



# Environmental Appeal Board

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## DECISION NO. EAB-EMA-21-A012(a)

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

**BETWEEN:** P.N.D. Construction Ltd. **APPELLANT**

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

**BEFORE:** A Panel of the Environmental Appeal Board  
David Bird, Panel Chair

**DATE:** Conducted by written submissions concluding  
on March 24, 2022

**APPEARING:** For the Appellant: Rick Johal Davinder  
For the Respondent: Ben Naylor and Megan Parisotto,  
Counsel  
Julia Roe, Articled Student

### Preliminary Issue of Jurisdiction

#### INTRODUCTION

[1] On November 17, 2021, the Environmental Appeal Board (the "Board") received a notice of appeal on behalf of P.N.D. Construction Ltd., doing business as PND Soil and Gravel (the "Appellant"). The Appellant appeals a September 29, 2021 Determination of Administrative Penalty (the "Determination") by a delegate of the Director, *Environmental Management Act* (the "Respondent"), who is employed with the Ministry of Environment and Climate Change Strategy.

[2] In the Determination, the Respondent decided that the Appellant contravened section 6(2) of the *Environmental Management Act* (the "EMA") and imposed an administrative penalty under section 115 of the EMA and the *Administrative Penalties (EMA) Regulation* (the "Regulation").

[3] Under section 101 of the EMA, an appeal must be filed 30 days after notice of the decision (the Determination, in this case) is given. The Appellant states that the Determination was received on November 7, 2021. The notice of appeal is dated November 7, 2021.

[4] On its own initiative, the Environmental Appeal Board (the "Board") requested submissions from the parties on the preliminary issue of whether the

appeal is outside of the Board's jurisdiction because it was filed after the expiry of the 30-day time limit set under section 101 of the *EMA*.

[5] This decision addresses how the Determination was given to the Appellant and whether the appeal was filed within the 30-day appeal period specified in section 101 of the *EMA*. If the appeal was not filed in time, this decision addresses whether the appeal should be summarily dismissed for lack of jurisdiction. This appeal was heard by written submissions.

[6] In the process of receiving written submissions from the parties, the Appellant provided unsolicited new evidence. This decision also addresses an application by the Respondent seeking that the Board reject the new evidence.

## **BACKGROUND**

[7] The Appellant's company conducts various businesses, including PND Soil & Gravel, which operates a facility blending materials including manure, wood chips, lawn and garden waste, and certified compost into topsoil.

[8] At some point, the Director concluded that the Appellant's soil and gravel operational activities require a permit under the *Waste Discharge Regulation* of the *EMA*. The parties have been working together on the Appellant's application for a permit, and that matter is not the subject of this preliminary decision.

[9] Rick Johal Davinder, also known as Rick Johal, is not one of the four names listed in the Determination as directors of the Appellant. However, Rick Johal has represented himself to the Director and the Board as the proper representative of the Appellant. Rick Johal provided submissions, on behalf of the Appellant, to the Director during the opportunity to be heard process before the Determination was issued.

[10] It appears Rick Johal began communicating with the Director via email on August 7, 2020. In an email dated August 26, 2020, Rick Johal stated that he was the proper representative of the Appellant that the Director should communicate with.

[11] On August 27, 2020, the Director sent a Notice of Administrative Penalty to Rick Johal, as the representative of the Appellant, using the email address he had provided. A Notice of Administrative Penalty is required under the *Regulation*, which was followed by an "opportunity to be heard" conducted in writing by the Director. On November 30, 2020, Rick Johal provided a written submission to the Director as part of the opportunity to be heard. It is not clear from the record whether this submission was sent by email.

[12] Approximately nine months later, on September 29, 2021, the Director sent the Determination by email to Rick Johal at the email address he used to communicate with the Director or the Director's staff. The Determination was also emailed to another individual. The other email address is purportedly the email address of Rick Johal's brother Nirmal. Rick Johal's August 26, 2020 email to the Director indicated that "I would also like you to know that the notices you have sent to my brother Nirmal should have come to me."

[13] On November 17, 2021, Rick Johal sent a notice of appeal to the Board by email. The notice of appeal states that Rick Johal is the Appellant's representative,

and the email address provided for contacting for the Appellant is the same as the email address provided for contacting Rick Johal. The notice of appeal is signed and dated November 7, 2021 and indicates that the Determination was received on November 7, 2021. Enclosed with the notice of appeal is a copy of the September 29, 2021 Determination, a November 1, 2021 invoice from the Ministry of Environment and Climate Change Strategy requesting payment of the administrative penalty specified in the Determination, a letter dated November 16, 2021, from Gurmail Manhas of Manhas, Mar Lawyers, and copies of Rick Johal's emails of August 7 and 26, 2020 to the Director<sup>1</sup>.

[14] The Board's case manager wrote to the Appellant on November 24, 2021, using this same email address, outlining that it appeared the Determination was sent by email to the Appellant on September 29, 2021, triggering the 30-day timeframe to file an appeal with the Board in section 101 of the *EMA*, which states:

The time limit for commencing an appeal of a decision is 30 days after notice of the decision is given.

[15] The case manager's November 24, 2021 letter notified the Appellant that the appeal appeared to have been filed too late, and may be summarily dismissed because the Board does not have jurisdiction to accept an appeal filed outside of the 30-day appeal period under section 101 of the *EMA*. The Appellant was asked to provide information and arguments addressing whether the appeal was filed on time and why the appeal should not be dismissed.

[16] The Board received two email responses from Rick Johal, on behalf of the Appellant, on November 25, 2021 and December 14, 2021. The email sent on December 14, 2021 includes a second copy of a letter dated November 16, 2021, from Gurmail Manhas of Manhas, Mar Lawyers. Mr. Manhas' letter is addressed to Paul Johal Trucking Ltd. and simply states "Enclosed please find enclosed documents received at the registered office of the company". Paul Singh Johal is listed in the Determination as one of the directors of the Appellant. The mailing address for Manhas, Mar Lawyers is the same mailing address for the Appellant Company.

[17] The Appellant asserts in those submissions that the Determination should be considered given to the Appellant on November 6, 2021, when it was delivered by registered mail to the Appellant's corporate address. The Appellant argues this is when the four directors of the Appellant were served with the Determination.

[18] On January 10, 2022, the Board's case manager wrote the parties, providing the Respondent with copies of the Appellant's notice of appeal and attachments, the Board's correspondence with the Appellant, and the Appellant's written submissions and enclosures received on November 25, 2021 and December 14, 2021. The Respondent was invited to provide evidence and submissions on whether the Appellant's notice of appeal was filed in time; and, if not, whether the appeal should

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<sup>1</sup> I note the Determination dated September 29, 2021 states that the Notice of Administrative Penalty was provided on August 27, 2021 and Rick Johal's written submission in response to the Opportunity to be Heard was provided November 20, 2021. The year 2021 in those dates appears to be a typographical error and does not reflect the dates in 2020 contained in the Director's cover letter to the Appellant or the evidence subsequently provided to the Board in this appeal.

be dismissed under section 31(1)(a) or (b) of the *Administrative Tribunal Act* (the "ATA"). The Board can summarily dismiss an appeal if the matter is not within the Board's jurisdiction (section 31(1)(a)) or if it was not filed within the applicable time limit (section 31(1)(b)).

[19] On January 31, 2022, the Respondent provided its submissions by email. On February 14, 2022, the Appellant provided its final reply by email. In its final submission, the Appellant provided new evidence. On March 1, 2022, the Respondent sought the opportunity to make submissions on whether the Board should accept the new evidence filed by the Appellant on February 14, 2022.

[20] On March 2, 2022, the parties were invited to make submissions on the issue of whether the Board should accept the new evidence filed by the Appellant. The Board received the Respondent's submission on March 16, 2022, and a final reply from the Appellant on March 24, 2022. The Appellant's March 24, 2022 final submission included additional new evidence. This new evidence was rejected and my reasons for rejecting this further new evidence are provided below.

## **ISSUES**

[21] This decision addressed the following issues:

1. Whether the Appellant's new evidence submitted on February 14, 2022 should be accepted into the record?
2. Whether the Appellant's new evidence submitted on March 24, 2022 should be accepted into the record?
3. Whether the Appellant filed its appeal within the 30-day time limit specified in section 101 of the *EMA*?
4. If not, should the appeal be dismissed under section 31(1)(a) or (b) of the *ATA*?

## **ANALYSIS AND DISCUSSION**

### **1. Whether the Appellant's new evidence submitted on February 14, 2022 should be accepted into the record?**

#### *Respondent's Submissions*

[22] The Respondent submits that the Board should not accept the new evidence submitted by the Appellant on February 14, 2022. The Respondent notes that section 11 of the *ATA* grants the Board the power to make rules of procedure to facilitate the just and timely resolution of appeals. Section 11 of the *ATA* applies to the Board through section 93.1(1)(d) of the *EMA*. The Board has created a number of rules based on this authority.

[23] The Respondent submits that the Board's Rule 22 provides that new evidence will not be accepted "unless the panel decides that the evidence is material and there is a good reason for the failure to produce it in a timely fashion." The Respondent notes that Rule 2.3 states that unless otherwise directly by the Board, the Rules apply to all appeals before the Board.

[24] The Respondent submits that the Board's Manual and Rule 22 create certainty for parties regarding the submission process, and the procedures and Rules reflect the principles of procedural fairness.

[25] The Respondent submits the requirements to accept new evidence under Rule 22 have not been met. The Appellant has not identified how the evidence is material or the "good reason for the failure to produce it in a timely fashion." The Board's November 24, 2021 letter granted the Appellant the opportunity to make a submission to the Board and provide evidence in support of its submission, and the Respondent asserts the Appellant had the new evidence at that time and has not explained why the new evidence was not provided at the time of the Appellant's original opportunity to present its evidence.

[26] The Respondent submits that the Board should not waive or modify the requirements of Rule 22 in this matter because it is not an exceptional circumstance. The Respondent submits that it would be prejudicial to accept the new evidence because the Respondent relies on the Board to follow its published Rules and procedures. In addition, the Appellant has the onus of proving that the notice of appeal was filed on time, and the Appellant's new evidence appears to be in response to the Respondent's submissions regarding how and why notice of the Determinations was given and what triggered the 30-day timeframe to file the appeal.

[27] To uphold the principles of procedural fairness, the Respondent submits that parties and the public expect that the Rules and procedures will be applied consistently. The Respondent submits that it would be procedurally unfair and inconsistent with Rule 22 to accept the Appellant's new evidence.

#### *Appellant's Submissions*

[28] The Appellant's March 24, 2022 submission did not address whether his new evidence should be accepted, nor did it reply in any way to the Respondent's submissions.

#### *Panel's Findings*

[29] The Board's Rule 2(1) provides that the Rules apply to all parties and participants "unless the Board orders or directs otherwise..." (emphasis added). Section 11(3) of the ATA provides that the Board has the authority to waive or modify its rules in "exceptional circumstances." The Board's Rule 22 provides that once the appeal record is closed, no new additional evidence will be accepted unless the Board decides: 1) the new evidence is material; and 2) there is a good reason for the failure to produce it in a timely fashion. Rule 22(2) states:

Once the record is closed, no additional evidence will be accepted unless the panel decides that the evidence is material, and that there is a good reason for the failure to produce it in a timely fashion.

[30] Although the general principle under Rule 22 is that new evidence will not be accepted, Rule 22(3) provides that the Board may accept new evidence and outlines procedures to provide the Respondent with the opportunity to respond to the new evidence.

[31] On page 27, the Board's Practice and Procedure Manual (the "Manual") addresses the procedure for written hearings, and it provides that no new evidence should be included in an appellant's final submission.

[32] Generally, the written submission schedule provides an appellant with the first opportunity to make submissions, followed by the respondent. The appellant is then afforded the right to a final submission (called the final reply) to respond to the evidence and arguments provided in the written submission given by the respondent. The opportunity to provide a final reply does not normally give the appellant an opportunity to provide new evidence that should have or could have been provided when the appellant's initial written submission was due. An appellant's final submission should only respond to arguments and evidence raised as part of the respondent's submissions.

[33] This procedure upholds principles of administrative fairness by providing each party to an appeal the opportunity to present their cases, including evidence, to the other parties and the Board, and the opportunity to reply to the case presented by the other parties. Each party to an appeal is responsible to provide sufficient evidence on which to support their assertions. New evidence is generally not accepted as part of an appellant's final reply because the respondent would have no further opportunity to respond. This would be procedurally unfair.

[34] The new evidence provided by the Appellant on February 14, 2022 is material because it is the first time that Rick Johal, on behalf of the Appellant, explicitly denies receiving the Determination by email. The Board's January 10, 2022 letter stated that the Board was inviting the Respondent to make submissions on the issues that the Appellant had addressed in its earlier submissions, and the Appellant was being given an opportunity to make a final reply to the Respondent's submissions.

[35] In this case, although not specified in the Board's correspondence, the record closed on receipt of the Appellant's February 14, 2022 final submission. Rule 22 was then triggered.

[36] I agree with the Respondent's submission that the Appellant has not provided good reasons to explain why this evidence was not given earlier in the process. I considered and weighed the fact that the Appellant is not represented by legal counsel in this appeal, and it may have been an oversight or issue with communicating in writing that resulted in the evidence being presented late in the submission process.

[37] However, I find this is an exceptional circumstance where I should waive or modify Rule 22 because the new information is material to the issue of whether the appeal was filed in time and in consideration that the Appellant is not represented by legal counsel and it was not made clear in the Board's letter that the appeal record was closed when receiving the Appellant's final reply.

[38] The central issue in this appeal is how the Determination was given to the Appellant. Prior to the Appellant's February 14, 2022 final submission, Rick Johal did not confirm or deny receiving the Determination by email on September 29, 2021.

[39] I find that the Appellant's new statement that Rick Johal did not (my emphasis) receive the September 29, 2021 Determination by email is material to

the issue in this appeal and should not be ignored or rejected. It is important to consider all relevant and material evidence at this stage because if the appeal is summarily dismissed the Appellant's right to a hearing on the merits is lost.

[40] Since this new evidence was provided in the Appellant's final submissions and is material and relevant to Issue 3, and there are exceptional circumstances to accept the new evidence, I concluded that procedural fairness required that the Respondent have an opportunity to respond to this new evidence.

[41] I addressed the procedural fairness issue by providing the Respondent the opportunity to respond to the evidence. I will deal with those submissions later in my reasons.

[42] As a result, I find that Rule 22 should be waived in this circumstance and I have accepted the new evidence provided by the Appellant in its February 14, 2022 submission.

## **2. Whether the Appellant's new evidence submitted on March 24, 2022 should be accepted into the record?**

[43] The Appellant submitted additional new evidence with its March 24, 2022 submission. This is despite clear direction from the Board that new evidence was not to be provided.

[44] I find that the evidence the Appellant attempted to introduce is not relevant to the preliminary issue I am deciding. It is information related to the process that the Appellant is undergoing with the Ministry regarding a permit.

[45] I find that it is unnecessary to either engage in a similar analysis of whether to accept this evidence under Rule 22, or to seek submissions from the parties on the admissibility of this evidence, because I have found it is irrelevant and it has not been considered in reaching a decision on how the Appellant was given notice of the Determination.

## **3. Whether the Appellant filed its appeal within the 30-day time limit specified in section 101 of the EMA?**

### *Appellant's Submissions*

[46] The Appellant argues that notice cannot be given unless all four of the directors are served, and this was not done until the Determination was sent to the Appellant's corporate address. Rick Johal submits that a staff member of the Director called him and asked that he acknowledge receiving the September 29, 2021 email containing the Determination. Rick Johal submits that, during this call, he told the Director's staff that the Appellant's directors should be served with the Determination. Rick Johal did not specify when this telephone conversation with the Director's staff occurred.

[47] Rick Johal submits that when the Determination was issued his father, who is one of the four directors of the Appellant, was ill in the hospital.

[48] The Appellant relies on the November 16, 2021 letter from Mr. Manhas of Manhas Mar, which was addressed to Paul Johal Trucking Ltd. This letter contained

an invoice from the Ministry for the administrative penalty and a copy of the Determination.

[49] The Appellant submits that not giving the Determination to all four directors of the Appellant creates a hardship, because the individual directors might be expected to pay the penalty if it is not paid by the Appellant.

*Respondent's Submissions*

[50] The Respondent submits that the evidence supports a finding that Rick Johal is the representative of the Appellant, and he used email to communicate with the Director and to receive communications from the Director. The Respondent says that Rick Johal's August 7 and 26, 2020 emails to the Director support a finding that it was reasonable for the Director to give the Appellant notice by email to the email address provided.

[51] The Respondent's submissions detail how it met its obligations under section 2 and 3 of the *Regulation* when it issued the Notice Prior to Determination of Administrative Penalty on August 27, 2020. The Respondent submits that the Appellant responded to the alleged contraventions on November 30, 2020.

[52] The Respondent submits that notice of the Determination was properly given to the Appellant when it was sent by email to Rick Johal on September 29, 2021. This email address was used by Rick Johal to previously communicate with the Director and is the same email address used by the Appellant to communicate with the Board in the appeal process. The Respondent submits that it was reasonable for it to conclude that Rick Johal was the proper representative of the Appellant and that notice of the Determination could be given by emailing it to the email address provided. The Respondent relies on Rick Johal's August 26, 2020 email to support its submission.

[53] The Respondent submits there is no evidence that the Determination was not received when it was sent by email, and the Appellant did not initially dispute that the Determination was given in this manner. The Respondent notes that the Appellant first alleges in its February 14, 2022 submission that it did not receive the Determination by email.

[54] The Respondent submits that the Board should give more weight to the evidence that the Determination was given when sent by email and not accept the Appellant's statement it was not received.

[55] The Respondent notes that Rick Johal alleges he was contacted on or after September 29, 2021 by the Director's staff to confirm that the Appellant received the Determination by email. The Appellant submits it was during this alleged call that new instructions were provided to this individual to send notice of the Determination to all four directors of the Appellant by mailing it to the corporate address.

[56] In response to this new evidence, the Respondent provided an affidavit from Ms. Angela Wilson dated March 16, 2022 (the "Affidavit"). Ms. Wilson states that she called Mr. Johal twice "on or about July 2021" requesting confirmation that the Appellant received an inspection report emailed on July 22, 2021. Ms. Wilson attests that Rick Johal replied to her telephone message on July 30, 2021 by email. Ms. Wilson states that she is not aware of any other telephone calls to the Appellant



after July 2021, and she did not call him after issuing the September 29, 2021 Determination. Ms. Wilson attests that she sent an additional copy of the Determination by registered mail, and it was delivered on November 1, 2021. Ms. Wilson's Affidavit states that the Determination was deposited with Canada Post on October 10, 2021, it was processed on October 28, 2021, and it was delivered on November 1, 2021. A copy of the registered mail tracking was not included with Ms. Wilson's Affidavit.

[57] The Respondent submits that the Board should also reject the Appellant's submission that notice can only be given by serving all four directors of the Appellant, because there is no legal requirement to give notice in this manner

[58] The Respondent submits the timeframe in section 101 was triggered when the Director gave the Appellant notice of the Determination by email on September 29, 2021. The Director relied on the statements of Rick Johal in August 2020 that he was representing the Appellant and was the correct person to communicate with.

[59] The Respondent submits that the evidence demonstrates that the Appellant historically used this email to communicate with the Director and most recently the Board. The Respondent submits that no reliable evidence has been provided that the Determination was not given on September 29, 2021 via email.

[60] The Respondent submits that Mr. Johal's new evidence is not credible because no evidence has been provided to support the new statement. Additionally, the Respondent has provided uncontested evidence in the Affidavit that the Determination was emailed on September 29, 2021, which challenges the Appellant's claim that he was called by the Director's staff to confirm he received the Determination and that he provided direction at that time to send Determination to all four directors of the Appellant.

[61] The Respondent submits that that the Board should give more weight to the historical use of the email address provided by Mr. Johal to communicate with the Director and subsequently with the Board.

[62] The Respondent submits that the *EMA* and *ATA* do not obligate it to give notice by notifying all four directors of the company and their legal counsel. The requirement is to give notice to the aggrieved person, which the Respondent submits has been fulfilled when the Determination was emailed on September 29, 2021 to the declared representative of the Appellant.

#### *Appellant's Final Reply*

[68] In reply to the Respondent's submissions, the Appellant asserts that the Determination was not received by email and a search of the emails received on September 29, 2021 do not show anything received on that date.

[69] The Appellant submits that the Determination was sent by registered mail to the Appellant's corporate address and, at that time, all four directors were notified of the administrative penalty. The Appellant submits that if the Board finds that the Determination was given by email on September 29, 2021, then the Appellant's directors were not aware that they may be liable for an administrative penalty. The Appellant submits that all four directors were named on the Determination, so all four directors need to be served.

*Panel's Findings*

[70] In this preliminary decision, the key question is whether the Appellant filed its notice of appeal "30 days after notice of the decision is given". The 30-day timeframe to file an appeal is based on the language in section 101 of the *EMA*. My analysis focuses on when and how notice of the decision was given to the Appellant. In this preliminary decision, both parties have an obligation to present evidence to support their assertions.

[71] In *Patricia Rush et al. v. District Director*, Decision Nos. 2018-EMA-003(a), 004(a) and 012(a) to 016(a), August 20, 2018 [*Rush*], beginning at para. 54, the Board found that the language in section 101 of the *EMA* is different than language in other statutes, including the *ATA* and the *Oil and Gas Activities Act*. In the *ATA*, the language is that a notice of appeal "must be filed within 30 days of the decision". In *Rush*, the Board concluded that the legislature had a specific intention when it used the words "after notice of the decision is given" because it could have used words like "after the date of the decision" or "within 30 days of when the decision was made", which is used in other statutes.

[72] At para. 55 in *Rush*, the Board found that section 133 of the *EMA* allows notices under the *EMA* to be given to an aggrieved person by various means. This is because section 133(2) of the *EMA* states that any notice required under the *EMA* may [underline added] be given by registered mail. The Board in *Rush* concluded that this language did not preclude other means of giving an aggrieved person notice under the *EMA*.

[73] Although I am not bound by this prior decision, I agree with the analysis in *Rush* that the words of section 101 and 133 have specific meaning and that notice can be given by any means including registered mail.

[74] In the circumstances before me, I have evidence that the Director gave notice of the Determination in two ways. It was sent by email on September 29, 2021 to the Appellant's representative, and it was later sent by registered mail to the Appellant's registered corporate address. The undisputed affidavit evidence of the Respondent's witness is that the Determination was deposited with Canada Post on October 10, 2021, for delivery by registered mail. Under section 133(3) of the *EMA*, if a notice under the *EMA* is sent by registered mail to the last known address of a person, the notice is deemed to be served on the person to whom it is addressed on the 14th day after deposit with Canada Post. In the present case that means the copy of Determination that was sent to the Appellant on October 10, 2021 by registered mail is be deemed to have been received by the Appellant on October 24, 2021. Based on that evidence, the 30-day appeal period in section 101 of the *EMA* would have begun on October 24, 2021, and ended on November 23, 2021. If the Determination were sent only in that way, the Appellant's notice of appeal would have been filed on time.

[75] However, the Respondent also submitted evidence in the Affidavit that the Determination was emailed to the Appellant's representative on September 29, 2021. I accept the Respondent's evidence that the Determination was sent by email to the Appellant's representative on that date. Unlike the facts in *Rush*, the Respondent has provided no evidence as to when the email was opened or received. The Respondent simply says that his staff received no indication that the Determination was not successfully sent by email.

[76] On the other hand, the Appellant has the burden of proving his assertion that the email was not received. I find that the Appellant has provided insufficient evidence to support his assertion that he did not receive the Determination by email.

[77] Until receiving the Appellant's submission and new evidence on February 14, 2022, I interpreted the Appellant's position to be that the notice requirement under section 101 was not met because the Determination was not sent to all four directors of the Appellant. I inferred from these submissions that Mr. Johal did not deny receiving the Determination by email on September 29, 2021, but he argued that notice was not fulfilled because it was not given to all four directors of the Appellant. Mr. Johal's new evidence is that the Determination was not received by email and that conducting a search of his email did not produce the Determination.

[78] While I acknowledge that it may be difficult to prove you have not received an email, I find that it is possible to present evidence to establish on the balance of probabilities that it was not received. For example, the Appellant's representative could have provided evidence about his use of that email address and how regularly it is checked. Alternatively, in other circumstances, people may change email addresses and they may not monitor all email accounts regularly. If that was the case, the Appellant's representative could have provided evidence of those things. Another possibility that could have been supported by evidence would be if the email went into a spam or junk folder and was not noticed or received until that folder was checked. No such evidence or explanations have been presented in this case.

[79] In the Appellant's submissions, Mr. Johal alludes to his father being in the hospital. This statement does not clearly indicate whether this occurred when the Determination was emailed on September 29, 2021, or at some other time. The Appellant does not explain why this hospitalization may have resulted in the notice of appeal not being filed until November 17, 2021. This information is also inconsistent with his latest assertion that he never received the Determination by email because his father being in the hospital at that time is only relevant assuming he was given notice of the Determination at that time.

[80] If the Appellant is putting this argument forward as a special circumstance resulting in filing the appeal late, I am unable to consider this because the Board has no authority to extend the timeframe to file an appeal.

[81] Based on all the relevant and admissible evidence and information that the parties have provided, I find on a balance of probabilities that the Appellant's representative was given notice of the Determination by email on September 29, 2021. I find the Determination was sent to an email address that Rick Johal regularly and consistently used to communicate with the Director throughout the proceedings that led to the Determination. I find that it is more likely than not that the Appellant's representative was given the email containing the Determination on or about September 29, 2021. Therefore, the 30-day timeframe to file an appeal of the Determination ended on or about October 29, 2021.

[82] I find that Mr. Johal provided this email address to the Director, Mr. Johal directed that he was the proper representative of the Appellant to communicate with, and the Director relied on this representation when giving notice of the Determination.

[83] I also find that Mr. Johal communicated with the Director using this email. I find Mr. Johal subsequently used this same email address to communicate with the Board on behalf of the Appellant. I note there was a nine-month gap between the Appellant's August 26, 2020 email to the Director and when the Director issued the Determination by email. However, the Respondent's witness provided undisputed evidence that the Appellant was still communicating using this same email with the Director in July 2021.

[84] I find it is more likely than not that Mr. Johal actively monitored and used this email address for the purpose of receiving and sending communication on behalf of the Appellant in relation to the Determination, and he still uses this email address to communicate with the Board about the appeal of the Determination. There is insufficient evidence to support Mr. Johal's February 14 and March 24, 2022 assertions that the Determination was not given, or received, by email on September 29, 2021.

[85] While Mr. Johal's statement that he did not receive the email is some evidence that it was not received, I give more weight to the evidence that Mr. Johal has consistently and effectively used this email address to receive communications from the Director and the Board.

[86] I give little weight to Mr. Johal's assertion that he never received the email, given that he did not make this assertion until months after filing the notice of appeal, when responding to submissions of the Respondent. I place significant weight on the Respondent's affidavit evidence that the Determination was sent to Mr. Johal's email address on September 29, 2021.

[87] I am not persuaded by the Appellant's argument that service of notice cannot be considered given under the *EMA* unless it is provided to all four directors of the company and its legal counsel. The Appellant provided no legal authority to support this argument. While the Determination was addressed to all four directors and emailed to the Appellant's identified representative, there is no obligation in the *EMA* requiring all four directors of the Appellant's company be served before notice is considered to have been given. By representing himself, and acting, as the agent for the Appellant, the Director was only legally required to give notice to Mr. Johal.

#### **4. Should the appeal be dismissed under section 31(1)(a) or (b) of the ATA?**

[89] Section 31(1)(a) of the *ATA* provides that the Board may dismiss all or part of an appeal<sup>2</sup> if the appeal is not within the Board's jurisdiction. Section 31(1)(b) provides that the Board may dismiss all or part of an appeal if the appeal was not filed within the applicable time limit. I find that this appeal does not fall within the Board's jurisdiction because the notice of appeal was not filed with the Board within 30 days after the Appellant received notice of the Determination by email on September 29, 2021, as required by section 101 of the *EMA*. Therefore, both

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<sup>2</sup> Section 31 of the *ATA* uses the word "application" instead of appeal, but section 1 of the *ATA* defines "application" as including an appeal.

sections 31(1)(a) and (b) of the *ATA* apply in this case, and the appeal should be summarily dismissed.

[90] As required by section 31(2) of the *ATA*, the Appellant was provided the opportunity to be heard on this issue, and I have considered the Appellant's submissions in reaching my decision.

**DECISION**

[91] For the reasons provided above, I summarily dismiss this appeal under section 31(1)(a) and (b) of the *ATA* because it was filed out of time and the Board has no jurisdiction to hear the appeal.

[92] The appeal is summarily dismissed, and the Board will take no further action on this appeal.

"David Bird"

David Bird, Panel Chair  
Environmental Appeal Board

May 3, 2022