BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
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
Email: eabinfo@gov.bc.ca

DECISION NO. EAB-EMA-21-A002(a)

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

BETWEEN:	Christine McLean	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Mount Polley Mining Corporation	**THIRD PARTY**
BEFORE:	A Panel of the Environmental Appeal Board: Darrell Le Houillier, Chair	
DATE:	Conducted by written submissions concluding on April 22, 2021	
APPEARING:	For the Appellant:	Matthew R. Voell, Counsel
	For the Respondent:	Stephen E. King and Cory Bargen, Counsel
	For the Third Party:	Robert M. Lonergan and Kerry Kaukinen, Counsel

PRELIMINARY DECISION - JURISDICTION

[1] This decision addresses a preliminary question regarding whether the Board has jurisdiction over an appeal of an amended permit that flowed from a consent order issued by the Board on a different appeal of the same permit.

[2] Permit #11678 (the "Permit") authorizes Mount Polley Mining Corporation ("MPMC") to discharge effluent into Quesnel Lake from MPMC's copper and gold mine (the "Mine") located southwest of Quesnel Lake.

[3] On February 1, 2020, Douglas J. Hill, a Director under the *Environmental Management Act* (the "Director"), amended the Permit (the "February 2020 Amendment"). MPMC appealed the February 2020 Amendment. MPMC and the Director reached an agreement to resolve some of the issues in that appeal. As a result, on September 18, 2020, the Board issued a consent order (the "Consent Order") reflecting the terms of their agreement and further amending the Permit.

[4] On December 31, 2020, the Director issued an amended Permit (the "December 2020 Amendment") that included the amendments ordered in the Consent Order, as well as updates to some names in the Permit.

[5] Christine McLean appealed the December 2020 Amendment. Ms. McLean owns and occupies property on Quesnel Lake, and has appealed a previous Permit amendment.

[6] The Director and MPMC raised a preliminary issue regarding whether the December 2020 Amendment is a decision that may be appealed by Ms. McLean. Section 100(1) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "*Act*"), states that a "person aggrieved by a decision of a director" may appeal the decision to the Environmental Appeal Board (the "Board"). The Director and MPMC maintain that the December 2020 Amendment is not a decision of the Director, because it is a consolidation of prior versions of the Permit, incorporating the terms of the Board's Consent Order.

[7] Ms. McLean submits that the December 2020 Amendment is an appealable decision of the Director, and the Board has jurisdiction to hear her appeal.

BACKGROUND

[8] MPMC has operated the Mine and held the Permit since 1997.

[9] On August 4, 2014, the Mine's tailings storage dam failed and released millions of cubic metres of tailings into Hazeltine Creek and Polley Lake, and subsequently into Quesnel Lake. After the breach, the Mine's operations were suspended.

[10] In 2015, MPMC was allowed to resume operations at the Mine. On November 29, 2015, the Director issued an amendment to the Permit that allowed MPMC to discharge treated effluent from the Mine directly to Quesnel Lake for two years on a temporary basis.

April 2017 Amendment – appealed by Ms. McLean and MPMC

[11] On April 7, 2017, the Director issued an amended Permit (the "April 2017 Amendment") authorizing MPMC to discharge effluent from the Mine through a submerged diffuser into Quesnel Lake for the remaining anticipated operating life of the Mine (which was up to 2022, at that time). The April 2017 Amendment set limits on contaminant concentrations at the outlet of the effluent treatment plant, where the effluent enters Quesnel Lake. It also stated that certain limits on contaminant concentrations must be met at the edge of the "Initial Dilution Zone" 100 metres from the point of discharge.

[12] Both MPMC and Ms. McLean appealed the April 2017 Amendment to the Board.

[13] On October 2, 2018, the Director issued further amendments to the Permit (the "October 2018 Amendment"). On October 11, 2018, MPMC advised the Board that the October 2018 Amendment addressed the issues in its appeal of the April 2017 Amendment. MPMC withdrew that appeal.

[14] Ms. McLean's appeal of the April 2017 Amendment (Appeal No. 2017-EMA-008) raised concerns about the potential adverse effects of discharging effluent from the Mine to Quesnel Lake. Her appeal was scheduled to be heard in May 2019.

[15] On April 17, 2019, Ms. McLean requested that the Board postpone the hearing of her appeal. She had learned that MPMC was applying for a further amendment to the Permit, and in her view, the proposed amendments were material to the issues in her appeal of the April 2017 Amendment. Additionally, she stated that the proposed amendments were "concerning and would likely be appealed in any event". She proposed adjourning the hearing until a decision was made on MPMC's application to amend the Permit. The Board granted her request for an adjournment.

February 2020 Amendment – appealed by MPMC

[16] On February 1, 2020, the Director issued a further amended Permit (the "February 2020 Amendment"). This amendment involved several changes to the Permit, including the introduction of a numeric performance metric ("NPM") limit for copper concentrations in the discharged effluent, and requiring MPMC to prepare a new water management plan by December 1, 2020.

[17] MPMC appealed the February 2020 Amendment to the Board (Appeal No. EAB-EMA-20-A003). Ms. McLean did not appeal the February 2020 Amendment.

[18] On September 18, 2020, following an agreement between MPMC and the Director to resolve some of the issues in MPMC's appeal, the Board issued the Consent Order which further amended the Permit.

[19] The Consent Order states, in part:

> ON THE APPLICATION of the parties, without a hearing and by consent:
>
> THE BOARD ORDERS under section 16 of the *Administrative Tribunals Act*, S.B.C. 2003, c. 45 that:
>
> 1. Pursuant to section 103(c) of the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act"), Mount Polley Mining Corporation ("MPMC")'s Permit 11678 ("Permit") is amended as follows:
>
> …

[20] The remainder of the Consent Order amended or deleted certain clauses in the Permit. Specifically, it: amended the opening paragraph of clause 2.8; amended clause 2.8.1(a); deleted clause 2.8.1(b); amended clause 2.8.1(c) and renumbered it as clause 2.8.1(b); amended the opening paragraph of clause 2.8.2; deleted clause 2.8.2(c); and, amended clauses 2.9, 2.10, and 4.2.1(i).

[21] The Consent Order was signed by the Director's legal counsel, MPMC's legal counsel, and the Chair of the Board. The Board provided a copy of the Consent Order to Ms. McLean's legal counsel on September 30, 2020.

[22] On October 13, 2020, MPMC submitted an amended notice of appeal, which removed references to the issues and Permit clauses that were the subject of the Consent Order. MPMC's remaining grounds of appeal pertain to sections 2.8.2(a) and 2.8.2(b) of the Permit, as amended in the February 2020 Amendment. MPMC challenges the imposition of the NPM limit of 12 micrograms per litre for the total concentration of copper at the outlet of the effluent treatment plant.

December 2020 Amendment – appealed by Ms. McLean

[23] On December 31, 2020, the Director issued the December 2020 Amendment. According to the Director, the December 2020 Amendment "memorialized" the terms of the Consent Order, and updated the names of two First Nations. Otherwise, the December 2020 Amendment contains the same language as the February 2020 Amendment.

[24] On January 28, 2021, Ms. McLean appealed the December 2020 Amendment to the Board (Appeal No. EAB-EMA-21-A002). In her notice of appeal, she raises concerns about the adverse impacts of the discharge of Mine effluent to the environment, and she submits that options are available for reducing contaminant levels in the effluent and its impacts on the environment. She asks the Board to set aside the December 2020 Amendment, or alternatively, to vary the Permit by adding requirements with respect to water quality, and monitoring and reporting on the effluent discharge. In the further alternative, she asks the Board to "vacate" the December 2020 Amendment and remit the matter back to the Director with directions.

[25] On February 4, 2021, the Board held a pre-hearing conference with MPMC, the Director, and Ms. McLean to clarify what issues remained in Ms. McLean's appeal of the April 2017 Amendment, given the subsequent amendments to the Permit. During the conference, the Director and MPMC raised concerns about Ms. McLean's new appeal and whether the December 2020 Amendment is an appealable decision given that it appeared to flow from the Consent Order.

[26] Consequently, on February 11, 2021, the Board invited MPMC, the Director, and Ms. McLean to provide written submissions addressing the following questions:

a) Is the December 2020 Amendment an appealable decision?

b) If not, should the appeal of the December 2020 Amendment be summarily dismissed under section 31(1)(a) of the *ATA* due to lack of jurisdiction?

c) In the alternative, should the appeal be dismissed under section 31(1)(c) or section 31(1)(g) of the *ATA*?

[27] The Board also requested clarification on whether, and if so, to what extent, the grounds of appeal in Ms. McLean's of the December 2020 Amendment (Appeal No. EAB-EMA-21-A002) subsume, or render moot, the grounds of appeal in her appeal of the April 2017 Amendment (Appeal No. 2017-EMA-008), in the event that the Board finds that it has jurisdiction over her appeal of the December 2020 Amendment.

Board's authority over appeals of permits and permit amendments under the Act

[28] Section 14 of the *Act* provides a director with the discretion to issue a permit authorizing the introduction of waste into the environment. Section 16 of the *Act* governs the amendment of such permits. Section 16(1) provides a director with the discretion to amend a permit, subject to requirements for the protection of the environment that the director considers advisable.

[29] Section 16(3) of the *Act* limits a director's authority to amend a permit in certain circumstances. Section 16(3) states that if a permit "is subject to conditions

imposed pursuant to a decision made in an appeal to" the Board under the *Act*, "those conditions must not be amended except":

> (a) by the Board, and
>
> (b) after the Board has given the parties an opportunity to be heard on the question of whether the conditions should be amended.

[30] Section 100(1) of the *Act* states that a "person aggrieved by a decision of a director or a district director" may appeal the decision to the Board. Section 99 of the *Act* defines "decision" for the purposes of appeals under the *Act*. The definition includes, among other things, "issuing, amending, renewing, suspending, refusing, cancelling or refusing to amend a permit" (section 99(d)), and "including a requirement or a condition" in a permit (section 99(e)).

[31] Section 103 of the *Act* sets out the Board's powers when deciding an appeal. Section 103(c), which is cited in the Consent Order, states that the Board "may make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances." Consequently, in deciding an appeal of a permit or a permit amendment, the Board may exercise a director's powers under sections 14 and 16(1) of the *Act*.

[32] Certain sections of the *Administrative Tribunals Act* (the "*ATA*") apply to the Board pursuant to section 93.1 of the *Act*. As a result, the *ATA* provides additional powers to the Board in appeals under the *Act*. For example, section 16 of the *ATA* empowers the Board to make consent orders on the request of the parties to an appeal. In addition, section 31(1) authorizes the Board to summarily dismiss an appeal for a variety of reasons, such as if the appeal is not within the Board's jurisdiction (subsection (a)), the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process (subsection (c)), or the substance of the appeal has been appropriately dealt with in another proceeding (subsection (g)).

ISSUES

[33] I have considered the following issues in this preliminary decision:

1. Should Ms. McLean's appeal of the December 2020 Amendment be summarily dismissed under section 31(1)(a) of the *ATA* because the appeal is not within the Board's jurisdiction?
2. If not, should Ms. McLean's appeal of the December 2020 Amendment be summarily dismissed under sections 31(1)(c) or (g) of the *ATA*, respectively, because the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process, or the substance of the appeal has been appropriately dealt with in another proceeding?

[34] Given my conclusions below on Issues 1 and 2, I need not address the third question posed in the Board's letter dated February 11, 2021; i.e., whether, and if so, to what extent, the grounds of appeal in Ms. McLean's of the December 2020 Amendment subsume, or render moot, the grounds of appeal in her appeal of the April 2017 Amendment.

DISCUSSION AND ANALYSIS

1. Whether Ms. McLean's appeal of the December 2020 Amendment should be summarily dismissed under section 31(1)(a) of the *ATA* because the appeal is not within the Board's jurisdiction?

Summary of the Director's submissions

[35] The Director submits that Ms. McLean's appeal of the December 2020 Amendment should be dismissed under section 31(1)(a) of the *ATA*, because the December 2020 Amendment is merely a consolidation of prior versions of the Permit, incorporating the terms of the Consent Order. The Board was acting in the place of the Director when it issued the Consent Order resolving part of MPMC's appeal of the February 2019 Amendment. The Director then memorialized the terms of the Consent Order in the December 2020 Amendment. The Director says he did not make an independent, appealable decision when he issued the December 2020 Amendment, and therefore, it is not an appealable "decision" of a director under the *Act*.

[36] In addition, the Director submits that the Board's enabling legislation does not entitle it to hear appeals from the consent orders it grants.

[37] The Director submits that only those portions of a permit that are altered by a decision of a director are properly the subject of an appeal. An appeal does not open up the entirety of a permit for scrutiny or alteration: *Unifor Local 2301 v. Rio Tinto Alcan Inc.,* 2017 BCCA 300 [*Unifor*], at para. 40.

[38] Finally, the Director submits that if Ms. McLean's appeal of the December 2020 Amendment is not dismissed under section 31(1)(a) of the *ATA*, it should be dismissed under either section 31(1)(c) or (g), respectively, because it gives rise to an abuse of process, or the substance of the appeal has been appropriately dealt with in another proceeding. The Director argues that Ms. McLean seeks to use this appeal to circumvent her failure to appeal the February 2020 Amendment. By pursuing this appeal, she seeks Board intervention regarding a decision which was dealt with by way of the Consent Order, which is an abuse of process. Similarly, given that the only change in the Permit reflected in the December 2020 Amendment is the change ordered by the Consent Order, the substance of this appeal has been appropriately dealt with in another proceeding.

[39] In support of those submissions, the Director provided a table that compares the language in the Permit amendments ordered in the Consent Order with the language in the relevant clauses in the December 2020 Amendment. The Director also provided a table that compares the language in the clauses in the December 2020 Amendment where the names of two First Nations were updated, with the language in those clauses in the February 2020 Amendment.

Summary of MPMC's submissions

[40] MPMC submits that the appeal of the December 2020 Amendment should be summarily dismissed under section 31(1)(a) of the *ATA* because no decision or amendment in respect of the Permit was made on December 31, 2020. The version

of the Permit that was appended to the Director's December 31, 2020 letter was a consolidation of terms in the Permit accounting for changes made by the Consent Order, and was not a "decision" of the Director within the meaning of section 99 of the *Act*.

[41] In the alternative, MPMC submits that the appeal should be dismissed under section 31(1)(c) and section 31(1)(g) of the *ATA*. It argues that the appeal is frivolous, since it is not appealing a decision made by the Director. Further, the substance of the appeal is actually whether the April 2017 Amendment is lawful, and this is being dealt with in Ms. McLean's Appeal No. 2017-EMA-008.

[42] In the further alternative, if the Board determines that it has jurisdiction to hear Appeal No. EAB-EMA-21-A002, MPMC argues that the appeal should nonetheless be dismissed. The grounds of appeal in both of Ms. McLean's appeals are virtually identical, are fundamentally related to the April 2017 Amendment, and are properly dealt with in Appeal No. 2017-EMA-008.

Summary of Ms. McLean's submissions

[43] Ms. McLean submits that the December 2020 Amendment is an appealable "decision" of the Director within the meaning of section 99 of the *Act*. She notes that the Supreme Court of BC has stated that the definition of "decision" in the *Act* is "extremely broad" and that interpreting it otherwise would "strain the limits of interpretation of the English language" (*Unifor, Local 2301 v. British Columbia (Environmental Appeal Board)*, 2015 BCSC 1592, at para. 35). Similarly, the BC Court of Appeal held in *Unifor* at paras. 31 and 32 that the list of appealable decisions in section 99 "is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the statute", and that it would be unreasonable to artificially narrow the interpretation of section 99.

[44] Ms. McLean submits that the Director and MPMC fail to explain why the Board should disregard an express term in the December 2020 Amendment, which provided that the new Permit supersedes and replaces all previous versions of the Permit. Specifically, she submits that the December 2020 Amendment, like the April 2017 and February 2020 Amendments, was not just notice of various amendments to the Permit. Rather, it was a new amended Permit issued by the Director pursuant to section 14 of the *Act*. In these instances, a full copy of the Permit was issued, and it expressly stated:

> This Authorization supersedes and replaces all previous versions of Permit 11678 issued under Section 14 of the Environmental Management Act.

[45] In contrast, Ms. McLean notes that the October 2018 Amendment: was made by letter and not by issuing a full copy of the revised/amended Permit; simply stated that the Director was imposing amendments to certain clauses of the Permit; expressly stated "[a]ll other terms and conditions of Permit 11678 remain unchanged and in full effect"; and, did not include a provision stating that the October 2018 Amendment superseded and amended all previous versions of the Permit. Thus, she submits that the October 2018 Amendment was an amendment made pursuant to section 16 of the *Act*.

[46] Ms. McLean submits that the Director and MPMC fail to acknowledge the difference and legal effect between amendments to the Permit, which occurred in the October 2018 Amendment, and the issuance of an entire new amended Permit which occurred on December 31, 2020.

[47] Ms. McLean acknowledges that a communication from a director may convey information or decisions that are not appealable (*Re Revolution Organics, Limited Partnership and British Columbia (Director, Environmental Management Act)*, 2017 CarswellBC 2664 (BC EAB) [*Revolution*]). However, she says there can be no dispute that the December 2020 Amendment was, among other things, the issuance, amendment, renewal of a permit, and it cancelled all previous versions of the Permit. Even if the December 2020 Amendment was simply a consolidation of previous amendments to the Permit, the fact remains that rather than simply issuing amendments pursuant to section 16 of the *Act*, the Director issued a new amended Permit on December 31, 2020. At the very least, by superseding and replacing all prior versions of the Permit on December 31, 2020, the Director brought his decision within the scope of section 99(d) of the definition of "decision".

[48] In the alternative, Ms. McLean submits that if the Board finds that she is not entitled to appeal a term of the Permit that was entered into by the Consent Order, then it is only the specific changes imposed by the Consent Order that cannot be appealed. She maintains that the balance of the Permit issued on December 31, 2020 is appealable.

[49] In that regard, Ms. McLean notes that a director may amend a permit on their own initiative under section 16(1)(a) of the *Act*, and she says this is what happened on December 31, 2020. She says the only statutory limit on a director's authority to amend a permit is where conditions have been imposed pursuant to a decision made in an appeal to the Board. Section 16(3) provides that "those conditions" may not be amended except by the Board and after the parties have been given an opportunity to make submissions. In other words, the limitation in section 26(3) only applies to conditions that are imposed by the Board. Ms. McLean submits that the Director did not amend conditions imposed by the Board on December 31, 2020, and thus, the statutory limit on the Director was not engaged.

[50] Ms. McLean also argued that, as the Director did not seek her leave or the leave of the Board before issuing the February 2020 Amendment, it cannot be that she would lose rights of appeal as a result of an amendment that occurred while the Permit was under appeal.

[51] Finally, Ms. McLean argues that even if some or all of the December 2020 Amendment is not an appealable decision, the Board should not exercise its discretion to dismiss her appeal under section 31(1) of the *ATA*. Ms. McLean says that she is not attempting to indirectly appeal the Consent Order. She maintains that the changes made in the Consent Order are not the basis for her appeal of the December 2020 Amendment. Rather, Ms. McLean argues in this appeal that the Director should have included many additional terms in the December 2020 Amendment. Furthermore, she submits that the terms of the April 2017 Amendment have been "subsumed and replaced" by the Permit issued on December 31, 2020, which is the form of Permit as it currently exists.

Summary of the Director's reply submissions

[52] The Director submits that Ms. McLean's submissions do not address the fundamental point that there is no new decision of the Director to appeal. Section 100(1) of the *Act* provides that a person aggrieved by a decision of a director (or a district director) can commence an appeal against that decision. Section 100(2) clarifies that the Minister's decisions are not appealable. The Director submits, therefore, that the definition of "decision" in section 99 only applies to a director or district director, and not to a decision rendered by any other decision-maker. In this instance, the Director did not render a decision; rather, he brought the existing version of the Permit in line with the Consent Order. The decision was not that of the Director, but of the Board.

[53] Furthermore, the Director submits that he has no authority to change an order of the Board. If an order of the Board is to be altered, it could only be done by the BC Supreme Court.

[54] In addition, the Director submits that *Unifor* stands both for the proposition that any changes to an authorization are capable of being appealed, and that changes to one aspect of an authorization do not open the remainder of the authorization to appeal (*Unifor*, paras. 40 - 41). Thus, the Director maintains that *Unifor* does not support Ms. McLean's argument that the December 2020 Amendment made the entirety of the Permit capable of being appealed. Interpreting a restatement or consolidation of a permit as re-opening the legislated 30-day appeal period would run counter to providing certainty to persons who emit into the environment under an authorization.

[55] The Director also challenges Ms. McLean's argument that unless an authorization expressly states that it repeals and replaces any or all previous authorizations, it does not automatically have that effect. On the contrary, the Director argues that a foundational tenet of administrative law is that if an authorization is provided to the same party for the same purpose as a previous authorization, then the new authorization replaces the previous version. This can be understood by analogy to the repeal and replacement of statutes as set out in s. 36 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, which provides that upon repeal and replacement, the prior statute no longer has the force and effect of law. Were this not the case, there would be two statutes dealing with the same subject matter, potentially in two different ways, leading to legal impossibilities and confusion about how to comply.

[56] The Director says that same is true with authorizations under the *Act*. If previous authorizations were not automatically repealed and replaced by updated authorizations (with or without the specific mention of that replacement), the regulatory structure governing authorization holders would cease to function. For example, if there were multiple operative versions of an authorization relating to the same activity, any changes to an authorization that conflicted with a previous version of the authorization could render operations under the authorization impossible. Further, restatements or consolidations issued by regulators to ensure all interested parties understand the status of an authorization would instead introduce a lack of clarity by opening the authorization up to a new potential appeal. This is an absurd result that should be avoided.

[57] In conclusion, the Director submits that the Board issued the Consent Order, which was later reflected in correspondence from the Director that set out the current version of the Permit, incorporating the effect of the Consent Order into the consolidation. Clear communication from a director that consolidates changes into a single document benefits the director (as the regulator), the permittee, and the public because the current terms of the authorization are readily available to all. Such communication does not constitute an appealable decision under the *Act*, and to interpret it as an appealable decision would lead to absurd results.

Summary of MPMC's reply submissions

[58] In reply to Ms. McLean's submissions, MPMC says that although the Director can revoke and issue a new version of the Permit, the Director did not do so on December 31, 2020. MPMC disputes the proposition that the December 2020 Amendment repealed and replaced all previous versions of the Permit. MPMC maintains that the "express term" of the Permit cited by Ms. McLean was itself an existing term, and was not "made again" on December 31, 2020.

[59] MPMC submits that the December 31, 2020 version of the Permit was of an administrative nature, and was a consolidation of the existing Permit with the amendments made in the Consent Order. No new decision was made on December 31, 2020, except to update the names of two local First Nations. Any appeal of the remaining Permit terms is barred by section 101 of the *Act*, which sets a 30-day time limit for commencing an appeal.

The Panel's findings

[60] As stated in *Unifor* at para. 31, section 99 "is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the" *Act*, and "some of the enumerated types of decisions overlap with others." I also note that the definition of "decision" in section 99 is not specific to particular decision-makers under the *Act*.

[61] However, I find that section 100 of the *Act* narrows the scope of "decisions" that may be appealed to the Board, depending on who makes the "decision". Section 100(1) states that "a decision of a director or a district director" may be appealed to the Board. Section 100(2) expressly excludes decisions made by the Lieutenant Governor in Council or the Minister under the *Act* from being appealable to the Board. Although the *Act* does not expressly state that the Board's decisions may not be appealed to the Board, there is no authority under the *Act* for the Board to vary its own decisions.

[62] Furthermore, section 53 of the *ATA* prohibits the Board from amending its own final decision other than to clarify it or correct a clerical or typographical error, an accidental or inadvertent error, an omission or similar mistake, or an arithmetical error made in a computation. A "final decision" is one that, under section 54 of the *ATA*, can be enforced by filing a certified copy with the Supreme Court of British Columbia. The whole point of such an order is its enforceability, meaning that a consent order must be a "final decision" as contemplated under the *ATA*. While section 53(5) of the *ATA* affirms the Board's ability to reopen an appeal to cure a jurisdictional defect, as discussed below, there are no procedural fairness

implications that amount to a jurisdictional defect and no other concerns as to the Board's jurisdiction in issuing the Consent Order.

[63] Finally, there is an alternative method by which decisions of the Board can be changed. Decisions of the Board may be reviewed by the BC Supreme Court pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241. Additionally, section 97 of the *Act* states that the Lieutenant Governor in Council may, in the public interest, vary or rescind an order or decision of the Board.

[64] Thus, although "decision" is defined quite broadly in section 99 of the *Act*, I find that other sections in the *Act* and the *ATA* indicate the Legislature's intention that only decisions made by a director (or a district director) may be appealed to the Board. The Board may not hear appeals of its own decisions and may not, outside of a narrow scope for clarifications and corrections, amend its own decision. Thus, even if the December 2020 Amendment contains a "decision" within the definition of section 99, the question becomes whether it contains a "decision" made by the Director, or the Board, or some combination of the two.

[65] The fact that the December 2020 Amendment consisted of a full copy of the Permit attached to a letter issued by the Director is not, in itself, conclusive evidence that the Director exercised a decision-making power under the *Act*. Para. 31 of *Unifor* states that section 99 "is intended to comprehensively enumerate virtually all of the various types of substantive decisions that are made under the statute" [underlining added]. As the Board stated in *Revolution* at para. 38, to be an appealable "decision", there must be some exercise of authority under the legislation that relates to a subsection of section 99, and:

> While a letter may, indeed, communicate a decision that is appealable under the *Act*, it may also convey information or decisions that are not appealable. Thus, … it is the contents of a letter that must be examined to determine if there are any decisions that have been made and are, therefore, appealable.

[66] In the present case, for there to be a substantive "decision" of the Director, the Director must have exercised a decision-making power under the *Act*, and this is determined by comparing the content and effect of the December 2020 Amendment to that of the Board's Consent Order and the previous version of the Permit. Specifically, I have considered the extent to which the Director exercised a decision-making power under sections 14 or 16(1) of the *Act* when he issued the December 2020 Amendment. As stated in *Unifor* at para. 34, "In granting and amending permits, the director under the *Environmental Management Act* has only those powers given to him by statute." As noted above, and as Ms. McLean acknowledges, section 16(3) prohibits the Director from amending conditions in a permit that were imposed pursuant to a decision made in an appeal to the Board.

[67] The changes or differences in the language in the 2020 December Amendment as compared to the February 2020 Amendment can be grouped into two categories: (1) changes that mirror the amendments specified in the Consent Order; and, (2) updates to the names of two First Nations. I will first consider the latter category.

[68] I find that the name updates are amendments to the Permit that were not ordered in the Board's Consent Order. The February 2020 Amendment referred to

the two First Nations as the "Williams Lake Indian Band" and the "Soda Creek Indian Band", whereas the December 2020 Amendment refers to them as the "Williams Lake First Nation" and the "Xatsull First Nation", respectively. These First Nations are entitled to receive certain information under the Permit. However, the name updates do not affect which First Nations receive that information. As such, I find that the name updates are not a substantive "decision" of the Director, as these updates have no substantive effect.

[69] I now turn to the differences in the language in the 2020 December Amendment that resulted from the Consent Order versus the language in the February 2020 Amendment. These changes in language are substantive in nature, but they are identical to the amendments that the Board ordered in the Consent Order. The Consent Order amended the Permit pursuant to the Board's powers under section 103(c) of the *Act*, and the Consent Order is clearly a decision of the Board with respect to MPMC's appeal of the February 2020 Amendment (Appeal No. EAB-EMA-20-A003). Consequently, I find that the amendments ordered in the Consent Order, and incorporated into the December 2020 amendment, are "a decision made in an appeal to the appeal board under Division 2 of Part 8" of the *Act*, as stated in section 16(3) of the *Act*. Those amendments are not the result of a decision of the Director; rather, they resulted from a decision of the Board.

[70] Accordingly, based on the language in the Consent Order and in the relevant sections of the *Act*, I find that the Director did not exercise a power to amend the Permit, or include a requirement or condition in the Permit, when he incorporated the amendments in the Consent Order into the December 2020 Amendment. To the extent that the 2020 December Amendment reproduces the amendments specified in the Consent Order, no substantive "decision" was made by the Director. The Director was simply updating or consolidating the Permit by incorporating amendments that were previously ordered by the Board. Consequently, to the extent that the December 2020 Amendment contains clauses that were imposed by the Board in the Consent Order, I find that they are not an appealable "decision" of the Director. Furthermore, according to section 16(3)(a), the conditions imposed in the Permit pursuant to the Consent Order must not be amended except by the Board. Therefore, the Director had no authority to amend the clauses that were amended by the Board in the Consent Order.

[71] Finally, I have considered Ms. McLean's argument that the December 2020 Amendment was an exercise of the Director's power under section 14 of the *Act* to issue a permit, and that the Director issued a new Permit which replaced all previous versions of the Permit. I find that the December 2020 Amendment, as a whole, is administrative rather than substantive in nature. Updating the names of two First Nations, and consolidating the amendments made in the Consent Order with the pre-existing clauses in the February 2020 Amendment, did not involve any substantive decision by the Director under section 14.

[72] In addition, the fact that the December 2020 Amendment provided a full copy of the updated Permit that includes the phrase, "This Authorization supersedes and replaces all previous versions of Permit 11678 issued under Section 14", does not automatically mean that the December 2020 Amendment was a new Permit flowing from an exercise of discretion under section 14. The February 2020

Amendment, and earlier versions of the Permit, also included that phrase. I find that the Director provided the December 2020 Amendment as a consolidated form or version of the Permit, in the interests of clarity and ease of reference. The phrase referenced by Ms. McLean was included in previous versions of the Permit, and was not a new addition. I find that the purpose of this phrase is to state, for the sake of clarity, that only one version of the Permit is in effect at once.

[73] A consolidated version of the Permit in the form of the December 2020 Amendment, incorporating the Board amendments and the Director's name updates into the text of the February 2020 Amendment, is an administrative tool meant to ensure that all interested parties have the same information about the contents of the Permit. The facts show that the Permit has been amended numerous times in recent years. Without the consolidation provided in the December 2020 Amendment, it would be cumbersome to ascertain exactly what obligations and authorizations are currently contained in the Permit. A reader would need to read the February 2020 Amendment together with the Board's Consent Order, which would be difficult not only for MPMC and the Director, but also members of the public who have an interest in the impacts of the Mine's discharge.

[74] In addition, if a consolidated Permit provided for administrative purposes was open to appeal, it would result in two occasions to appeal the same thing: once when the substantive decision affecting the Permit was issued (if it was a decision of the Director and not the Board), and again when the consolidated version of the permit was issued. This would be contrary to the 30-day appeal period in section 101 of the *Act*, and would be an absurd result that should be avoided.

[75] Lastly, I recognize that the effect of this decision is to deny Ms. McLean the ability to appeal the contents of the Consent Order to the Board, even if it affects some aspects of the April 2017 Amendment, which Ms. McLean had appealed. This is, however, a function of section 17 of the *ATA*. Section 17 contemplates that the Board must allow a withdrawal of an appeal, in whole or in part, where the parties advise the Board that they have settled part or all of an appeal. Similarly, under section 16 of the *ATA*, the Board may issue a consent order at the request of the parties, if the terms of the settlement are consistent with the enactments governing the appeal (the *Act*, in this case). If Ms. McLean wanted some control over the settlement terms arising from MPMC's appeal of the February 2020 Amendment, she should have appealed that version of the Permit or applied to be granted full-party participant status. She chose not to do any of these. As a result, the process has not been unfair to her and she cannot now seek to exert control over the terms of the settlement agreement, now incorporated in the December 2020 Amendment.

[76] Based on the foregoing, I find that Ms. McLean's appeal of the December 2020 Amendment should be summarily dismissed under section 31(1)(a) of the *ATA*. The December 2020 Amendment does not contain an appealable "decision of a director" under section 100(1) of the *Act*, and therefore, Board lacks jurisdiction over the appeal.

2. Should Ms. McLean's appeal of the December 2020 Amendment be summarily dismissed under sections 31(1)(c) or (g) of the *ATA*, respectively, because the appeal is frivolous, vexatious or trivial or gives

rise to an abuse of process, or the substance of the appeal has been appropriately dealt with in another proceeding?

[77] My decision on the first issue disposes of the appeal. However, for greater certainty, I have also considered whether the appeal should be summarily dismissed under sections 31(1)(c) or (g) of the *ATA*.

[78] There is no indication that Ms. McLean intended to file her appeal for improper purposes, or that her appeal is vexatious in nature. However, to the extent that she seeks to appeal the clauses in the December 2020 Amendment that stem from the Board's Consent Order, I find that the appeal would give rise to an abuse of process. As stated above, section 16(3)(a) of the *Act* provides that the conditions imposed in the Permit pursuant to the Consent Order must not be amended except by the Board. Section 16(3)(b) of the *Act* allows the Board to amend those Permit conditions after it has "given the parties an opportunity to be heard on the question of whether the conditions should be amended". While this "opportunity to be heard" is not a right of appeal, it is worth clarifying which "parties" are entitled to an opportunity to be heard under section 16(3)(b).

[79] The Consent Order was made by the Board pursuant to section 16 of the *ATA*, on application by "the parties". The parties to the appeal that led to the Consent Order (i.e., the appeal of the February 2020 Amendment) are MPMC and the Director. Ms. McLean is not a party to that appeal. Ms. McLean could have appealed the February 2020 Amendment. Indeed, her April 17, 2019 letter to the Board indicates that she was aware of MPMC's application that led to the February 2020 Amendment, and that she thought the proposed amendments may be material to her appeal of the April 2017 Amendment. However, Ms. McLean chose not to appeal the February 2020 Amendment. Alternatively, she could have requested that the Board add her as a party to that appeal, but she did not. Consequently, she is not one of "the parties" who would have an opportunity to be heard under section 16(3)(b) of the *Act* if the Board was considering further amendments to the conditions it amended pursuant to the Consent Order.

[80] I have also considered that Ms. McLean may have a valid appeal if I am wrong in finding that the First Nations' name updates in the December 2020 Amendment are not substantive in nature. If they are substantive decisions of the Director, and they may constitute either "amending" the Permit (section 99(d)) to update the First Nations' names, or "including a requirement or a condition" in the Permit, insofar as they update a reporting requirement or condition (section 99(e)). However, even if the names updates are a substantive decision of the Director, an appeal of that "decision" would not provide Ms. McLean with an opportunity to challenge any other portion of the Permit. As the Court of Appeal stated in para. 40 of *Unifor*:

> … An appeal of a decision does not lay an existing permit open to attacks at large. The appeal must be narrowly focussed on the particular impugned decision.

[81] The Board applied this reasoning in *Revolution* at para. 40, and found that the only substantive "decision" in the letter that was appealed in that case was an extension of due dates. The "decision" was the exercise of discretion to extend the

due dates, and the appeal was limited to issues related to the extension of the due dates. Similarly, in the present case, I find that an appeal of the updates that the Director made to two First Nations' names in the Permit would be limited to issues related to those name updates.

[82] To the extent that Ms. McLean's appeal of the December 2020 Amendment seeks to challenge aspects of the Permit that were unchanged from the February 2020 Amendment, I find that this would be an abuse of process, because she had the opportunity to appeal the February 2020 Amendment, but she did not, and the 30-day appeal period in section 101 of the *Act* expired months ago.

[83] Finally, I find that section 31(1)(g) applies to the extent that Ms. McLean seeks to appeal aspects of the December 2020 Amendment that the Board dealt with in the Consent Order arising from MPMC's appeal of the February 2020 Amendment. Section 31(1)(g) does not apply to the extent that she seeks to appeal the other aspects of the December 2020 Amendment, but as noted above, the remainder of the December 2020 Amendment is either: (a) identical to the February 2020 Amendment, which she did not appeal and cannot now appeal; or (b) consists of name updates that are either not a substantive decision that may be appealed, or even if they are an appealable decision, would not open up the rest of the December 2020 Amendment to being challenged in that appeal.

[84] For these reasons, I conclude that Ms. McLean's appeal of the December 2020 Amendment may also be summarily dismissed under sections 31(1)(c) and/or (g) of the *ATA*.

DECISION AND ORDER

[85] In making this decision, I have fully considered all of the evidence and submissions made, whether or not specifically referred to in this decision.

[86] Based upon my findings above, I summarily dismiss Ms. McLean's appeal of the December 2020 Amendment.

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

May 6, 2021