BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor 747 Fort Street
Victoria British Columbia
V8W 3E5
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
E-mail: eabinfo@gov.bc.ca

DECISION NO. EAB-MA-20-A002(a)

In the matter of an appeal under the *Mines Act*, R.S.B.C. 1996, c. 293

BETWEEN:	Mountainside Quarries Group Inc.	**APPELLANT**
AND:	Ministry of Energy, Mines, and Petroleum Resources	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell LeHouillier, Panel Chair	
DATE:	Conducted by way of written submissions concluding on November 20, 2020	
APPEARING:	For the Appellant:	Christopher A. Becker, Counsel
	For the Respondent:	Meghan Butler, Co-Counsel Micah Weintraub, Co-Counsel

PRELIMINARY DECISION REGARDING NATURE AND SCOPE OF APPEAL

BACKGROUND

[1] In June 2018, a worker employed by the Appellant, Mountainside Quarries Group Inc. (the "Appellant") was found dead at a gravel quarry operated by the Appellant. The prevailing theory related to the death of this worker was that he was struck by a rock ejected by a piece of heavy machinery that crushed rock, when he was nearby to refuel the machinery.

[2] On July 16, 2020, the Respondent, Justyn Bell, Acting Director, Health and Safety Specialists with the Health and Safety Branch of the Ministry of Energy, Mines and Petroleum Resources (the "Respondent"), levied an administrative penalty against the Appellant, following the death of the worker.

[3] The Respondent's decision concludes that the Appellant's mine manager had failed to meet the requirements in two sections of the Health, Safety and Reclamation Code for Mines, contrary to section 36.1(3) of the *Mines Act*, RSBC 1996, c. 293. Specifically, the Appellant's mine manager had failed to:

- ensure that the worker was adequately trained to do his job, and that he had not received thorough orientation and basic instruction in safe work practices; and
- maintain a record of all training that workers and supervisors have received and to make that record available to an inspector upon request.

[4] The Respondent levied a penalty of $47,500 against the Appellant for the two contraventions. This penalty was levied pursuant to authority found in section 36.6 of the *Mines Act*.

[5] The Appellant appealed the Respondent's decision to the Board, arguing that the mine manager had adequately trained the worker to do his job, and that the record of training had been adequate. The Appellant asked the Board to quash the administrative penalty in its entirety, or alternatively to reduce the penalty amount to reflect mitigation factors that the Appellant says should have been considered in this case.

[6] The Respondent has applied to the Board for a preliminary determination that the appeal must be considered based on the record of evidence before the original decision-maker, plus submissions by the parties, rather than afresh in a hearing *de novo*, which could involve new evidence being submitted to the Board. The Respondent asks also that the appeal be heard by way of written submissions.

ISSUES

[7] The issues before me are whether the appeal should:

1. be considered based on the record before the original decision-maker, rather than a hearing *de novo*; and
2. proceed by way of written submissions.

LEGISLATION

[8] The Board was established under the *Environment Management Act (1981)*, c. 14, SBC 1981, and continues to exist since the repeal and replacement of that legislation by the *Environmental Management Act*, c. 53, SBC 2003. The Board's general authority is found in Division 1 of Part 8 of that Act.

[9] Within Division 1, section 93.1 of the *Environmental Management Act* indicates that several parts and sections of the *Administrative Tribunals Act*, c. 45, SBC 2004, apply to the Board. The significance of some of this legislation will be described in greater detail later in this decision.

[10] Also, within Division 1, section 93(2) of the *Environmental Management Act* recognizes that other pieces of legislation give rights of appeal to the Board, and notes:

> **93(2)** In relation to an appeal under another enactment, the appeal board has the powers given to it by that other enactment.

[11] Another piece of legislation giving a right of appeal to the Board, at least through subordinate legislation, is the *Mines Act*. Section 36.7 of the *Mines Act* creates a statutory right of appeal for those provided with notices of administrative

penalties under section 36.3 of the *Mines Act*. Subsequently, the *Administrative Penalties (Mines) Regulation*, B.C. Reg. 47/2017 (the "*Regulation*"), designated the Board as the appeal body identified in section 36.7 of the *Mines Act*.

[12] Most of the other Acts under which the Board hears appeals provide that Division 1 of Part 8 of the *Environmental Management Act* also applies to appeals under those Acts (see: section 14(6) of the *Integrated Pest Management Act*, section 105(4) of the *Water Sustainability Act*, and section 101.1(3) of the *Wildlife Act*). However, the *Mines Act* and the *Regulation* do not adopt Division 1 of Part 8 of the *Environmental Management Act*.

[13] Division 2 of Part 8 of the *Environmental Management Act* contains provisions that apply only to appeals under that Act. Within Division 2, section 102(2) of the *Environmental Management Act* specifies that the Board may conduct appeals brought under Division 2 of Part 8 "… by way of a new hearing." A similar provision is found in most of the other Acts under which the Board hears appeals (see: section 14(7) of the *Integrated Pest Management Act*, section 105(5) of the *Water Sustainability Act*, and section 101.1(4) of the *Wildlife Act*). However, neither the *Mines Act* nor the *Regulation* expressly state that the Board may conduct an appeal as a new hearing.

[14] Also, within Division 2, section 103 of the *Environmental Management Act* addresses the Board's decision-making authority in appeals under that Act. This section allows the Board to:

(a) send the matter back to the person who made the decision, with directions,

(b) confirm, reverse or vary the decision being appealed, or

(c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[15] The Respondent refers to two key differences in the authority granted to the Board under the *Mines Act* from the authority granted to it under the *Environmental Management Act*. First, section 36.7(4)(a) of the *Mines Act* limits the decision-making authority of the appellate body to confirming, varying, or rescinding a decision under appeal. Second, section 10 of the *Regulation* indicates that various parts and sections of the *Administrative Tribunals Act* apply to the Board. The significance of these portions of the *Administrative Tribunals Act* will be discussed in greater detail, below.

DISCUSSION AND ANALYSIS

Submissions of the Parties

The Respondent

[16] The Respondent submits that, because the *Mines Act* and the *Regulation* do not say that the Board may consider appeals *de novo*, the Board should not do so, but should base its decision on information that was before the statutory decision-maker, plus the submissions made to the Board.

[17] The Respondent draws a distinction between the lack of explicit authorization to conduct appeals *de novo* under the *Mines Act* and the explicit authority for the Board to do so for appeals heard under the *Environmental Management Act*. The Respondent argues this distinction bellies an intention by the legislature for the Board to take a different scope and extent of appeal for appeals brought under the two different pieces of legislation.

[18] In support of that argument, the Respondent references two court decisions: *McKenzie v. Mason*, 1992 CanLII 2291 (BCCA) [*McKenzie*] and *SKK Investments Ltd. v. Alberta (Director of Social Care Facilities Licensing)*, 1994 CanLII 8964 (AB QB) [*SKK*]. *McKenzie* considers whether an appeal under the *Mineral Rights Act* is an appeal based on the record before the original decision-maker or an appeal *de novo*. *SKK* considers a similar question pertaining to a right of appeal created under *Alberta's Social Care Facilities Licensing Act*. These cases will be discussed in greater detail, below.

[19] The Respondent also submits that the distinction between the decision-making authority the Board has under the *Environmental Management Act* from the authority granted to it under the *Mines Act* and *Regulation* should mean a more limited scope of appellate review under the latter. The Respondent says that the Board being limited by section 36.7(4)(a) of the *Mines Act* to confirming, varying, or rescinding decisions made under that legislation supports the conclusion that the Board cannot consider an appeal *de novo* under the *Mines Act*. In contrast, the broader scope of decision-making authority granted under section 103 of the *Environmental Management Act*, to make any decision the decision-maker could have made, is consistent with the need for *de novo* appeals brought under that legislation.

[20] Furthermore, the Respondent argues that the Board's scope of legislated powers supports the same conclusion. There are distinctions between which portions of the *Administrative Tribunals Act* apply to the Board under the *Environmental Management Act*, compared to under the *Mines Act*. This includes that the Board may permit interveners to be involved in appeals brought under the *Mines Act*, but not under the *Environmental Management Act*. The Respondent argues that these distinctions mean that the legislature intended for the Board's powers and appeal process should be different in scope and complexity for appeals brought under the *Environmental Management Act*, compared to those brought under the *Mines Act*.

[21] While the Respondent acknowledges that section 34(3) of the *Administrative Tribunals Act* allows the Board to compel witness testimony and order the production of records by a party, "… this discretion should be reserved for exceptional cases where the Board considers additional evidence is necessary to determine the matters before it", particularly given that the legislature did not expressly confer upon the Board the ability to convene *de novo* hearings under the *Mines Act*, as it did under the *Environmental Management Act*.

[22] The Respondent maintains that, based on these arguments, the Board should conduct its hearing based on the record before the original decision-maker and the submissions made in the appeal, as permitted by its own *Practice and Procedure Manual*.

The Appellant

[23] While the Appellant is critical of the Respondent's argument, it took no position on the application. The Appellant stated that it did not see the need to introduce any witness testimony or expert evidence in the appeal in any event and was not opposed to the appeal proceeding in writing.

Findings of the Board

1. Should the Appeal be based on the record before the original decision-maker, rather than a hearing *de novo*?

Lack of Explicit Authority to Consider Appeals De Novo Under the Mines Act

[24] The Respondent is correct that, as set out in the *Environmental Management Act*, the Board derives powers from the enactment under which an appeal is raised. The Respondent has not, however, argued or established that this means that the Board may only draw powers from that enactment, and not from other enactments that apply to the Board, such as the *Administrative Tribunals Act*. In fact, the Respondent references powers granted to the Board under the *Administrative Tribunals Act* in his submissions.

[25] The Respondent is likewise correct that there are differences between the *Environmental Management Act* and the *Mines Act*, most significantly that the former specifies that appeals may be *de novo*, while the latter is silent on the question. The Respondent does not argue that this is determinative, nor should it be.

[26] The Board is a body created by statute, and unlike superior courts, it does not have inherit jurisdiction. This means that all of its power and authority must be derived by a valid delegation of power by the Legislature which created it. For the purposes of the issue before me, this delegation is done by legislation and regulation. An assessment of that legislation and regulation involves statutory interpretation, which is based not on a narrow reading of whether a particular turn of phrase is used in an enactment. Rather, as described in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), at para. 21, and many subsequent decisions of the Supreme Court of Canada, one must consider the words in an enactment, read in their context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. This is what took place in the two court cases relied upon by the Respondent.

[27] In *McKenzie*, the Court considered the *Mineral Tenure Act*, which created a right of appeal from certain decisions of the chief gold commissioner to the British Columbia Supreme Court, and from that Court to the Court of Appeal (provided leave was granted). The *Mineral Tenure Act* did not specify whether those appeals would be *de novo* on based the record that had been before the chief gold commissioner.

[28] In assessing that statutory right of appeal, the Court found no "… additional words in the *Mineral Tenure Act*, expanding the nature and scope of the hearing of the appeal…" and concluded, based purely on the statutory authority to appeal, that such an appeal would be on the record of evidence that was before the chief gold commissioner. Writing for the unanimous Court, Toy J.A. concluded, "I do not conceive that the Legislature intended to grant to appellants under s. 35(10) of the *Mineral Tenure Act* a full-blown Supreme Court Trial on whether or not mineral

claims have been properly located or the other matters the Chief Gold Commissioner is authorized to enquire into ….”

[29] Importantly, at paragraph 27, Toy J.A. also relied upon an unreported decision from the Court of Appeal in *Greater Victoria Dist. 16 Bd. of Trustees v. MacMurchie* (June 5, 1973), as summarized in *Shewan v. Board of School Trustees of School District #34 (Abbotsford)*, 1987 CanLII 159 (BC CA). In that case, the Court of Appeal noted that an appeal to court “in its usual sense” is not *de novo*, but rather based on the record of the proceedings before the original decision-maker, and involves the application of an appellate standard of review. This includes that the appeal body should only interfere with factual findings where there was palpable and overriding error, or where those findings appear to be clearly wrong, and should only review the record for an error in principle.

[30] *SKK* presents a similar conclusion, that an appeal is only *de novo* where the legislation which creates that right of appeal states that it is so, or where a review of that legislation indicates that an appeal *de novo* may be permitted by that legislation. I note, however, that the court in *SKK* specifically distinguished the right of appeal considered in that case—an appeal to the Court of Queen’s Bench in Alberta—from a right of appeal granted to an administrative decision-maker, like the Board.

[31] For the purposes of this decision, it is sufficient to note that the cases above support that a statutory right of appeal may be *de novo* where the legislature specifies that it is, or where the legislation conferring that right of appeal enables *de novo* appeals. Legislation may confer that right where, to borrow wording from *McKenzie*, the “… nature and scope of the hearing of the appeal …” extend beyond an appeal on the record before the original decision-maker.

[32] As I have noted, the cases above relate to statutory rights of appeal to courts and not to an administrative tribunal like the Board. It is not clear to me that the legislation should be presumed to create a right of appeal on the record of the original decision-maker, rather than an appeal *de novo*, as the Respondent argues. The Respondent has not provided sufficient authority or persuasive argument why such a presumption should apply to an administrative tribunal, but nothing turns on this point in this decision. Even if I presumed that appeals brought under the *Mines Act* should not be *de novo* because it is silent on the question, the outcome of this decision would be the same.

Contrasts Between the Environmental Management Act and the Mines Act

[33] In interpreting whether the Board should be able to conduct appeals *de novo* under the *Mines Act* in the absence of an explicit, legislated answer one way or the other, I agree that it is appropriate to consider the decision-making authority and powers granted to the Board under that legislation.

[34] It is not clear to me that a comparison between the powers and authority granted under the *Environmental Management Act* and the *Mines Act* will be helpful to this exercise, given that the Board’s authority to convene *de novo* hearings under the former is explicitly provided in that legislation, and need not be inferred based on the powers granted to it under that Act. That said, I have considered those distinctions in the interests of providing a thorough reply to the Respondent’s application.

Legislated Decision-Making Authority

[35] The Respondent correctly points out that the decision-making authority granted to the Board under the *Environmental Management Act* is broader than the scope of that authority granted under the *Mines Act*. Specifically, the Board is authorized, under the former, to refer the matter back to the decision-maker with directions; confirm, vary, or rescind any appealed decision; or "… make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances." This is not available under the *Mines Act*; in appeals brought under that legislation, the Board may only confirm, vary, or rescind decisions appealed to the Board.

[36] While the decision-making authority is limited under the *Mines Act* compared to the *Environmental Management Act*, the British Columbia Supreme Court has concluded that the Board's power to "confirm, vary or rescind" decisions under previous enabling legislation amounted to the "… widest possible scope of remedial powers."[1] This description was provided with respect to a prior right of appeal, created under section 5(4) of the *Health Act*, R.S.B.C. 1979, c. 161. I note that the right of appeal contained in the *Health Act* was not accompanied by any express indication that appeals to the Board could be *de novo*.

[37] It is also significant that the Board's decision-making authority is not constrained within the scope of the ability to confirm, vary, or rescind decisions under appeal. The Board is not bound to apply an appellate standard of review. As such, while the *Mines Act* does not give as broad a scope of decision-making power to the Board in appeals brought under that legislation, it does not enforce a circumscribed level of intervention with findings that would suggest that appeals need to be on the record that was before the original decision-maker. For these reasons above, I conclude that the scope of decision-making authority is insufficient to infer that appeals brought under the *Mines Act* cannot be considered *de novo* or that the Board is able to consider those appeals *de novo*.

Legislated Powers on Appeal

[38] As noted in *McKenzie*, legislation may be inferred to confer a right to appeals *de novo* through the "… nature and scope of the hearing of the appeal …". I turn first to the distinctions between the powers of the Board granted under the *Environmental Management Act* from those granted under the *Mines Act*. There are three distinctions between the powers conferred on the Board by the *Administrative Tribunals Act*, under those two appeal right-granting pieces of legislation:

- section 25 applies to appeals under the *Environmental Management Act*, but not to appeals under the *Mines Act*;
- section 33 applies to appeals under the *Mines Act*, but not to appeals under the *Environmental Management Act*; and
- section 59 applies to appeals under the *Mines Act*, but not to appeals under the *Environmental Management Act*.

[39] Section 25 specifies that filing an appeal to an administrative tribunal does not stay the decision under appeal. Under the *Mines Act*, the administrative

[1] See *British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board),* [1996] B.C.J. No. 1531, at paragraph 57.

penalties that may be appealed to the Board are not payable until 40 days have elapsed beyond the date the notice of penalty is provided to the penalized entity or, in case of an appeal, 40 days have elapsed beyond the date of the Board's final decision in an appeal. As such, in the ordinary course of business, stays are not applicable to appeals under the *Mines Act*. Given this broader legislative context, it is not clear to me that the non-application of section 25 of the *Administrative Tribunals Act* to appeals brought under the *Mines Act* is relevant.

[40] Section 33 allows the Board to grant intervener status to others, and at its discretion, the Board may (or may not) decide to restrict their ability to lead evidence, cross-examine witnesses, and present submissions. The Board's authority to grant this status is broad, arising where the Board is satisfied such a person "… can make a valuable contribution or bring a valuable perspective …" to the appeal.

[41] While the *Environmental Management Act* does not grant the Board this power with respect to "interveners", section 94 of that Act allows the Board to extend the right to present evidence, and even full party status, to "any person" appearing before it. When the Board grants a person limited participatory rights rather than full party status, the person is referred to as a "participant" and their participatory rights may be limited in various ways, such as providing submissions but no evidence, or providing evidence on a specific issue and not cross-examining witnesses. There is, in effect, little to no practical difference to this power aside from whether the person invited by the Board is described as a participant with limited participatory rights or an intervener.

[42] Lastly, section 59 describes the standard of review to be applied in judicial reviews of decisions made by the Board under the *Mines Act*. By contrast, the standard of review to be applied in judicial reviews of decisions made by the Board under the *Environmental Management Act* are decided based on common law principles, including the Court's assessment of the legislative intent expressed through the *Environmental Management Act*. In any case, defining the standard of review applicable to judicial reviews of Board decisions does not assist in determining the appropriate scope of review for appeals brought to the Board; as noted in *SKK*, the scope and deference that exists in an appeal to an administrative body may well be different than the scope and deference that exists in an appeal to or judicial review of that administrative body by a court.

[43] In short, the three distinctions in powers conferred upon the Board by the *Administrative Tribunals Act*, under the *Environmental Management Act* as compared to the *Mines Act*, do not support a conclusion that the legislature intended a different scope of appeals, level of inquiry, or level of deference in matters brought before the Board under those two pieces of legislation.

[44] While the distinctions between the portions of the *Administrative Tribunals Act* that apply to appeals brought under the *Mines Act* compared to those that apply to appeals brought under the *Environmental Management Act* are not determinative, I consider the extent of powers granted under both are. Section 10 of the *Regulation* grants the Board a broad range of powers under the *Administrative Tribunals Act* with respect to hearing appeals under the *Mines Act*, including powers to:

- control its own processes and to make rules respecting practice and procedure, including its ability to receive evidence (section 11);

- hear submissions from parties on facts, law, and jurisdiction (section 32);
- grant interveners the right to lead evidence or cross-examine witnesses (section 33);
- compel the attendance of witnesses and the production of documents and other things (section 34);
- convene electronic or oral hearings (section 36);
- allow witness testimony and cross-examination "…for a full and fair disclosure of all matters relevant to the issues in the [appeal]" (section 38); and
- admit information not protected as privileged evidence, that it considers relevant, necessary and appropriate, even if that information would not be admissible in a court of law (section 40).

[45] The Respondent addressed the power conferred under section 34, but not the rest. While the Respondent suggests that the Board should reserve these powers to cases where additional evidence is necessary to resolve an appeal, he provided no persuasive reason why this should be the case. Saying that this is so simply because the *Mines Act* does not expressly authorize the Board to conduct *de novo* appeals ignores that this authority may be presumed by the powers conferred by the legislation.

[46] Given the broad scope of the powers listed above, I am satisfied that the Board is able to control its own processes to receive a wealth of evidence, including testimonial evidence, to give "… a full and fair disclosure of all matters relevant to the issues in the [appeal]", as stated in section 38 of the *Administrative Tribunals Act*. Furthermore, under section 40 of that Act, the Board can admit any non-privileged, relevant, necessary, and appropriate information for the resolution of an appeal or as the Board's self-generated rules and the enabling legislation allow. The cross-examination of witnesses is envisioned, not only by parties but by interveners, unless the Board limits their ability to do so. Individually and collectively, these powers suggest that the Board may receive new evidence in an appeal brought under the *Mines Act*, in whatever valid processes and procedures the Board creates for itself.

[47] Additionally, section 40(3) of the *Administrative Tribunals Act* leaves open the possibility for other enactments to limit the Board's ability to admit or use as evidence oral testimony, documents, or other things. The *Mines Act* and *Regulation* do not do so. That the *Administrative Tribunals Act* expressly contemplates such a limitation, but that the *Mines Act* and *Regulation* do not impose such a limitation, further supports the conclusion that appeals under the *Mines Act* are not intended to be limited to the record of evidence before the original decision-maker.

[48] While the Board may, at its discretion, conduct hearings based on the record of evidence before the decision-maker, it is not obligated to, nor will it be presumed to do so. As noted in the Board's *Practice and Procedure Manual*, the Board will generally conduct appeals *de novo*. In this case, the Respondent has not provided any persuasive reasons why the present appeal should be conducted based purely on the record before the original decision-maker.

2. Should the Appeal proceed by way of written submissions?

[49] The Respondent argues that the appeal should be considered in writing because the parties are unable to submit new evidence as a right. Absent an order from the Board, made at its discretion and on its own initiative, for the production of new evidence, the appeal should proceed by way of written submissions, based on the information that was before the Respondent.

[50] For the reasons I have already provided, appeals under the *Mines Act* do not need to be based on the record before the original decision-maker. Parties are able to submit new evidence as a right, unless the Board orders otherwise in the circumstances of a given appeal. The parties are authorized to do so by the Board's enabling legislation discussed above, and the Board's self-generated rules: Rule 19 allows affidavit evidence to be submitted in oral hearings, Rule 20 allows evidence to be submitted along with written submissions, Rule 21 allows for witnesses to provide live testimony in oral hearings, and Rule 25 allows parties to present expert evidence.

[51] The Board has yet to canvas the parties on the appropriate form of hearing. This is to be discussed at a case management conference to follow this decision, as noted in a case management conference that occurred on October 9, 2020. As such, while the Board is not required to proceed by way of written submissions for the reasons provided above, and while the Appellant is not opposed to proceeding by way of written submissions, I consider it appropriate to leave the issue open for further consideration.

DECISION

[52] For the reasons above, I conclude that the appeal should not proceed based on the record before the original decision-maker, but rather be conducted as a hearing *de novo*. I also conclude that the appeal need not proceed by way of written submissions, and leave it open for a further decision by the Board as to how best to proceed, after further discussion with the parties.

[53] In making this decision, I have fully considered all the information and submissions provided, whether or not specifically referred to in this decision.

[54] The Respondent's application to limit the hearing to the record that was before the original decision-maker is denied. The Respondent's application for a preliminary determination that the appeal should proceed by way of written submissions is likewise denied.

"Darrell LeHouillier"

Darrell LeHouillier, Panel Chair
Environmental Appeal Board

December 3, 2020