



# Environmental Appeal Board

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## DECISION NO. 2018-EMA-021(f) [Group File: 2018-EMA-G02]

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

<b>BETWEEN:</b>	GFL Environmental Inc.	<b>APPELLANT</b>										
<b>AND:</b>	District Director, <i>Environmental Management Act</i>	<b>RESPONDENT</b>										
<b>AND:</b>	Michael Dumancic, Nathalie McGee, Meaghan Lyall, Margaret & Foster Richardson, Wendy Betts, David Frame, Carol Ann La Croix, Joss Rowlands, Shelley Lee, Barry Mah, Trish Steinwand, Harry Dhaliwal, Joan Hislop, Douglas Burgham, Jennifer Burgham, Douglas McDougall, and Michael W. Betts	<b>THIRD PARTIES</b>										
<b>AND:</b>	City of Delta	<b>THIRD PARTY</b>										
<b>BEFORE:</b>	A Panel of the Environmental Appeal Board Brenda L. Edwards, Panel Chair Linda Michaluk, Member Reid White, Member											
<b>DATE:</b>	Conducted by way of oral and written submissions concluding on June 12, 2020											
<b>APPEARING:</b>	<table border="0"><tr><td>For the Applicant:</td><td>Gary A. Letcher, Counsel Andrea Akelaitis, Counsel</td></tr><tr><td>For the Respondent:</td><td>Gregory Nash, Counsel Alex Little, Counsel</td></tr><tr><td>For the Third Parties:</td><td></td></tr><tr><td>Resident Appellants</td><td>Margaret Richardson</td></tr><tr><td>City of Delta</td><td>Alyssa Bradley, Counsel</td></tr></table>		For the Applicant:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel	For the Respondent:	Gregory Nash, Counsel Alex Little, Counsel	For the Third Parties:		Resident Appellants	Margaret Richardson	City of Delta	Alyssa Bradley, Counsel
For the Applicant:	Gary A. Letcher, Counsel Andrea Akelaitis, Counsel											
For the Respondent:	Gregory Nash, Counsel Alex Little, Counsel											
For the Third Parties:												
Resident Appellants	Margaret Richardson											
City of Delta	Alyssa Bradley, Counsel											

**INTERIM RELIEF APPLICATION #3****INTRODUCTION AND PROCEDURAL BACKGROUND**

[1] On August 1, 2018, Ray Robb, District Director (the "District Director") for the Metro Vancouver Regional District ("Metro Vancouver"), issued air quality management permit GVA1090 (the "Permit") to Enviro-Smart Organics Ltd., which is now GFL Environmental Inc. ("GFL"). The Permit, which was issued under both the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act") and the Greater Vancouver Regional District Air Quality Management Bylaw No. 1082, 2008, authorizes GFL to discharge air contaminants to the air from its aerobic composting operation (the "Facility") in Delta, British Columbia.

[2] GFL appealed various terms and conditions in the Permit and applied for a stay of two specific categories of those terms pending a hearing and decision on the merits of its appeal. On December 10, 2018, the (then) Chair of the Board denied the stay application: *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(a)). As a result, these terms and conditions remained enforceable according to the deadlines in the Permit.

[3] A group of concerned citizens also appealed the Permit but for different reasons than GFL's. These citizens are referred to as the "Resident Appellants" in this decision. Their appeals were joined with GFL's so the appeals could be heard together. The Resident Appellants were also made Third Parties in GFL's appeal. The City of Delta is a Third Party in all the appeals.

[4] The hearing of the appeals was originally set for 15 days commencing June 3, 2019. The hearing convened as scheduled from June 3-28, 2019. As it did not complete, the hearing reconvened from October 28-November 15, 2019 before adjourning. Following the adjournment, in November 2019, GFL brought an application for interim relief. Initially, GFL applied to adjust (vary) certain deadlines in the Permit from February 28, 2020 and March 1, 2020 to later dates (the "First Interim Application"). The Panel granted the relief sought on January 15, 2020 (see *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(d), January 15, 2020) (the "First Interim Decision").

[5] The hearing of the appeals reconvened from March 9-16, 2020 and was scheduled to continue the week of March 16-20th. However, on March 16th the Resident Appellants sought, and the Panel granted, an adjournment of the hearing due to health concerns related to the COVID-19 pandemic.

[6] Prior to the hearing adjourning on March 16, 2020, counsel for GFL advised the other Parties and the Panel that it anticipated bringing an interim application to address deadlines under the Permit, as varied by this Panel in the First Interim Decision.

[7] On March 18, 2020, by Ministerial Order No. M073, the Minister of Public Safety and Solicitor General declared a state of emergency throughout the Province under the *Emergency Program Act*, R.S.B.C. 1996, c. 111. The state of emergency

was subsequently extended and, at present, continues.<sup>1</sup> A series of Ministerial Orders have followed, including Ministerial Orders relevant to the operation of the Facility as an “essential service”.

[8] On April 1, 2020, GFL brought a second application (the “Second Interim Application”) asking the Panel for sixty-day extensions to the dates varied in the First Interim Decision. GFL sought these extensions to provide sufficient time for the emergency situation to subside, and for GFL to identify and assess the impacts, and ripple effects, of emergency conditions on the construction and commissioning of the new, full-enclosed facility, state of the art biofilter (and its enclosure), and 15.4 meter stack” (collectively the “New Facility”), while allowing for ongoing operation of the Facility as an essential service.<sup>2</sup> Recognizing the looming Permit deadlines, the Panel decided the Second Interim Application on an expedited basis.

[9] The Panel granted the relief sought on April 23, 2020, subject to certain conditions (see, *GFL Environmental Inc. v. District Director* (Decision No. 2018-EMA-021(e), April 23, 2020) (the “Second Interim Decision”). In this decision, we noted GFL’s submissions regarding the obstacles it faced in completing construction and commissioning of the New Facility. We also noted, with concern, that GFL provided little evidence in support of its application.<sup>3</sup> While we recognized that the Second Interim Application was being brought in extraordinary circumstances, we also made clear in paragraphs 61-62 that more needed to be done to justify further varying the deadlines in the Permit:

61. In the ordinary course of events, we would have expected persuasive evidence of these, and any other actual obstacles (be they legal or circumstantial), that are, or are reasonably likely to, impact GFL’s ability to complete construction and commissioning of the New Facility in the time permitted (as varied by the First Interim Decision). We would also have expected details of the efforts that GFL has taken, and will continue to take, to address those obstacles. We would further have expected evidence to support a submission, such as GFL made, that completing construction and commissioning through the use of alternate technology (e.g., videoconferencing with the suppliers), and/or with the assistance of other qualified individuals (e.g., engineers or others under contract), “could well put at risk the protection of the environment and is not respectful of the residents”.

62. That said, we are operating in extraordinary circumstances. Courts and tribunals, like commercial businesses, are adapting in real time to the need to continue to operate during this state of emergency and its immediate aftermath. This has meant, and likely will continue to mean, that whether and how decision-making bodies operate will continue to evolve to ensure that urgent matters are addressed in an orderly way. At present, courts and tribunals are issuing notices to legal professionals and the public regarding their processes. By way of example, we note that the BC provincial and

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<sup>1</sup> See Order in Council 310/2020.

<sup>2</sup> See Second Interim Decision at paragraph 27.

<sup>3</sup> *Ibid.*, at paragraph 58

superior courts recently notified the legal profession and the public that the courts will conduct some proceedings by videoconference, and will accept unfiled and unsworn affidavits in support of certain applications<sup>4</sup>. Indeed, the Board is currently considering alternatives to our normal in-person hearing to conclude the hearing of evidence in the Appeals from the Permit. We have approached this application in the same spirit of willingness to adapt and adjust our ordinary expectations in this extraordinary time. Our willingness to accept GFL's submissions and the limited evidence before us in these unique circumstances ought not to be misunderstood. The existence of a pandemic does not mean that it will be sufficient, going forward, to merely "request" changes to the Permit, including Date Extensions. A thoroughly reasoned application supported by evidence will be required.

[10] In granting the relief sought, at paragraph 65 of the Second Interim Decision, we directed as follows:

65. For the reasons provided above, GFL's application for the Date Extensions is granted subject to the condition that GFL submits, no later than June 1, 2020, a further application for interim relief (the "Third Application for Interim Relief") which addresses and provides the best available evidence in support of:

- a) the current state of construction and commissioning of the New Facility and the timeline for completion of construction and commissioning and readiness to commence operations at the New Facility;
- b) the reasons for delays in construction and commissioning of the New Facility since the Appeals adjourned on March 16, 2020;
- c) any anticipated further delays in construction and commissioning of the New Facility including:
  - i. identified and reasonably foreseeable obstacles (including—but not limited to—travel restrictions, third party approvals, and availability of materials, equipment or personnel) to the ongoing operations at the Facility, the timely cessation of operations at the Facility, and commencement of operations at the New Facility (as provided for in the Permit and varied by this Panel of the Board);
- d) all steps taken—and to be taken—to address, in a pragmatic and timely manner, and considering the circumstances existing at the time of the application (including any ongoing state of emergency), the anticipated further delays, including the identified and reasonably foreseeable obstacles described in c); and

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<sup>4</sup> <https://www.bccourts.ca/index.aspx>; See also <https://www.provincialcourt.bc.ca/downloads/Practice%20Directions/NP%2019%20COVID-19%20Suspension%20of%20Regular%20Court%20Operations.pdf>

- e) the consequences for GFL, its customers, and the general public (including the Resident Appellants) if the relief is not granted.  
[Emphasis in original]

### The New Interim Relief Application

[11] On June 1, 2020, GFL filed its Third Application for Interim Relief as required by our Second Interim Decision. GFL seeks “specific timeline relief” that would, with two exceptions, vary two sets of deadlines approved in the Second Interim Decision: moving deadlines from **June 30, 2020** to **August 31, 2020**, and from **July 1, 2020** to **September 1, 2020** (the “Date Variations”). The application includes a detailed list of the requested Date Variations in a schedule that is attached as Appendix “A” to this decision.

[12] As shown in bold in Appendix “A”, the two exceptions are to:

- adjust the deadline to submit the emissions testing report for the new biofilter from **October 31, 2020**<sup>5</sup> (as provided for in the First Interim Decision) to **April 30, 2021**; and
- adjust the deadline for discharging contaminants from Emission Source 5 (the aging and curing area at the Facility) from **June 30, 2020** to **October 31, 2020**.

[13] Regarding the emissions testing report for the new biofilter, GFL submits that the requested date adjustment to April 30, 2021 follows from the timing of the requested date adjustment for commencement of operations of the New Facility. As to the exception for Emission Source 5, GFL submits that this date adjustment is required so that materials already in the aging and curing area when the New Facility commences can complete the aging and curing cycle, and can be gradually added to new material in the 21 processing bays at the New Facility to minimize the initial organic loading of the new biofilter.

### BACKGROUND

[14] The background to the Permit has been thoroughly canvassed in the First Interim Decision and will not be repeated, in detail, here. In brief, GFL operates a turf and composting operation at the Facility, located on 29 acres of farmland specifically zoned by the Corporation of Delta for composting operations. The total property is approximately 57.4 hectares.

[15] The Facility holds a licence issued by the Greater Vancouver Sewerage and Drainage District to accept organic waste (largely from Metro Vancouver municipalities) to produce compost.

[16] The initial stage of the composting process at the Facility is carried out “using the aerobic pile method, within two large, free-span covered buildings” (i.e., not

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<sup>5</sup> GFL’s submissions appears to mistakenly note October 31, 2019 as the deadline for the reporting requirement for emissions from the new biofilter. The Schedule notes the correct date of October 31, 2020.

enclosed). Organic waste feedstock is piled onto the building's concrete floor. An excavator or other means is used to turn the windrows as needed to optimize the primary composting process.

[17] There is no dispute that composting is an aerobic process, meaning that it occurs in the presence of oxygen. There is also no dispute that oxygen reduces the production of odorous air contaminants and, conversely, a depletion of oxygen can produce odours.

[18] When the Permit was issued, the Facility was an "open-air" operation.

[19] In August of 2017, GFL applied for a permit to authorize "the discharge of air emissions" from the Facility. A description of the composting operation and the emission sources were identified as part of the application.

[20] Following public consultation on the permit application, and after considerable discussion between GFL and the District Director (and staff at Metro Vancouver), in the spring of 2018, Metro Vancouver provided GFL with draft permits for comment. In response, GFL provided the District Director with a five-page set of "Proposed Criteria" for an air discharge permit that would allow GFL "to continue operating our composting business in the interim while we move forward in a timely manner towards fully enclosing our operations."

[21] On August 1, 2018, the District Director issued the Permit. The Permit is effective for a term of five years, set to expire on September 30, 2023. It is 43 pages and contains prescriptive and detailed requirements for: operations; design and engineering plan approvals; and, 97 submission requirements including those for 13 plans and 15 types of ongoing performance/progress reports.

[22] GFL's stated intention throughout the permit application and appeal process has been to upgrade the Facility. It first committed to constructing a new fully enclosed composting facility (i.e., the New Facility) by February 28, 2020<sup>6</sup>, subject to the necessary government approvals to construct and operate the New Facility on an expedited basis.

[23] GFL filed its Notice of Appeal with the Board on August 29, 2018. It appeals various terms and conditions in the Permit on the grounds that the District Director erred and exceeded his jurisdiction by including "unduly prescriptive and unnecessary requirements".

## **ISSUES**

[24] The sole issue to be decided in this application is, "whether the Panel ought to further extend Permit dates and authorizations, the majority of which were previously varied in the First and Second Interim Decisions".

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<sup>6</sup> Amended to May 1, 2020 in the First Interim Decision.

**DISCUSSION AND ANALYSIS**

[25] After receiving GFL's Third Application for Interim Relief, the Chair of the Panel wrote the Parties setting a schedule for submissions similar to the process that was followed for GFL's First and Second Interim Applications.

[26] As we did with respect to GFL's First and Second Interim Applications, the Panel has only summarized submissions from any given party, on any given issue, if those submissions are relevant, were provided within the timeframe for submissions set by the Panel and are not repetitious. All submissions were considered, but given the need, once again, to provide an expedited decision, the Parties should refer to the record for a full recitation of all evidence and submissions provided to the Panel.

**Whether the Panel ought to further extend Permit dates and authorizations previously varied by the First and Second Interim Decisions.***GFL's Submissions*

[27] GFL submits that granting the Date Variations are in the public interest. They allow GFL to continue operating and constructing the New Facility under the Permit, which supports provincial waste disposal targets, ensures Lower Mainland municipalities' organic diversion programs are supported and cost-effective, and will mitigate odour impacts during the commissioning phase of the New Facility. Further, the Date Variations will ensure that GFL does not suffer irreparable harm while it completes the construction and commissioning of the New Facility. GFL submits that the requested Date Variations are necessary to ensure that neither GFL, nor the various public interests served by GFL's sustainable organics processing operations, are harmed by disrupting the organics processing operations provided by the Facility.

[28] In accordance with paragraph 65 of the Second Interim Decision, GFL filed four affidavits in support of the Date Variations:

- a. An affidavit sworn May 28, 2020 by Ernesto Ayala, Project Manager for Unitech Construction Management Ltd. ("Unitech"), which has provided construction management services to GFL for the New Facility construction project;
- b. An affidavit sworn May 28, 2020 by Richard Nicoletti, Compost Equipment Manager for BDP Industries Inc. ("BDP"), which is providing the custom-designed process system and equipment for the New Facility;
- c. An affidavit sworn May 28, 2020 by Don Mathsen, Chief Engineer for BacTee Systems Inc. ("BacTee"), which is providing the design, product and technical support services for all air handling at the New Facility; and
- d. An affidavit sworn June 1, 2020 by Matthew McAra, Area Vice President, Solid Waste – Western Canada for GFL.

[29] GFL submits that delays in the construction and commissioning of the New Facility have arisen due to design changes, the COVID-19 situation, severe weather, and other causes common to complex projects.

#### Delays Due to Design Changes

[30] GFL submits that, in order to comply with strict timelines in the Permit, the New Facility construction project had to proceed on an expedited schedule, based on “preliminary designs and best possible estimates” for design and equipment specification. Physical construction began on May 10, 2019, notwithstanding that GFL did not obtain initial approval from Metro Vancouver for the initial “final” design until May 31, 2019.<sup>7</sup> Work has had to be adjusted, added to, or re-done due to changes made to the eventual final design. For instance, after construction had already begun, GFL was required to include a 15.4 metre stack in the New Facility. The District Director did not provide “conditional design approval” on the stack until October 28, 2019.

[31] In their affidavits, Mr. Mathsen and Mr. Ayala provide evidence regarding the construction delays brought about by the design changes.<sup>8</sup> They explain that the requirement to add a stack to the New Facility design led to a series of cascading design and engineering requirements, including: complicated detailed engineering; a new building to enclose the new biofilter; engineering and structural work related to that building; two large blowers to push biofilter air through the stack; and a large, custom-designed electrical transformer to power the blowers. Additional time was required to order, fabricate, deliver and install the stack, building material, blowers and transformer.

#### COVID-19-Related Delays

[32] GFL submits that the COVID-19 pandemic has directly and indirectly impacted, and continues to impact, the construction and commissioning of the New Facility.

[33] Mr. Ayala describes the impact of COVID-19 on the project<sup>9</sup>. He states that, prior to the pandemic, there would be between 50 to 100 tradespeople/labourers at the project site involved in the construction of the New Facility. Beginning in mid-March 2020, tradespeople began raising concerns about being exposed to the coronavirus on their commute to, and work at, the New Facility site. Some refused to attend the site; others were unable to work due to childcare issues resulting from provincial emergency response requirements. Still others walked off the site due to health concerns. An electrical foreman at the project site reported COVID-19 symptoms and was told to self-isolate. Workers related to the foreman, and those working with him asked to be laid off. Overall, delays occurred in March 2020 due

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<sup>7</sup> See hearing transcript of June 10, 2019, page 66, lines 2-5.

<sup>8</sup> See Mathsen affidavit at paragraph 9 and Ayala affidavit at paragraphs 54-56.

<sup>9</sup> See Ayala affidavit at paragraphs 12-33.



to a depleted workforce and the difficulties finding, hiring and training new workers on the project during a pandemic.<sup>10</sup>

[34] Mr. Ayala also explains that, in the last weeks of March 2020, government entities and industry safety associations began providing COVID-19 guidance related to the operation of construction sites.<sup>11</sup> After receiving the guidance, beginning March 24, 2020, Unitech dedicated a project safety officer responsible for implementing COVID-19 protocols. The protocols included: restricting access to the site; increasing hand-washing stations; increasing hand cleaning and sanitizing; cleaning common areas, tools, and handrails; and requiring employees to sign in, complete questionnaires and undergo temperature checks, daily.

[35] GFL submits that while the entrance protocols increased the safety of the work environment at the New Facility construction site, their implementation, on a daily basis, slowed progress at the site.<sup>12</sup> Other COVID-related protocols, related to how work was being performed on the site, resulted in further delays. For example, social-distancing requirements necessitated more meetings and briefings (with fewer participants in each), the use of equipment and planning to perform tasks (rather than workers), limiting the number of workers in a hoist or in a single work area at one time, and requiring self-isolation for symptomatic employees. Mr. Ayala estimates an ongoing loss of production time of approximately 30 minutes per day per worker in addition to the delays caused by the entrance protocols.

[36] GFL submits that, in addition to delays directly attributable to the COVID-19 situation, it has experienced indirect delays related to the pandemic. For example, the metal building supplier for the new biofilter building is in Ontario and was impacted by that province's COVID-19 orders. This impacted the supplier's ability to provide certain materials needed by trades at the site to advance the construction.<sup>13</sup> These delays had trickle-down effects that impacted the project timeline. For example, supply delays impacted completion of the roof of the biofilter building which, in turn, delayed installation of duct work.<sup>14</sup>

[37] GFL submits, as it did in the Second Interim Application, that the COVID-19 pandemic also delayed the ability of BacTee and BDP personnel to travel from their respective locations in the United States to British Columbia to perform their necessary start-up and commissioning work. BDP personnel were scheduled to attend the site in late March or early April to begin commissioning the agitators and dollies that transfer the agitators between the 21 channel process bays in the New Facility. GFL submits that for safety and warranty reasons, BDP personnel must train the equipment operating personnel at the New Facility to operate the equipment, and must be on site for the work.<sup>15</sup> GFL and BDP personnel had

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<sup>10</sup> Ibid., at paragraph 14.

<sup>11</sup> Mr. Ayala deposed at paragraphs 18 to 20 as to the guidance documents issued by the Provincial Health Officer, the BC Construction Safety Alliance and WorkSafe BC.

<sup>12</sup> Mr. Ayala deposed that implementing the protocols caused a delay in the start of each workday by approximately 60 minutes, initially. Repetition of the protocols, over time, reduced the delay to 30-45 minutes.

<sup>13</sup> See Ayala affidavit at paragraphs. 32 and 34.

<sup>14</sup> Ibid., at paragraph 35.

<sup>15</sup> See Nicoletti affidavit at paragraphs 14-16 and 23.

anticipated multiple site visits by multiple BDP personnel to commission the start-up of the agitator equipment and the overall computer control system, train staff, and ensure the system is functioning properly once the 21 channels are loaded with composting material. Travel restrictions arising from COVID-19 prevented BDP personnel from travelling to the site in late March/early April and, again, in early May 2020.<sup>16</sup>

[38] Similarly, BacTee personnel were scheduled to travel from North Dakota to the New Facility construction site in mid-April 2020, to review the air system equipment, ensure that it was installed and connected properly, and identify any issues that could affect or delay its commissioning. They, too, faced COVID-19-related travel restrictions. BacTee personnel still need to travel to British Columbia to oversee the installation of the BacTee air system floor tiles in the biofilter before material is added, and to perform initial commissioning services on the air system. They will need to return to perform commissioning services to balance the air/ventilation system and initiate the “acclimation” of the biofilter.<sup>17</sup>

[39] GFL submits that the COVID-19 pandemic has delayed these important start-up and commissioning services that were to be provided by BDP and BacTee personnel.

[40] GFL submits that it has taken steps to mitigate the delays caused by the COVID-19 pandemic. It has implemented protocols to improve worker safety while ensuring workers who are not feeling well do not come to the site, and those who come feel confident in remaining. GFL submits that it also took steps to reduce the COVID-19 delays related to BDP personnel's inability to travel to the site. In particular, it took action to reduce the number of tasks that BDP personnel would need to address when they travel to the New Facility to expedite commissioning work.<sup>18</sup>

[41] Further, GFL submits that between March and mid-May 2020, it held between 25-30 conference and video calls between the on-site project team and its American suppliers. They discussed work progress and plans in an effort to minimize foreseeable delays when BacTee and BDP personnel could eventually travel from the United States to the New Facility to conduct their respective commissioning work.<sup>19</sup> GFL also took steps to keep multiple trades onsite at the same time to reduce the risk of losing them to other projects.

[42] GFL submits that, even with these mitigation measures, it continues to experience COVID-19 related delays. After accounting for mitigation measures and overlap in individual task delays, Mr. Ayala's evidence is that the direct and indirect COVID-19 delay to the final completion of the New Facility is approximately 4-5 weeks.

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<sup>16</sup> See Nicoletti affidavit at paragraphs 12-22 and 28-29.

<sup>17</sup> See Mathsen affidavit at paragraphs 70-72.

<sup>18</sup> See e.g., Ayala affidavit at paragraph 42 re GFL's prototype used to perform initial work in remediating portions of the concrete channel walls.

<sup>19</sup> See Mathsen affidavit at paragraph 26.

[43] GFL submits that, at the time of its application, the delays are not over as British Columbia remains in a state of emergency. COVID-19-related delays have the potential to continue to compound general construction delays. For example, BacTee and BDP personnel need to oversee mechanical and electrical progress to ensure that any necessary corrections (or “tweaks”) can take place in advance of commissioning the New Facility. This is required to avoid additional delays. However, their inability to travel to the New Facility creates further uncertainty about when the work will be completed.<sup>20</sup> While GFL continues in its efforts to bring these personnel to the site, their ability to cross the border depends on satisfying Canadian Border Services Agents (“CBSA”) that they are symptom free of COVID-19 and that they are travelling for work purposes. Further, whether they will be subject to a mandatory quarantine period in British Columbia will be dependent on CBSA being satisfied that their work in Canada is related to a Canadian-deemed “essential” service.<sup>21</sup>

#### Other Construction Delays

[44] GFL submits one of the other delays to the completion of the New Facility arose because the City of Delta took approximately 4 weeks to approve designs related to the installation of the external electrical system power line which, in turn, delayed GFL’s ability to issue a work order for BC Hydro until mid-March 2020. By this time, BC Hydro’s work and schedule were impacted by the COVID-19 pandemic.<sup>22</sup> One of BC Hydro’s restrictions (maximum “outage” time) resulted in BC Hydro placing a hold on the work at the New Facility project.<sup>23</sup> submits that it remains uncertain when BC Hydro would complete its work. Until BC Hydro completes its work to connect the transformers and provide sufficient, permanent power to the site, commissioning of the New Facility cannot be completed.<sup>24</sup>

[45] GFL cites other delays which have impacted the construction and commissioning timeline for the New Facility, such as design changes brought about by the need to construct a stack at the New Facility. As noted earlier, those changes require GFL to acquire two large blowers and a custom-designed electrical transformer to power the blower, order fabricating, and secure delivery and installation of the stack, biofilter building material, blowers and transformer, among other activities.<sup>25</sup> Further, detailed design engineering in February 2020 identified the need for the stack to be constructed of stainless steel (rather than aluminum as

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<sup>20</sup> BDP and BacTee personnel were scheduled to travel to the New Facility construction site the week of June 1 and June 15, 2020, respectively, i.e., after GFL filed its submissions in this application. See Mathsen affidavit at paragraph 27 and Nicoletti affidavit at paragraph 29.

<sup>21</sup> See *Minimizing the Risk of Exposure to COVID-19 in Canada Order*, P.C. No. 2020-0370.

<sup>22</sup> See Ayala affidavit at paragraph 49 regarding BC Hydro’s social distancing, prioritizing, crew restrictions and “outage” time restrictions flowing from the COVID-19 situation.

<sup>23</sup> See Ayala affidavit at paragraph 49.

<sup>24</sup> *Ibid.*, at paragraph 50.

<sup>25</sup> See Ayala affidavit at paragraph 54.

had first been contemplated), necessitating a search for a Canadian supplier that could fabricate the stack in the projected timelines.<sup>26</sup>

[46] Another unanticipated delay to the construction and commissioning timeline occurred due to extreme weather events in the area of the site. GFL submits that, in total, delays caused by design changes, extreme weather and longer-than-usual waits for approvals, have resulted in an approximate 10-week delay to the final completion of the New Facility.<sup>27</sup> [This is in addition to the 4-5 week COVID-19-related delays<sup>28</sup>.]

#### New Facility Progress

[47] In further response to the Panel's requirements in paragraph 65 of the Second Interim Decision, GFL submits that it has made significant progress on the New Facility since February 27, 2020, when Metro Vancouver staff photographed the progress it observed.<sup>29</sup>

[48] In particular, GFL submits that progress since February 27, 2020 includes:

- a. fully enclosing Building #2 at the Facility;
- b. completing the metal structure (including wall and roof trusses), 90% of the wall panels and 90% of the roof panels for enclosing the new biofilter building;
- c. completing significant portions of the new Building #3 air channel blower system (including ducting and installation of fire extinguisher water system lines);
- d. completing the 21 process channels/bays in Building #3 (including air system lines, rail system for the agitators, and conveyor system);
- e. receiving the 4 BDP agitators and transfer carriages/dollies at the site;
- f. completing the air plenum and connection of the ducting lines for Building #3;
- g. completion of ductwork for Building #3;
- h. installation of fans and blowers in Building #3;
- i. installation and commissioning of 3 transformers for Building #3 and the connector building;
- j. completion of the connector building;
- k. commissioning of back-up generators for the New Facility;
- l. installation of insulation in Buildings #2 and #3;

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<sup>26</sup> Ibid., at paragraphs 54-55.

<sup>27</sup> Ibid., at paragraph 65.

<sup>28</sup> Ibid., at paragraph 68.

<sup>29</sup> See Exhibits 203-210 in the Appeal.

- m. completion of the fire extinguisher system;
- n. installation of the overhead doors in Buildings #2 and #3 and the connector building;
- o. completion of the structural steelwork for the biofilter building;
- p. installation of approximately 65% of roof panels and 80% of wall panels for the new biofilter building;
- q. installation of approximately 75% of the internal electrical system for the new biofilter building and progressing other internal electrical systems;
- r. completion of the conveyor system (including the internal system in all buildings and the external system from Building #3 to finished compost area);
- s. completion of excavation and forming for the concrete pad for the stack and blowers for the new biofilter;
- t. delivery of shredders to the site;
- u. completion of ductwork for Building #2 and the connection to Building #3; and
- v. completion of various construction quality control tasks.<sup>30</sup>

#### Outstanding Tasks and Estimated Completion Timeline

[49] GFL submits that there are four stages that it must complete before the New Facility will be complete and operational. These are:

- 1. conclude physical construction and equipment installation;
- 2. ensure construction of building and installation of equipment is proper and equipment is working properly;
- 3. ensure the air and HVAC systems are “balanced”, optimized and functioning properly together; and
- 4. ensure that all equipment and systems are properly controlled, and functioning together with compost material in place, i.e., “real world testing”.

[50] GFL submits that the primary outstanding tasks for completion of the New Facility include:

- a. BC Hydro installing the electrical power connections to the New Facility;
- b. BDP personnel completing the rail track installation and bay wall remediation in Building #3;
- c. GFL completing mechanical and electrical systems in Buildings #2 and #3;

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<sup>30</sup> See Ayala affidavit at paras. 9-10 and attached Exhibits “A” and “B.”

- d. BacTee personnel overseeing the start of installation of the BacTee floor system and completion of that installation;
- e. BDP personnel starting-up and commissioning the BDP agitators in Building #3;
- f. GFL starting up of the conveyor system;
- g. GFL completing the biofilter building roofing and cladding;
- h. GFL completing the stack and blower pads;
- i. GFL securing delivery and installation of the stack;
- j. GFL securing delivery and installation of the biofilter ducting work and biofilter building transformer;
- k. GFL securing installation of the blowers; and
- l. BacTee and BDP personnel completing commissioning and balancing.

[51] Given the 4-5 week delays resulting from the COVID-19 situation and the approximate 10 week delays associated with design change, severe weather and other complex project delays, GFL estimates that the four stages of completion and commissioning will be completed in the period August 15 to 31, 2020, with GFL making best efforts to complete by August 15, 2020.<sup>31</sup>

[52] GFL submits that completion of the construction and commissioning of the New Facility as currently projected is contingent on: electrical connection by BC Hydro at the New Facility by no later than July 15, 2020; the stack being shipped by the supplier by June 19, 2020; the transformer being shipped by the supplier by June 16, 2020; BDP and BacTee personnel being permitted to travel to the site by no later than the weeks of June 1, 2020 and June 15, 2020 respectively; and no unforeseen complications or delays to the remaining outstanding tasks that GFL is unable to mitigate.

#### Impacts if the Date Variations are not Granted

[53] GFL submits that if the Date Variations are not granted, it will be required to shut down the Facility for approximately two months until the New Facility is complete and operational. This will have impacts on GFL's customer, the general public (including the Resident Appellants), and GFL. Further, if GFL is forced to stop receiving and processing diverted organics, the Province, Metro Vancouver, and each of its member municipalities' ability to reach their greenhouse gas reduction goals will be impaired.

[54] GFL submits that it receives organics (diverted from landfill) from the City of White Rock and has contracts to receive diverted organics from the City of Vancouver, the City of Richmond, the City of Burnaby, and the City of Delta. GFL also receives a smaller portion of its annual volume of compostable material from commercial customers (businesses and multi-family residential units).

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<sup>31</sup> See Ayala affidavit at paragraphs 68-69.

[55] If GFL is not able to receive these organics pending completion and start-up of the New Facility, it will be unable to meet its contractual obligations. Further, GFL submits that there is no available permitted and operational capacity in other composting facilities within 200 kilometres of GFL's Facility that could receive the estimated 10,000 tonnes of compostable material for the summer months of 2020.<sup>32</sup> Diverting this volume of organics to facilities that do not have the capacity to properly process the material could lead to odour issues at those facilities. Trucking the material to more distant composting operations would result in a larger carbon footprint and undermine Metro Vancouver's sustainability goals, even if these operations would accept the tonnage that is currently received at the Facility.<sup>33</sup>

[56] If it is unable to accept the diverted organics, GFL submits that its municipal customers will have wasted their efforts to source separate materials. Further, GFL will suffer the loss of significant revenue under its contracts with Metro Vancouver municipalities and for the services it provides to the City of White Rock, for which it receives tipping fees. As contractual tipping fees are "competitive business information", they are not generally disclosed; however, GFL states that these fees are substantial and not recoverable.<sup>34</sup> GFL submits that it may lose customers if it is unable to provide services for two months.

[57] GFL also submits that, if the Date Variations are not granted, material on site will need to be excavated and loaded for transportation off site. Disturbing material that is at various stages of processing would potentially release odours as this is not a controlled process and not part of best management practices for composting organics. GFL submits that, if this material is removed, it will not be available to be mixed with new/raw material, as planned, to gradually activate and acclimate the biofilter media and bacteria. This will lead to a more odorous activation process for the New Facility.<sup>35</sup>

#### *The Third Parties' Submissions*

[58] Neither the Resident Appellants nor the City of Delta took a position on GFL's Third Application for Interim Relief. Delta urged GFL to complete the New Facility, have it operational as soon as possible, and to take steps to mitigate the impact of odorous air contaminants from the Facility on surrounding residents.

#### *The District Director's Submissions*

[59] The District Director does not clearly take a position in response to GFL's application for the Date Variations; he does not oppose or consent to the application, nor does he take "no position" as did the Resident Appellants and

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<sup>32</sup> See McNamara affidavit at paragraphs 10-12.

<sup>33</sup> Ibid., at paragraph 14

<sup>34</sup> A City of Vancouver, Administrative Report dated January 22, 2018 and attached to the McAra affidavit as Exhibit "B" notes that Vancouver staff sought approval to contract with GFL for services to receive, sort and process organic materials with an annual value of \$3,050,000 plus taxes.

<sup>35</sup> See McAra affidavit at para. 20 and Mathsen affidavit at paragraph. 15.

Delta. Instead, the District Director submits that, in the Second Interim Application, GFL was less than forthright with the Board. He states that GFL purportedly filed that application for further variations of the Permit deadlines because of the “extraordinary circumstances” caused by the “unprecedented COVID-19 issues”. However, at that time, GFL already knew that the project was almost 2.5 months behind schedule for reasons having nothing to do with COVID. The District Director submits that GFL knew—but failed to disclose to the Board—key evidence including:

- the approximately 4-week delay in concrete pouring caused by higher than anticipated wet weather that occurred in January and early-February 2020;
- the delay of approximately 3 weeks that it alleges resulted from the City of Delta’s delay in approving electrical design drawings;
- delays relating to the detailed design of and anticipated delivery of the stack; and
- an estimated shipping date of June 16, 2020 for the biofilter building transformer.

[60] The District Director submits that GFL’s conduct is worthy of rebuke and “this application should be considered in light of GFL’s lack of candour and transparency before the Board and the relief sought by GFL.” If, however, the Panel is “inclined to grant any extensions”, the District Director submits that it should require GFL to provide “detailed and comprehensive bi-weekly updates to the Board and the Parties commencing on June 22, 2020, including the best available evidence in support of the first four areas (A-D) set out in paragraph 65 of the Board’s April 23, 2020 decision”.

[61] In addition, to reduce the impact of GFL’s operation on the public the District Director “requests” that we restrict the amount of incoming material to the Facility in July and August 2020 to 8,000 tonnes per month. The District Director submits that GFL ought to be able to divert 2,000 tonnes per month without impacting its contractual obligations to municipalities. No evidence was provided in support of this “request”.

[62] The District Director submits that, in his view, the “appropriate procedure” for a permittee requesting permit amendments is for the permittee to apply to the District Director, with supporting documentary evidence, in the ordinary course. The District Director further submits that GFL’s lack of candour in the Second Interim Application “exposes the frailty of having the Board being put in the position of determining permit amendment applications based on bare assertions of fact and sometimes superficial information without supporting documentary evidence”. Because there is no cross-examination on the affidavits, the Board is left to rely on one-sided and untested information provided by an applicant, often unsupported by the best available evidence.

#### *GFL’s Rebuttal Submissions*

[63] GFL argues that the District Director’s submission does not substantively address the extensive evidence filed by GFL. Further, GFL submits that the District



Director has not lead evidence that undermines or contradicts GFL's evidence. Specifically, the District Director does not deny that if the application is not granted, GFL will suffer significant and irreparable financial and reputational harm and the identified public interests will suffer.

[64] GFL submits that the District Director has made unfounded allegations that GFL "categorically rejects", e.g., that it "concealed" or "failed to disclose" that construction of the New Facility was, at the time of the Second Interim Application, already delayed. GFL submits that it has not hidden or concealed the fact that construction of the New Facility has been delayed. GFL points to the evidence of Brian King, on behalf of GFL, regarding the potential for delays (including weather and supply-related delays) and the ripple effect such delays would have on the construction schedule.<sup>36</sup> GFL submits that:

- it noted the potential for further delays in its First Interim Application;<sup>37</sup>
- it noted that the COVID-19 pandemic was "adding to other delays" in its Second Interim Application;<sup>38</sup> and
- in its April 14, 2020 reply submissions on the Second Interim Application, GFL noted that it was experiencing delays not caused by the pandemic.

[65] GFL submits that the pandemic was, however, precluding it from determining the total delay to the construction schedule at the time of the Second Interim Application.

[66] GFL submits that the District Director has failed to explain what useful purpose its request that GFL submit bi-weekly updates will serve. GFL submits that such a requirement will only add another requirement to the already overly prescriptive Permit.

[67] GFL also submits that the Panel has twice determined that these matters are properly before them and the District Director has provided no reason why those decisions should change.

[68] Finally, GFL submits that we ought not to accede to the District Director's request to amend the Permit volume provisions for July and August 2020 "in order to reduce the impact of GFL's operations on the public". The District Director provides no evidence that links volumes received to impact on the public. GFL submits that it has provided evidence that during the current COVID-19 pandemic, there has been a material increase in residential curbside organic waste volumes in Metro Vancouver.<sup>39</sup>

[69] In sum, GFL submits that it has filed "significant and extensive evidence" that demonstrates that GFL has acted, and continues to act, reasonably and

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<sup>36</sup> See June 10, 2019 transcript of the hearing at page 86, lines 22-47 and page 87, lines 1-3 and 10-16.

<sup>37</sup> See GFL's First Interim Application at paragraphs 76-81(b)

<sup>38</sup> See GFL's Second Interim Application (letter) at page 3.

<sup>39</sup> See McAra affidavit of June 1, 2020 at paragraph 16

diligently to mitigate COVID-19-related and other schedule impacts. It has filed evidence showing that it is making every effort to complete the New Facility as quickly as possible, and the Facility and New Facility will be important contributors to the organics-diversion regime in Metro Vancouver. GFL argues that its evidence establishes that it will suffer irreparable financial harm if the Facility is shut down, and that the requested Date Variations support public interests (including waste diversion, greenhouse gas reduction and odour impacts).

### *The Panel's Findings*

[70] As we stated in the First Interim Decisions at paragraph 43 (and adopted in the Second Interim Decision at paragraph 45), the Board has the authority under section 15 of the *Administrative Tribunals Act* (the "ATA") to make any interim order that it has the jurisdiction to make on a final basis:

43. We are satisfied that section 15 of the ATA, like section 16.1 of the SPPA [Ontario *Statutory Powers Procedure Act*], provides the Board and us with "a largely unfettered discretion" to make any interim order that it has the jurisdiction to make on a final basis, to ensure that the statutory rights it deals with are protected pending a final decision on the merits of the appeal. Understood in this way, we find that we have the authority to make interim orders under section 15 of the ATA and that the power is broader than the authority to stay all or part of a decision under appeal as provided for in section 25 of the ATA.

### *The test for interim relief*

[71] In the First Interim Decision, we found that the relief sought was "stay-like" and it was, therefore, appropriate to apply the three-part test for a stay or injunctive relief from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]. We also found, however, that each application needed to be considered on its own merit and, in different circumstances, the two-part test articulated by the Ontario Labour Relations Board in *Canadian Union of Public Employees, Local 1287 v. Niagara (Municipality)*, 1997 CanLII 15582 might be more appropriate (the "Ontario SPPA Test"). At paragraphs 54 to 57 of the First Interim Decision we found as follows:

54. We have concluded that both categories of the interim relief sought by GFL in the Application can be addressed under either section 15 or section 25 of the ATA. We have proceeded under section 15 as the relief sought, while stay-like in some aspects, includes a request for interim relief that would provide for a transitioning between the cessation of operations at the current facility and the commencement of operations at the substantially new facility, something that is not presently contemplated in the Permit. The Permit assumes an "almost" seamless transfer of operations with no commissioning or "start up" grace period. We say "almost" seamless transition because the Permit does not provide for operations on February 29, 2020, which creates a

"gap" in time in that GFL is neither permitted to, nor prohibited from, operating.

55. In deciding whether to allow the application and grant the relief sought by GFL, the test that we will apply is the three-part *RJR-Macdonald* test for interlocutory (interim) relief. We note that in *RJR-Macdonald*, the appellant sought relief for a certain period from the enforcement provisions in the *Tobacco Products Control Regulation* just as GFL has sought temporary relief from certain enforcement provisions in its statutory authorization, i.e., the Permit.

56. In our view, the *RJR-Macdonald* test is the appropriate test to apply where, as here, whether the relief sought is characterized as a "variation" or a "stay", the result would be the same, i.e., certain provisions in the Permit will not be enforceable on the dates presently set in the Permit. It is the practical effect of the requested orders that most persuasively guides us on this question. In this case, the outcome (if granted) is stay-like, even if the request is not brought under the stay provisions; some of the provisions will become enforceable at later dates, while other terms will become enforceable if and when we find that the enforcement mechanism provided for in the Permit (i.e., odour units) is appropriate as a statutory emissions compliance limit. The "gap" in the Permit with respect to operations on February 29, 2020 will also be addressed. The Board applies the test in *RJR-Macdonald* when deciding whether to stay a decision under appeal as will we, to ensure consistency and predictability in the Board's processes.

57. It bears emphasizing that an application for an interim order of a different nature, such as an order adding or otherwise varying terms in a decision under appeal or conveying a benefit on an interim basis, may not involve the *RJR-Macdonald* test. The test to be applied in any given application is a matter to be addressed by the panel in that case, based on the nature of the order requested.

[72] In the Second Interim Decision we determined that, in the unique circumstances of the COVID-19 pandemic, the appropriate test to apply to the application for relief was not the three-part "stay" test; rather, we found that the two-part Ontario SPPA Test for interim relief better addressed the situation.<sup>40</sup> That test requires us to consider whether there is an arguable case for which the Board is empowered to give a remedy and, if so, whether the balance of harm favours granting the interim relief. We reached that conclusion in the Second Interim Decision as we found that the relief sought was not a "stay" of provisions in the Permit pending the outcome of an appeal; it was a variation of interim relief already granted by the Panel in the unique circumstances surrounding the COVID-19 pandemic—circumstances that were not in dispute.

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<sup>40</sup> See Second Interim Decision at paragraph 51.

[73] In our view, given that the relief sought is, again, a variation of the interim relief we previously granted, we find that the two-part test for interim relief continues to be the appropriate test to apply.

[74] Any request for relief pending the outcome of an appeal from the terms of a Permit (such as the request for the Date Variations), requires an application to the Board under section 15 of the ATA. Procedural fairness dictates that the other Parties to an appeal be given the opportunity to respond to any such request for relief. That is the process that we followed for GFL's First and Second Interim Applications, and it is the process that has been applied to GFL's current request for the Date Variations.

[75] In both the First Interim Decision and the Second Interim Decision, we found that GFL was entitled to bring an application for interim relief to us, rather than to the District Director, in the circumstances. In the First Interim Decision at paragraphs 81 to 83, we found that GFL was entitled to bring its application to vary terms in the Permit to us—the Panel of the Board hearing the appeals—rather than to the District Director:

81. We also find that GFL is free to bring this Application, rather than seek an amendment of the Permit from the District Director (or pursue some other option, as suggested by the Resident Appellants). Although, at some point, it might have been appropriate to apply to the District Director for an amendment to the Permit for the changes that are the subject of the Application, the Panel agrees with GFL that it is now appropriate for the Panel to decide these issues as part of the appeal process. There is nothing in the ATA or the Board's Rules that prevents it from doing so. No persuasive authorities were provided in support of the District Director's position that GFL should have sought an amendment of the Permit, rather than interim relief from the Panel.

82. The Permit is before the Panel and the delays in the appeal process are interwoven with the Board's practices and the conduct of the parties to the appeals. The Board (and this Panel) is the master of its own process and this extends to considering whether to grant interim relief under section 15 of the ATA or stays under section 25. The Panel has the jurisdiction to decide this matter and to do so within the context of the Board's appeal processes.

83. Further, even if GFL were to apply for an amendment of the Permit, it would retain a right of appeal to the Board if the application were denied. This would return the matter to the Board in any event. For all these reasons, the Panel is in the best position to decide the Application.

[76] In response to GFL's Second Interim Application, the District Director, again, criticized GFL for seeking interim relief from the Panel rather than applying to the District Director to vary the Permit's terms. In the Second Interim Decision at paragraph 47, we adopted the reasoning from the First Interim Decision at paragraphs 81 to 83. We find that our previous reasoning also applies in the circumstances of GFL's current application.

[77] In the Second Interim Decision we further noted that section 16(3) of the *Act* states that "[i]f a permit or an approval is subject to conditions imposed pursuant

to a decision made in an appeal to the appeal board", those conditions are not to be amended except by the Board, after the Board has given the parties an opportunity to be heard on whether the amendments ought to be made. We did not find it necessary to decide whether the amendments we made to the Permit in the Second Interim Decision constituted "conditions" to the Permit within the meaning of section 16(3) as the result would have been the same; i.e., we would have granted the relief sought in any event rather than directing that GFL apply for relief to the District Director. We apply the same reasoning to our determination of GFL's current application.

[78] In addition to the reasons given in the First and Second Interim Decisions on this matter, we find that it is not appropriate to require GFL to make this application to the District Director for the following reasons.

[79] Since the District Director issued the Permit, the situation leading to the issuance of the Permit has changed markedly. More than 2 years have passed since the Permit was issued and, in the intervening time, significant changes have occurred to the design first contemplated for the New Facility.

[80] Also, a pandemic has occurred leading to a state of emergency and associated restrictions on construction and, indeed, on the hearing of the Appeals. None of this was contemplated by the District Director.

[81] Further, and importantly, we have heard 36 days of evidence, including considerable evidence that was not before the District Director when he made his decision to issue the Permit. Declining to hear this application and requiring GFL to apply for the requested changes to the District Director, would be duplicative (in terms of evidence in support of the application) and would undoubtedly lead to significant delays, both to the project and the completion of the appeal hearing. It is likely that the application would take some time to be reviewed and decided by Metro Vancouver and, as noted in the First Interim Decision, that decision could result in a further appeal to the Board.

[82] Moreover, it is evident from the parties' conduct during the hearing (and in the submissions) that relations between them are "strained". This hearing has been "hard fought". We commented on the acrimonious interactions between counsel for the District Director and GFL in the First Interim Decision. That tension remains obvious in the current application.

[83] For all these reasons, it is appropriate for the Panel to decide the application in the circumstances.

#### *Application of the Two-Part Ontario SPPA Test*

[84] The two questions to be answered under the Ontario SPPA Test are: whether there is an arguable case for which the Panel is empowered to give a remedy and, if so, does the balance of harm favour granting the interim relief.

[85] As part of the first branch of the test (the nature of the remedy), we have considered whether the relief sought is truly "interim" in nature. We have considered the present state of emergency in the Province (a state that has continued unabated since March 18, 2020). We have also considered Ministerial

Order M084 referencing the current operations at GFL as an “essential service”. We have further considered the uncontroverted evidence that GFL has submitted regarding the obstacles to the construction and commissioning of the New Facility in the timeline permitted.

[86] We find that, in these circumstances, the relief sought is truly interim as, if granted, it will allow GFL to continue providing the essential services of receiving and processing organic waste from Metro Vancouver municipalities and other sources, pending completion and commissioning of the New Facility. If we do not grant the relief sought, GFL’s current operations would have to cease effective June 30, 2020, and the New Facility would not be operational. Further, as we found in both the First and Second Interim Decisions, this decision does not involve any final determination on the substantive issues raised in GFL’s appeal. As was the case when we decided the Second Interim Application, the hearing has not yet finished. This is, in large part, because of the March 16, 2020 pandemic-related adjournment and complications associated with reconvening during a state of emergency. We still have to hear evidence from the remaining witnesses and receive the Parties’ final submissions before making our final determination on the substantive issues raised in the appeals.

[87] We now turn to the remaining portion of part one of the test; i.e., whether GFL has established that it has an arguable case that the Date Variations are necessary and appropriate in the circumstances. We find that GFL has provided persuasive evidence (in the affidavits of Messrs. Mathsen, Nicoletti, McAra and Ayala) that the COVID-19 situation, late changes to the design of the New Facility, and severe weather conditions, cumulatively amount to unforeseen obstacles that have delayed the construction and commissioning of the New Facility in the time permitted. We are further satisfied, based on the evidence tendered in support of its application, that GFL has taken reasonable steps to mitigate the impact of these obstacles.

[88] In sum, we find that, based on GFL’s submissions and the evidence in support of those submissions, there is an arguable case that the Date Variations are necessary and appropriate in these unique circumstances. We considered the District Director’s submission that the evidence before the Board consists of “bare assertions of fact and sometimes superficial information without supporting documentary evidence” and that, because there is no cross-examination on the affidavits, the Panel is left to rely on “one-sided and untested information”. We note, however, that the District Director did not apply to cross-examine GFL on the affidavits it tendered in support of its application. GFL also tendered copies of the transcript of its witnesses’ evidence during cross-examination by the Parties at the hearing. We find that we have sufficient, credible evidence to decide this application, and that the Parties had a reasonable opportunity to challenge the evidence as part of their responding submissions or other processes (e.g., apply to cross-examine GFL’s affiants).

[89] Turning to the second part of the test, i.e., whether the balance of harm favours granting the relief sought, we find that it does.

[90] In the circumstances, we find that it is not in the public interest to deny the application and allow the Facility to close before the New Facility commences

operations. There is a pandemic and, based on the evidence, there is a dearth of other facilities capable of processing the tonnage of organics to be received by GFL in July and August 2020. We accept GFL's evidence that some of the disruptions and delays to the construction and commissioning of the New Facility arise out of the very pandemic that led to its designation as an "essential service". We also find that, while not complete, there is sufficient evidence before us to establish that GFL will suffer significant financial and reputational loss if it is unable to meet its contractual obligation to provide organics processing to Metro Vancouver, and to provide services to its other clients, for the months of July and August 2020.

[91] We also considered the potential for harm to the Resident Appellants if the Facility ceases operation and the New Facility is not operational, leaving organic material in various stages of composting at the site. If the Facility is required to cease operation, we find that the organic material on site—at various stages of the composting process—would need to be removed from the site. This would require interrupting the composting process and disturbing material, a process that could foreseeably lead to an exacerbation of the odour issues complained of by the Resident Appellants. We note that, in response to this application, neither the Resident Appellants nor the City of Delta have asked that we order the Facility to cease operations.

[92] We accept GFL's evidence that, in an effort to mitigate the ongoing harm to the Resident Appellants, GFL intends to use finished compost, mixed with new organic material, to prime the new biofilter; a process that GFL submits will be less odorous than priming the new biofilter with new organic material. However, as noted above, there will not be a ready supply of aged and cured compost on site when the commissioning of the new biofilter occurs if the Facility is closed and compost that was in the aging and curing stage has been removed from the site.

[93] We find that it is in the public interest, and in the interest of fairness to the Resident Appellants, that the construction and commissioning of the New Facility continue and be completed as soon as reasonably possible and using the least odour-intensive process possible. Were we to deny the application, both the Resident Appellants and GFL would suffer needlessly and nothing would be gained.

[94] In sum, we find that, to borrow the language of the Ontario Environmental Review Tribunal in *CCCTE v. Ontario (Environment and Climate Change)*, 2015 CanII 70377 (ON ERT), GFL has provided a "reasonable explanation of the necessity of the proposed (Permit) amendments".

[95] For all of these reasons, we find that GFL has complied with the conditions we listed in paragraph 65 of the Second Interim Decision. We also find that GFL has established, on a balance of probabilities, that there is an arguable case for which we are empowered to give a remedy and that the balance of harm favours granting the requested relief; specifically, the Date Variations.

[96] In the event that we grant the Date Variations, the District Director requests that we vary the Permit to limit the tonnage of materials receivable in the months of July and August 2020. He also requests that we require GFL to provide "detailed and comprehensive bi-weekly updates to the Board and the Parties commencing on

June 22, 2020, including the best available evidence in support of the first four areas (A-D) set out in paragraph 65” of the Second Interim Decision.

[97] Regarding the request to vary the tonnage, we find that there is insufficient evidence and argument before us to justify the addition of this term.

[98] Regarding the request for bi-weekly updates, we find that this is unnecessary in the circumstances. Metro Vancouver, as regulator, has authority to monitor performance of the Permit and has the ability to ask reasonable questions in relation to progress. While we understand that the District Director and the Third Parties want to ensure that the varied deadlines are met and the New Facility is completed as quickly as possible, we are satisfied that GFL is similarly motivated to meet the Permit deadlines (as varied) and is making best efforts to have the New Facility completed and commissioned by the end of August. There is no apparent incentive for it to delay.

## **DECISION**

[99] For the reasons provided above, GFL’s application for the Date Variations is granted.

“Brenda L. Edwards”

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Brenda L. Edwards, Panel Chair  
Environmental Appeal Board

“Linda Michaluk”

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Linda Michaluk, Member  
Environmental Appeal Board

“Reid White”

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Reid White, Member  
Environmental Appeal Board

June 25, 2020



## "Appendix A"

## Schedule of Date Variations

Permit Page	Emission Source & Description	Current Permit Date	Requested Permit Date Adjustment
Page 2, para.1, Table 1	Approved Person test distances 2 km	April 30, 2020	August 31, 2020
Page 2, para. 1, Table	Approved Person test distances 1 km	May 1, 2020	September 1, 2020
Page 3, para. 4	Monthly quantity of material received	Until May 1, 2020	Until August 31, 2020
Page 4	Emission Source 01	Discharge of air contaminants is prohibited from this source after June 30, 2020	Discharge of air contaminants is prohibited from this source after August 31, 2020
Page 5	Emission Source 02	Discharge of air contaminants is prohibited from this source after June 30, 2020	Discharge of air contaminants is prohibited from this source after August 31, 2020
Page 6	Emission source 03	Discharge of air contaminants is prohibited from this source after June 30, 2020	Discharge of air contaminants is prohibited from this source after August 31, 2020
Page 6	Emission source 03 Works and procedures	Until July 1, 2020 the permittee must keep a record of the use of positive aeration between the hours of 6 am to 7 pm	Until September 1, 2020 the permittee must keep a record of the use of positive aeration between the hours of 6 am to 7 pm
Page 7	Emission source 04A	Discharge of air contaminants from	Discharge of air contaminants from

		this source is prohibited after June 30, 2020	this source is prohibited after August 31, 2020
Page 7	Emission source 04A Works and procedures	Until July 1, 2020 the permittee must record on a daily basis the duration of positive aeration (in hours) correlated with the specific zones used in a computerized log or format approved in writing by the District Director	Until September 1, 2020 the permittee must record on a daily basis the duration of positive aeration (in hours) correlated with the specific zones used in a computerized log or format approved in writing by the District Director
Page 8	Emission source 04B	Discharge of air contaminants from this source is prohibited after June 30, 2020	Discharge of air contaminants from this source is prohibited after August 31, 2020
Page 10	Emission source 05	Discharge of air contaminants from this source is prohibited after June 30, 2020	Discharge of air contaminants from this source is prohibited after <b>October 31, 2020</b>
Page 11	Emission source 06	Discharge of air contaminants from this source is prohibited after June 30, 2020	Discharge of air contaminants from this source is prohibited after August 31, 2020
Page 11	Emission source 06 Works and procedures	By July 1, 2020 transfer of all finished compost material from ES08 and ES10 must only occur by covered conveyance utilizing minimal drop heights	By September 1, 2020 transfer of all finished compost material from ES08 and ES10 must only occur by covered conveyance utilizing minimal drop heights

		approved by the District Director and good operating practices to minimize fugitive odour and dust emissions	approved by the District Director and good operating practices to minimize fugitive odour and dust emissions
Page 12	Emission source 07	Until June 30, 2020 the authorized rate of discharge is that resulting from the aerobic treatment of leachate and storm water runoff	Until August 31, 2020 the authorized rate of discharge is that resulting from the aerobic treatment of leachate and storm water runoff
Page 12	Emission source 07	After July 1, 2020, the authorized rate of discharge is that resulting from aerobic treatment of storm water runoff	After September 1, 2020, the authorized rate of discharge is that resulting from aerobic treatment of storm water runoff
Page 12	Emission source 07 Maximum emission quality	Until June 30, 2020: typical air contaminant emissions from aerobic treatment of leachate and storm water runoff	Until August 31, 2020: typical air contaminant emissions from aerobic treatment of leachate and storm water runoff
Page 12	Emission source 07 Maximum emission quality	After July 1, 2020: typical air contaminant emissions from aerobic treatment of storm water runoff	After September 1, 2020: typical air contaminant emissions from aerobic treatment of storm water runoff
Page 12	Emission source 07 Works and procedures	From June 30, 2020 all leachate must be collected	From September 1, 2020 all leachate must be collected

Page 13	Emission source 08 Maximum emission quality	By July 1, 2020, the Total Volatile Organic Compounds equals concentration (mg/m3) as approved by the District Director	By September 1, 2020, the Total Volatile Organic Compounds equals concentration (mg/m3) as approved by the District Director
Page 13	Emission source 08 Works and procedures	By July 1, 2020 ES08 consists of equipment related to ...	By September 1, 2020 ES08 consists of equipment related to ...
Page 21	Reporting requirement: emissions testing new biofilter	October 31, 2020	<b>April 30, 2021</b>