Appeal File No.: 2015-WAT-004

ENVIRONMENTAL APPEAL BOARD

IN THE MATTER OF AN APPEAL UNDER SECTION 92 OF THE *WATER ACT*, R.S.B.C. 1996, C. 483

BETWEEN

CITY OF NANAIMO

APPELLANT

AND

COMPTROLLER OF WATER RIGHTS, *WATER ACT*

RESPONDENT

WRITTEN SUBMISSIONS OF THE RESPONDENT FOR A STAY PENDING A DECISION ON THE APPEAL

Filed by:	The Respondent Comptroller of Water Rights
To:	The Appellant City of Nanaimo
Order Sought:	That the Appellant's stay application be dismissed.
Material relied upon:	Affidavit #1 of Robert McLean made June 15, 2015 Affidavit #1 of Scott Morgan made June 15, 2015 (and remade June 17, 2015) Book of Authorities

SUBMISSIONS OF THE COMPTROLLER

1. The Appellant seeks the stay of an order issued under s. 88(1)(d) of the *Water Act*, R.S.B.C. 1996 (the "Act") on April 29, 2015 (the "April 29 Order") by Glen Davidson, P.Eng., Director and Comptroller of Water Rights, Water Management Branch, Ministry of Forests, Lands and Natural Resource Operations (the "Comptroller"), to the City of Nanaimo (the "City") in response to its failure to meet the requirements of section 7.1 of the *British Columbia Dam Safety Regulation*, B.C. Reg. 44/2000, as amended by B.C. Reg.163/2011 (the "Regulation"), with regard to the Middle Chase River Dam ("Middle Dam") and the Lower Chase River Dam (the "Lower Dam"), together the "Colliery Dams".

2. In these submissions, the Respondent presents the facts relevant to the Board's consideration of the Appellant's stay application, then responds to the Appellant's submissions for each stage of the legal test for granting a stay, and finally demonstrates why such stay should not be granted by the Board.

Part 1: Factual Background

3. The City is the holder of water licenses on Chase River, including Conditional Water Licenses (CWL) C61423 and 61424, both of which authorize dams to store water for land improvement purposes in relation to the Colliery Dams.

4. As holder of the current licenses for these dams, the City is the dam owner of Middle and Lower Dams under the Regulation. The Regulation applies to both dams by virtue of s. 2 due to their height and the amount of water stored. There is no dispute between the parties that the Regulation applies to both Middle and Lower Dams.

5. As dam owner, the City is subject to the obligations and requirements of any dam owner as set out in the Act and Regulation without exception.

A. Events Concerning the Parties and Colliery Dams

6. Dam failure consequences classification is determined in accordance with the criteria in Schedule 1 of the Regulation which include identifying the population at risk, the potential loss of life, damage to environment and cultural values, and potential infrastructure and economic losses. The classifications are "low", "significant", "high, "very high", and "extreme".

7. Currently, the consequence classifications for the Colliery Dams are "very high" for Lower Dam and "high" for Middle Dam.

8. The primary hazard associated with the Colliery Dams is that their spillways are severely undersized, which means inadequate flood routing capacity in flood events of a certain magnitude. The potential consequences of this are overtopping of the dams leading to dam failure and endangerment of the public, infrastructure, resources and environment downstream. As the following paragraphs will illuminate, this knowledge is not new to the City and the City had long since obtained the information it required to take steps to address the safety hazards identified by its engineering and other consultants prior to the April 29 Order now under appeal.

Early 2000's

9. In 2002, the City obtained an engineering report from Water Management Consultants (WMC) entitled *Middle and Lower Chase River Dams Spillway Hydrology Study* which concluded the spillway capacities for both dams are greatly undersized. In reaching this conclusion, the authors refer to a review of the dams completed ten years earlier which also identified issues respecting inadequate spillways.

Affidavit #1 of Robert McLean ("McLean Affidavit"), Exhibit "I", pages 5-7

10. In 2003, Golder and Associates ("Golder") conducted a Dam Safety Review for the City for each of Middle Dam and Lower Dam. Golder's reviews identified inadequate spillway capacities that meant they were not up to design standards and the consequent inability of the dams to handle the specified flood events. Again, Golder references earlier studies that had identified the same issue.

Affidavit #1 of Scott Morgan ("Morgan Affidavit"), Exhibit "B", page 33 (Middle Dam Review), page 26, 34 (Lower Dam Review)

11. In 2010, EBA Engineering Consultants Ltd. conducted a seismic hazard assessment for the City. The resulting report notes, among other things, the presence of a school, daycare and residences in the inundation zone. Many of the reports' recommendations are in relation to the anticipated completion of an inundation zone study.

Morgan Affidavit, Exhibit "C', page 56

2012 Inundation Study and the City's Plans to Remove the Dams

12. On September 12, 2012, Associated Engineering completed the *Chase River Dam Breach Flood Inundation Study* for the City which identifies several serious hazards posed by the potential failure of the dams. These include casualties in the range of 30-60 people in the event of a flood-related dam failure and direct economic losses in the range of $40-$46 million. The study also describes the area downstream of Lower Dam as follows: "this areas has urbanized and is now largely occupied by single family residential homes, but a large school (John Barsby Community High School) and a private daycare operation (Little Ferns Daycare) are also present only a short distance from the Chase River."

Morgan Affidavit, para. 11 (and Exhibit "D", pages 1-1, 7-1)

13. As indicated in the Appellant's Written Submissions at paragraphs 5-14, the City's plan of action in response to the unacceptable risk posed by the Colliery Dams from October

2012 onward was to remove the Colliery Dams. However, this was met with community opposition.

14. On July 30, 2013, the Comptroller accepted the request of the City to put its application to remove and replace the Colliery Dams on hold pending community consultation. But the Comptroller indicated concern about delays in the plans to mitigate the ongoing risk and urged the City to quickly implement a plan.

15. On August 7, 2013, the City's Council voted to cancel an existing tender for removal of the Colliery Dams (Appellant's Written Submissions, paragraph 16).

Protracted Investigations and Deliberations on Remediation (Summer 2013-2014)

16. During the following year and a half, the City extensively explored options aside from removal of the Colliery Dams and obtained numerous studies and reports to this end. There was also continuing communication from the Dam Safety Section ("DSS") and the Comptroller to the City indicating concern with the delay in arriving at a plan to address the ongoing safety hazards of the dams.

17. In letters dated August 28 and October 10, 2013, School District 68 expressed concerns to both the Minister and the Mayor of Nanaimo as the John Barsby Community School is downstream of Lower Dam and in the inundation zone. In particular, the School District was distressed due to the City Council's decision to cancel plans to remove the dams because it exposed the school to the threat of loss of life and damage.

18. On September 9, 2013, the City's Technical Committee was formed and charged with identifying an environmentally minimally invasive, cost and time effective, remediation solution for Middle and Lower Dams to meet safety standards. The Committee had the mandate of developing a permanent solution to the public safety problem to be put in place in 2014 if possible and not later than 2015.

19. On October 1, 2013, the Comptroller attended a meeting in Nanaimo with the City and advised that he would be considering the possibility of an Order under the Act due to concerns with the delay with the City coming up with a long term plan for addressing risks associated with the Colliery Dams.

20. As reported to the Comptroller, the engineering firm Golder Associates ("Golder") was retained to be the City's consulting engineers and technical advisor to the City Council's Technical Committee. Consequently, Golder conducted investigations related to the Colliery Dams and respecting remediation in particular.

21. On March 4, 2014, Golder presented four remediation options at a meeting attended by DSS staff and City staff, a representative from the Snuneymuxw First Nation (which had been involved in consultations with the City for over a year), among others. The options presented were to enlarge the spillway, build an auxiliary spillway (swale), labyrinth spillway, or an overtopping protection approach. Golder also advised of an upcoming publication by the US Federal Emergency Management Agency (FEMA) on overtopping approaches that was due out in the summer. The City identified the labyrinth spillway as the preferred option and the overtopping approach as the secondary option.

22. On April 24, 2014, the Comptroller agreed in principle, pending a final report from Golder on the technical rationale, to lower the consequences classification for the dams from "extreme" to "very high" (Lower Dam) and "high" (Middle Dam).

23. Thereafter, Golder produced several studies and reports in 2014 for the City. The reports include:

    a. *Report on Colliery Dam Stability* (July 25, 2014);
    b. *Report on Colliery Dams Hydrology and Hydraulics* (July 25, 2014);
    c. *Report on Colliery Dams Risk Assessment* (July 25, 2014);
    d. *Report Colliery Dams Remediation Options* (August 29, 2014); and
    e. *Colliery Dams Consequence Classification* (November 21, 2014).

24. These reports build on the already existing foundation of reports and information the City had obtained respecting the hazards associated with the Colliery Dams and how best to address them. In particular, Golder's August 29, 2014, *Remediation Options* report further elaborated on each of the four options that had been presented on March 4, 2014.

25. Over the remaining eight months of 2014, the Technical Committee made reports to Council essentially urging it to commit to a remediation approach based on the information gathered thus far, but to no avail. The Council voted down proceeding with either labyrinth or overtopping approach and would only commit to the further review of an auxiliary spillway (see the Appellant's materials at page 135, Exhibits "BB", "CC", and "DD" of the Affidavit #1 of Chris Jackson).

Futile Pre-Order Efforts to Prompt the City to Act (2015)

26. At the beginning of the year, Golder produced a report dated January 16, 2015, *Auxiliary Spillway – Conceptual Design* reconfirming that this option is feasible for Lower Dam.

27. On January 23, 2015, the Comptroller confirmed that he was accepting Golder's recommendations about lowering the consequence classification of Lower Dam to "very high" and Middle Dam to "high", but also required the City to take steps as outlined in s. 7.1 of the Regulation, to wit: prepare a revised plan that identifies and prioritizes actions required to correct the safety hazards at the Colliery Dams and provide a timeline for completion and to implement the plan in a timely manner. The deadline for submission of this plan was February 27, 2015.

28. City staff were enthusiastic about the auxiliary spillway design as presented in the January 16, 2015, Golder report and brought the report and a recommendation to City Council on February 2, 2015, to proceed with that remediation option, noting that it is estimated to be two thirds of the cost of the labyrinth spillway or overtopping option and had the potential for further cost savings.

29. There appeared little left for the City to do but to finally move forward by picking a remediation option for Lower Dam and implementing it.

30. Despite this recommendation, the City Council voted on February 6, 2015, not to proceed with the auxiliary spillway option and instead voted to continue the protracted deliberations and "permit more time to investigate and prepare a revised plan for any required remediation when determined". The City then wrote to the Comptroller and advised they would not be able to meet the deadline of February 27 to submit their revised plan because of the motions passed at the Council meeting. There was no explanation of why the City could not or would not avail itself of the auxiliary spillway option aside from the Council simply voting not to and there was no indication of any concrete alternative plan.

31. On February 25, 2015, the Comptroller wrote to the City advising again that they must select a remediation option for Lower Dam and submit a plan respecting the remediation of Lower Dam and a plan respecting any action required for Middle Dam, and implement both plans within a reasonably expeditious timeframe in accordance with the Regulation. The Comptroller also granted the City a one month extension of the original timeframe to March 27, 2015 (the City had previously requested this as a Council member was ill).

32. Again City staff made efforts in a March 16 report to the City Council to get the Council to bring an end to their deliberations and act by directing staff to:

> Install an auxiliary spillway for the Lower Dam and provide a plan for Middle Dam that complies with the Regulation, plus ensure deadlines and requirements outlined in the Comptroller's letter of February 25, 2015, are met; or
>
> Pursue the labyrinth spillway or overtopping options instead of the auxiliary spillway.

33. Again, City Council did not heed the recommendation of the City staff at its March 16, 2015, Council meeting. Not only did it fail to select a remediation option but it voted

down a motion that included ensuring the City would meet the Comptroller's deadlines and requirements outlined in the February 25 letter. That is, the Council literally voted not to comply. Instead, the Council voted to take steps in relation to the dams that did not involve any remediation at all and then "confirm" with the Comptroller that this was somehow acceptable.

34. On March 17, 2015, the City wrote to the Comptroller advising of the Council's motions and then on March 27, 2015, submitted plans to the Comptroller in relation to the Colliery Dams that involved no remediation at all. The Comptroller was never provided any explanation as to how taking no action in relation to remediating the Lower Dam could bring the City into compliance with the Comptroller's requirement that the City take action in relation to remediating Lower Dam (amongst other requirements).

The April 9 and 29 Orders, and GSI's Overtopping Approach

35. The Comptroller issued an Order on April 9, 2015, advising the City was not in compliance with the Regulation as none of the information requested in the Comptroller's correspondence of February 25 had been received. The Order required, among other things, that the City select (from available options identified by the City's consultants) either the auxiliary spillway design or the labyrinth spillway design for Lower Dam and substantially complete the remediation of Lower Dam by October 15, 2015 (the "April 9 Order").

36. Over the next month or so, rather than select one of these specified options for which the City already had the necessary reports, studies and designs on which to proceed, the City returned to the idea of an overtopping protection approach for Lower Dam. The overtopping protection approach had already been put forward by Golder in the spring of 2014 (at the March 4, 2014, meeting) and summer of 2014 (Golder's *Remediation Options* report of August 29, 2014), and by GeoStabilization International (GSI) during a presentation to the City Council on August 11, 2014.

37. On April 16, 2015, the City wrote to the Comptroller advising of a motion passed by the City's Council on April 13, 2015, to file an appeal of the April 9 Order with the Environmental Appeal Board and suggesting the City make a presentation to DSS outlining an overtopping remediation approach of GSI presented by Councillor Kipp at the April 13, 2015, Council meeting. The City requested that the Comptroller amend the April 9 Order to allow for consideration of GSI's overtopping approach proposal and that further time be granted to develop the proposal.

38. The presentation to DSS as suggested by the City occurred on April 22, 2015, with various DSS staff, the Comptroller, various City Council members and staff, and GSI. GSI made it clear that they would only be responsible for the portion of the project involving the slope of the dam but would require another engineering firm (such as Golder) to tend to all other aspects.

39. By that time, DSS and the Comptroller were well aware of the 2014 FEMA Manual recommendation that the overtopping protection approach not be used in relation to dams over 40 feet in height. The Lower Dam is 77 feet in height. Furthermore, this approach has never been used in BC, as DSS had advised the City back in March 2014. (See the Morgan Affidavit at paras. 30, 51-52).

40. Still, the Comptroller agreed at the April 22, 2015, meeting to the requested amendment of the April 9 Order to allow for consideration of an overtopping approach, but only if it was accompanied by an expert opinion on the advisability of the approach in terms of proper practice. The Comptroller also specifically raised the FEMA guidelines at the meeting.

41. The Comptroller issued the April 29 Order which amended the April 9 Order by including the overtopping protection approach as a remediation option alongside the other two remediation options for Lower Dam but required an independent expert report on the overtopping protection approach. The April 29 Order also extended the deadline

of October 15, 2015, to November 15, 2015, for substantial completion of the Lower Dam remediation.

42. As indicated in the Appellant's submissions, the GSI overtopping approach was a non-starter.

43. On May 12, 2015, DSS advised the City that one of two independent experts proposed by the City to assess the technical feasibility of the overtopping approach proposed by GSI was acceptable. That expert was one of the peer reviewers of the FEMA Manual.

44. On May 12, 2015, GSI indicated in correspondence to the City that there appeared to be no need for GSI's participation in either the design or project delivery phase as a more traditional approach proposed by Golder "seems to provide the City a much higher level of comfort". The correspondence further states "[i]f for some reason, we are misreading the City's level of comfort and willingness to contemplate a higher level of managed-risk", GSI would be prepared to deliver on their proposal.

45. On May 18, 2015, GSI wrote a second letter to the City referring to their realization that their proposal could not be meshed with that of Golder. (These letters are found as exhibits LL and MM, at pages 215 and 217 of the exhibits to the first affidavit of Mr. Chris Jackson, sworn May 21, 2015.)

46. In both letters, GSI lauds Golder's credibility and capacity as an engineering firm capable and ready to carry out the remediation work required on Lower Dam. Nonetheless, there is no indication offered by the City of why they have not, to date, pursued an overtopping or other approach suggested by Golder.

47. The two remediation approaches for Lower Dam that are acceptable to the Comptroller as specified in the April 29 Order—that is, the auxiliary spillway design or the labyrinth spillway design—remain acceptable approaches open to the City to address the potential safety hazards of Lower Dam within the timeframe contemplated by that Order—i.e. substantial completion by November 15, 2015.

48. Aside from the possibility of political discontent, the City has given no substantive and rational explanation of why it cannot proceed with one of the two remaining options.

B. The Colliery Dams Pose a Significant Public Hazard and Require Immediate Remediation

49. As reviewed above, the safety hazards posed by the Colliery Dams, including risks of loss of life, physical and environmental damage and economic loss, especially in the area downstream of Lower Dam, have been clearly identified and known for years.

50. Prior to the issuance of the April 9 Order, a DSS Senior Dam Safety Engineer, Robert McLean, conducted a review of the 2002 WMC report and the 2014-2015 Golder Reports with the view of determining whether they used common good engineering practice, whether they were underestimating the spillway capacities or overestimating the design floods, and what the conclusions are respecting whether dam overtopping may potentially lead to dam failure.

51. McLean authored a technical memorandum (the "Technical Memorandum") containing his review as outlined above on which the Comptroller was briefed. The Technical Memorandum is included as Exhibit "J" to the McLean Affidavit.

52. McLean's unequivocal evidence is that WMC and Golder do not overstate their conclusions that the spillways for both Colliery Dams are not even close to being adequate. As a result, remediation is unquestionably necessary.

53. The Technical Memorandum also contains the conclusion, based on McLean's review of the reports, that there is a high probability of both dams overtopping in extreme flood events.

54. To demonstrate the extent of this hazard, McLean calculated the degree of risk of both dams overtopping over given timeframes in extreme weather events versus the standard recommended by the Canadian Dam Association. The result shows a staggering discrepancy between the standard to which the dams should be held and the current spillway capacities.

55. For example, the probability, or rate of risk, of Lower Dam overtopping in the specified flood event over the last century (given the Colliery Dams are over 100 yrs old) is 98.3%. According to the CDA's standards, the rate of risk at which the design of an adequate spillway for a dam of the same classification as Lower Dam is exceeded is just 0.306%.

56. The Technical Memorandum also concludes, based on McLean's review, that there is a medium probability of dam failure as a result of overtopping. The failure, though not likely to be "sudden burst" of the dam walls could occur in 1 or 2 hours for Middle Dam and Lower Dam, respectively.

57. While the consequences of dam failure had been identified before in studies such as the Associated Engineering September 12, 2012 inundation study, the Golder *Consequence Classification* report of November 21, 2014, provides additional clarity:

    a. There is a permanent population downstream including residents, a school and a daycare and fatalities would be expected in the "high" to "very high" range;

    b. There is an expectation that contaminated soils would be released downstream into the Chase River;

    c. Destruction of aquatic and terrestrial resources is likely with permanent alteration and destruction of habitat;

    d. Damage to infrastructure is expected including public transportation, services and commercial facilities including the school;

    e. Severe damages to residences downstream is expected; and

    f. Resultant economic loss in the millions of dollars.

58. One of the Golder reports reviewed by McLean was the *Risk Assessment* of July 25, 2014, which also provides analysis of affected assets and risks to life beginning at page 35 of the report (Exhibit "F" to the McLean Affidavit). Various scenarios are modelled to determine the downstream loss consequences. Quantities for one such scenario of a fast breach of Middle Dam due to the specified flood event, with no Lower Dam failure (notably a conservative scenario) include:

a. affected improvements value of $44.2 million;
b. contents of $16.2 million;
c. day population at risk of 917 people; and
d. night population at risk of 1254 people.

59. In short, the public safety hazards are acute and the need for remediation is immediate.

Part 2: Submissions opposing the stay application

60. To secure the stay of an order under the *Water Act* the Appellant must satisfy all three steps of the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (SCC):

a) There is a serious issue to be tried;

b) Irreparable harm will result if the stay is not granted; and

c) The balance of convenience, with due consideration for the public interest, favours granting the stay.

61. Before considering these steps in turn and responding to the Appellant's submissions on each of them, the Respondent makes the following general submissions on the statutory regime under which the Order was made, the indivisibility of municipalities as legal persons, and the relationship between the parties' respective jurisdictions and law-making powers. These general observations are relevant to each of the three steps in *RJR-MacDonald* and will be referred to in responding to positions taken by the Appellant on each step.

A. The Authority of the Comptroller and Municipalities

The Province Has Jurisdiction to Regulate Dams and Their Owners

62. The Appellants do not contest the Comptroller's authority to make orders under ss. 85 and 88 of the *Water Act*. These sections are clear that the Comptroller can order the alteration, installation, replacement, repair, maintenance, improvement, sealing, closure or removal of, or the addition to, any works. This is particularly the case if potential hazards to dam safety have been identified.

63. What is also clear at s. 88(2) is that the Comptroller may make an order under s. 88(1) subject to any conditions the Comptroller considers advisable.

64. The Appellants also do not contest the application of the *Regulation*, which makes it clear at s. 7.1 that dam owners must prepare a plan that identifies and prioritizes any actions required to correct the potential safety hazard of a dam and implement the plan in a timely manner.

65. The Respondent issued the Order after the Appellant failed to comply with this section.

Municipalities are Indivisible Legal Persons and Must Comply with Provincial Legislation

66. A municipality is a corporation of the residents of its area and the governing body of a municipality is its Council — *Community Charter*, S.B.C. 2003, c. 26 ("*Community Charter*"); ss. 6 (1), (2).

67. A municipality has the capacity, rights, powers and privileges of a natural person of full capacity — *Community Charter*; s. 8 (1).

68. Municipalities are governed by provincial legislation and are obliged to comply with the law, just as individuals and business corporations are so obliged.

69. The Appellant's submissions on virtually every part of this application declare as relevant the deliberations, meetings and voting actions of Nanaimo City Council, along with

obligations Councillors believe they have to "Save the Dams" advocates and other Nanaimo citizens who desire certain outcomes concerning the Colliery Dams.

70. With due respect given to the Appellant's important democratic function as a local government, this function does not relieve a municipality from its obligations to comply as a legal person with provincial legislation and orders issued under the same.

71. The Appellant has been aware of the hazard posed by the Colliery Dams and has known of its obligations to address dam safety for many years, but has deliberated and delayed instead of fulfilling its obligations under the law.

72. The Appellant states that in responding to the Order, it may find itself in a "stalemate" (Appellant's submissions, paras. 69, 70).

73. The Appellant further insists that the Comptroller unfairly denies Councillors a negative option—i.e. that they should effectively have the right to elect to take no action in response to the Order (Appellant's submissions, paras. 66). Put another way, Nanaimo City Council believes it should have the right to disregard the Rule of Law and, in this case, to disregard its obligations to act in accordance with the law to actually address the dam safety issues.

74. Despite seriously considering the safety of the Colliery Dams for years and receiving numerous technical reports all pointing to a serious hazard, and despite receiving professional advice that clearly supports the requirements of the April 29 Order, the Appellant effectively argues that it should only have to comply with the Order if the terms of the Order are satisfactory to its Council members (Appellant's submissions, paras. 43, 56, 57).

75. The Respondent invites the Board to consider the circumstances if the same argument were put forward by an individual served with the same Order concerning his or her dam that posed a serious risk to the public. It would be entirely unreasonable for an individual to take the position that he or she reserves the right to be indecisive about following the terms of the Order or deciding not to comply at all.

76. The Appellant submits it is not the same as any individual dam owner and that special consideration should be given to the fact that the City as a body corporate is governed by a democratic body for the requisite purposes of a local government. This is not so and if it were, it would be reflected in the relevant legislation whether that be the *Community Charter* or the *Water Act* (which it is not). The Appellant has the same obligations as any dam owner, including the obligation to comply with Regulation and orders of the Comptroller.

77. The Respondent submits Councillors for the Appellant are confusing their political accountability to constituents with their fiduciary duty to the corporation of the City of Nanaimo to ensure the Appellant complies with all provincial laws. Should individual Councillors believe their political obligations to their constituents render them unable to pass the resolutions necessary to keep the Appellant in compliance with the law, then the Respondent suggests they have the options of abstaining from voting or resigning their positions as Council members, rather than to force the City to contravene the Regulation or the Comptroller's Order (potentially offences under the *Water Act*).

The City of Nanaimo's Authority Here is Subordinate to Provincial Legislation

78. Throughout its submissions, the Appellant appears to misunderstand the relationship between provincial legislation and municipal powers.

79. Municipalities are entirely the creatures of provincial statutes. Accordingly they can exercise only those powers which are explicitly conferred upon them by a provincial statute. Municipalities have no inherent authority or jurisdiction.

R. v. Greenbaum, [1993] 1 S.C.R. 674 (SCC)

80. The *Community Charter* makes it clear that municipal bylaws have no effect if they are inconsistent with a provincial enactment:

> **Relationship with Provincial laws**
> 10 (1) A provision of a municipal bylaw has no effect if it is inconsistent with a Provincial enactment.

(2) For the purposes of subsection (1), unless otherwise provided, a municipal bylaw is not inconsistent with another enactment if a person who complies with the bylaw does not, by this, contravene the other enactment.

81. The Appellant may contend that it holds certain competing powers such as the right to regulate the health, safety or protection of persons or property, but these powers are limited and are subject to specific conditions and restrictions:

Fundamental powers

8 …

(3) A Council may, by bylaw, regulate, prohibit and impose requirements in relation to the following: …

(g) the health, safety or protection of persons or property in relation to matters referred to in section 63 [protection of persons and property]; …

(j) protection of the natural environment;…

(10) Powers provided to municipalities under this section

(a) are subject to any specific conditions and restrictions established under this or another Act, and

(b) must be exercised in accordance with this Act unless otherwise provided.

82. Section 63 of the *Community Charter* limits the municipality's authority respecting protection of persons and property to discrete matters that are not applicable.

83. The *Community Charter* provides for areas of potentially shared jurisdiction (s. 9), but certain pre-conditions are required which includes provincial government approval in a variety of forms including regulation, agreement, and ministerial approval (see s. 9(3)). The Appellant does not argue s. 9(3) applies to the present case and it is the Respondent's submission that it does not apply.

84. While the Appellant's Council has not yet passed a bylaw with respect to the issues raised in this appeal, the sections of the *Community Charter* serve to define the City's sphere of authority vis-à-vis the Province and its regulators and illustrate the City's subordinate position to provincial legislation and the Comptroller on matters of dam safety.

85. Furthermore, the Appellant's arguments on the stay application amount to an argument that they should be able to step outside the City's sphere of authority and encroach on that of the Province and Comptroller. This puts the Appellant in direct conflict with the public safety provisions of the *Water Act*, the Regulation and the statutory obligation of the Comptroller in relation to dam safety. As these positions clearly conflict with each other, the Appellant's authority must give way to the provincial regulator acting under the provincial enactment.

86. When it comes to the Colliery dams, Nanaimo is a licensee and dam owner, so subject to compliance with that regulation.

B. The Legal Test for Stay Applications

Serious Issue to be Tried

87. The Appellant sets out three areas of appeal it claims meet the *RJR-MacDonald* test of a "serious issue." We deal with each in turn below. While the Respondent concedes the threshold is low at this step of the test, it submits the grounds put forward by the Appellant are so baseless and unsubstantiated as to be frivolous.

Scope and urgency of order

88. The first ground of appeal relied on by the Appellant is that the scope and urgency of the Order are unwarranted. Unlike the other grounds for appeal, which are largely technical attacks on how the Order was made, this argument goes to the substantive heart of the Order. It effectively asks: Should the City of Nanaimo be forced to remediate the Colliery Dams within the specified timeframe?

89. Yet despite the relative importance of this position to the Appellant's application, it provides absolutely no credible and relevant evidence to support the contention that the Order should be varied or reversed, even on a preliminary basis.

90. In its submissions, the only evidence the Appellant purports to rely on for this position is an affidavit from a professional engineer, Michael Porter, offering a commitment from

BGC Engineering to undertake a peer review of the multiple existing engineering reports on which the Order is based.

91. In his affidavit, Mr. Porter says 1-2 months is needed to do a peer review of the reports to date but, importantly, neither Mr. Porter nor the City provide any suggestion as to why a peer review is warranted or provide any rationale for undertaking one.

92. It is Mr. Porter's further evidence that he cannot provide a timeframe for design plans for an alternative option, if they are needed. The Appellant's inclusion of Mr. Porter's evidence is simply another stalling tactic and ignores the protracted nature of the City's deliberations on the matter thus far.

93. The Appellant's own evidence in the form of the letters from GSI in May 2015 (contained in exhibits LL and MM to the Affidavit #1 of Chris Jackson) amounts to a ringing endorsement of Golder's professional credibility and capacity to carry out the necessary remediation.

94. The Respondent submits that from the facts set out in Part 1 above, it is clear the April 29 Order was issued in reliance on the Appellant's own engineering reports conducted by Golder Associates. There is no evidence to bring these reports and their findings into question—even on a preliminary evaluation.

95. The most reliable evidence before the Board on the matter, comes from Robert McLean, a senior professional engineer who reviewed the many Golder reports commissioned by the Appellant and observes the following at paragraphs 10 and 11 of his Affidavit #1:

> I found no reason to conclude that the consultant engineers were being too cautious in estimating the capacity of the spillways or the design floods. That is, I am of the view they were not overstating the degree to which the spillways for both Middle and Lower Dams are inadequate.

96. Taken together, the Appellant's materials before the Board contain no qualified opinion or fact to support the contention the Comptroller erred in identifying a safety hazard and the scope and urgency of remedial action. On the contrary, Mr. McLean's evidence establishes there is no reason to doubt the City's own engineering reports, the hazard posed by the Colliery Dams, or the scope and urgency of remedial action.

Unreasonable time and options

97. Many of the submissions responding to allegations of error in identifying the hazard and the scope and urgency of remediation apply here. The Appellant has provided no cogent evidence to support its position that the Order is unreasonably narrow or time-pressed.

98. The logical evidence to support such a position would include an opinion from a qualified engineer that compliance with the Order was either practically unreasonable or unreasonable to complete within the timeframes given. The Appellant offers no such evidence.

99. The only evidence tendered by the Appellant that nominally raises concerns about the Order is the Affidavit #1 of Councillor Jim Kipp made on May 27, 2015. The evidence contained in this affidavit amounts to Councillor Kipp's identification of personal concerns he has with the *effect* of the Order. At paragraph 7 of his affidavit, he does express a personal concern "about the basis upon which the Comptroller concludes that significant remedial work is required..." but Mr. Kipp offers no professional engineering analysis, authority, or information to substantiate this concern.

100. While the Councillor's sincerity and concern for his community cannot be questioned, Mr. Kipp has neither the experience nor the qualifications to provide any evidence of sufficient weight to raise any doubts as to the reasonableness of the Order and the reports on which it is based.

101. Instead of providing evidence questioning the science behind the Order, the Appellant in its written submissions protests with a simple hope that there may exist other options that are cheaper and may satisfy those Councillors with concerns about the impact of remediation. No evidence is given to suggest such options exist or that they can be implemented in a timely manner, as required by s. 7.1 of the Regulation.

102. With regard to the required timelines, the Appellant offers no evidence why it cannot complete the required works within the required time. Instead, its submissions focus on a lack of time to explore alternative options, or otherwise make a decision—despite having

deliberated and investigated alternative options, with the assistance of numerous professionals, for several years.

103. Merely being concerned about the financial and political costs of remediation does not, in itself, amount to raising a serious issue that satisfies the first step of the test in RJR-MacDonald for interlocutory applications.

104. With regard to the issues of urgency and timelines in general, it is important to note that the Appellant has had substantive warning with regard to the hazards posed by the Colliery Dams and has thorough and reliable professional reports on remedial options. The delays that have put the Appellant in a position of having to comply with urgency to a tight timeline are all attributable to the Appellant's problematic and at times dysfunctional decision-making. The extensive record of municipal proceedings included in the Appellant's materials ample demonstrates Council's indecision over many years.

Jurisdictional issues

105. The City argues that s. 88(1) and (2) do not allow the Comptroller to attach conditions containing choices of remedial options and timelines and that to do so amounts to directing "how Council deliberates as a democratically elected governing body" (Appellant's submissions, para. 61).

106. The section really at issue here is 88(2): "An order under subsection (1) may be made subject to any conditions the engineer consider advisable [emphasis added]", wherein the Comptroller is authorized to perform the powers of an engineer.

107. The modern approach to statutory interpretation is set out in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".

108. Nothing in this section indicates there are restrictions on the nature of the Order made. It would be a tortured interpretation to find legislative authority for the Appellant's position that orders are prohibited from specifying the timing and scope of the actions set out in

s. 88(1)(d). Instead, the purpose of the *Water Act* here is clearly to ensure that regulators have sufficiently broad powers necessary to make whatever orders are necessary to protect the public from dam failure.

109. The Appellant contends that it is a serious issue that the Comptroller has specified options for spillway remediation of the Lower Dam and this has somehow fettered the Appellant's discretion. The Appellant takes this position despite the fact those options were first identified by the Appellant's own expert consultants and then expanded at the request of the Appellant to include the possibility of a third option of undertaking an overtopping protection approach, provided it met the requisite safety requirements.

110. Rather than tell the Appellant how it is to deliberate, the Comptroller makes it clear in the Order what are the outcomes that are required to protect the public. This is the Comptroller's regulatory role, as set out in statute. To the degree that the Order and the Comptroller's actions require Council to deliberate and make various resolutions or bylaws to carry out the prescribed activity, these effects are incidental.

111. The Appellant suggests that the Comptroller gave the City a choice of remedial options rather than selecting one for the City "presumably because the Comptroller considers the ultimate choice to be a decision made by the City's Council" (Appellant's submissions, para. 63). This is not the case. The Comptroller included in the April 29 Order two remedial options with respect to which substantial engineering support had already been obtained such that they are acceptable to him. The third option of the overtopping approach was included with the caveat that it must be accompanied by an independent expert opinion that would require the approval of the Comptroller. In this respect, the Comptroller is not deferring to the Council but rather stipulating the confines of what is acceptable in terms of the City's compliance with the Regulation.

112. Moreover, the Appellant's suggestion that the Comptroller offering it options instead of just specifying one course of action has somehow fettered Council's discretion invites the opposite conclusion. The Comptroller left to Council as many options as are available while still making sufficiently precise requirements in the Order to ensure the public hazard posed by the Colliery Dams is addressed before the next season of heavy rainfall.

113. It is worth noting that the April 29 Order gives the Appellant significant freedom to explore over a generous period (the balance of the calendar year) any options that address the safety hazard posed by the Middle Dam, followed by implementation of one of those options within a very reasonable time frame. This is a reflection of the lesser hazard posed by Middle Dam compared to Lower Dam.

114. Likewise, the direction and timelines respecting specific remedial options in the April 29 Order concerning Lower Dam are reflective of the increased hazard posed by Lower Dam and the consequences of not taking sufficient remedial action before the 2015 rainy season.

115. The Appellant is subject to the statute and the regulator carrying out the purposes of the statute. The regulator, in this case the Comptroller, identified a contravention of the dam safety regulation and therefore the need for the Order. It is up to the Appellant to comply.

116. The Appellant has not put forward substantive evidence or law that establishes there is sufficient jurisdictional conflict here to constitute a "serious issue" for the purposes of the first step of the *RJR-MacDonald* test.

Error of Law in Order

117. It is difficult to understand the fresh argument the Appellant offers in this section. In paragraphs 71-77 above, the Respondent offers argument responding to the Appellant's protest that not providing a negative option (i.e. the right to do nothing in the face of a serious public hazard), or failing to expressly provide for the possibility of a deadlocked Council, is somehow procedurally unfair.

118. With respect, the position taken by the Appellant here is completely untenable. As previously stated, it is not unfair to have denied the Appellant an option to simply ignore the need to remediate the Colliery Dams and do nothing. The City of Nanaimo does not have the final say on whether or not it must take action to address the dam safety hazard posed to the public, and it cannot point to its own inability to render decisions as justification for this argument.

119. Clearly the position taken here is so incoherent and unsubstantiated that it raises no serious issue under the *RJR-MacDonald* test.

Irreparable Harm

120. The Respondent concedes that the effect of denying the Appellant's stay application may be that it is forced to undertake the remedial works concerning Lower Dam with immediate effect, and incur necessary financial, political and other costs.

121. However, the Appellant would face such costs at whatever point it eventually undertook the required remedial work, whether this summer or in future years. And the uncontroverted evidence before the Board demonstrates the need for immediate remedial action. The Appellant offers no informed evidence that denies the need for remedial work on the Lower Dam. It simply says that the Comptroller and the City's own consultants, Golder, *might* be wrong about the risks and what to do about them—with nothing more.

122. The Appellant suggests at paragraph 73 that the harm it faces is that it has to incur the cost of construction before the Board can consider whether the Appellant should have greater discretion with how it responds to safety concerns. This focus on how it makes decisions, as opposed to the actions it's forced to take, illustrates the somewhat bewildering nature of the Appellant's position—a position it has possibly been forced to take, owing to the dearth of credible evidence to support an alternative view of the hazards posed by the dams.

123. The financial harm the Appellant faces may well be irreparable, in the sense that expenses incurred in complying with the Order may be unrecoverable. But in specifying the nature of the remedial options, the Comptroller is making clear that these options are the only ones that will satisfy the requisite dam safety regulations and that such options can be implemented within the required timeframe. This position comes after extensive professional expert involvement and consultation with the Appellant over many years. The Respondent submits that costs can only fairly be considered irreparable where they are not considered inevitable. On the uncontroverted facts, the Respondent submits they are indeed a certainty.

124. The temporary loss of park amenity, while regrettable, is also the inevitable effect of any actions taken to remediate the dams, even if quite limited in extent and duration. Of all the harms cited by the Appellant, this one has the most difficulty standing up against the prospect of dam failure. The maintenance of public works, even the very creation of most public works, nearly always interferes with the extant use of related public space or resources. This compromise is part of everything from roads to harbours to airports—and is central to the functioning of modern society. Again, were there any substantive evidence supporting the possibility that *no* remedial action needs tobe taken with regard to the dams, then such impacts would not necessarily be inevitable. But as no such evidence is before the Board, the impact on park use must be deemed inevitable and thus not irreparable harm for the purpose of the test.

125. Finally, with regard to the ostensibly irreparable harm of political protest or discontent, it is difficult to see how this is properly a harm for the Board to consider. The *RJR-MacDonald* test states the issue is "whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" [emphasis added]. It is important to keep in mind that the applicant in this case is the City of Nanaimo, and not those politicians—whether individually or taken together as a governing body—who make up its municipal Council.

126. With this lens, it is difficult to understand how the Applicant could suffer "political" harms. Political accountability is the domain of elected officials, not the government bodies that they govern. The convictions and stated intentions of individual Councillors have no bearing on this part of the analysis. While there may be financial costs associated with mounting a legal and practical response to acts of civil disobedience or protest, these costs can be an unavoidable part of governing in a society that permits its citizens substantial rights of democratic protest and expression. Furthermore, such costs are again insubstantial when compared with the interest of public safety in the face of an urgent and significant hazard.

127. The Appellant raises the prospect, at para. 81 of its submissions, that Council may be "required to make a positive order that it may not [sic] prepared to make in the time

required." The Appellant here again fails to recognize that it is not open to Council whether or not it can elect to comply with an order made by a regulator under provincial legislation. It is trite to say that governments must abide by the Rule of Law, but in the current instance it is worth repeating.

Balance of Convenience

128. At this point, the Board must consider which of the two parties will suffer greater harm from granting or refusing the application for a stay, pending a decision of the appeal.

129. The Supreme Court of Canada in *RJR-MacDonald* elaborated on the special case where a party on an application for a stay represents the public interest. Usually, but not always, this is an attorney general representing government, as here. The Court says at para. 71:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

130. The Court provides further related commentary at paras. 80, 81, and at para. 69 cites with approval the following commentary from the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791:

> When a public authority is prevented from exercising its statutory powers, it can be said … that the public interest, of which that authority is the guardian, suffers irreparable harm.

131. The Respondent submits this precedent requires the Board to assume that if it grants a stay, it will cause irreparable harm to the public interest.

132. The Appellant will no doubt protest that the public interest would likewise be harmed should this stay application be denied as it claims the concerns it has laid out are also issues of public interest. But in the case before the Board, a stay would directly prevent the Comptroller from exercising his statutory powers—circumstances are on all fours

with the Court's findings above. Denial of a stay, on the other hand, does not prevent the City from exercising its statutory powers. Instead, it would have the effect of requiring them to take action where they have so far refused to do so—action that is necessary to avoid serious risks of harm to the public.

133. Indeed, the protracted nature of the City's investigation, deliberation, and general indecision must be considered at this stage of the test. It is frankly galling for the City to argue the balance of convenience favours a body that claims irreparable harm will result if they do not have more time to act, when the record before the Board clearly shows the City has had ample time over several years to act, but has failed to do so.

134. The financial and political harms alleged by the Appellant to be the consequence of denying this application do not stack up against the real, quantified threat of loss of life, and the risks to the environment and resources posed by staying the Order for remediation of the Colliery Dams. These latter factors are of paramount importance.

135. The overwhelming evidence provided by the City's own engineer consultants over the years is that the spillways for both dams are severely undersized. Indeed, the evidence of McLean underscores the high probability the dams will overtop in the specified flood events in various timeframes, and the vast discrepancy of the risks posed by the current spillways versus what risks are deemed acceptable by today's standards.

136. These risks increase with each passing month the dams are not remediated.

137. What has also been made clear in reports by the City's engineer consultants is what is at stake in the event of a dam failure: significant loss of life and general risk to a permanent population downstream (including a school and daycare), damage to public infrastructure, residences, and commercial facilities, and environmental damage. It is worth noting that the potential damage caused by dam failure is also estimated to be far greater than the costs that would be incurred by the City in remediating Lower Dam in accordance with the April 29 Order.

138. The harms identified by the Appellant are in many instances the necessary costs of governing. Public works often require substantial funds to addresses matters of public

safety. Public works often involve a balancing of various interests, including cultural and societal values that demand compromise. These compromises often carry political consequences. But the administration of public works is impossible if those holding the reins of power are unwilling to incur any political costs. Good governance and the protection of the public relies on political leadership that has the courage to do what is right and that, above all, respects the Rule of Law.

Conclusion

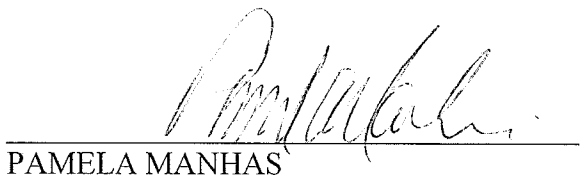
139. The Respondent submits that the case the Appellant has put forward is driven by political concerns and not concerns about administrative fairness, the technical rationale behind the Order, or the reasonableness of the Order. The Appellant fails to raise a serious issue to be tried.

140. The harms the Appellant says it faces should the Board deny its application for a stay are not sufficiently irreversible and their nature is such that the Board should consider them to be subordinate to the imperative to protect the general public from the quantified and rigorously substantiated hazards of dam failure in the present case.

141. Finally, the Appellant has also failed to show on the balance of convenience that the various financial and other costs and risks it faces in undertaking the prescribed remedial steps outweigh the significant risks of death, injury, and substantial financial and environmental losses to the general public in the event of dam failure.

142. The Respondent respectfully submits the application for a stay be denied.

Date: June 17, 2015



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