# Environmental Appeal Board

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**DECISION NO. EAB-EMA-21-A006(a)**

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

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| **BETWEEN:** | Gibraltar Mines Ltd. | **APPELLANT** |
| **AND:** | Director, *Environmental Management Act* | **RESPONDENT** |
| **BEFORE:** | A Panel of the Environmental Appeal Board<br>Linda Michaluk, Panel Chair | |
| **DATE:** | Conducted by way of written submissions concluding on September 21, 2021 | |
| **APPEARING:** | For the Appellant: | Robin Junger, Counsel<br>Jamieson D. Virgin, Counsel |
| | For the Respondent: | Micah Weintraub, Counsel<br>Meghan Butler, Counsel |

## STAY APPLICATION DECISION

## APPEAL

[1] Gibraltar Mines Ltd. ("GML") operates a copper and molybdenum mine, the Gibraltar Mine (the "Mine"), near Williams Lake, British Columbia. GML holds Permit PE-416 (the "Permit") issued under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"). The Permit authorizes GML to discharge Mine and mill effluent to the ground, saddle dam seepage and runoff to Arbuthnot Creek, and tailings impoundment supernatant to the Fraser River, subject to numerous conditions.

[2] On May 13, 2021, the Director, *Environmental Management Act* (the "Director"), who is employed in the Ministry of Environment and Climate Change Strategy (the "Ministry"), issued a decision amending the Permit. GML appealed the amendment decision. One of the remedies GML requested on appeal is a temporary stay of some aspects of the amendment decision, pending the Board's final decision on the merits of the appeal. The Director opposes the application for a stay.

[3] This decision addresses GML's application for a stay.

## BACKGROUND

[4] The Mine is the second largest open pit copper mine in Canada and is located within the Cuisson Creek watershed, which drains into the Fraser River. The Fraser River is approximately 11.7 km to the west of the Mine.

[5] As part of its mining operations, GML decided to remove water from one previously mined pit (Gibraltar East Pit) and transfer the water to another previously mined pit (Granite Pit). GML wanted to transfer the water so GML could further mine Gibraltar East Pit.

[6] Both Gibraltar East Pit and Granite Pit are located within GML's permitted mining and lease areas under the *Mines Act* and the *Mineral Tenure Act*.

[7] The Ministry encouraged GML to seek an amendment to the Permit in respect of GML's proposed water transfer plans.

[8] GML questioned why such an amendment would be necessary. In GML's view, the water transfer would not result in the discharge of waste into the environment, and transferring water within an existing mine site to support mining operations is a standard mining practice.

[9] Notwithstanding GML's position that an amendment was unnecessary, on November 20, 2020, GML applied to amend the Permit. The application sought to add a section to the Permit to allow the discharge of effluent from Gibraltar Pit East to Granite Pit. A space on the application for "additional description" describes it as the "[d]ischarge of tailings impoundment supernatant and seepage pond water, excess PLS/raffinate from an SX-EW plant, open pit drainage, rock dump drainage and domestic sewage to Granite Pit". In support of the application, GML prepared a report dated October 2020. The report explains at pages 26 and 27 that the proposal involved transferring 40 million cubic metres of existing effluent from Gibraltar East Pit to Granite Pit, and directing other discharges to Granite Pit that would have previously been directed to Gibraltar East Pit. The other discharges would be from tailings and seepage ponds, effluent pipelines, surface drainage collection ditches, mined out pits, sewage lagoons, and pumping systems.

[10] On May 13, 2021, the Director issued a decision amending the Permit. In doing so, the Director included a number of amendments that GML had not applied for and that GML claims adversely affect its interests (the "Unsolicited Amendments"). The Unsolicited Amendments are in sections 1.7 (non-point source discharges of mine contact water), 2.10 (site wide water management plan), 3.9 (Cuisson Lake water quality evaluation), 3.11 (groundwater trigger-response plan), 4.1 (general reporting), and table 1.a. (sampling water quality and flow of Granite Pit supernatant) of the Permit.

[11] In a separate document dated May 13, 2021, the Director provided reasons for his decision to amend the Permit.

[12] On June 10, 2021, GML appealed the decision to amend the Permit. In its original Notice of Appeal, GML requested several remedies including a temporary stay of the Unsolicited Amendments pending the Board's decision on the appeal. GML stated that it intended to file a separate application for the stay.

[13] On July 22, 2021, GML filed its application for a stay of the Unsolicited Amendments. The Board offered the Director an opportunity to provide written submissions on the application, and GML an opportunity to reply to the Director's submissions.

[14] On August 25, 2021, GML filed an amended Notice of Appeal, with the Director's consent. I have summarized the amended grounds of the appeal as follows:

- grounds alleging procedural and administrative unfairness in the process that led to the decision to amend the Permit; and
- grounds alleging that the Unsolicited Amendments are unreasonable, exceed the Director's jurisdiction and, in some instances, are vague and not necessary for the protection of the environment.

[15] The relief sought in the amended Notice of Appeal is:

a) a temporary stay of the Unsolicited Amendments pending the Board's decision on the appeal;
b) with respect to section 1.6.3 of the Permit, vary the Director's decision by adding the words "tailings impoundment supernatant";
c) with respect to the Unsolicited Amendments, send the matter back to the Director for reconsideration, with directions to ensure that common law principles of procedural fairness are respected; and
d) award costs of this appeal in favour of GML.

[16] This decision will only address the stay application.

[17] As noted previously, the Director opposes GML's application for a stay. The Director submits that by selectively seeking a stay of certain amendments made to the Permit, GML effectively asks the Board to allow it to proceed with their requested effluent discharge to Granite Pit without having to also comply with the imposed environmental monitoring and reporting requirements necessarily associated with that request. The Director maintains that it is not in the public interest to allow the discharge of waste to the environment without commensurate environmental monitoring.

[18] Both parties provided affidavit evidence in support of their submissions.

## ISSUES

[19] Should the Board grant a temporary stay of the Unsolicited Amendments pending a final decision on this appeal?

## RELEVANT LEGISLATION

[20] Section 25 of the *Administrative Tribunals Ac*t, S.B.C. 2004, c. 45 (the "*ATA*") allows the Board to order a stay. Section 25 provides that an appeal does not operate as a stay of a decision under appeal unless the Board orders otherwise. Section 25 of the *ATA* appears in Part 4 of that Act. Section 93.1 of the *Act* provides that Part 4 of the *ATA* applies to the Board (subject to some exemptions not relevant to this decision).

[21] As described in the Board's *Practice and Procedure Manual*, the Board decides stay applications using the test described in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 DLR (4th) 385 (SCC) [*RJR-Macdonald*]. This test was referenced by both parties in their submissions. The test involves three parts:

- whether the appeal raises a serious issue;
- whether the applicant for a stay will likely suffer irreparable harm if a stay is refused; and
- whether the harm that the applicant will suffer if a stay is refused exceeds any harm that may occur if a stay is granted (the "balance of convenience" test).

[22] GML, who has applied for the stay, bears the onus of proof in this application.

[23] I will address each aspect of the three-part test as it applies to this application.

## DISCUSSION AND ANALYSIS

### Does the appeal raise a serious issue?

### GML's Submissions

[24] GML submits that the Notice of Appeal raises serious issues to be tried. In particular, GML alleges the following:

a) the Director failed to comply with common law principles of procedural fairness in issuing the Unsolicited Amendments, because GML was not made aware of (and given a chance to respond to) all information and submissions being relied upon by the Director; and
b) the Director exceeded his jurisdiction by issuing amendments on his own initiative without first advising GML that he intended to exercise the power to amend the permit on his own initiative under section 16 of the *Act* and providing GML an opportunity to make submissions in respect of that proposed exercise of statutory power.

[25] GML submits that this Board and the courts have held on many occasions that breaches of procedural fairness and exceedance of jurisdiction by a statutory decision maker are issues that warrant intervention by oversight bodies (*R. v Singh*, 2018 ONSC 1532, at para. 194, citing *London (City) v. Young* (2006), 64 Admin LR (4th) 149 (ONSC), at para. 10; D.J. Mullan, *Administrative Law Cases, Text and Material,* 5th ed (Toronto, Emond Montgomery Publications Limited, 2003) at 24).

### Director's Submissions

[26] The Director submits that the threshold for establishing a serious issue will not be met where the case, on its merits, is frivolous or vexatious. The Board has considered an appeal to be frivolous "if there is no justiciable question, little prospect that it can ever succeed, and it is lacking in substance or seriousness" (*Klassen v. British Columbia (Ministry of Health)*, [1998] B.C.E.A. No. 56, at para. 34).

[27] The Director submits that the two "serious issues to be tried", as described by GML, are not supported by the record before the Board. In that regard, the Director maintains that he provided GML with a draft of the proposed amendments to the Permit on April 16, 2021, and sought feedback from GML. GML's April 26, 2021 response was little more than an expression of discontent that the Director would consider making amendments to the Permit beyond those requested by GML in its amendment application.

[28] The Director submits that implementation of the Unsolicited Amendments is inevitable given the relief sought by GML. GML does not seek to quash the Unsolicited Amendments on the basis of science or that that a lesser measure would have been protective of the environment. Rather, GML asks the Board to remit the matter back to the Director for reconsideration "with directions to ensure common law principles of procedural fairness are respected".

[29] The Director submits that the Board has repeatedly held that any perceived or actual administrative fairness ground is cured by the *de novo* appeal process (*Lindelauf v. British Columbia*, [2015] BCEA No. 14). It cannot be that the "serious issue to be tried", for the purpose of establishing the first element of the test for a stay under *RJR-MacDonald*, is the very thing that is cured by virtue of the appeal process itself.

[30] The Director submits that the judicial decisions cited by GML related to fairness and exceedance of jurisdiction are neither Board decisions nor stay decisions.

[31] The Director submits that GML has not discharged its burden of showing a serious issue to be tried.

### GML's Reply Submissions

[32] GML replies that the Director's argument that there is no serious issue to be tried because the unfairness can be remedied on appeal is absurd. If the Director's position was accepted, a stay could never be issued in any case where the appeal is filed on procedural fairness grounds.

[33] GML also replies that there are serious issues to be tried on each of its grounds of appeal. GML's grounds of appeal were made clear in the original Notice of Appeal and have been further augmented by the amendment to the Notice of Appeal, which the Director consented to. GML says the Director has not correctly stated GML's grounds of appeal. GML's Amended Notice of Appeal dated August 25, 2021 appealed the Director's decision on several grounds that are not restricted to the procedural fairness issues identified in the Director's submissions. The Director has not addressed any of these additional grounds in his submissions.

[34] GML also disputes the Director's characterization of some of the facts that preceded his decision, and his characterization of the serious issues to be tried.

### Panel's Findings

[35] The court in *RJR-Macdonald* indicated that the "serious issue" component of the test has a low threshold. There are no specific requirements related to the determination on this question, and that the first part of the test is satisfied if the appeal is not frivolous or vexatious.

[36] Questions of administrative and procedural fairness are indeed, on their face, serious issues. They are not simply questions of law, nor are they frivolous or vexatious. They are questions that are treated seriously by the Board and are addressed when an appeal is heard. As pointed out by the Director, a hearing before the Board is a *de novo* process, and the Board has held that any perceived or actual procedural fairness ground is cured by that process. That opportunity, however, will come later in this appeal process when the matter proceeds to a hearing and the appeal is tested on its merits. As stated in *RJR-Macdonald* at paras. 50 to 55, a prolonged examination of the merits of the appeal is generally neither necessary nor desirable in deciding a stay application, unless the appeal involves a pure question of law or the outcome of the stay will amount to a final determination of the appeal. I find that neither of those exceptions apply in this case.

[37] In addition to the procedural fairness issues raised by the appeal, the grounds of appeal allege that the Director exceeded his jurisdiction under the *Act* by imposing the Unsolicited Amendments, as they were not necessary "for the

protection of the environment" as provided in section 16 of the *Act*. I note that this ground of appeal was briefly stated in GML's original Notice of Appeal, and GML's amended Notice of Appeal expanded on this ground. The Director filed his submissions on the stay on September 3, 2021, after the amended Notice of Appeal was filed on August 25, 2021. Although the Director consented to the amended Notice of Appeal and had notice of the amended grounds of appeal before addressing the stay application, the Director's submission on the stay focused on the grounds of appeal related to procedural fairness.

[38] I find that the grounds of appeal related to the Director's jurisdiction to amend the Permit "for the protection of the environment" raise questions that are not pure questions of law. They raise questions that will require the Board to consider technical evidence about the nature of the requirements imposed by the Unsolicited Amendments, and whether they are for the protection of the environment. Although much of the material provided by both parties addressed the merits of the appeal, I find that the issues raised by the appeal are complex enough that they should not be decided based on the limited evidence and arguments provided in this preliminary proceeding. Furthermore, the outcome of the stay will not amount to a final determination of the appeal. Although a few of the Unsolicited Amendments contain deadlines that have passed or must be met in the next few months, many of the Unsolicited Amendments require GML to complete sampling or reporting tasks daily, monthly, annually, every three years, or every five years.

[39] I am satisfied that GML has met the low threshold at the first part of the test. I find that the appeal raises serious issues which are neither frivolous nor vexatious, and are not pure questions of law. I find the appeal raises a serious issue.

### Will GML likely suffer irreparable harm if a stay is denied?

### GML's Submissions

[40] GML submits that it will suffer irreparable harm if the stay is refused, in that the Board has neither the jurisdiction to award damages to GML should the appeal succeed, nor can it "undo" the time and effort incurred by GML to implement the Unsolicited Amendments pending the outcome of the appeal. GML points to several Board decisions in support of its position: *Pinnacle Renewable Energy Inc. v. British Columbia*, 2013 CarswellBC 1444 [*Pinnacle*], at paras. 74 to 77, 88 and 93; *Wohlleben v. British Columbia (Assistant Regional Waste Manager)*, 2002 CarswellBC 2554 [*Wohlleben*], at para. 28; and, *GFL Environmental Inc. and District Director, Environmental Management Act, Re*, 2019 CarswellBC 3956 [*GFL #2*], at para. 110.

[41] GML submits that the Unsolicited Amendments require it to incur significant time and expense. In particular, the development of a Groundwater Trigger Response Plan (the "GTRP"), as set out in sections 1.7 and 3.11 of the Permit, is a significant undertaking in terms of time and expense.

[42] According to the July 22, 2021, affidavit ("Pierce Affidavit #1") of Mr. Ben Pierce, General Manager of Gibraltar Mines, GML expects the costs of meeting the Unsolicited Amendments to exceed $300,000 based on the following:

- Development of a GTRP would take more time and cost than the previously completed Fraser River Trigger Response Plan, which took over two years to receive final approval and cost approximately $107,500. There is little existing guidance available for the development of GTRPs and no applicable Water Quality Guidelines specific to groundwater; consequently, specialized environmental consulting resources will be required.
- Additional requirements set out in section 2.10 pertaining to a site wide water management plan ("SWWMP") will cost $25,000.
- A new permit condition (section 3.9) requiring the characterization of Cuisson Lake will cost approximately$25,000 to conduct onsite sampling and prepare a memo with the results, and this should be done three times in the first year, for a cost of $75,000 in the first year alone (exhibit D attached to Pierce Affidavit #1, is an email with a cost estimate from Minnow Aquatic Environmental Services, dated February 5, 2021) (the "Minnow Email").
- The condition (section 4.1) requiring submission of materials to the Director and specified Indigenous communities will cost approximately $3,000 annually.
- Monitoring of the Granite Pit Supernatant site as set out in Permit Table 1a (Mine Site Surface Water Sample Sites and Monitoring Frequency) will cost approximately $30,000 for the purchase of a drone due to lack of site access, and $60,000 to $75,000 annually for drone sampling.

**Director's Submissions**

[43] The Director submits that the harm asserted by GML is purely financial, speculative, overstated, and nominal when considering the scale of GML's mining operation. There is little evidence provided to substantiate the $300,000 cost estimated by Mr. Pierce. The stated cost of compliance is less than 0.3 percent of GML's 2020 cash flow.

[44] A summary of the Director's submission in terms of the cost estimate provided by GML follows:

- The cost of acquiring a drone is a cost of doing business which is directly related to GML's desire to discharge effluent to Granite Pit.
- GML's recent experience developing the Fraser River Trigger Response Plan should make development of the GTRP more, not less, efficient. Given that the Mine is experiencing seepage to ground that may affect the surrounding environment, the GTRP requirement is very likely an expense GML will have to incur at some point in the future and in any event.
- GML has not attempted to disentangle the additional costs associated with monthly as opposed to quarterly monitoring; fixed and recurring consulting costs are costs that GML would have to incur in relation to any monitoring program regardless of frequency.
- GML has provided no documentation or information as to how Mr. Pierce arrived at the $25,000 cost attributed to the additional modelling requirements in section 2.10 of the Permit.
- GML is already in the process of updating its SWWMP. Given that the Mine is experiencing ongoing water quality and quantity issues, to the extent the modelling requirements in section 2.10 of the Permit increases the cost of updating GML's SWMMP, they are likely costs GML will have to incur at some point in the future and in any event.

- The costs estimated by Mr. Pierce for the Cuisson Lake sampling program (section 3.9) were provided from a consultant, Minnow Aquatic Environmental Services, dated February 5, 2021. The timing of this cost estimate demonstrates that GML was contemplating they would need to complete baseline sampling of downstream water resource values that could be influenced by groundwater seepage prior to the decision to amend the Permit. Given that the Mine is experiencing seepage to ground that may affect the surrounding environment, and the conclusions and recommendations of third-party consultants, the requirement for characterisation of Cuisson Lake is very likely an expense GML will have to incur at some point in the future and in any event.
- The $3,000 annual cost estimated by Mr. Pierce for reporting to the Director and specified Indigenous communities (section 4.1) is an assertion without any supporting documentation, is nominal, and cannot be characterized as irreparable.

[45] The Director submits that the global cost estimate is speculative and insufficient to establish irreparable harm.

[46] The Director further submits that the three Board decisions cited by GML in support of its position on irreparable harm are distinguishable from the present appeal:

- *Pinnacle* concerned the Board finding that a timeline imposed by the Director was ultimately unrealistic;
- *Wohlleben* concerned the Board finding irreparable harm that was not purely financial, and there would be impact to a farm operation resulting from loss of a vital water supply; and
- *GFL #2* concerned the Board finding that denying the application for a stay would result in the applicant being forced to shut its operations or operate in non-compliance with its permit. The Board found that circumstances had changed since its denial of an earlier application for a stay, wherein the Board had found that the applicant provided insufficient evidence or information to establish that its business or reputational interests would likely suffer irreparable harm unless a stay was granted.

[47] The Director submits that unlike *Pinnacle* and *GFL #2*, GML has not raised the impossibility of compliance and the risks of having to shut down or being found in contravention as a result of that impossibility. Also, GML's asserted harms, being its estimated costs of compliance with the Unsolicited Amendments, are materially different from the harm found to be irreparable by the Board in *Wohlleben*.

[48] The Director submits that the Board's decision in *Gill v. British Columbia (Ministry of Environment)* (Decision No. 2016-WAT-006(a), October 13, 2016) [*Gill*], provides guidance in assessing evidence in a stay application. In that case, the applicant provided his own estimate of the cost of complying with the order under appeal. The Board found the estimate was speculative because the applicant provided no details regarding how he calculated the cost, and no supporting documents such as cost quotes from qualified professionals. The Board accepted that the applicant would incur some costs to comply with the order, but this alone was insufficient to meet the second part of the test.

[49] The Director submits that the evidence proffered by GML in support of this part of the test is of similar quality to the evidence the Board considered insufficient

in *Gill*, *GFL Environmental Inc. v District Director, Environmental Management Act* (Decision No. 2018-EMA-021(a), December 10, 2018) [*GFL #1*] and *Harvest Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act* (Decision No. 2016-EMA-175(a), April 4, 2017) [*Harvest*]. GML has not met its onus of establishing irreparable harm.

**GML's Reply Submissions**

[50] GML's reply submissions contained a second affidavit from Mr. Pierce (Affidavit #2, September 17, 2021). The Board's *Practice and Procedure Manual* states on page 27 that no new evidence should be included in an appellant's reply submission. I am satisfied that the Director's submissions did not raise any unexpected issues and as a result, I see no reason to not follow the procedure as set out above. As Affidavit #2 is new evidence, I find that it is not properly part of GML's reply submission. The Director had no opportunity to respond to Affidavit #2. As such, it would be unfair to the Director to admit this evidence. Accordingly, I find the second affidavit to be inadmissible and have not considered any information from Affidavit #2.

[51] GML replies that much of the Director's argument regarding irreparable harm goes to the merits of the appeal and will be addressed at the hearing of the merits.

[52] In addition, GML replies that the only evidence before the Board is that GML will incur significant costs in implementing the Unsolicited Amendments, and the Board cannot award "costs" even if the appeal succeeds. The magnitude of the harm relative to the size of the permit holder is irrelevant, as is the suggestion that the conditions are "the costs of doing business". Since the Board cannot award "costs", and the evidence demonstrates that GML will incur costs, the harm is irreparable.

**Panel's Findings**

[53] At this stage of the *RJR-MacDonald* test, I must determine whether GML, as the applicant for a stay, has demonstrated that it is likely to suffer irreparable harm if a stay is denied.

[54] As stated in *RJR-MacDonald* at p. 405 (paras. 63 - 64):

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the [applicant's] own interest 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 damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision …; where one party will suffer permanent market loss or irrevocable damage to its business reputation… or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined. …

[55] I accept that GML will incur costs associated with meeting the Unsolicited Amendments. What is at issue is whether those costs represent 'irreparable harm' such that a stay pending the outcome of the appeal should be granted.

[56] The evidence presented does show that at least some of the information used for cost estimation purposes in this proceeding had been either acquired or initiated by GML before the amended Permit was issued on May 13, 2021. Exhibit E attached to the Pierce Affidavit #1 provides an example: the report by Golder Associates Ltd., dated April 26, 2021, is a proposal for pit lake drone water sampling and includes "specific revisions to the original proposal dated 18, February 2021". This information was used by Mr. Pierce to assist in estimating costs associated with meeting the new requirements in Table 1a of the Permit.

[57] This evidence suggests that some of the expenses that GML would incur to comply with the Unsolicited Amendments, if a stay is denied, would have been incurred even if the Unsolicited Amendments had not been imposed. As such, it appears that some of those costs may have been incurred regardless of whether the Unsolicited Amendments were imposed.

[58] In light of the April 2021 report from Golder Associates Ltd., I find that GML would have likely incurred some of the costs it related to complying with the Unsolicited Amendments in any event. I do not find GML's submissions to the contrary to be persuasive, given that GML was soliciting estimates for some of the work required by the Unsolicited Amendments before the amended Permit was issued.

[59] The largest part of the cost estimate appears to arise from sections 1.7 and 3.11 of the Permit, which require the development of a GTRP. Mr. Pierce estimated that the GTRP will take longer to develop than the Fraser River Trigger Response Plan, and cost more than the $107,500 it cost to do so. However, GML has provided neither a detailed cost breakdown nor a contractor proposal to support Mr. Pierce's estimation. At best, his estimation is just that—a guess based on past experience. At worst, his estimation amounts to speculation.

[60] Furthermore, GML did not say what proportion of the costs to comply with the Unsolicited Amendments would likely be incurred before the Board issues a decision on the merits of the appeal. For the purposes of deciding a temporary stay application, the only relevant costs are those that would likely be incurred before the conclusion of the appeal.

[61] While not binding on me, analysis from previous decisions of the Board can provide guidance and help bring consistency to adjudication. In *GFL #1,* at para. 92, the Board stated:

> As stated by the Board in *Harvest* [*Fraser Richmond Organics Ltd. v. District Director, Environmental Management Act* (Decision No. 2016-EMA-175(a), April 4, 2017)], an applicant need not conclusively prove that their interests will suffer irreparable harm if a stay is denied. However, a stay is an extraordinary remedy and the applicant must provide sufficient evidence to establish its interests are likely to suffer harm. Speculative claims, and assertions that are not supported by adequate evidence, are insufficient to establish that an applicant's interests are likely to suffer irreparable harm.

[62] I find the reasoning of the Board in that previous decision to be equally applicable to the present stay application.

[63] As stated in *RJR-MacDonald,* it is not the magnitude of the harm suffered that determines if it is "irreparable"; it is the nature of the harm, such as a party being forced out of business or suffering irrevocable damage to its business

reputation. The Board has no authority to award damages (although the Board may order "costs" under section 47 of the *ATA*), and any expenses that GML incurs to comply with the Unsolicited Amendments could not be recovered through the appeal process if the appeal is successful. As such, those expenses may be unrecoverable. However, there is insufficient evidence for me to conclude that incurring such expenses, even if they are unrecoverable, would cause irreparable harm to GML's financial or business interests. No evidence was presented to show that GML's financial viability or its business reputation stands to be adversely affected if the stay is not granted.

[64] If a stay is denied, GML will be able to continue to operate the Mine and discharge effluent in accordance with the conditions in the Permit. This is unlike the circumstances in *GFL #2* or *Wohlleben*. In *GFL #2*, the applicant established that denying a stay would likely result in the applicant having to either close its operations or operate in non-compliance with its permit, and its business reputation would likely suffer irreparable harm. In *Wohlleben*, denying a stay meant that the applicant would have comply with an order to remove a dam. The applicant provided evidence that denying a stay of the order would permanently harm the agricultural viability of some of his land and he would suffer severe financial consequences.

[65] The present circumstances are also unlike those in *Pinnacle*, in which the applicant claimed that compliance with the order was not feasible, and non-compliance would cause irreparable harm to its reputation. The appeal involved an ambient air quality monitoring station located in the community that measured air contaminants from any source. The appeal did not involve permit conditions that required the applicant to monitor contaminants emitted at the applicant's facility.

[66] For all of these reasons, I conclude that GML has not proved that it will likely suffer "irreparable harm" if the stay is refused, and therefore, that the second part of the test has not been met.

**Where does the Balance of Convenience lie?**

[67] There are conflicting decisions in the common law on whether, in considering a stay application, the decision-maker should end the analysis once part two of the three-part test in *RJR-MacDonald* fails.

[68] At paragraphs 12 and 13 of *Njoroge v. British Columbia (Human Rights Tribunal)*, 2020 BCSC 1723, the Court described the application of the test from *RJR-MacDonald* as follows:

> The three factors are not to be treated like a checklist of separate watertight compartments, but instead are interrelated and strength in one part of the test can compensate for weakness in another: *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 at 346–47, [1987] 2 W.W.R. 331 (C.A.), aff'd [1991] 1 S.C.R. 62, 53 B.C.L.R. (2d) 189

[69] However, at paragraph 3 of *Canada (Public Works and Government Services) v. Musqueam First Nation*, 2008 FCA 214 (CanLII), the Court described the application of the test from *RJR-MacDonald* as follows:

> The three factors are conjunctive: failure to satisfy any one factor will lead to the denial of the interlocutory injunction. The onus is upon the applicant to satisfy each factor.

[70] As there are conflicting approaches to the application of *RJR-MacDonald* three-factor test in the case law, I have proceeded with my analysis of the remaining part, the "balance of convenience", of that test.

**GML's Submissions**

[71] GML submits that it would face greater harm if the stay is not granted pending the appeal, than the Director's interests would suffer if the stay is granted.

[72] GML submits that the Director has provided no information to suggest there would be harm to the environment in the absence of the Unsolicited Amendments, and he has failed to acknowledge existing information which suggests there has been (and will continue to be) no harm to the environment in the absence of the Unsolicited Amendments.

**Director's Submissions**

[73] The Director submits that when both parties allege that inconvenience will be suffered, a consideration of the public interest must be taken into account. Either party to a dispute may "tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought" (*RJR MacDonald,* at para. 66).

[74] The Director submits that in *RJR-MacDonald* (at para. 71), the court made the following statement in relation to the "Balance of Convenience and Public Interest Considerations":

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

[75] The Director submits that the Board has also recognized the importance of action taken under environmental protection legislation in the public interest. For example, in *North Fraser Harbour Commission v. British Columbia (Ministry of Environment, Lands and Parks)* (Decision No. 97-WAS-05(a), June 5, 1997) [*North Fraser*]), the Board accepted that an order was made by the Deputy Director "in furtherance of his statutory mandate to protect the environment for present and future use controlling, ameliorating and, where possible, eliminating the deleterious effects of pollution on the environment; i.e., it was made in the public interest."

[76] According to the September 3, 2021, affidavit of Mr. Luc Lachance, the Director, the amendments he made to the Permit were:

- necessary to ensure environmental protection given GML's requested amendment to allow (new) effluent discharge to Granite Pit;
- to ensure efficient, open, and transparent information sharing with the local Indigenous governments; and
- consistent with current Ministry guidance on how to regulate the discharge of non-point source discharges…,".

[77] In his affidavit, Mr. Lachance states (at para. 42):

> As a director under the *EMA,* it is my statutory duty to ensure that waste is only permitted to be discharged on terms and conditions that I consider to be protective of the environment. In my view, staying only the provisions of the Discharge Permit with which Gibraltar does not agree, without also staying the permitted discharge of effluent into Granite Pit that they asked for, is not protective of the environment and creates a risk of irreparable harm to the environment by failing to adequately monitor the effects of that discharge. The amendments made to sections 1.7, 2.10, 3.9, 3.11 and Table 1a of the Discharge Permit are, in my opinion, necessary monitoring requirements associated with their approved request to discharge effluent to Granite Pit. They cannot be separated.

[78] The Director submits that on the one side of scale are GML's speculative cost estimates and inconveniences. On the other side are environmental values threatened by effluent quantity, quality and seepage at the Mine, and the requirements that the Director considered necessary to protect those values.

[79] The Director submits that the public interest concerns far outweigh any potential for harm identified by GML.

### GML's Reply Submissions

[80] I have already found, above, that GML's reply contained a second affidavit from Mr. Pierce that is not properly part of a reply submission, and is inadmissible. I have not considered any information from Affidavit #2.

[81] GML replies that while the Director cites environmental values threatened by mine effluent quantity, quality and seepage, he does not identify any anticipated environmental harm.

### Panel's Findings

[82] At this stage of the *RJR-MacDonald* test, I must determine which party will suffer the greater harm from either granting or denying the stay application.

[83] I find the comments in *RJR-MacDonald* (at para. 71) to be instructive in determining how to weigh the relative impact of private and public interests in such a decision, particularly the following:

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[84] Affidavit evidence was presented by the Director to show that he has the statutory duty to ensure that waste is only permitted to be discharged on terms and conditions that the Director considers to be protective of the environment. The Board has held that decisions made under the *Act* (or its predecessor) to regulate or control waste discharges to the environment are assumed, on their face, to be made in the public interest (e.g., *North Fraser*; *Howe Sound Pulp and Paper Ltd. v. Director, Environmental Management Act*, Decision No. 2008-EMA-001(a), March 7, 2008, at paras. 82 to 83). I acknowledge that one of GML's grounds of appeal

relates to whether the Unsolicited Amendments are necessary "for the protection of the environment", as provided in section 16 of the *Act*. However, I find that it would be inappropriate in this preliminary proceeding to assess the parties' evidence that pertains to the merits of the Unsolicited Amendments.

[85] I find that, on their face, and for the limited purposes of this application, the Unsolicited Amendments appear to be consistent with the Director's authority under sections 14 and 16 of the *Act* to amend a permit "for the protection of the environment". According to the Director's affidavit and his May 13, 2021 reasons for his decision, the discharge of effluent to Granite Pit is expected to result in seepage to groundwater that will reach Cuisson Lake. There was no water quality data for Cuisson Lake. Therefore, water quality sampling and monitoring is, in the Director's view, needed to assess the environmental effects of the effluent discharge. I find that the Unsolicited Amendments are related to the gathering of baseline information and characterizing an area that could be impacted by Mine related discharge, and to requiring that the discharge of waste to the environment is accompanied by commensurate environmental monitoring. However, I caution that these findings have no bearing on the merits of the appeal, and are only made for the purposes of deciding this stay application.

[86] In my analysis of the second part of the *RJR-MacDonald* test, I found that GML will likely incur some expenses but will not suffer irreparable harm, if the stay is denied. I find that the potential financial harm to GML, if a stay is denied, does not outweigh the public interest in the continued application of the Unsolicited Amendments for the protection of the environment.

[87] I find that the balance of convenience favours denying the stay and not suspending the Unsolicited Amendments which are, on their face, consistent with the public interest in protecting the environment, pending the conclusion of the appeal.

## DECISION

[88] In making this decision, I have fully considered all of the submissions and admissible evidence, whether or not specifically referenced in this decision.

[89] For the reasons provided above, the application to issue a temporary stay of the Unsolicited Amendments pending the Board's decision on the appeal is denied.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

December 13, 2021