COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cowichan Valley Regional District v. Cobble Hill Holdings,* 2016 BCCA 160

Date: 20160415
Docket: CA43548; CA43549

Between:

Cowichan Valley Regional District

Respondent
(Petitioner)

And

Cobble Hill Holdings Ltd., South Island Aggregates Ltd. and South Island Resource Management Ltd.

Appellants
(Respondents)

Before: The Honourable Madam Justice Kirkpatrick
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated March 21, 2016 (*Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCSC 489, Victoria Registry Docket 13-3547).

Counsel for the Appellants, Cobble Hill Holdings Ltd. and South Island Aggregates Ltd.:	L.J. Alexander
Counsel for the Appellants, South Island Resource Management Ltd.	K.R. Doerksen J. Lee
Counsel for the Respondent, Cowichan Valley Regional District:	B. Williamson F. Marzari
Place and Date of Hearing:	Vancouver, British Columbia April 6, 2016
Place and Date of Judgment:	Vancouver, British Columbia April 15, 2016

Summary:

The appellants apply for a stay of two injunctions pending the disposition of their appeals. The underlying appeals concern the interpretation and application of a zoning bylaw. The impugned injunctions effectively restrain the appellants from importing contaminated soil to a quarry site near Shawnigan Lake. The respondent municipality opposes the application, and seeks various orders in the alternative, including an order that the appellants post security for the cost of removing any waste material imported to the quarry site as a result of a stay. Held: application allowed on a limited basis. The balance of inconvenience favours granting a limited stay of the injunctions. As a condition of the limited stay, the appellants must post security for costs and give an undertaking as to damages.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] The appellants, Cobble Hill Holdings Ltd. (“CHH”), South Island Aggregates Ltd. (“SIA”), and South Island Resource Management Ltd. (“SIRM”), seek orders that the following injunctions, pronounced by Mr. Justice B.D. MacKenzie on March 21, 2016, be stayed pending the disposition of their appeals from that part of the order:

> (e) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd. and South Island Aggregates Ltd., and all persons having notice of this order from using, or allowing, or permitting the use of, the property as a landfill facility, contrary to the zoning bylaw;
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> (f) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd., and South Island Aggregates Ltd., from importing onto the property located at 640 Stebbings Road, in the Cowichan Valley Regional District, any waste material, including contaminated soil, that is required to be permanently encapsulated in engineered cells.

[2] In the alternative, the appellants seek orders that the foregoing injunctions be varied to permit SIRM to complete those contracts for the receipt of contaminated soil: (a) to which SIRM was already committed as of March 21, 2016; and (b) for which SIRM irrevocably tendered bids prior to March 21, 2016, in respect of such contracts as may be awarded after that date.

[3] The respondent, Cowichan Valley Regional District (the "CVRD"), opposes the appellants' stay applications. In the alternative, if a stay is granted, the CVRD seeks orders that the appellants: (a) post security for the costs of the proceedings below; (b) post security for the costs of the appeal; (c) post security for the cost of removing waste material imported to the property as a result of any stay; and (d) proceed with the appeals on an expedited basis.

BACKGROUND

[4] In his reasons for judgment, indexed at 2016 BCSC 489, the chambers judge set out the following summary of the parties to this proceeding and the issues raised on the underlying petition (at paras. 1-8):

> [1] This litigation focuses on the importation of contaminated soils to a quarry operation north of Victoria, British Columbia, activities which the quarry owner says are reclamation of the quarry.
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> [2] The petitioner, Cowichan Valley Regional District ("CVRD"), disagrees and says the respondents are operating a landfill, not reclaiming the quarry. It seeks a declaration that the use of the property is either a contaminated soil treatment facility or a landfill facility, and that neither is a permitted use according to CVRD zoning bylaws. The CVRD also seeks injunctive relief to restrain the respondents from such use of the property as well as orders requiring the respondents to remove contaminated soils and related structures from the property, located at 640 Stebbings Road, in the Shawnigan Lake watershed. The property is zoned F-1 (Primary Forestry) according to Shawnigan Lake Zoning Bylaw No. 985 (the "zoning bylaw").
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> [3] The respondents, Cobble Hill Holdings Ltd. ("CHH") and South Island Aggregates Ltd. ("SIA"), oppose the relief sought in the petition, and seek costs on Scale "C", due to what they submit is the complexity of the issues. CHH is the owner of the property, while SIA operates the quarry pursuant to a permit issued in 2006 under the *Mines Act*, R.S.B.C. 1996, c. 293.
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> [4] In addition to the 2006 permit issued to SIA authorizing its mining activities, in August 2013, the Ministry of Environment ("MoE") issued a permit pursuant to the *Environmental Management Act*, S.B.C. 2003, c. 53 (*EMA*), allowing CHH to discharge "*refuse* … from a *contaminated soil treatment facility* and a *landfill facility*" located at the quarry site (emphasis added).
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> [5] The third respondent, South Island Resource Management Ltd. ("SIRM"), was, by consent, added as a respondent prior to the commencement of the petition proceeding. SIRM is an independent company, incorporated April 20, 2015, and retained by CHH for the express purpose of carrying out what the respondents submit is the reclamation project at the quarry.

> [6] The respondents assert they are not operating a landfill or a contaminated soil treatment facility, as alleged by the CVRD, or any other activities that fall outside the "mining activities" permitted under the zoning bylaw. The respondents say they are merely reclaiming the land as required under the 2006 mining permit. They therefore say that reclamation is either a permitted use under the bylaw, or, as a "core" or integral mining activity, not subject to local government zoning power.
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> [7] On the other hand, while it is common ground that the petitioner has no jurisdiction over the extraction of aggregate material at the quarry, the CVRD says what is now occurring at the property is the operation of a landfill, a completely separate enterprise, and that these activities are not related to mining activities at all; the petitioner says it is clearly a non-permitted land use. Moreover, the petitioner submits that, even if it is considered reclamation, as the bylaw only permits "crushing milling concentration for shipment" of the aggregate, reclamation is simply a "related mining activity" and, as has been decided in several court decisions, related mining activities that are not a necessary part of the extraction process are subject to local land use bylaws [citations omitted].
>
> [8] Not surprisingly, there is significant concern about the importation of contaminated soil to the quarry site, resulting in a 31-day hearing in 2014 before the Environmental Appeal Board ("EAB"), where the CVRD was one of several appellants. The petitioner points out that it filed this petition in October 2013, shortly after the MoE permit was issued, but agreed to put this proceeding on hold, pending the outcome of the EAB appeal. In March 2015 the EAB upheld the validity of the MoE permit, authorizing the importation of contaminated waste to the quarry site. The petitioner then proceeded with the petition. However, as the parties have emphasized, this proceeding is not about re-litigating health and environmental issues, rather, it focuses on whether the activities are prohibited by the petitioner's land use bylaw.

[5] The judge set out the applicable legislation at paras. 35-41 of his reasons:

> [35] The petitioner, as a local government, has the authority to regulate or prohibit land use, buildings and other structures pursuant to s. 903 of the *Local Government Act,* R.S.B.C. 1996, c. 323 (*LGA*), as it was prior to January 1, 2016.
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> [36] The definition of "land," for the purpose of the *LGA,* is found in the *Community Charter*:
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> > Land
> >
> > (a) for the purposes of assessment and taxation, means land as defined in the Assessment Act, and
> >
> > (b) for other purposes, includes the surface of water, but does not include
> >
> > (i) improvements,
> >
> > (ii) mines or minerals belonging to the Crown, or

> (iii) mines or minerals for which title in fee simple has been registered in the land title office …
>
> [37] Under the authority of s. 903 of the *LGA*, the CVRD adopted the applicable zoning bylaw. Relevant to the question of permitted land uses is s. 4.2:
>
> > 4.2 Land or the surface of water shall not be used and structures shall not be constructed altered located or used except as specifically permitted by this bylaw.
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> [38] Section 7.4(a) of the zoning bylaw specifies the permitted uses of the land in the F-1 zone applicable to the property:
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> > (1) management and harvesting of primary forest products excluding sawmilling and all manufacturing and dry land log sorting operations;
> >
> > (2) extraction crushing milling concentration for shipment of mineral resources or aggregate materials excluding all manufacturing;
> >
> > (3) single family residential dwelling or mobile home;
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> > (4) agriculture silviculture horticulture;
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> > (5) home based business;
> >
> > (6) bed and breakfast accommodation;
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> > (7) secondary suite or small suite on parcels that are less than 10.0 hectares in area;
> >
> > (8) secondary suite or a second single family dwelling on parcels that are 10.0 hectares or more in area.
>
> [39] Given the provision in s. 7.4(a)(2), this bylaw permits extraction, that is "mining," and the related specific processing activities. In addition, the respondents emphasize that s. 4.4 of the bylaw states that "all uses permitted by this bylaw include those uses *accessory* to the permitted principal uses" (emphasis added).
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> [40] Notwithstanding the permitted uses in the F-1 zone, pursuant to the general land use powers in s. 903 of the *LGA*, the CVRD passed s. 5.20 of the zoning bylaw, pertaining to the importation and "storage" of contaminated waste or soil on land in the CVRD:
>
> > Unless explicitly permitted in a zone, no parcel shall be used for the purpose of storing contaminated waste or contaminated soil, if the contaminated material did not originate on the same legal parcel of land that it is being stored on.
>
> [41] Even though the CVRD referred to this provision in its petition, it says this section need only be considered if I do not accept its primary submission that the present activities at the quarry are not a permitted land use.

[6] The core of the judge's analysis centered on the interpretation and scope of the CVRD's zoning bylaw (the "CVRD Bylaw"), including whether the appellants'

activities fell outside local government land use jurisdiction. He held that, "the issue between the parties is, 'at its most basic,' an exercise of statutory interpretation to determine the scope of a legislative provision in order to ensure a unified regulatory scheme" (at para. 64).

[7] The judge found that the appellants' activities:

(a) were not *ultra vires* the CVRD's power to zone land uses (at para. 91);

(b) did not qualify as a permitted land use under s. 7.4 of the CVRD Bylaw (at para. 92);

(c) did not qualify as a permitted accessory use under s. 4.4 of the CVRD Bylaw (at para. 96); and

(d) amounted to the operation of a landfill and therefore contravened the CVRD Bylaw (at para. 113).

[8] The judge then considered the relief sought by the CVRD on its petition. At para. 121, he found that there were "no exceptional circumstances in this case that would warrant non-enforcement of the bylaw, even though there will be significant financial repercussions for all the respondents". In the result, he ordered that:

(a) Following the decision in [*Cowichan Valley Regional District v. Lund Small Holdings Ltd.*, unreported reasons, Victoria Registry No. 00-2934], there is a declaration that a contaminated soil treatment facility is not a permitted use on the property located at 640 Stebbings Road, in the Cowichan Valley Regional District, under the zoning bylaw;

(b) There is a declaration that the landfill facility located at 640 Stebbings Road, in the Cowichan Valley Regional District, is not a permitted use under the zoning bylaw;

(c) There is a declaration that the permanent encapsulation in engineered cells of refuse, waste or contaminated soil not originating on the property is not a permitted land use at the property at 640 Stebbings Road, in the Cowichan Valley Regional District;

(d) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd. and South Island Aggregates Ltd., and all persons having notice of this order from using, or allowing, or permitting the use of, the property as a contaminated soil treatment facility, contrary to the zoning bylaw;

(e) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd. and South Island Aggregates Ltd., and all persons having notice of this order from using, or allowing, or permitting the use of, the property as a landfill facility, contrary to the zoning bylaw;

(f) An injunction restraining the respondents, Cobble Hill Holdings Ltd., South Island Resource Management Ltd., and South Island Aggregates Ltd., from importing onto the property located at 640 Stebbings Road, in the Cowichan Valley Regional District, any waste material, including contaminated soil, that is required to be permanently encapsulated in engineered cells.

[9] Finally, he noted the following at para. 125:

> [125] Because of the difficulty in enforcing a mandatory injunction, and in separating the different material now on site, I decline to order the removal of any facilities or product presently situated on the property. I accept the respondents' submission that what is presently situated on the property, such as the concrete lock blocks in the soil management area and the upgraded water treatment system, can be a legitimate and important use within the parameters of extraction and the other permitted mining activities of crushing and milling. As far as the application for removal of the material that has already been encapsulated within the engineered landfill is concerned, I defer to the expertise of the MoE and the EAB as to the safety of this product and decline to order its removal.

[10] On March 24, 2016, the appellants, CHH together with SIA (CA43548), and SIRM individually (CA43549), each filed a notice of appeal from the judge's order.

STAY OF THE INJUNCTIONS

[11] The appellants seek orders staying the injunctions set out in paragraphs (e) and (f), above. In the alternative, the appellants seek orders varying these injunctions to permit SIRM to satisfy its existing contractual commitments and any contractual commitments that may arise from bids tendered prior to March 21, 2016.

A. Applicable Law

[12] The power to grant a stay of an order pending appeal derives from ss. 10(2)(b) and 18 of the *Court of Appeal Act*.

[13] The granting of a stay is a discretionary order: *The Owners of Strata Plan LMS 2768 v. Jordison*, 2013 BCCA 206 at para. 5.

[14] The onus is on the applicant to meet the three-part test for granting a stay, summarized by Hinds J.A. in *British Columbia (Milk Marketing Board) v. Grisnich* (1996), 70 B.C.A.C. 142, 50 C.P.C. (3d) 249 at para. 7 [*Grisnich*]:

> (1) that there is some merit to the appeal in the sense that there is a serious question to be determined;
>
> (2) that irreparable harm would be occasioned to the applicant if the stay was refused;
>
> (3) that, on balance, the inconvenience to the applicant if the stay was refused would be greater than the inconvenience to the respondent if the stay was granted.

[15] The threshold for merits is "a low one": *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 at para. 22. The appropriate question is whether there is a serious question to be tried, not whether the applicant has a strong *prima facie* case: *Tanguay v. Bridgewater Bank*, 2012 BCCA 234 at para. 18.

[16] Whether a stay should be granted may depend principally on whether the applicant has established irreparable harm: *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Company*, 2015 BCCA 6 at para. 8. Irreparable harm may include severe financial consequences (*Grisnich* at para. 11), loss of revenue that cannot otherwise be recovered (*Barbour v. University of British Columbia*, 2009 BCCA 334 at para. 5), or financial loss to guarantors if a project cannot complete (*Firstar Investment v. Ridgewood Development et al*, 2003 BCCA 654 at para. 18).

[17] The stay of a permanent or mandatory injunction pending appeal is only justified in exceptional circumstances. In *Kollen v. Vancouver (City)*, 2006 BCCA 93 at para. 11, Mr. Justice Smith held:

> [11] The test in this Court for a stay pending appeal of a mandatory injunction was set out by Rowles J.A. in *Winser v. W.J. Stelmaschuk and Associates Ltd.* (1993), 39 B.C.A.C. 136; [1993] B.C.J. No. 3094 (Q.L.). After referring to and quoting from *Laboratoire Pentagone Ltée v. Parke, Davis &*

> *Co.*, [1968] S.C.R. 269 at 272-73 and *Wright v. Saanich (Municipality)* (1984), 49 B.C.L.R. 32 at 35-36 (B.C.C.A., Chambers) Macfarlane J.A., she said,
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> > [19] These authorities establish that where a permanent injunction has been granted, interference with the injunction can only be justified in exceptional circumstances. In determining whether such circumstances are present, the judge to whom the application is made must consider both the grounds of the appeal and the circumstances of the parties. If there is likely to be irreparable detriment to the defendant if the injunction remains in force pending appeal and little, if any, detriment flowing from the suspension of the injunction to the plaintiff, the interests of justice may require that the injunction be suspended pending the appeal.

[18] Where the injunction enforces a local bylaw, the public interest in ensuring compliance with the law may tip the balance of convenience in favour of refusing a stay of the injunction. In *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 348-349, the Supreme Court of Canada held:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

[19] Further, the Court held (at 346):

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. 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.
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> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely. …

[20] In *North Cowichan (District) v. Jopp Ventures Corp.*, 2000 BCCA 327 [*Jopp Ventures*], the trial judge found that the appellant's composting operation was not a permitted use under municipal zoning bylaws. In this Court, the appellant sought a stay of the order enjoining its activities pending the determination of its appeal. Saunders J.A. found that the balance of convenience did not favour granting a stay of the injunction. At paras. 10-11, she held:

> [10] The criteria on a stay application parallels the test for an interlocutory injunction. In cases of injunctions to enforce local laws, the balance of convenience is generally found to be in favour of the injunction on the basis that the public interest in having the law obeyed outweighs any hardship from the imposition and enforcement of an injunction: *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 47 M.P.L.R. (2d) 249 (B.C.C.A.).
>
> [11] This concept is equally apt to a stay application, particularly when the stay sought is of a permanent injunction obtained after a trial of the action. The public's interest in having the bylaw obeyed pushes the balance of convenience towards the continuance of the injunction and a refusal of the stay.
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> [Emphasis added.]

[21] At para. 12, Saunders J.A. also noted the following circumstances:

> [12] I am reinforced in my conclusion that a stay should not be granted by consideration of the appellant's delay in seeking a stay and its intervening conduct in which it was found in non-compliance with the injunction and fined for contempt.

[22] Despite the public's interest in having an existing bylaw enforced, a judge of this Court retains the discretion to decide whether or not to grant a stay. In *North Pender Island Local Trust Committee v. Conconi*, 2009 BCCA 174 at para. 14 [*Conconi*], Frankel J.A. held:

> [14] I agree with the Local Trust Committee that these two decision [*sic*] of this Court [*Jopp Ventures* and *Vancouver (City) v. Zhang* (9 February 2009), No. CA036802 (B.C.C.A. Chambers)] stand for the general proposition that

> the public interest will suffer if conduct which a court has found to contravene an admittedly valid bylaw is allowed to continue. However, I do not agree with it that, on an application for a stay, the fact that an injunction has been granted by a judge of the Supreme Court should be treated as effectively conclusive with respect to the balance of convenience. On an application of this nature, a judge of this Court has an independent discretion to exercise, and his or her decision will be informed by factors that are different from those considered by the judge whose order is being appealed.

[23] Finally, serious financial hardship may be a relevant consideration. In *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 230, the appellant, a local government, applied for the stay of an order declaring a bylaw *ultra vires* and therefore invalid. The appellant argued that the balance of convenience favoured a stay based on concern for the public interest. The respondent opposed the application on the basis that it faced a real risk of going out of business if the stay were granted. At paras. 34-36, I held:

> [34] The inconvenience to the District's residents is couched in language of "concern" with the impact of the soil removal operations. As the respondent has demonstrated, those concerns are largely addressed by the conditions attached to the mines permit itself.
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> [35] By contrast, the respondent has been unable to operate the mine for three full operating seasons (2010-2012) and has been unable to earn enough revenue to pay its property taxes to the District of $23,000-$26,000 per year. Its vendor mortgage of $1.65 million is fully repayable by November 2014. Another loan of $2.5 million is guaranteed by the respondent's principals and secured against the properties on which the mine operations take place. There is a consequent risk of the respondent becoming bankrupt, causing a loss of the property and the mines permit.
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> [36] In my opinion, the balance of inconvenience lies in favour of the respondent which risks serious financial hardship if the stay is allowed. The District's hardship is significantly ameliorated by the regulatory conditions in place under the mines permit. In my view, the balance of inconvenience strongly favours the respondent.

B. Relevant Facts & Position of the Parties

[24] The appellants submit that the interests of justice favour granting a stay. They point to the following factors:

- SIRM has outstanding contractual commitments and has irrevocably tendered for work that may result in additional contractual commitments;

- if SIRM is unable to fulfill its contractual commitments, harm will result to the business and approximately 20 families (along with the 60 families employed by SIRM's parent company, in whose name it issues tenders);
- CHH has significant monthly obligations that depend on rent paid by SIRM;
- foreclosure is imminent if the appellants' mine cannot operate;
- the principals of CHH have given personal guarantees and will suffer personal harm if their financers foreclose;
- the CVRD delayed in bringing the underlying petition; and
- there is a public interest in the continued operation of the site, which is the only site on Vancouver Island capable of receiving contaminated soil.

[25] The CVRD effectively concedes that the appeals have sufficient merit to satisfy the low threshold under the first part of the test for a stay. However, the CVRD opposes the stay applications on the basis that: (i) the appellants will not suffer irreparable harm if a stay is refused; (ii) the CVRD will suffer irreparable harm if a stay is granted, because sanctioning unlawful activity and irreversibly altering property in a drinking watershed is contrary to the public interest; and (iii) the balance of convenience favours having the impugned bylaw obeyed.

[26] The CVRD argues that, without a stay, the appellants are not prevented from excavating rock from the quarry or reclaiming the quarry with clean soil. The CVRD further submits that the financial harm alleged by the appellants in the event that a stay is not granted is exaggerated and unsupported by convincing documentary evidence. The CVRD urges the Court to find that there is no evidence or argument that would support the exercise of the Court's limited discretion not to maintain the injunctions in this case.

DISCUSSION

[27] I accept that the stay of a permanent injunction can only be justified in exceptional circumstances.

[28] I also accept, as the CVRD has effectively conceded, that there is some merit to the appeals in the sense that there is a serious question to be determined.

[29] The first criteria for a stay having been conceded, I must turn to examine the circumstances of the parties and whether there will be irreparable detriment to the appellants if the injunctions remain in force. I must also consider the detriment to the CVRD if the injunctions are suspended pending the determination of the appeals.

[30] Although these appeals concern the interpretation and applicability of the CVRD Bylaw, the public concerns surrounding contamination of water in Shawnigan Lake from the permitted site is a relevant feature of the harm that may accrue if the injunctions are suspended.

[31] The environmental concerns of the CVRD were addressed by the Environmental Appeal Board, which upheld the Ministry of Environment permit, and discussed the public interest, at para. 224, 225 and 715 of its reasons:

> [224] The Delegate states that he also considered and weighed the public interest in ensuring that, when contaminated sites are cleaned up, the soil is treated and landfilled in a way that is strongly regulated and monitored. He considered that there was benefit to having a contaminated soil bioremediation and landfill facility on southern Vancouver Island given that, in the absence of such a facility, contaminated soil is either dumped illegally, moved under soil relocation agreements, or trucked to other parts of the Province. Against these benefits, he also considered the public's concerns regarding the impact of having such a facility nearby, and the potential risks to the environment and human health.
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> [225] The Delegate testified that he considered the concerns received from local residents regarding potential social and economic impacts flowing from the Permit. However, he found no evidence that there would be any negative impacts on jobs or the local economy. Conversely, he concluded that there were clear social and economic benefits to the larger Island community of cleaning up existing contaminated sites by moving contaminated soil to a well-designed, engineered facility that screens, treats and properly manages contaminated soils, and that is monitored and regulated.

> …
>
> [715] At the same time, the evidence before the Panel clearly establishes that there are also environmental benefits that flow from depositing contaminated soils in a regulated, approved facility, as opposed to the illegal dumping of such materials in unregulated, unapproved locations with all of the associated risks to the environment and human health. The evidence before the Panel is that such unauthorized actions have been happening in the Cowichan Valley: it is not an "imaginary" risk.

[32] The evidence before the Court indicates that the Ministry of Environment is acutely aware of the public's concerns.

[33] On November 13, 2015, in response to concerns about non-containment of surface water from SIA's quarry site, Island Health issued a no-water-use advisory for the south end of Shawnigan Lake. On November 17, 2015, Island Health lifted this advisory, stating that final test results received that day showed that "there was no risk to the public's health had water been consumed or used".

[34] On December 3, 2015, the Ministry of Environment stated that it had no reason to believe that there were any issues with SIA's contact water management systems. However, the Ministry went on to state:

> Ministry of Environment staff have been working extremely hard to address ongoing concerns raised at this site. Ministry staff have received in excess of 50 individual complaints and queries, and staff have conducted four inspections of the SIA site since November 12, 2015. At this time we are satisfied with the permittee's response to date and their planned activities. No further action is contemplated by the Ministry at this time.

[35] The evidence also establishes that SIRM is currently the only operator receiving contaminated soil on a regulated basis on Vancouver Island. Tom Anderson, the general manager of planning and development for the CVRD, deposed in October 2013 to the existence of "significant illegal dumping of contaminated soil in the Cowichan Valley". I accept that it is in the public interest to prevent illegal dumping of contaminated soil.

[36] Against these legitimate concerns, which are generally subject to regulation and monitoring by health and environmental authorities, are the financial concerns of the appellants.

[37] SIRM director Todd Mizuik deposed to the financial implications to SIRM if the injunctions are not lifted. SIRM is contractually bound to accept contaminated soils for deposit. If unable to do so by reason of the injunctions, it may be forced to pay a competitor, located off Vancouver Island, significantly more to accept the same material. If unable to arrange for disposal of the soil, Mr. Mizuik estimates SIRM will be in default of its contractual obligations in the range of $5.6 million to $8.2 million.

[38] In addition, even if SIRM does not accept contaminated soils for deposit, its monthly cost of maintaining the quarry site in compliance with requirements under the provincial permits is approximately $137,000.

[39] If the injunction is not lifted, the jobs of 19 SIRM employees and 60 additional employees within the companies related to SIRM will be affected.

[40] In short, SIRM submits that, unless it can continue to conduct its business, it may be forced into bankruptcy, raising the spectre of an “orphan” contaminated soils site without proper management or regulation.

[41] CHH expresses similar financial concerns.

DISPOSITION

A. Stay of the Injunctions

[42] In my opinion, the balance of inconvenience favours granting a limited stay of the injunctions to forestall the potential closure, bankruptcy, or foreclosure of the appellants. In my view, such a stay is also in the public interest in that it protects against the spectre of an orphan site and illegal dumping of contaminated soils.

[43] However, I am prepared only to grant the alternative relief claimed by the appellants, and only to this extent:

> that the injunctions be stayed to the extent necessary to permit SIRM to complete the contracts for the receipt of contaminated soil required

> to be permanently encapsulated in engineering cells to which SIRM was contractually committed as of March 21, 2016.

[44] To be clear, this stay does not extend to contracts for which SIRM irrevocably tendered bids prior to March 21, 2016 or thereafter, and which have not yet been awarded or were awarded after March 21, 2016.

[45] Attached to these reasons is a schedule of those contracts which may be completed pursuant to the stay, and those which may not.

B. Security

[46] The parties agreed at the hearing of this application that the appellants would, as a condition of any stay, be required to post $25,000 in respect of the CVRD's costs of the proceedings in the Supreme Court and its costs of the appeal.

[47] The CVRD also sought an order for security for the cost of removing any waste material imported to the site as a result of any stay.

[48] The appellants opposed that order on the basis that the order appealed from did not require the removal of material but rather, the judge left the matter of removal to "the expertise of the [Ministry of Environment] and the [Environmental Appeal Board]" (at para. 125).

[49] It is difficult, if not impossible, to assess an amount of security that could reasonably address the cost of removal. In these circumstances, I consider the preferable order to be that, as a term of the stay, the appellants will be required to file an undertaking as to damages for the removal, if ordered, of any waste material imported to the site as a result of the stay.

C. Expedited Appeal

[50] The parties have agreed that the appeal will be heard on an expedited basis over two days during the week of August 15, 2016, and the Court Registry has accommodated that agreement.

[51] I order that the stay of the injunctions will take effect upon payment of $25,000 by the appellants as security for costs and the filing of the undertaking as to damages, and will continue, subject to further order of this Court if issues of regulatory compliance or otherwise arise, until the date set for the hearing of the appeal in August 2016, on which date the stay will expire. It will, of course, be open to the division hearing the appeal to continue the stay or confirm its expiration.

D. Costs

[52] The costs of this application will be in the appeal.

"The Honourable Madam Justice Kirkpatrick"

Schedule: SIRM's Active Projects and Open Tenders, as of March 15, 2016

Category	Estimate/Job #	Status	Tonnes Committed	Tonnes Received	Tonnes to be Received	Balance to be Received
Subject to the stay	--	Active Project	40,000.00	5,289.62	34,710.38	$1,561,950
	--	Active Project	19,000.00	7,853.68	11,146.32	$1,081,162
	20150914	Active Project	16,150.00	--	16,150.00	$939,550
	20160216	Active Project	10,000.00	2,794.16	7,205.84	$35,292
	20160229	Active Project	5,000.00	47.04	4,952.96	$421,001
	20160315	Active Project	32,000.00	--	32,000.00	$1,600,000
		Sub-Total:	**122,150.00**	**15,984.50**	**106,165.50**	**$5,638,955**
Not subject to the stay	20160226	Open	400.00	--	400.00	$46,000
	20160301	Open	28,000.00	--	28,000.00	$1,400,000
	20160301	Open	10,363.00	--	10,363.00	$932,670
	20160302	Open	2,000.00	--	2,000.00	$180,000
	20160314	Open	1,000.00	--	1,000.00	$85,000
	20160314-2	Open	240.00	--	240.00	$21,600
		Sub-Total:	**42,003.00**	**--**	**42,003.00**	**$2,665,270**
	20150715	Open - Past 30	18,000.00	--	18,000.00	--
	20150915	Open - Past 30	2,000.00	--	2,000.00	--
	20150914	Open - Past 30	2,500.00	--	2,500.00	--
	20151001	Open - Past 30	1,000.00	--	1,000.00	--
	20151008	Open - Past 30	100.00	--	100.00	--
	20151217	Open - Past 30	2,400.00	--	2,400.00	--
	20160217	Open - Past 30	28.00	--	28.00	--
	20160219	Open - Past 30	1,240.00	--	1,240.00	--
	20160223	Open - Past 30	14,000.00	--	14,000.00	--
		Sub-Total:	**41,268.00**	**--**	**41,268.00**	**--**