

REPLY TO: VANCOUVER OFFICE

**VIA EMAIL & COURIER**

June 24, 2015

Registrar  
Environmental Appeal Board  
Fourth Floor - 747 Fort Street  
PO Box 9425 Stn Prov Govt  
Victoria, BC V8W 9V1

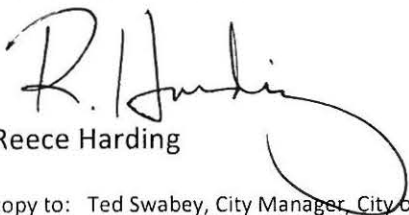
Dear Sir/Mesdame:

**Re: Appeal of April 29, 2015 Order of Comptroller of Water Rights –  
File No. 2015-WAT-004  
Our File No. 00037-0466**

Please find enclosed the Reply Submissions in support of the stay application for the City of Nanaimo with respect to the above Appeal of the April 29, 2015 Order of Comptroller of Water Rights.

Yours truly,

YOUNG ANDERSON



Reece Harding

copy to: Ted Swabey, City Manager, City of Nanaimo  
Toby Seward, Director of Development, City of Nanaimo  
Pamela Manhas, Ministry of Justice  
Rolf Warburton, Ministry of Justice

Enc.

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ENVIRONMENTAL APPEAL BOARD FOR BRITISH COLUMBIA

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

BETWEEN:

CITY OF NANAIMO

APPELLANT

AND:

COMPTROLLER OF WATER RIGHTS, *WATER ACT*

RESPONDENT

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REPLY SUBMISSION OF THE APPELLANT CITY OF NANAIMO

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FILED BY: The Appellant, City of Nanaimo

TO: The Respondent, Comptroller of Water Rights

AND TO: The Respondent's Legal Counsel  
Ms. Pamela Manhas & Rolf Warburton  
Ministry of Justice, Legal Services Branch

## REPLY SUBMISSIONS OF THE CITY OF NANAIMO

1. By Reply, the City seeks to address several mischaracterizations of the decision-making authority of the City Council and its individual members of Council. The City says that a more complete understanding of the statutory municipal decision-making process is required to fairly consider its Stay Application. For ease, we have attached all statutory references to this Reply.

### *The City's unique decision-making authority*

2. In Reply to paragraphs 74-75 of the Comptroller's submissions, the City says that the City cannot be compared to an individual. Decisions made the City's Council are statutorily required to be made through the consensus of multiple elected individuals (*Community Charter*, ss. 122-123). The decision-making process is materially different. That the Order expressly demands a decision regarding how compliance is to be achieved further distinguishes it from the hypothetical question raised in paragraph 75 of whether the individual must comply.
3. In Reply to paragraph 77, the City says that the Comptroller inappropriately and unreasonably suggests that members of Council who oppose choosing from the remedial options ordered by the Comptroller may either abstain from voting or resign from their position.
4. It is unreasonable for an opposing councillor to abstain from a vote. Subsection 123(4) of the *Community Charter* deems an abstention from voting to be an affirmative vote. At law a councillor who abstains is not taking a neutral position but is instead voting in favour.
5. Resignation is similarly unreasonable. If the majority of Council resign in order to express their opposition to the positive resolution ordered by the Comptroller, the statutory quorum for doing business will be lost until replacement measures are

ordered (*Community Charter*, s. 129). The City questions how the surrender of councillors' representative authority on all matters and the temporary shutdown of Council could be seen as an appropriate means of expressing the will of their constituents. The City says that orders under the *Water Act* are to ensure dam safety, not compel municipal councillors to resign from office.

6. The Comptroller's submissions also do not directly respond to the risk of a stalemate, despite the fact that the City's ultimate decision-making authority is defined as being the sum of votes made by individual members of Council (*Community Charter*, s. 123). The evidence filed by the City demonstrates that stalemate votes are reality, not theory.
7. In Reply to paragraphs 78 through 86, the City says that its Council has not adopted a bylaw regarding the Colliery Dams and need never adopt a bylaw in this matter. The Council enactment at issue in this proceeding is a resolution that the Comptroller seeks to compel City Council to adopt. With respect, these submissions are irrelevant and unhelpful.
8. In reply to paragraph 104, the City says that it is erroneous to describe the City's decision-making as problematic and dysfunctional when Council has consistently and continuously met and deliberated on matters related to the Colliery Dams. That Council has considered submissions, deliberated and then adopted or rejected motions is evidence of Council's functioning as a deliberative body, notwithstanding the Comptroller's criticism of the decisions that Council has made.
9. In Reply to paragraphs 105-110, the City says that the Order's interference with the deliberative process of an elected municipal council cannot be considered an "incidental" effect of a Provincial regulator's authority. The Comptroller can order the City to take an actual action without compelling the City's Council to make a highly political decision. The statutory purposes of the *Water Act* include regulation of dam safety, but do not include regulation of Council's deliberative proceeding.

10. Furthermore, the Comptroller's written submissions unduly characterize Council's failure to endorse the particular options specified in the Order as evidence of an intention that Council will not identify its own preferred response to the Dam Safety Risk or that the City as a corporation will not perform specific remedial work once that specific work is identified by either a decision of the Council or by the Environmental Appeal Board in response to Council's indecision.
11. In Reply to paragraph 117, the City says that the Comptroller is again confusing the City's assertion that its Council should not be forced to make an unpopular choice between multiple different options from a claim that the City could not be ordered to do particular work specified by the Comptroller. Objection to being compelled to choose between the options set out in section 1 of the Order is not the same as objecting to the performance of a specific remedial option that is ordered by the Comptroller.
12. In Reply to paragraph 126, the City says that the Comptroller mischaracterizes the political harm identified by the City. The City says that undue interference with Council deliberations is an unquantifiable harm to the democratic process. The City's electorate may accept the Comptroller ordering the City to perform specific work, but still object to the Comptroller ordering the City's own Council to make a specific decision that the Council has so far declined to make. The presumption is that Council votes reflect the will of the electorate.

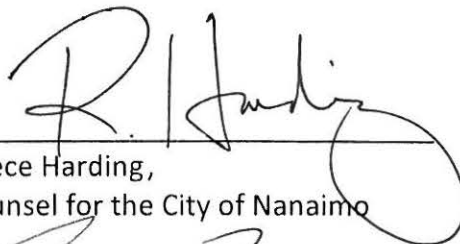
13. Neither Council nor the Comptroller have chosen a specific remedial option that they respectively consider best for the Colliery Dams. The Order seeks to compel Council to choose between options that Council has so far rejected. The Notice of Appeal seeks relief that avoids unnecessary and unlawful interference with Council deliberations. Either the City's Council (Notice of Appeal, s. 1 of relief sought) or the Environmental Appeal Board (Notice of Appeal, s. 2 of relief sought) will make a specific decision regarding the remediation of the Colliery Dams. A stay will preserve the opportunity to achieve this preferred result.

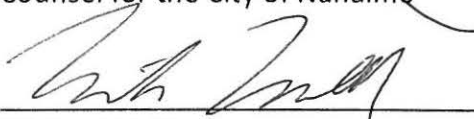
All of which is respectfully submitted.

Dated:

June 24, 2015

Signed:

  
\_\_\_\_\_  
Reece Harding,  
Counsel for the City of Nanaimo

  
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Michael Moll,  
Counsel for the City of Nanaimo

Current to May 26, 2015

S.B.C. 2003, c. 26, s. 122

[eff since January 1, 2004](Current Version)

## **COMMUNITY CHARTER**

### **SBC 2003, CHAPTER 26**

#### **Part 5 -- Municipal Government and Procedures**

##### **Division 2 -- Council Proceedings**

##### **SECTION 122**

*Exercise of powers by bylaw or resolution*

122 (1) A council may only exercise its authority by resolution or bylaw.

(2) If an enactment provides that a council is required or empowered to exercise a power by bylaw, that power may only be exercised by bylaw.

(3) If a council may exercise a power by resolution, that power may also be exercised by bylaw.

(4) An act or proceeding of a council is not valid unless it is authorized or adopted by bylaw or resolution at a council meeting.

*SBC 2003-26-122, effective January 1, 2004 (B.C. Reg. 423/2003).*

Current to May 26, 2015

S.B.C. 2003, c. 26, s. 123

[eff since January 1, 2004](Current Version)

## **COMMUNITY CHARTER**

### **SBC 2003, CHAPTER 26**

#### **Part 5 -- Municipal Government and Procedures**

#### **Division 2 -- Council Proceedings**

#### **SECTION 123**

##### *General voting rules*

123 (1) Unless otherwise provided, a motion on a bylaw or resolution, or on any other question before council, is decided by a majority of the council members present at the meeting.

(2) Each council member has one vote on any question.

(3) Each council member present at the time of a vote must vote on the matter.

(4) If a council member does not indicate how he or she votes, the member is deemed to have voted in the affirmative.

(5) If the votes of the members present at a council meeting at the time of the vote are equal for and against a motion, the motion is defeated.

(6) A requirement under an enactment for an affirmative vote of a specified portion of all members of a council means an affirmative vote of that portion of the number of members of which the council consists under section 118 [size of council].

(7) The voting rules established by this section also apply to council committees.

*SBC 2003-26-123, effective January 1, 2004 (B.C. Reg. 423/2003).*



Current to May 26, 2015

S.B.C. 2003, c. 26, s. 129

[eff since January 1, 2004](Current Version)

## **COMMUNITY CHARTER**

### **SBC 2003, CHAPTER 26**

#### **Part 5 -- Municipal Government and Procedures**

##### **Division 2 -- Council Proceedings**

##### **SECTION 129**

*Quorum for conducting business*

129 (1) Subject to an order under subsection (3) or (4), the quorum is a majority of the number of members of the council provided for under section 118 [size of council].

(2) The acts done by a quorum of council are not invalid by reason only that the council is not at the time composed of the number of council members required under this Act.

(3) If the number of members of a council is reduced to less than a quorum, the minister may either

(a) order that the remaining members of the council constitute a quorum until persons are elected and take office to fill the vacancies, or

(b) appoint qualified persons to fill the vacancies until persons are elected and take office to fill them.

(4) The municipality may apply to the Supreme Court for an order under subsection (5) if, as a result of section 100 [disclosure of conflict], the number of council members who may discuss and vote on a matter falls below

(a) the quorum for the council, or

(b) the number of council members required to adopt the applicable bylaw or resolution.

(5) On an application under subsection (4), the court may

(a) order that all or specified council members may discuss and vote on the matter, despite sections 100 [disclosure of conflict] and 101 [restrictions on participation], and

(b) make the authority under paragraph (a) subject to any conditions and directions the court considers appropriate.

(6) An application under subsection (4) may be made without notice to any other person.

*SBC 2003-26-129, effective January 1, 2004 (B.C. Reg. 423/2003).*