



Environmental Appeal Board

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DECISION NO. EAB-EMA-21-A006(b)

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

BETWEEN: Gibraltar Mines Ltd. **APPELLANT**

AND: Director, *Environmental Management Act* **RESPONDENT**

BEFORE: A Panel of the Environmental Appeal Board
Linda Michaluk, Panel Chair

DATE: Conducted by way of written submissions
concluding on January 11, 2022

APPEARING: For the Appellant: Robin Junger, Counsel
For the Respondent: Meghan Butler, Counsel

APPLICATION TO RECONSIDER STAY DECISION

[1] On December 13, 2021, the Board issued Decision EAB-EMA-21-A006(a) (the "Decision") regarding the stay application filed by Gibraltar Mines Ltd. ("GML") concerning a permit amendment issued by the Director, *Environmental Management Act* (the "Director"). GML appealed the permit amendment, and one of the remedies it sought was a temporary stay of some aspects of the amendment decision, pending the Board's final decision on the merits of the appeal. After conducting a written hearing, the Board issued the Decision denying the stay application.

[2] On December 17, 2021, GML requested that the Board reconsider its Decision. The Director opposes GML's request to reconsider the Decision.

[3] This decision addresses GML's request for reconsideration of the Decision.

BACKGROUND

[4] GML operates a copper and molybdenum mine, the Gibraltar Mine (the "Mine"), near Williams Lake, British Columbia. The Mine is the second largest open pit copper mine in Canada and is located within the Cuisson Creek watershed, which drains into the Fraser River. The Fraser River is approximately 11.7 km to the west of the Mine.

[5] GML holds Permit PE-416 (the "Permit") issued under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act"). The Permit authorizes GML to discharge Mine and mill effluent to the ground, saddle dam seepage and runoff to

Arbuthnot Creek, and tailings impoundment supernatant to the Fraser River, subject to numerous conditions.

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

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

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

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

[10] Notwithstanding GML's position that an amendment was unnecessary, on November 20, 2020, GML applied to amend the Permit.

[11] On May 13, 2021, the Director issued a decision amending the Permit. In doing so, the Director included a number of amendments that GML had not applied for and that GML claims adversely affect its interests (the "Unsolicited Amendments").

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

[13] On July 22, 2021, GML filed its application for a stay of the Unsolicited Amendments. GML's application included an affidavit affirmed by Ben Pierce on July 22, 2021 ("Affidavit #1").

[14] In a letter dated July 28, 2021, the Board acknowledged receipt of GML's application for a stay of the Unsolicited Amendments. In that letter, the Board offered the Director an opportunity to provide written submissions on the application, and GML an opportunity to reply to the Director's submissions.

[15] On August 25, 2021, GML filed an amended Notice of Appeal, with the Director's consent. The relief sought in the amended Notice of Appeal included a number of remedies, including a temporary stay of some aspects of the amendment decision, pending the Board's final decision on the merits of the appeal.

[16] On September 3, 2021, the Director provided a written submission opposing GML's application for a stay. The Director provided an affidavit in support of his submissions.

[17] On September 17, 2021, GML filed its final reply submissions, as well as a second affidavit affirmed by Ben Pierce on September 17, 2021 ("Affidavit #2").

[18] On December 13, 2021, the Board issued the Decision which denied the stay application.

[19] In para. 50 of the Decision, I noted that GML's reply submission included a second affidavit (Affidavit #2), in addition to the affidavit it had included with its application for a stay. I considered that page 27 of Board's *Practice and Procedure Manual* (the "Manual") provided that no new evidence should be included in an appellant's reply submission. Having been satisfied that the Director's submissions did not raise any unexpected issues, and that the Director had no opportunity to respond to Affidavit #2, I found that the new evidence was not properly part of GML's reply submission and was inadmissible. I did not consider any information from Affidavit #2.

[20] On December 17, 2021, GML requested that I revisit my decision not to admit Affidavit #2, and then reconsider the Decision on the stay application if Affidavit #2 is ultimately admitted. GML submits that my refusal to consider Affidavit #2 was a material determination and represents an administrative law error, in that it was done without notice to GML or an opportunity for GML to respond on the question of admissibility of Affidavit #2 before the Decision was made.

[21] The Director opposes GML's request to reconsider the Decision.

ISSUE

[22] Should I revisit the decision not to admit Affidavit #2, and then if the Affidavit is to be admitted, reconsider the Decision on the stay application?

DISCUSSION AND ANALYSIS

GML's Submissions

[23] GML submits that the guidance in the Manual at page 27, that no new evidence should be included in an appellant's reply submission, refers to written hearings of appeals, and not to preliminary motions like a stay application.

[24] GML submits that the statement "no new evidence to be included" is not law or a categorical rule, and administrative tribunals are not prevented from admitting evidence on reply to a motion if the moving party could not have reasonably anticipated the positions and evidence advanced by the respondent. GML views the question of whether that was or was not the case here as a material question that I ruled on without the benefit of any submissions. GML says it would have made submissions as to why the Board should not refuse to admit Affidavit #2.

[25] GML submits that I, as a matter of procedural fairness, should have raised my concern and sought submissions from the parties on the admissibility of Affidavit #2. If consideration of Affidavit #2 was not opposed by the Director, I should have considered Affidavit #2. If the Director opposed consideration of Affidavit #2 and I then found it to be inadmissible, then Affidavit #2 should not be considered. However, if the Director opposed consideration of the Affidavit #2 and I ruled it admissible, but I found that the Director did not have sufficient opportunity to respond to Affidavit #2, then the Director should have been offered a such an opportunity.

[26] GML requests that I revisit my ruling on this question, apply the steps above, and then reconsider the decision on the stay application if Affidavit #2 is ultimately admitted. GML acknowledges that doing so may or may not change the ultimate outcome, but GML says it is the appropriate process in the circumstances.

Director's Submissions

[27] The Director submits that Affidavit #2 is not proper reply and that I committed no error, in principle or in law, by ruling it inadmissible in the Decision, at para. 50.

[28] The Director submits that the rules of evidence before the Board are generally less formal than before a court. However, section 12.2 of the Manual states that "the Board may exclude evidence if it is of minimal relevance, is unreliable, may confuse the issues, or may prejudice the other parties". New evidence offered in reply, with no opportunity to sur-reply, can be prejudicial.

[29] The Director submits that even if Affidavit #2 had been admitted, it would not have affected the result of the stay application and is of minimal relevance. The Director maintains that the stay application was decided on the irreparable harm and balance of convenience (Decision, at paras. 58 – 63, and paras. 84-86, respectively), which are aspects of the legal test applicable to a stay application. Affidavit #2 does not specifically address either of those issues; in particular, Affidavit #2 does not fill any of the gaps in the evidence that I identified in the Decision (e.g., at paras. 59 and 63).

[30] The Director submits that it would serve no useful purpose to reopen the stay application to admit and consider evidence that is irrelevant to the issues on which the stay application was decided.

GML's Reply

[31] GML declined to make a reply submission.

Panel's Findings

[32] The Manual was created to assist parties in the appeal process. It is a comprehensive document that explains the appeal process in detail and cites the legislation and/or Rule that may apply to a subject, and any Board policy relevant to that subject. Although I agree with GML that the Manual itself is not law, I note that the Manual is informed by, and refers to, the Board's enabling legislation and other applicable legislation, common law principles that apply to the Board including the principles of procedural fairness, and the Rules of practice and procedure that the Board has made pursuant to section 11 of the *Administrative Tribunals Act* (the "ATA"), which I discuss in more detail below. The Manual addresses the Board's procedure for written hearings beginning on page 27 under the heading "Written Hearing Procedure". It says, in part, that "no new evidence is to be included" in the appellant's reply submissions. As noted by both GML and the Director, I considered this procedural guidance in determining how to address Affidavit #2 when I made the Decision.

[33] GML submits that this section of the Manual refers to written appeal hearings and does not refer to preliminary motions such as stay applications.

[34] The Manual addresses stay applications in section 7. On pages 21 and 22, the Manual states, in part:

A party seeking a stay must apply to the Board in accordance with Rule 16 [General application procedure].

...

Normally an application for a stay will be conducted in writing, rather than in an oral hearing.

[emphasis added]

[35] I find that that the Manual provides guidance that stay applications will be conducted in writing, and not in an oral hearing, and that these applications are to be made in accordance with the Board's Rule 16.

[36] Section 11(1) of the *ATA* states that the Board "has the power to control its own processes and may make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it." In addition, section 11(2) of the *ATA* empowers the Board to make rules with respect to specific aspects of its practices and procedures, including "receipt and disclosure of evidence, including ... pre-hearing receipt and disclosure and pre-hearing examination of a party on oath, affirmation or by affidavit" (subsection (c)), "the filing of written submissions by parties" (subsection (e)), and "procedures for preliminary or interim matters" (subsection (k)). Based on those provisions, it is clear that the Board may make rules respecting its practices and procedures for hearing and deciding preliminary applications for a stay pending the Board's final decision on an appeal, and the filing of written submissions and document evidence, including affidavit evidence, on a stay application.

[37] The Board's Rule 16 addresses the Board's practice and procedure for all applications that may be made to the Board. The Board's Rule 20 addresses, in general, the Board's practice and procedure for written hearings.

[38] Rule 16 states:

1. All pre-hearing and post-hearing applications must be made to the Board in writing. Pre-hearing applications include, but are not limited to, the following matters:

...

- c. stay of the decision under appeal;

...

2. All applications must include:

- a. the grounds (the reasons) for the application;
- b. the relief requested (the nature of the order or direction);
- c. whether the other parties agree to it (if known); and

d. any evidence to be relied upon.

[39] I find that Rule 16 clearly indicates that an application for a stay must be made in writing, and the application must include any evidence that the applicant is relying on.

[40] GML's July 22, 2021 application for a stay states at page 9, under the heading "Evidence Relied On", as follows:

37. The Appellant relies on the Affidavit of Ben Pierce made July 22, 2021.

[41] I find that the July 22, 2021 affidavit of Ben Pierce (Affidavit #1) is the only evidence that GML submitted with its application for a stay.

[42] Contrary to the Board's Rule 16, and contrary to GML's own statement set out above, GML later tried to submit further affidavit evidence (Affidavit #2) in its final reply submission.

[43] GML's September 17, 2021 final reply states at page 11, under the heading "Evidence Relied On", as follows:

41. The Appellant relies on the Affidavit of Ben Pierce made July 22, 2021, and the Affidavit #2 of Ben Pierce made September 21, 2021.

[44] If GML wanted me to consider additional evidence that was not part of its application and that did not comply with Rule 16, GML should have applied to the Board for permission to submit additional evidence. The Board's Rules do not allow GML to simply submit additional evidence in reply without doing so. GML is expected to be familiar with, and abide by, the Board's Rules and the Manual, which are publicly available on the Board's website. This is especially so given that GML is represented by legal counsel. Furthermore, based on the schedule for written submissions that the Board provided in its letter dated July 28, 2021, GML was aware that the Director would have had no opportunity to respond to the new evidence in Affidavit #2, unless I amended the submission schedule and re-opened the written hearing. It was inappropriate for GML to simply assume that I might alter the written hearing procedure to accommodate the new evidence and make an exception to Rule 16, without GML making a request to do so.

[45] It was GML's responsibility to apply, before submitting Affidavit #2, for permission to provide the new evidence, and to explain why the Board should waive Rule 16. GML failed to do so. In that regard, I have also considered section 11(3) of the *ATA*, which provides that the Board "may waive or modify one or more of its rules in exceptional circumstances." At no time, during either the hearing of the stay application or the hearing of this request for reconsideration, has GML claimed there are "exceptional circumstances" that would justify granting an exception to Rule 16.

[46] In these circumstances, I find that it was consistent not only with Rule 16 but also the principles of procedural fairness, to refuse to admit Affidavit #2. When I made the ruling not to admit Affidavit #2, I did so to "facilitate the just and timely resolution" of the stay application, as stated in section 11(1) of the *ATA*.

[47] I find that the GML has not met its burden to show that the ruling regarding the inadmissibility of Affidavit #2 was inappropriate, unfair, or inconsistent with the

Board's practices and procedures as set out in its Rules and the Manual. GML's attempt to file new evidence with its final reply was contrary to the Board's Rule 16, the guidance provided in the Manual, and the principles of procedural fairness. There is no basis to re-open the hearing of the stay application to allow Affidavit #2 to be considered.

[48] Given that there is no change in the admissible evidence on which the stay application was decided in the Decision, I conclude that there is no reason to reconsider the Decision.

DECISION

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

[50] For the reasons provided above, the request to revisit my decision not to admit Affidavit #2 is denied, and consequently, the Decision will not be reconsidered.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

January 27, 2022