

ENVIRONMENTAL APPEAL BOARD FOR BRITISH COLUMBIA

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

BETWEEN:

CITY OF NANAIMO

AND:

COMPTROLLER OF WATER RIGHTS, *WATER ACT*

APPLICATION FOR A STAY PENDING A DECISION ON THE APPEAL

Applicant:

City of Nanaimo

On Notice to:

Comptroller of Water Rights, Water Management Branch, Dam Safety Section,
Ministry of Forests, Lands and Natural Resource Operations

Order Sought:

Pursuant to s. 92 of the *Water Act*, an order that the Comptroller of Water Rights' order against the City of Nanaimo issued on April 29, 2015 be stayed until such time as the Board has heard and decided this Appeal.

Grounds for Seeking a Stay:

A stay should be granted as there are serious issues to be decided, irreparable harm will result if a stay is not granted and the balance of convenience favours granting a stay.

Materials to be Relied On:

1. Affidavit of Chris Jackson #1 made May 21, 2015
2. Affidavit of Chris Jackson #2 made May 26, 2015
3. Affidavit of Niki Wilson #1 made May 25, 2015
4. Affidavit of Michael Porter #1 made May 26, 2015
5. Book of Authorities

SUBMISSIONS OF THE CITY OF NANAIMO IN SUPPORT OF A STAY**Part I: Statement of Facts**

1. All facts cited in "Part 1: Statement of Facts" pertain to the affidavits of Chris Jackson #1 and #2 unless noted. These Affidavits should be reviewed in their entirety as they contain a near complete corporate record related to the Colliery Dams from September 2012 to the present.

A. The City and Colliery Dam Park

2. The City of Nanaimo (the "City") is a municipality under the *Community Charter* and the *Local Government Act*. The elected City Council exercises or delegates the City's decision-making authority by bylaw or resolution adopted by the majority of its members at a meeting of Council.
3. Under the City's statutory authority to provide municipal services to residents and visitors, the City owns and operates 631 hectares of parks, including a park known as Colliery Dam Park. Colliery Dam Park contains two dams known as the "Colliery Dams". Those two dams are specifically known as the Middle Chase River Dam (the "Middle Dam") and the Lower Chase River Dam (the "Lower Dam"). The City operates the Colliery Dams pursuant to Conditional Water Licences C061424 and C061423 issued under the *Water Act*.
4. The Colliery Dams are a rare link with Nanaimo's industrial heritage as they were built in 1910-11 by the Western Fuel Company to supply water for coal washing and for use by miners. The reservoirs are now used as park ponds and a popular

fresh water swimming spot. The area surrounding the Colliery Dams is enhanced by the scenery of the reservoirs.

B. The City's Intention to Demolish the Dams in 2012-2013

5. In September 2012, the City received two assessment studies regarding the stability of the Colliery Dams. The studies indicated that the Colliery Dams posed an unacceptable risk.
6. Beginning in October 2012, Council responded to the potential safety hazard posed by the Middle and Lower Dams by ordering their removal and restoring the Chase River in Colliery Dam Park to its natural state. The Council also unanimously resolved that the City should pursue \$7 million in short-term borrowing to fund the removal. The City scheduled open houses regarding the dam removal project for November 5 and 8, 2012.
7. Beginning later in October 2012, people began being asked to be added to the agenda for meetings of the City's Council in order to speak out against the removal of the Colliery Dams. At a Council meeting on November 26, 2012, City Council responded to a group initiative calling itself "Save the Dams" by inviting the group to meet with City representatives.
8. From December 2012 to February 2013, Council continued to receive letters and hear from delegations regarding the fate of the Colliery Dams and the potential loss of historical and cultural value if they are removed.
9. On December 17, 2012, Council authorized City Staff to engage professional engineers to provide conceptual level cost estimates for rebuilding or rehabilitating the Middle and Lower Dams.
10. At the May 6, 2013 special open meeting of Council, Council received a presentation from the engineering firm Kohn Crippen Berger regarding their study entitled "Middle and Lower Colliery Dams Conceptual Costing of Rehabilitation

and Replacement Options". The Council also heard from six delegations speaking on behalf of keeping the Colliery Dams. Council unanimously resolved to defer consideration of the Colliery Dams issue.

11. At the May 13, 2013 open meeting of Council, Council heard from 10 delegations regarding the Colliery Dams. A motion was tabled to delay the demolition of the Colliery Dams until the Spring of 2014. The motion was defeated. Council then adopted a resolution directing the City to proceed with the immediate demolition of the Colliery Dams.
12. Later in May 2013, Colliery Dam Park was the site of threatened protests that were intended to impede the removal of the Lower and Middle Dam. At a special in camera meeting of Council on May 27 2013, the minutes of which were subsequently released, Council members in attendance voted 7-1 that: "Council authorize Staff to seek injunctive relief from persons interfering with Council's resolution to remove the Colliery Dams."
13. At the June 10, 2013 open meeting of Council, Council heard from 40 delegations speaking in support of the Colliery Dams. At that same meeting, Council passed a motion by a 5-4 vote that "Council authorize the public tender call for the removal of the lower and middle Chase River Dams."
14. At the June 17, 2013 special open meeting of Council, Council received 10 delegations or questions regarding the Colliery Dams. At the July 8, 2013 open Council meeting, 57 people asked to appear as delegations.

C. The City's Pursuit of New Remedial Options

15. From August 2013 to September 2014, Council deliberations centered on pursuing a remedial option that would retain the Colliery Dams.
16. At the August 7, 2013 special open meeting of Council, Council heard from 23 delegations regarding the Colliery Dams. By unanimous votes of 8-0, Council

adopted a resolution cancelling the tender of removal work for the Middle and Lower Dams and a resolution "to pursue a new strategy to deal with the long term mitigation of risks associated with the dams."

17. At the September 9, 2013 open meeting of Council, Council heard from a delegation regarding short-term risk mitigation for the Lower and Middle Dams. By a vote of 9-0, Council adopted a resolution incorporating dam safety policies and an emergency action plan. A committee known as the "Technical Committee" was formed as a result of this resolution.
18. At the October 21, 2013 meeting of the Committee of the Whole, Council heard from the same delegation regarding short-term risk mitigation for the Lower and Middle Dams and unanimously adopted a resolution that instructed the Technical Committee to "Develop option(s) for remediating the existing dams that will satisfy the requirements of the Dam Safety Section of the Ministry of Forests, Lands, and Natural Resources."
19. At the November 18, 2013 open meeting of Council, Council received a staff report regarding funding options for the remediation of the Colliery Dams. The staff report set out five options for borrowing or raising funds for particular projects and advised which options would require electoral approval.
20. At meetings of Council on February 24, 2014 and March 24, 2014, Council received staff reports updating them on the Technical Committee's progress.
21. At the open meeting of Council on July 14, 2014, the Council heard a presentation from the Colliery Dam Park Preservation Society. The Council also heard from a number of delegations, including those who expressed concern about the Technical Committee's involvement of the Colliery Dam Park Preservation Society.
22. At the August 11, 2014 meeting Council heard from a number of delegations regarding the Colliery Dams. By a vote of 4-2, Council adopted a resolution that

directed City Staff to not proceed with a public meeting to explain the Technical Committee's work and options and to instead proceed with a request for proposals using the steps outlined by Council in the resolution.

23. At the September 8, 2014 open meeting of Council, Council adopted a resolution that Council refer the issue of a Hydraulic study to model overtopping of the Colliery Dams to Staff for consultation with Golder Associates Ltd.

D. Council Meetings and Dissatisfaction with Options

24. From September 2014 onwards, Council resolutions expressed dissatisfaction with the remedial options that had been presented and an intention to pursue further alternatives.
25. At the September 15, 2014 open meeting of Council, Council received a staff report regarding procurement for rehabilitation of the Colliery Dams. Council also heard from a number of delegations regarding the Colliery Dams. By a vote of 4-5, a motion to proceed with a request for a "Request for Qualifications and a Request for Proposal process to seek proposals from design/build contractors for overtopping and labyrinth spillway options" was defeated. Council then adopted a resolution that directed "Staff to provide a report to Council identifying the type of studies and associated costs needed to evaluate Colliery Dams remediation options".
26. At a Committee of the Whole meeting on November 3, 2014, Council received a staff report providing an update regarding the Colliery Dams. Council adopted the following motions by votes of 5-4, 5-4, 6-3 and 9-0 respectively:
 - (a) *that Council direct Staff to review water distribution in an overtopping situation and how it impacts overtopping flow rate;*
 - (b) *that Council direct Staff to review capacity of the existing spillway;*

- (c) *that Council direct Staff to review the concept of an alternate swale/drainage course to Harewood Creek; and*
 - (d) *that Council direct Staff to provide a report back to Council with recommended next steps once the following has been completed:*
 - (i) *review water distribution in overtopping situation and how it impacts overtopping flow rate;*
 - (ii) *review capacity of existing spillway; and,*
 - (iii) *review concept of alternate swale/drainage course to Harewood Creek.*
27. At the open Council Meeting on February 2, 2015, Council adopted a resolution by a vote of 7-1 that City Staff "not proceed with any design work or expenditure for the alternate drainage course/swale for the Lower Colliery Dam" and that City Staff "amend the Schedule for Remediation to reflect the current lowered classification to permit more time to investigate and prepare a revised plan for any required remediation when determined and to inform the Dam Safety Section of the above direction by Council."
28. At the open meeting of Council on March 2, 2015, Council received a letter from the Comptroller dated February 25, 2015. A motion to direct staff to bring to the next Council meeting a report setting out "the options which have been identified as ways to remediate the Lower Dam in such ways to satisfy the requirements of the Provincial Government" was defeated by a vote of 4-4.
29. At the open meeting of Council on March 16, 2015, Council adopted a resolution related to the Colliery Dams Emergency Preparedness Plan and the development of a "Colliery Dam Surveillance Plan". The resolution did not relate to a potential remediation plan for the Colliery Dams.

E. The April 9 Order

30. On April 9, 2015, Glen Davidson, P. Eng., Comptroller of Water Rights, Water Management Branch, Dam Safety Section, Ministry of Forests, Lands and Natural Resource Operations (the "Comptroller") issued an order under the *Water Act* (the

"April 9 Order") in response to alleged contravention of section 7.1 of the British Columbia Dam Safety Regulation with regard to the Colliery Dams.

31. The April 9 Order required the City to perform remedial work on the Lower and Middle Dams. As part of this requirement, section 1(a) of the April 9 Order also required the City to select "one of the two following Lower Dam remediation options (as described by Golder) in order to address the potential safety hazard of Lower Dam:"
 - i. *the Labyrinth Spillway Design (Report on Dam Remediation Options, Golder, August 29, 2014); or*
 - ii. *the Auxiliary Spillway Design (Auxiliary Spillway – Conceptual Design, Golder, January 16, 2015);*
32. At the Committee of the Whole meeting of Council on April 13, 2015, Council received a presentation regarding the possibility of a remedial option for the Colliery Dams that provided for overtopping rather than modification of the spillway (the "Third Option"). Council then resolved to file an appeal of the April 9 Order and to seek a stay from the Comptroller.
33. At the special open meeting of Council on April 22, 2015, Council adopted a resolution instructing City Staff and the City's solicitors to file an appeal of the April 9 Order on the basis that the City required additional time as well as the opportunity to consider the Third Option. Council also instructed City Staff to seek a stay of the April 9 Order from the Environmental Appeal Board.

F. The April 29 Order

34. On April 29, 2015, Glen Davidson, P. Eng., Comptroller of Water Rights, Water Management Branch, Dam Safety Section, Ministry of Forests, Lands and Natural Resource Operations (the "Comptroller") issued an order under the *Water Act* (the "April 29 Order") in response to alleged contravention of section 7.1 of the British Columbia Dam Safety Regulation with regard to the Colliery Dams. The April 29

Order is a new order that modifies and replaces the April 9 Order.

35. The preamble of the April 29 Order records a meeting between City officials and the Comptroller and a request by the City for the opportunity to consider the Third Option.
36. The April 29 Order requires the City to make two choices that are essential to the performance of the required remediation. The first essential choice is set out in sections 1(a)-(b) of the April 29 Order and includes consideration of the April 29 Order. Those sections order the City to pursue steps necessary to increase the flood routing capacity for Lower Dam by:
 - a) *Selecting one of the following Lower Dam Remediation options in order to address the potential safety hazard of Lower Dam:*
 - i. *The labyrinth spillway design (Report on Dam Remediation Options, Golder, August 29, 2014),*
 - ii. *The auxiliary spillway design (Auxiliary Spillway – Conceptual Design, Golder January 16, 2015), or*
 - iii. *An overtopping protection approach which, combined with other features as may be required (together the “overtopping approach”), would provide a level of protection comparable to that provided by the other two options, the technical details for which approach to be set out in the acceptable alternative proposal as described in paragraph (b) below;*
 - b) *notifying this office of the selected remediation option **by June 1, 2015** and, if proceeding with the overtopping protection approach, the notification must be accompanied by a report from an independent expert, satisfactory to this office, with the following*

qualifications and experience, in accordance with Section 12 of the BC Dam Safety Regulation:

- i. in dam design, construction and analysis, and*
- ii. in hydraulic, hydrological, geological, geotechnical and structural engineering, and*
- iii. in the design, construction and performance of overtopping protection alternatives for embankment dams;*

The report of the independent expert must confirm the technical feasibility of the proposal to meet the flood routing capacity at Lower Dam and that the proposal meets recognized dam safety guidelines (e.g. CDA Dam Safety Guidelines, 2013), as well as current best practice for the design and construction of overtopping protection for dams (e.g. US FEMA Technical Manual: Overtopping Protection for Dams, 2014);

37. The April 29 Order imposes the following required actions at sections 1(c)-(d) with regard to this first choice:

- b. Preparing and submitting a design report and construction plans, for approval under Section 4 of the B.C. Dam Safety Regulation by **June 22, 2015**;*
- c. Substantially completing the chosen remediation option by **November 15, 2015**.*

38. The second essential choice imposed under the April 29 Order is implied at section 2(a) that requires that once “the chosen remediation option for Lower Dam has been completed”, the City must:

- a. Prepare and submit to this office **by the end of 2015**, a revised conceptual plan that identifies and prioritizes any actions required to correct the potential safety hazard with Middle Dam, along with a timeline for taking*

those actions within a reasonably expeditious time frame, timed to follow after completion of actions to correct the potential safety hazard with Lower Dam.

39. Whereas section 1(a) of the April 29 Order specified a choice between two specific conceptual plans that the City must implement, section 2(a) is not as narrow and required only that a conceptual plan be prepared.
40. The April 29 Order imposes the following required actions at section 2(b) with regard to the conceptual plan that the City chooses to prepare under section 2(a):

*b. Implement the revised plan, based on the priorities identified in the plan, within a reasonably expeditious time frame **but no later than the end of 2017**, and in accordance with Section 4 of the B.C. Dam Safety Regulation, as applicable to any alteration, improvement or replacement to all or any part of the dam intended to correct a potential safety hazard and which must be implemented in a timely manner.*

G. The Unavailability of the Third Option and the City Appeal of the April 29 Order

41. In response to the April 29 Order, the City promptly retained engineering firms to provide the report necessary to consider the Third Option. The City sought to retain GeoStabilization International for the purpose of pursuing a technical approach to the Third Option suggested by GeoStabilization International.
42. On May 15 and May 18, 2015, the City received letters from GeoStabilization International that stated that GeoStabilization International would not be providing a report because of GeoStabilization International's conclusion that the tight timelines and "an effort to streamline the process" meant that the City was better off working with Golder & Associates. As a consequence, City Council is unable to consider the Third Option as provided under the April 29 Order at this time.

43. In considering the City's options for the Colliery Dams, City Council must meet and vote on resolutions that the City Council collective considers to be in the public interest. The outcome votes reflect a spectrum of views of the individual Council members. The City says that decisions compelled by the April 29 Order engage highly political issues that may make it difficult for the City to identify an option that satisfies the majority of council members within a short period of time.

44. Illustrative examples of the political attention drawn to the issue include:

(a) Significant public attendance at open Council meetings as delegations and in question period at which the fate of the Colliery Dams is considered. Many of the exhibits in Mr. Chris Jackson's affidavits indicates this.

(b) Local media reporting:

i. that two council members would be prepared to engage in civil disobedience if the Third Option is rejected; and

ii. a councillor is frustrated with how communication has occurred with regard to the Third Option and GSI and with "a process she no longer wants to be a part of."

[see Affidavit #1 of Niki Wilson, sworn May 25, 2015 at Exhibits A, B, C and D]

45. At the open meeting of Council on May 19, 2015, Council adopted a resolution instructing City Staff to file an appeal of the April 29 Order and to seek a stay of the April 29 Order from the Environmental Appeal Board.

Part II: Why a Stay Should be Granted

46. This is an application for a stay of the April 29 Order issued by the Comptroller. We have provided copies of all the case law cited herein tabbed in the order in which the authorities appear in our companion Book of Authorities.

47. The test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (SCC) applies to applications for stays before the Board.¹ The test requires an applicant for a stay to demonstrate the following:

- (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 favours granting the stay.

A. Serious Issue

48. In *RJR-MacDonald*, the Court held that the threshold is low when considering whether there is a serious issue to be tried. If the case is neither vexatious nor frivolous, the inquiry generally should proceed onto the next step of the test.²
49. The City says that this appeal raises serious issues to be decided. The City's Notice of Appeal sets out multiple grounds of appeal. The grounds of appeal relate to the facts, law and jurisdiction surrounding the April 29 Order and the manner by which the Dam Safety Branch is seeking to compel the City to make decisions related to broad municipal purposes beyond dam safety.
50. The City advances the following grounds of appeal against the issuance of the April 29 Order in its May 21, 2015, Notice of Appeal:
- 1. *The April 29 Order should be reversed because the Comptroller erred in estimating the potential safety hazard posed by the Colliery Dams and erred in assessing the scope and urgency of remedial action that is presently required.*
 - 2. *In the alternative, the April 29 Order should be modified to grant the City more time and greater discretion to identify and consider other remedial*

¹ *North Fraser Harbor Commission et al. v. Deputy Director of Waste Management* (Environment Appeal Board, Appeal No. 97-WAS-05(a), June 5, 1997), [1997] B.C.E.A. No. 42 (Q.L.)

² *RJR-MacDonald*, *supra* at paras. 49 and 50

option or options that the Council might consider to be in the interests of the City.

3. *Additionally and in the further alternative:*

- (a) the Comptroller lacked the jurisdiction to require that the City's Council make a choice regarding a remediation option and to fetter that discretion with timelines and parameters set by the Comptroller; or*
- (b) if the Comptroller did have such jurisdiction, the Comptroller erred in ordering the City to make a choice regarding the Lower Dam in a manner that does not accommodate the plenary nature of the City's Council, including the possibility the City will not comply with the April 29 Order if the Council vote on which particular remedial option is preferred results in a stalemate; and*

the order should be modified so as to respect City Council's statutory authority over decisions regarding the fulfillment of municipal purposes.

(i) Erred in Scope and Urgency of Order

The City Council has concerns that the scope of the April 29 Order may result in significant resources being spent by the City which may not be necessary. In this regard, the City has reached out to BC Engineering Inc. for a peer review for the City's engineering reports to date and, if necessary, advice on remedial options for the Colliery Dams. BGC Engineering Inc. has committed to do this work, but the City must obtain a stay first for the work to be done. The City would like this opportunity to ensure its resources are properly directed before implementing the April 29 Order.

[see Affidavit #1 of Michael Porter, made May 26, 2015]

(ii) Unreasonable Time and Options

51. The City says that the April 29 Order is unreasonable under the circumstances because of its short timelines and narrow choices for remedial options.
52. The City says that when City Council originally sought to remove the Colliery Dams, it sought to use public open houses to keep its residents informed of a decision that had a significant impact on the financial, cultural and heritage-preservation interests of its residents. Over a number of months, the public's negative response to dam removal encouraged Council to reconsider that course of action.
53. In response to the April 9 Order, the City's Council sought the inclusion of the Third Option as an alternative means of addressing the potential safety hazard of the Colliery Dams. Despite promptly retaining Geo-Stabilization International as an independent engineer, the City has now been advised that the engineer is not prepared to provide the requested reports. The City consequently needs more time to retain and receive the services of another independent engineer or to consider other options that Council might consider to be in the public interest.
54. The City has identified BGC Engineering Inc. as this engineer and they can commence peer review work if a stay is granted.

[see Affidavit #1 of Michael Porter, sworn May 26, 2015]

55. Under the April 29 Order, City Council is required to make a positive choice within less than a month. The Comptroller defers to Council on the one hand, by giving them a choice of options, but does not respect the time required by Council to engage and respond to its residents in considering the issue at open meetings and with regard to public comment. The City says that Board should be very mindful of the democratic function of municipal councils. In *London (City) v. RSJ Holdings Inc.* 2007 SCC 29, Charron J held:

In light of the particular statutory provision that occupies us -- the open meeting requirement -- I would add the following comment on the principle of deference. The dissent of McLachlin J. (as she then was) in Shell Canada is often cited as a broad statement of the deference that courts owe to municipal governments. In large part, this deference is founded upon the democratic character of municipal decisions. Indeed, McLachlin J. recognized that deference to municipal decisions "adheres to the fundamental axiom that courts must accord proper respect to the democratic responsibilities of elected municipal officials and the rights of those who elect them" (p. 245). Municipal law was changed to require that municipal governments hold meetings that are open to the public, in order to imbue municipal governments with a robust democratic legitimacy. The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law.³

The timing of the April 29 Order is unreasonable given the time needed by Council to perform its democratic functions.

56. Given the current difficulty the City is having in pursuing the Third Option, the City says that the choices required under the April 29 Order are too narrow. The City says that if City Council is to be tasked with identifying the preferred remedial option for the Colliery Dams, as is the obvious intention of the April 29 Order, then City Council says the April 29 Order should be able to present other alternative options that are acceptable to the Dam Safety Branch once City Council has had an appropriate amount of time to:

- (a) retain the services of an independent engineer;
- (b) receive the benefit of the independent engineer's advice; and
- (c) consider any remedial options endorsed by the engineer, including potentially the Third Option or a new option, and whether such options are in the best interest of the City.

³ 2007 SCC 29 at para 38

57. The City says that the Board should recognize that requirements imposed on the City by the April 29 Order are not ones that affect the interests of a private dam owner, but rather affect the City's interest in dam safety, good governance, public park provision and the stewardship of the public assets of its community. More time and greater flexibility is required than is provided under the April 29 Order, given the breadth of interests that must be considered and the need for a majority of Council members to identify the remedial option that the City wishes to take.

(iii) Absence of Jurisdiction

58. The City says that the Comptroller erred by exceeding his jurisdiction by imposing requirements in the April 29 Order that fetter Council's discretion.
59. The City does not dispute that the Comptroller's authority to make orders under section 88(1)(d) of the *Water Act* includes the authority to make orders against a municipal corporation. However, the City says that the Comptroller's authority does not include specifying the timing and scope of decisions that must be made by a municipal council.
60. Section 1(a) of the April 29 Order requires the City to make a positive choice between three remedial options by June 1, 2015. The *Community Charter* provides at section 114(3) that:

- (3) *The powers, duties and functions of a municipality are to be exercised and performed by its council, except as otherwise provided under this or another Act, and a council, in exercising or performing its powers, duties and functions, is acting as the governing body of the municipality.*

and at section 122(1) that:

- (1) *council may only exercise its authority by resolution or bylaw.*

Consequently, a requirement that the City make a specific positive choice with no provision for inaction on the matter, is a requirement that the City Council must deliberate on, and only on, the options selected by the Comptroller in a time specified by the Comptroller.

61. Such a requirement to spur and guide council deliberations is beyond the powers of the Comptroller under the *Water Act*. Section 85(1) of the *Water Act* provides that:

"In addition to the other powers given under this Act, the comptroller may at any time do any act or thing that a regional water manager, engineer or officer is empowered to do under this Act."

And section 88(1)(d) provides:

88(1) In addition to all other powers given under this Act, an engineer may do one or more of the following:

...

(d) order the alteration, installation, replacement, repair, maintenance, improvement, sealing, closure or removal of, or the addition to, any works;

...

(2) An order under subsection (1) may be made subject to any conditions the engineer considers advisable

The City says that these provisions should not be interpreted as conferring an authority on the Comptroller to use orders under the *Water Act* to direct how Council deliberates as a democratically elected governing body.

62. A power to spur and guide a municipal council's deliberation on a matter is wholly unnecessary for an order under section 88(1)(d) of the *Water Act*. This Board has considered a number of orders related to dams and in those instances the dam owner was ordered to perform specific actions on the dams without any requirement that the dam owner make a positive choice.

Studer v. British Columbia (Ministry of Water, Land and Air Protection), [2003]
B.C.E.A. No. 42

Devilin v. British Columbia (Ministry of Environment, Lands and Parks), [1999]
B.C.E.A. No. 48

Kerr v. British Columbia (Ministry of Environment, Lands and Parks), [1999]
B.C.E.A. No. 6

63. In this case, the Comptroller has not specified an action that must be done but has specified a range of possible of actions from which to choose, presumably because the Comptroller considers the ultimate choice to be a decision made by the City's Council. The City agrees that its Council is the appropriate authority to make discretionary decisions regarding the fate of the Colliery Dams, however, it says that Council must be able to do so by a deliberative process that is unfettered. The Comptroller is effectively setting Council's agenda and crafting the resolutions Council may consider. That aspect of the April 29 Order is not an order in relation to a dam but an order in relation to Council deliberation.
64. The City says that both its Council and the Comptroller are subordinate authorities that exercise powers granted by Provincial statute. The exercise of the Comptroller's statutory discretion to issue orders under the *Water Act* should not be interpreted as including a paramount or dominant power over the City Council's exercise of its discretion to make decisions by resolution or bylaw.⁴
65. If the Comptroller was dissatisfied with Council's deliberations and any delay to the City's response to the potential safety hazard posed by the Colliery Dams, the Comptroller could have responded by ordering that the City, the corporation, perform the specific remedial option that the Comptroller considers appropriate. The Comptroller could also have given the City the option to pursue an alternative remedial option if the City considered it appropriate. If Council declined to select the alternative, or Council declined to even consider the alternative, the City would still have been obliged to perform the remedial option specified by the

⁴ *Yellow Cab Company Ltd. v. Passenger Transportation Board*, 2014 BCCA 329 at para 87

Comptroller.

66. What the Comptroller may not do is exactly what has been sought to be done by the April 29 Order. The Comptroller is seeking to fetter Council's deliberative authority to govern by requiring Council to meet and requiring Council to only pick the positive choices presented to it by the Comptroller. A failure of Council to meet and positively select a choice would cause the City to be in breach of the April 29 Order.

(iv) Error of Law in Order

67. If the Comptroller may use the terms and conditions of an order under the *Water Act* to control Council deliberations, the City says that manner in which it does so is procedurally unfair.
68. The City says that asking Council members to vote between three positive options with no negative option is unfair in its potential operation against the City.
69. How a Council member will vote cannot be guaranteed. In seeking to represent the best interests of their constituents, there may be a stalemate on the vote. This can occur even though all Council members agree that a positive choice of a remedial option should be made. In such a case the City, as a corporation, will not comply with the April 29 Order even if the intention of all the Council members is to comply. By presenting the City with only positives choice and no express provision as to what occurs in a stalemate, the April 29 Order is unfair in its operation.
70. Even if City Council were to exclude consideration of the Third Option, a stalemate remains a possibility. As is demonstrated within Mr. Jackson's Affidavit #1, the City Council has often met with an even-number of Council members in attendance raising the prospect of 4 Council members favouring and 4 Council members opposing the first two options presented by section 1(a) of the April 29

Order even if, hypothetically, all of the Council members agree that one of the two options should be pursued. This is an untenable situation for the corporate City.

71. The City says it easily meets the first part of the *RJR-MacDonald* test – there is a serious question to be tried.

B. Irreparable Harm

72. In *RJR-MacDonald*, the Supreme Court of Canada summarized this stage of the test for an interlocutory injunction or a stay as follows at para. 58-59:

At this stage the only issue to be decided 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. "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured usually because one party cannot collect damage from the other.

73. The City says that if a stay is not granted by the Board, the Board would have effectively decided the issue to be tried. Compliance with the Order pending the decision would require the City to make the positive choice and commence construction before the Board has an opportunity to consider whether the City should be afforded greater discretion in how it responds to the safety concerns, if any, of the Colliery Dams.
74. Further, this is clearly a situation where the City cannot seek damages from the Comptroller.
75. The City does not contest that a failure to mitigate a dam safety hazard perpetuates a risk to people and property that should be considered with regard to the irreparable harm analysis.
76. However, the City says that the Board should be mindful that the April 29 Order

allows for time for the City to make a positive choice regarding which of the Comptroller's selected choices the City wishes to pursue. The Comptroller has presumably also factored in delay should the City be unable or unwilling to make a positive choice. The City says that the Board should be mindful of the likelihood that the Colliery Dams will remain in their present condition and that delay in imposing a remediation option is reflective of a pursuit of other important public interest goals.

77. In addition to the irreparable harm noted at paragraphs 73 and 74 above, the City also submits that compliance with the April 29 Order, notwithstanding the City's filing of a Notice of Appeal, may cause the City to suffer irreparable harm with regard to:

- (a) financial expenditures;
- (b) loss of park amenity;
- (c) the representative democratic functions of individual Council members and Council as a whole; and
- (d) a heightened risk of political discontent;

if the Board later determines that the City should have been allowed more time and the ability to pursue different remedial options. Evidence of this "irreparable harm" is contained in the Affidavits #1 and #2 of Chris Jackson and Affidavit #1 of Niki Wilson.

[For example on "finances", see Affidavit #2 of Chris Jackson at Exhibit C, and "political discontent" see Affidavit #1 of Niki Wilson at Exhibits A-D]

78. With regard to financial expenditures, the Council has been presented with options regarding the estimated cost of various remediation options and the methods of financing them. The estimated costs are millions of dollars. Some methods of financing will require elector approval, whereas others require council to unilaterally impose an additional tax burden on ratepayers. If successful on appeal, the Council may be permitted to consider additional options that may be

less expensive to provide, once Council considers the broader municipal interest, more value for money.

79. There is no party from whom the City can recover its expenditure as damages. The City does not expect that the Comptroller or Province will indemnify it for the wasted expense of pursuing a remedial option that is later abandoned and replaced with an alternative preferred option as permitted by a Board order. The Board has found that it is doubtful that a Provincial entity will provide such an indemnity.⁵
80. With regard to a loss of park amenity, the City says that any remedial option will require construction work to be done in Colliery Dam Park such that access or enjoyment of the park will be limited or reduced. The interference caused by construction of one option will be wholly unnecessary, if that option is abandoned so that the City can pursue a different remedial option as a result of a Board order. The temporary loss of a park amenity to residents is a cultural harm that cannot be repaired.
81. With regard to the representative democratic function of council, the Council of the City has already seen significant public protest in response to its earlier decision to remove the Colliery Dams. As there is no Third Option to presently consider, compliance with the requirement of the April 29 Order to make a positive choice between the first two remedial options presented by the Comptroller means that Council may be required to make a choice that the individual Council members do not consider to be representative of the will of their constituents. Similarly, Council as a whole is also required to make a positive order that it may not prepared to make in the time required. If the Board finds that such compulsion on Council members and the City were inappropriate, the political consequence of such unnecessary decisions cannot be repaired.

⁵ *West Fraser Mills Ltd. (c.o.b. Eurocan Pulp and Paper Co.) v. British Columbia (Ministry of Environment, Lands and Parks)*, [1999] B.C.E.A. No. 73 at para 22.

82. With regard to the risk of discontent, the City says that it has already faced protests that sought to impede the City's removal of the Colliery Dams in 2013. If public dissatisfaction with how the April 29 Order compels the implementation of a remedial option on the City results in new protests, the cost and impact of responding to protests, be it financial or political, will be borne by the City. As stated by the British Columbia Supreme Court, "damage done by the protestors is not likely to be repaired."⁶

C. *Balance of Convenience*

83. The third part of the test in an application for a stay is a determination of which of the two parties will suffer the greater harm from the granting or refusal of a stay.⁷
84. The City says that it will suffer the greater harm if a stay is refused. A refusal of the stay means that the City will be obliged to comply with the April 29 Order and bear the consequent irreparable financial, cultural, democratic and political harm as detailed above.
85. The City does acknowledge that there is public interest in dam safety and in compliance with section 7.1 of the Dam Safety Regulation. Section 7.1 requires that dam owners respond to a potential safety hazard by implementing a plan in a timely manner. The City says that it has not clearly breached this requirement as timeliness in this context requires consideration of a number of municipal public interests, including the financial, cultural, heritage, and safety interests of the City's residents and ratepayers. Only City Council can do this.

⁶ *International Forest Products Ltd. v. Kern*, 2000 BCSC 1141, at para. 33

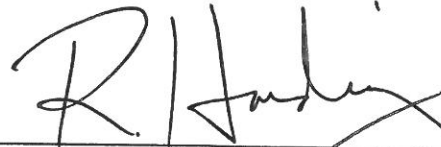
⁷ *RJR-MacDonald*, supra. para. 85

Part III: Conclusion

86. The City says that a stay should be granted as there are serious issues to be decided; irreparable harm will result if a stay is not granted; and the balance of convenience favours granting a stay until such time as the Board has heard and decided this Appeal.

All of which is respectfully submitted.

Dated: May 26, 2015

A handwritten signature in black ink, appearing to read 'Reece Harding', written over a horizontal line.

Reece Harding,
Counsel for the City of Nanaimo