (the "Respondent"), an Assistant Water Manager appointed under the *Water Sustainability Act*,[1] on September 10, 2024.

[2] A change approval is a decision made under section 11 of the *Act*, authorizing a person to make changes in and about a stream. Under the *Act*, a stream is defined to include any natural watercourse, including a lake.

[3] The Approval authorizes the Tretheway Beach Society (the "Society") to dredge a portion of Windermere Lake (the "Lake") and to undertake erosion protection along a portion of the shore of Lake, below the high-water mark. These activities are subject to certain requirements and are to benefit the use and operation of a shorefront marina (the "Marina") in the Lake, which is operated by the Society. The Society is the Third Party in this appeal.

[4] The ʔakisq̓ nuk First Nation (the "Nation") appealed the Approval to the Environmental Appeal Board (the "Board"). The Nation is a part of the Ktunaxa First Nation with traditional stewardship responsibilities under the Ktunaxa Nation's legal and governance systems. The Nation is also a band as defined under the *Indian Act*.[2] The Nation argues that the Respondent, when granting the Approval, failed to adequately consult and accommodate the Nation.

[5] The Nation has applied for a stay of the Approval, pending the outcome of this appeal. If granted, the stay would mean that the Approval is of no force and effect until the Board decides the appeal on its merits.

Issue

[6] The issue addressed in this preliminary decision is whether the Board should stay the Approval, pending the outcome of this appeal.

[7] While some of the parties raised questions about the production of documents and the requirement for witnesses to be made available as between the parties for a hearing on the merits of this appeal, I have not addressed those issues in this preliminary decision. I have focused on the Nation's stay application, in respect of which all parties have made submissions. Should the parties wish to apply for orders compelling the disclosure of

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[1] S.B.C. 2014, c. 15 (the "*Act*").

[2] R.S.C. 1985, c. I-5.

documents or the attendance of witnesses at any forthcoming hearing, they will need to bring applications to the Board for such orders, following the Board's processes. The parties making comments to this effect within their submissions on the stay application are not in keeping with those processes and I will not address them further in this preliminary decision.

Applicable Test

[8] The Board has the authority to grant stays of appealed decisions under section 25 of the *Administrative Tribunals Act*.[3] That section of the *ATA* applies to this appeal by application of section 93.1(1)(d) of the *Environmental Management Act*[4] and section 105(4) of the *Water Sustainability Act*.[5]

[9] Historically, the Board has decided stay applications with reference to the tree-part test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC) [*RJR-MacDonald*]. The three-part test requires three questions to be answered affirmatively for a stay to be granted. The questions are:

1. Is there a serious issue to be addressed in the appeal?
2. Will the party applying for a stay suffer irreparable harm if the stay application is denied?
3. Does the balance of convenience favour granting a stay?

[10] The parties referenced this three-part test in their submissions. There is no dispute this is the applicable test and, consistent with the Board's usual practice, I have decided this stay application by applying this test.

Background and Evidence

Factual Evidence

[11] The work authorized in the Approval is to take place from September 11, 2024, to April 30, 2025. This work is to occur under the on-site supervision of a qualified environmental professional (a "QEP") with the authority to shut work down. The Society has contracted with an environmental consultant firm and, from that firm, Sherri McPherson, an aquatic biologist and environmental consultant, has been designated the QEP.

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[3] S.B.C. 2004, c. 45 (the "*ATA*").

[4] S.B.C. 2003, c. 53.

[5] S.B.C. 2014, c. 15.

[12] The Approval also required the Society to install an "isolation system," which in this case comprised of geotextiles anchored to the lakebed on one side and floating atop the water on the other. These geotextiles are intended to allow water to pass through, but not fine particulate, of the kind present in the lakebed at that location, and thus confine any sediments churned up by dredging of the Marina and the approach to the Marina within a contained area (the "Contained Area"). The silt curtains were put in place prior to the Lake freezing over, in September or October 2024. The Nation does not agree that the silt curtains will be effective or that they have been properly maintained or installed.

[13] The work plan for dredging also involved removing mussels and fish from the Contained Area before the Lake froze over, and before the mussels were expected to burrow into the lake bottom for the winter. The intent was to ensure no fish or mussels would be exposed to impacts from dredging, which the silt curtains are to confine to the Contained Area.

[14] There was an incident in October 2024, where there was some disruption of the silt curtains. The parties characterize this incident, and the reliability of what was done to address the disruption, differently. Their perspectives will be addressed when discussing their evidence and submissions.

Certification of Expert Evidence

[15] The Nation and the Society each put forward one expert opinion.

[16] The Appellant sought to qualify an environmental consultant and professional biologist, Jay White. The Appellant applied to do so on an abridged timeframe and the Board granted this request. Based on the credentials put forward, I accept Mr. White as an expert witness in the field of environmental science, particularly associated with aquatic impacts from dredging operations.

[17] The Society sought to qualify Ms. McPherson to refute the evidence provided by Mr. White. Ms. McPherson has been involved in several dredging operations in the Lake, including the planning of the work authorized in the Approval. The Nation did not object to Ms. McPherson's certification as an expert witness and, given her education and work history, I certify Ms. McPherson as an expert in the projection and mitigation of environmental impacts from dredging operations, as well as the dredging project design.

[18] The Nation argued that Ms. McPherson was not sufficiently impartial to provide expert testimony, referencing *White Burgess Langille Inman v. Abbott and Haliburton Co.*[6] In that case, at paragraph 49, the Court notes that a proposed expert witness should not be certified as such "… only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence." In the same paragraph, the Court distinguishes between employment relationships—which, for the

[6] 2015 SCC 23 (CanLII) ("*White Burgess*").

most part, are not grounds for not qualifying an expert—from a "direct financial interest in the outcome of the litigation," which the Court says will be "… of more concern."

[19] In this case, there is insufficient evidence to conclude that Ms. McPherson has a direct financial interest in the outcome of this appeal. The company she works for has been contracted to provide services with respect to the work authorized by the Approval, but she is a contractor, and I am satisfied that this relationship gives rise to lesser concerns even than those that would arise from an employment relationship. Ms. McPherson's work history shows that she does not work only for one client, and it is clear that the Society is engaging in limited work in this area. I am not satisfied that Ms. McPherson is reliant on her employer's contract with the Society. I therefore consider that any concerns about Ms. McPherson's impartiality should go to weight.

[20] While Ms. McPherson's report does not explicitly acknowledge that her duty is to the Board, this is not a disqualifying factor. The opposite is also true: a comment that a proposed expert is aware of and will conduct themselves in accordance with their duties of impartiality and to assist the Board rather than any party does not mean that witness will automatically be accepted as an expert. The Nation's concern goes to weight.

Submissions and Evidence

The Nation's Submission

[21] The Nation argues that there is a serious issue to be addressed in this appeal.

[22] The Nation says that to satisfy the second question under the *RJR-MacDonald* test it must show there is "a meaningful risk of irreparable harm"[7]—that is, harm cannot be remedied if the outcome of the appeal does not align with the outcome of the stay application. The Nation says that where, as here, infringement of constitutional rights is argued, an applicant need only show a "reasonable likelihood of irreparable harm."[8]

[23] The Nation also references case law that discusses the concept of irreparable harm in the context of Indigenous rights. Referencing *Wahgoshig First Nation v. Ontario*,[9] *Taseko Mines Limited v. Tsilhqot'in National Government*,[10] and *Ahousaht First Nation v. Canada (Fisheries and Oceans)*,[11] the Nation argues that impacts to Aboriginal rights, including restrictions on the ability to exercise such rights in preferred places, constitutes irreparable harm. The Nation says that risks to a First Nation's way of life, culture, and

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[7] The Nation references *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120 ("*Potash*"), at para. 61.

[8] The Nation references *Tłı̨chǫ Government v Canada (Attorney General)*, 2015 NWTSC9 ("*Tłı̨chǫ*"), at para. 66–68.

[9] 2011 ONSC 7708 ("*Wahgoshig")*, at para. 51–53.

[10] 2019 BCSC 1507 ("*Tsilhqot'in*"), at para. 93 and 103.

[11] 2014 FC 197 ("*Ahousaht*"), at para. 30–31.

traditions in fishing have been referenced in finding irreparable harm.[12] Further, the Nation argues that irreparable harm will be assumed where Aboriginal rights are at issue and no damages have been claimed.[13]

[24] The Nation says that the work authorized in the Approval will result in irreversible impacts to fish and fish habitat in the Lake, and in irreparable harm to the Nation's Aboriginal rights and title. Specifically, the Nation says they have exercised an Aboriginal right to fish in the Lake since time immemorial and the damage done to fish and fish habitat will impact that right, as well as intergenerational education that takes place while members of the Nation fish together.[14]

[25] The Nation says that salmon and burbot, which were traditionally fished by the Nation, are in decline and members of the Nation are forced to fish for more available species, such as trout.

[26] In support of its argument about impacts to fish and fish habitat, the Nation relies on the opinion by Mr. White. Mr. White summarizes some of the environmental demands on the Lake as a result of surrounding development and notes that the Marina had previously been dredged in 2006.

[27] According to Mr. White, dredging can be done via suction or mechanical means. This project involved mechanical dredging, which can result in resuspension of fine particles in the water, resulting in increased nutrient levels, turbidity (reduced light penetration in the water), contaminant mobilization, and habitat disruption. The scope of impact depends, in part, on whether dredging is of newly deposited material or previously undisturbed sediment. These effects of dredging can result in stress to fish populations, which Mr. White described in some detail.

[28] According to Mr. White, there was insufficient assessment of sediment characteristics, which should have informed the choice of suction or mechanical dredging, particularly given the potential for widespread hydrocarbon contamination in the sediments of the Lake, as described in a previous study by Ecoscape Environmental Consultants Ltd.[15]

[29] Mr. White noted there were uncertainties related to the proposed dredging. Mr. White added that it was not expected that sediments would freeze, given that the Lake's water was not expected to be frozen down to the level of the sediment. Mr. White stated this could reduce the effectiveness of silt curtains that were to be put in place to mitigate

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[12] See *'Namgis First Nation v. Canada (Fisheries, Oceans and Coast Guard)*, 2018 FC 334, at para. 94.

[13] The Nation relies on *Yahey v. British Columbia*, 2015 BCSC 1302 ("*Yahey*"), at para. 40–45, in support of this position.

[14] To establish these (and other) facts, the Nation relies on affidavits provided by Nasuʔkin (Chief) Donald Sam and a former Nasuʔkin, Lorne Shovar.

[15] The report is titled "Lake Windermere Recreational Impacts and Sediment Quality", prepared on January 31, 2023.

environmental effects from dredging. On the other hand, Mr. White identified potential complications for the use of silt curtains if they are frozen in place. He also described potential impacts to mussel populations and stated that mussels not relocated from the area to be dredged would likely be killed. Mr. White noted that the time for the authorized activity set out in the Approval is outside of the usual time that would minimize the risk of impact to fish species.

[30] Mr. White also expressed concerns that the silt curtains were "blown out" after being installed for the dredging operation at issue in this appeal, but before the Lake froze over, in October 2024. Mr. White expressed concern whether the silt curtains were properly repaired.

[31] The Nation also relied on evidence from Mr. Shovar (who has not been qualified as an expert in this appeal), that dredging would result in habitat more favourable to largemouth bass, a fish species that preys upon native fish species in the Lake. This would also, according to Mr. Shovar, result in: disruption of the natural food web in the Lake, impacts on burbot, possible disruption of burbot spawning, and an increased likelihood of eradication of some species from the Lake. Mr. Shovar explains this opinion stems from his Indigenous knowledge, his review of a technical document, and his vocational experience as both Nasu?kin and Director of Lands and Resources for the Nation.

[32] The Nation also explains that its law recognizes the inter-connection of all things. Their law recognizes that the Nation's right to fish depends on its ability to access suitable fish habitat, which can support the fish and the plants and animals upon which the fish rely. Development around the Lake has resulted in an already-existing loss of preferred fishing locations for the Nation.

[33] Overall, the Nation argues that the harm that it will suffer to its Aboriginal rights is irreparable because it is not quantifiable in monetary terms and cannot be recovered. It is an interference with the practice of Aboriginal rights in preferred places, and impacts the Nation's identity, spirituality, laws, traditions, culture, and rights, which are connected to and arise from the Nation's special relationship with the land.

[34] With respect to the third question from *RJR-MacDonald*, the Nation says this relates to which party would suffer more harm from the granting or denying of the application. The Board is to consider the public interest at this stage of the analysis as well, and notes that courts have found that reconciliation with Indigenous communities is in the public interest.[16]

[35] The Nation argues that the balance of convenience favours granting the stay. This would preserve the status quo, while denying the stay would allow the work authorized in the Approval to proceed. The work would likely take place before a hearing on the merits of this appeal could be completed, resulting in the Nation's appeal probably being rendered moot. Carrying out the work would also result in the impacts to Aboriginal rights

[16] *Taseko*, at para. 131, and *Ahousaht*, at para. 30–32.

and title that the Nation say will occur without the benefit of a hearing on the merits or, in their view, adequate consultation and accommodation of their interests.

[36] The Nation argues that, where the only effect of the stay is the postponement of a course of action not previously available, it is prudent to maintain the status quo.[17] Furthermore, in this case, the public interest in protecting the duty to consult and the honour of the Crown outweighs any delays the Society may experience as a result of the stay being granted. Additionally, the Nation notes the Board has previously found that the protection of a First Nation's constitutional rights outweighed the potential of financial harm to another party.[18]

The Respondent's Submission

[37] The Respondent takes no position on the Nation's stay application but says that the facts presented by the Nation are incomplete and need to be heard more completely at the hearing on the merits. The Respondent says the Board should make no findings in this preliminary decision as to whether consultation was sufficient and whether the Respondent met their obligations with respect to consultation in this case.

The Society's Submission

[38] The Society agrees with the Nation that whether there has been a failure of the duty consult raises a serious issue; however, there is insufficient evidence to conclude that this occurred here. The Society also disagrees with the Nation on the second and third questions of the *RJR-MacDonald* test.

[39] With respect to the second question from the *RJR-MacDonald* test, the Society says that the appropriate question to answer is whether there is a "reasonable probability" that the applicant is likely to suffer irreparable harm if the stay is not granted, not the lesser threshold referenced by the Nation.[19] The Society argues that this threshold does not change because the applicant is asserting an infringement of constitutional rights, referencing *Chief Kathi Dickie v. Assistant Regional Water Manager*.[20] The evidence supporting a stay must be reliable and relevant.[21]

[40] The Society says there is no evidence to support any impairment or impedance of the Nation or its members from exercising their Aboriginal rights. Furthermore, the Society says there is no evidence to support that the Nation had any unaddressed

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[17] *Taseko* at para. 112.

[18] *Fort Nelson First Nation v. Assistant Regional Water Manager*, 2014 BCEAB 9 (CanLII), at para. 16, and *Nak'azdli Band Council v. Deputy Minister, Pesticide Control Act*, 2003 BCEAB 27 (CanLII), at para. 11.

[19] The Society references *Deep Water Recovery Ltd. v. Director, Environmental Management Act*, 2024 BCEAB 17 (CanLII) ("*Deep Water*") in support of its position.

[20] 2012 BCEAB 19 (CanLII).

[21] The Society references *Plantinex Inc. v. Kitchenuhmaykooshib Inninuwug First Nation*, [2007] O.J. No. 1841 (No. 2), at para. 156.

concerns with the Approval when it was issued, that they had sought further consultation, or that the scope of consultation provided was inadequate.

[41] Recognizing that Mr. Shovar provided evidence on that point, the Society says Mr. Shovar was not advanced as an expert and his opinion on the potential impacts of the work authorized by the Approval should not be given weight.

[42] With respect to Mr. White's evidence, the Society relied on affidavit evidence provided by Randall Pasay, a director and the Secretary of the Society. Mr. Pasay stated that Mr. White did not review the environmental management plan associated with the Approval, did not have an accurate understanding of the substrate present at the site to be dredged, and did not understand that most of the silt curtains to be used in connection with dredging operations were new.

[43] The Society also advanced the opinions of Ms. McPherson in contrast to those advanced by Mr. White. The Society argues that I should prefer Ms. McPherson's opinions for two reasons: first, she has greater familiarity with the area of the project and, second, she has recently been involved with other, similar dredging operations.

[44] Ms. McPherson stated that the lakebed is predominantly sand and fine particles, which do not raise concerns about particulate filling interstitial spaces. Furthermore, dredging is to take place while the lake is frozen over, which alleviates some concern around turbidity. Ongoing turbidity monitoring during dredging will ensure that the silt curtains are effective, and if they are not, work will cease to ensure whatever failures exist are addressed. Additionally, Ms. McPherson described site-specific work done to ensure that the silt curtains were properly installed prior to the Lake freezing, and she explained that the silt curtain installation is projected to withstand freezing conditions on the Lake (consistent with prior projects on the Lake).

[45] Ms. McPherson stated that some silt curtains had previously been used on another project in the Lake but did not need to be decontaminated as they were used in the same water body without being affected by any spills. Ms. McPherson advised that these curtains had been repaired and retrofitted as needed to be used again. She stated that these pre-used curtains were placed in areas of least water energy, and thus least risk of damage. She denied their use was inappropriate.

[46] Ms. McPherson also addressed the October 2024 event, after the curtains were installed for this project, before the Lake froze. She denied the curtains had been "blown out," but acknowledged that after a storm their anchoring had been increased, as it was deemed insufficient. She stated that it is not unusual to improve anchoring after installation of silt curtains.

[47] Ms. McPherson also stated there were no concerns about direct impacts to fish, including fish in early phases of life, from dredging because of the use of silt curtains and the salvage of fish from the Contained Area before the Lake froze over. These silt curtains were included to address the likelihood that the Lake will not be frozen to the depth of the sediment over the entire work area. Furthermore, fish will be able to move away from any

noise disturbance, which would be less than that which is associated with boat traffic in and around the Marina during warmer months.

[48] Ms. McPherson also described working on mapping burbot spawning and rearing grounds in the Lake, and not having observed winter angling in or around the Contained Area. She advised that while work was underway, the unfrozen water would be observed through the ice (if possible) to check for burbot, and any anglers would be asked to show their catch, so she could check for burbot. Should evidence of nearby burbot be found to exist, Ms. McPherson advised that criteria for instantaneous turbidity would be used as the turbidity benchmark during dredging, to ensure the effectiveness of the silt curtains and that more exacting turbidity standards would be used to ensure minimized impact to burbot. Ms. McPherson also stated there was no evidence that any mussels remained in the Contained Area.

[49] Ms. McPherson says that mechanical dredging was selected as it has been historically used. She says that suction dredging would not be practical and effective in the work location at issue, and in any event, all dredging operations result in resuspension of fine particulate, such that mitigation strategies are required. Ms. McPherson stated she understood the nature of the sediments from carrying out dredging operations on the Lake previously and from site visits.

[50] With respect to the efficacy of silt curtains, Ms. McPherson says they are an established technology and were used during dredging at another marina (the "Second Marina") in 2021. According to the Society, the Nation had supported those dredging operations. Ms. McPherson indicates that the dredging authorized in the Approval is using similar methodology to other dredging projects on the Lake, with which she has been involved and which featured silt curtains frozen to the bottom of the Lake and effective isolation of resuspended solids (as determined by turbidity monitoring during those projects). She says, in any event, the installation of the silt curtains should be sufficient given the energy of the water in the Lake. Ms. McPherson noted that the 2021 dredging for the Second Marina used silt curtains.

[51] Furthermore, Ms. McPherson says that, while the work authorized in the Approval is outside of the window of least risk, work can nonetheless proceed if the risks to fish, mussels, and sensitive habitat is properly mitigated. In this case, she stated that the risk to early fish in early life-stages is low because of the type of substrate present in the dredging area, the use of a silt curtain, and the low probability or burbot spawning near the Contained Area. Ms. McPherson says that, while some impact to habitat is inevitable with dredging, in this case the area has been minimized by the scope and isolation of the Contained Area. Additionally, the dredging will mitigate sediment disturbance from propellor wash and impacts on a larger footprint.

[52] Ms. McPherson added that lakebed sediment around the Marina is predominantly carried in by a stream north of the Marina and then pushed southward in foreshore deposition by wind-generated waves. Ms. McPherson stated that the proposed dredging operation was not expected to significantly impact sediment movement within the Lake,

while sediment disturbance from boat activity in and around the Marina is expected to decrease. Environmental impacts from moorage and docking throughout the Lake is also expected to decrease.

[53] Ms. McPherson indicated that a historical review of activities at the Marina did not indicate a concern for hydrocarbon contamination, nor did sampling of lakebed sediment around the Marina in 2022. In any event, contaminated sediment would not be dispersed because of the use of silt curtains.

[54] According to Ms. McPherson, as dredging operations are ongoing, turbidity monitoring will be used to ensure the efficacy of the silt curtains and to determine when those barriers can be removed, once resuspended sediments have settled out within the Contained Area. This addresses effects to fish habitat, in her view.

[55] Overall, the Society argues that the Nation has not established they are likely to suffer irreparable harm if the stay is denied. The Society says the Nation has argued that it has lost access to areas of preferred fishing as a result of historical development, not the work authorized in the Approval. The Society also argued that the Nation contributed to the very environmental issues that the Nation says are causing significant harm by leasing reserve land out for development, which ultimately included the Second Marina. Additionally, the Society says that if there were impacts from the dredging of the Second Marina in 2021, the Nation could have described them but it did not do so.

[56] With respect to the third question in the *RJR-MacDonald* test, the Society says that a stay could mean that the work authorized by the Approval will not occur within the timeframe described in the Approval, or potentially at all. Not doing this work would mean continued scouring of the lakebed and mussel habitat by boat traffic into, out of, and within the Marina, without protection offered by silt curtains. Furthermore, allowing the work to proceed could reduce the environmental impact of boats mooring or docking at different locations on the Lake.

[57] Furthermore, the Society notes that cases involving Aboriginal rights and title can take years to resolve in court and argues that stays over such durations may cause unnecessary prejudice to parties and disincentivize the successful party from cooperating.[22]

[58] The Society says that the work authorized in the Approval are, in large part, to address repeated and ongoing occurrences of boat propellers striking the bottom of the Lake while moving into, out of, and within the Marina, resulting in sediments being stirred up. The work would also allow Marina to operate with the minimum water depth recommended by British Columbia's Ministry of the Environment.[23] The Society argues

[22] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 14.

[23] To support these assertions, the Society relies upon affidavit evidence from Mr. Pasay.

that the projected impacts associated with the work authorized in the Approval are "minimal," as described in Ms. McPherson's report.

[59] The Society says that it has spent a total of roughly $128,000 to secure, enact, and defend the Approval. The Society says it will have incurred some of these expenses for no reason if the Approval cannot proceed as planned.

The Nation's Reply

[60] The Nation says that it does not need to prove the merits of the case—in this case, the inadequacy of consultation—for the purpose of the stay application. Its pleadings must only raise a serious issue to be decided on the merits. The Nation says the Board need not make any findings of fact pertaining to the adequacy of consultation in this case. The Nation adds that it is immaterial whether it objected to the Approval other than through the appeal process but, if this is relevant, the Nation says it had insufficient time to properly consider and object to the Approval before it was issued.

[61] The Nation disagrees that the stay could be a final determination of the appeal. The *Act* allows a water manager to extend the term of a change approval. The Nation also notes that the appeal is not a claim to rights and title, and it would be inappropriate for the Board to address this issue. As such, the Society's concern about this matter extending for years is unfounded.

[62] In addition to the objections to Ms. McPherson's impartiality, summarized previously, the Nation also argued that Ms. McPherson cannot be objective where her opinion references work she has previously done, for the same and other clients.

[63] The Nation also notes that turbidity monitoring cannot safeguard against impacts outside the Contained Area, merely identify impacts so that they can be addressed. The Nation also relies on the evidence of Mr. White, whose report indicates that the Lake is a widening of the Columbia River and that it is not common practice to use silt curtains in river systems (although he does note that there are silt curtains designed for this purpose).

[64] The Nation also notes that Mr. Pasay has not been presented as an expert witness and any opinions he advances on matters requiring expertise should be disregarded by the Board.

[65] Finally, with respect to the balance of convenience, the Nation argues that it will likely suffer irreparable harm if the work authorized in the Approval proceeds. Additionally, the Nation argues that any harm caused by the work will impact the whole of the Lake. The Nation adds that, while the Society has described loss of funds if the stay is granted, this does not establish that financial harm will flow, or that further costs will be required.

Findings and Decision

[66] In deciding whether the Approval will be stayed pending a decision on the merits of this appeal, I will address the three-part test from *RJR-MacDonald*, as set out earlier in this decision.

Is there a serious issue to be addressed in the appeal?

[67] The Nation and the Respondent agree there is a serious issue to be addressed in this appeal. The Society agrees that, in principle, an allegation of inadequate consultation of a First Nation is a serious issue, but says that the available evidence does not establish that consultation was inadequate in this case.

[68] The Nation does not need to demonstrate the inadequacy of the consultation for the purposes of the stay application. That is a question to be addressed when this appeal is decided on its merits. It is sufficient for the purposes of the first part of the test that the Nation has raised serious issues in their pleadings, and there seems to be no dispute about whether those issues are validly raised in this appeal.

[69] The Society's concerns about whether there were any remaining issues for consultation and accommodation, whether the Nation raised any concerns or objections about the Approval, and whether it has established that the Respondent inadequately consulted or accommodated with the Nation, are all questions to be addressed when the appeal is decided on its merits.

[70] I agree with the Nation that the first question is a low bar. I find that the Nation has satisfied this requirement of the test from *RJR-MacDonald*: there is a serious issue to be addressed in the appeal.

Will the Nation suffer irreparable harm if the stay application is denied?

[71] The Nation relied on *Potash* and *Tłı̨chǫ* in arguing that the second question from *RJR-MacDonald* can be satisfied if there is a meaningful risk of irreparable harm. Both of these cases recognize the differing standards of proof that have been required in different jurisdictions and at different times by Canadian courts in deciding stay applications. The standard of proof needed to establish irreparable harm varies across jurisdictions, even within Canada.

[72] In *Deep Water*, I previously rejected the standard of "reasonable possibility" when answering the second question under the *RJR-MacDonald* test. As I noted in that case, proof before the Board is generally on a balance of probabilities and there must be sufficient reason to depart from that standard. I do not accept that courts in some jurisdictions doing so is sufficient reason for the Board to do so. A stay is an extraordinary and discretional remedy that falls within the inherent jurisdiction of some courts (those with such jurisdiction), while the Board lacks inherent jurisdiction.

[73] For the same reason, I do not consider it appropriate for the Board to collapse the three-part test for stays into something else, where the second question is minimized so

that the third factor can be the focus of the analysis. A persuasive authority has not been provided by the parties indicating that the Board should do so, merely that some courts have done so. As above, I do not consider that some courts are shifting the focus of their analysis in stay decisions to be sufficient for the Board to do so.

[74] As a result, I will apply the three-part test described in *RJR-MacDonald* and base my findings on a balance of probabilities. In referencing this standard of proof, I am aware that the Nation has also argued that irreparable harm should be presumed in this case. Referencing *Yahey*, the Nation says such a presumption is merited where constitutional rights have allegedly been infringed and where damages are not the primary remedy. The analysis in *Yahey* relies on, and extends the reasoning in, paragraph 342 of *RJR-MacDonald*.

[75] The context for that paragraph is important. Paragraphs 341 and 342 of *RJR-MacDonald* state:

> [341] The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.
>
> [342] This Court has on several occasions accepted the principle that damages may be awarded for breach of Charter rights: [citations omitted]. However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by the applicant following a refusal of relief, even through quantification, constitutes irreparable harm.[24]

[76] *Yahey* relies on this analysis where, at paragraphs 43–45, the Court states:

> [43] In any event, the Court in *RJR-MacDonald* referred to the difficulty of assessing irreparable harm in the case of an application to restrain an alleged breach of a right under the [*Charter*]. The Court said at 342 that in many cases it will be appropriate to assume that the loss to be suffered by the applicant constitutes irreparable harm.

[24] This passage refers to the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Part I of the *Constitution Act, 1982* (the "*Constitution Act, 1982")*, which is Schedule B to the *Canada Act (1982)* (UK), 1982, c. 11.

> [44] This case is comparable in that, while not a *Charter* case, it involves an alleged infringement of a constitutionally protected right. Existing aboriginal and treaty rights are recognized and confirmed by s. 35 of the *Constitution Act, 1982*. As with a *Charter* case, damages are not the primary remedy in such case and, in fact, [the applicant First Nation]'s Notice of Civil Claim does not include a claim for damages.
>
> [45] I find this to be at the very least a case where harm must be assumed, for purposes of the application, to be irreparable.

[77] The *Yahey* analysis is a clear extension of the analysis from *RJR-MacDonald* and the proposition that, where financial harm is demonstrated, it may be properly assumed to be irreparable where it is unclear at law, whether adequate compensation could be obtained at trial. *Yahey* extends that analysis, from one that depends on a lack of clarity in law (as it existed at that point), to a prospective assertion that a presumption of irreparable harm may be appropriate where constitutional rights are allegedly infringed and damages are not the primary remedy.

[78] *Yahey* is a decision of the British Columbia Supreme Court, a court of inherent jurisdiction. As I have said above, I take a cautious approach when t applying decisions of such institutions that evolve the law to the Board, without a clear indication that such evolutions ought to be applied by administrative bodies such as the Board. As a result, I am not satisfied that the significant expansion of the presumption referred to in paragraph 342 of *RJR-MacDonald* should be applied by the Board.

[79] I am particularly concerned about adopting the *Yahey* approach in the context of the Board's jurisdiction. The Board decides appeals of certain statutory decisions, and the remedies available are prescribed by the relevant legislation. The Board's limited remedial powers mean the scope of its constitutional remedies is different than a Court; in *Yahey*, the Court provided declaratory relief, which the Board cannot do. The Board also does not have the jurisdiction to award damages. If the Board were to apply the presumption as described in *Yahey*, this would mean that every case in which constitutional rights were alleged to be infringed, irreparable harm would be presumed. Already, constitutional infringement is likely to satisfy the low threshold of the first question under the *RJR-MacDonald* analysis in all but outlier cases. A stay decision in these circumstances would ultimately hinge on a balance of convenience. I do not consider this to be consistent with the extraordinary nature of this remedy and with the Board's function as a quasi-judicial institution.

[80] For these reasons, I will consider the question of whether the Nation will suffer irreparable harm if the stay application is denied on a balance of probabilities.

[81] This is not to say, however, that the consideration of Aboriginal rights or title is unimportant to assessing the question of irreparable harm. I agree with the Nation and with the analyses in *Wahgoshig* and *Tsilhqot'in*, that irreparable harm may be difficult to measure where it concerns Aboriginal and treaty rights, particularly where such harm can

result to way of life, identity, spirituality, culture, tradition, and a connection to the land that may be difficult for non-Indigenous individuals to fully understand. That said, I do not need to make findings related to the Aboriginal rights and title asserted by the Nation in order to reach a conclusion on irreparable harm, and I decline to do so. It is sufficient for the purpose of this application that the Nation has asserted that their Aboriginal rights and title would be impacted by the Approval in order for me to consider them in the context of assessing irreparable harm.

[82] I must approach the Nation's assertions of irreparable harm with care, understanding that such harms may not be readily evident to me, and I should consider the evidence presented carefully, in assessing whether irreparable harm is likely. This does not mean a different burden of proof exists for the Nation, but that the evidence presented must be assessed carefully and with appropriate regard to the relevant Aboriginal rights and the relevant Indigenous values and legal orders implicated by the pleadings in this case.

[83] In this case, the Nation argues that its Aboriginal rights and title (both fishing and otherwise) will be irreparably harmed by impacts to fish and fish habitat in the Lake, resulting from the dredging authorized by the Approval. The context is important, the Nation argues, as already its ability to exercise its fishing-related rights have been restricted by development in and around the Lake and declining populations of salmon and burbot in the Lake. The Nation has not argued, in this stay application, that its rights and title will be impacted by the Approval, other than through environmental impacts stemming from the dredging operations authorized in the Approval.

[84] The Nation relies on evidence from Mr. Shovar in arguing that there are likely environmental effects associated with the dredging operations authorized in the Approval. However, I have not qualified Mr. Shovar as an expert witness in this proceeding. The sources of his knowledge are insufficiently described in his affidavits and his evidence was not tendered in accordance with the Board's rule for expert evidence.[25]

[85] The Nation also relied on evidence from Mr. White, whom I have certified as an expert witness. Much of Mr. White's report relates to general information about possible environmental impacts associated with dredging. While this provides useful background information, such general information does not support a finding that, in this particular case, environmental impacts to fish or fish habitat is likely. As the irreparable harm alleged by the Nation stems from such environmental impacts, it follows that this aspect of Mr. White's report does not assist in answering the second question from *RJR-MacDonald*.

[86] Mr. White's report also raises questions and concerns about the dredging methodology given his concern about the lack of information about the sediment in the area, the risk to any mussels not removed from the Containment Area, the efficacy of silt curtains in the Lake (particularly during freezing weather) and the condition of the silt

[25] Rule 25 of the Board's Rules.

curtains used in this case. I consider these concerns to have been addressed in Ms. McPherson's report.

[87] While I appreciate the contractual relationship between Ms. McPherson's employer and the Society, and while she did not explicitly acknowledge her duty of impartiality and her duty to aid the Board and not any parties to this appeal, I nonetheless found her evidence persuasive. Ms. McPherson's analysis was clear and well-explained. It was based on her experience conducting dredging operations in the Lake previously, including at the Second Marina, and on a variety of studies and investigations. Her report demonstrated a solid understanding of the sediments present on the lakebed and the associated patterns of sediment deposition and transport within the Lake.

[88] Furthermore, Ms. McPherson addressed not only Mr. White's general concerns about dredging operations, but also provided detailed and compelling explanations for why the particular silt curtains being used in this case were selected, the steps that had been taken to ensure they would work properly, and prospective steps to be taken while the work is underway to ensure minimal environmental impacts. I am satisfied that Ms. McPherson had a sufficient understanding of the sediments, currents, and site-specific characteristics required to make well-informed decisions on the mitigation of environmental impacts from the planned dredging operations in and around the Marina. I find that Ms. McPherson adequately mitigated anticipated environmental impacts associated with the dredging operations, such that undertaking this work outside of the window of minimal risk to relevant fish species is not contra-indicated. I am also satisfied that reasonable steps were taken to remove fish and mussels from the Contained Area and to confine environmental impacts to the Contained Area. On a balance of probabilities, I conclude that it is unlikely there will be the sorts of negative impacts to fish and fish habitat that the Nation argues impacts its Aboriginal rights (and the rights of its members).

[89] I also note that, based on the strength of Ms. McPherson's evidence, even if I had adopted the *Yahey* approach that the Nation proposed, and assumed that the Nation would suffer irreparable harm as a result of the activities authorized in the Approval, I would have found that presumption to be rebutted. Ms. McPherson's evidence persuasively severs the causal link between the work to be undertaken under the Approval on one hand, and any impact to the rights of the Nation and its members (at least those rights described in the context of this stay application) on the other. Based on her evidence, I conclude that the Nation is unlikely to suffer irreparable harm if the Approval is not stayed pending the outcome of the appeal.

[90] In reaching this conclusion, I have not relied on the evidence of Mr. Pasay. I agree with the Nation that Mr. Pasay was not put forward as an expert witness and, in any event, I did not need to consider his evidence in reaching a conclusion on the second question from *RJR-MacDonald*. I similarly have not needed to rely on whether the Nation objected to, supported, or noted any negative environmental impacts associated with the Second Marina being dredged several years ago. There is little information available on that

historical dredging project and I consider this line of evidence to be of limited reliability. I have not needed to refer to it.

[91] For the reasons described above, I find that the Nation has not established on a balance of probabilities that it will suffer irreparable harm if the stay is denied. Beyond that, I find that the Society has established on a balance of probabilities that the Nation will not suffer irreparable harm if the stay is denied.

Does the balance of convenience favour granting a stay?

[92] Given that the Nation did not succeed in establishing that it is likely to suffer irreparable harm if the stay is not granted, I do not need to consider the balance of convenience. Accordingly, I have not addressed this question.

DECISION

[93] For the reasons provided above, I deny the Nation's stay application. While there is a serious issue to be tried, I have found that the Nation is unlikely to suffer irreparable harm with the denial of the stay.

[94] In reaching this conclusion, I have considered all the evidence, submissions, and authorities provided by the parties, whether or not they are specifically mentioned in this decision.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board