Environmental Appeal Board
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DECISION NO. EAB-EMA-21-A006(c)

In the matter of an appeal under the *Environmental Management Act*, SBC 2003, c. 53

BETWEEN:	Gibraltar Mines Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Darrell Le Houillier, Panel Chair	
DATE:	Conducted by way of written submissions concluding on April 15, 2022	
APPEARING:	For the Appellant:	Komal Jatoi, Counsel Robin Junger, Counsel Jamieson Virgin, Counsel
	For the Respondent:	Meghan Butler, Counsel Trevor Bant, Counsel

PRELIMINARY DECISION: REQUEST FOR ORDER

[1] The Appellant, Gibraltar Mines Ltd. ("Gibraltar"), operates the Gibraltar Mine, near Williams Lake, British Columbia. Gibraltar's operations involve the release of effluent into the nearby Fraser River. These releases are authorized by Permit 416 (the "Permit"), issued under the *Environmental Management Act*, S.B.C. 2003, c. 53 the "*Act*"), and are subject to certain conditions.

[2] In 2020, Gibraltar decided to resume mining in a pit that it had previously mined. It needed to transfer water from that pit to another pit onsite (the "Granite Pit"). The Ministry of the Environment and Climate Change Strategy (the "Ministry") recommended that Gibraltar seek to amend the Permit, so that the transfer of water would be authorized under the Permit. Gibraltar did so.

[3] Gibraltar and the Ministry exchanged correspondence for several months, before the Permit was amended on May 13, 2021 (the "Amendment"). This Amendment was approved by Luc Lachance (the "Director"), who is a Section Head in the Ministry's Mining Operations department, and is designated as a director under the *Act*.

[4] The Amendment did not include all the amendments requested by Gibraltar. In particular, it did not list "tailings impoundment supernatant" in a list of materials

suitable for discharge. Additionally, the Amendment imposed additional requirements that the Director added on his own initiative.

[5] Gibraltar filed a Notice of Appeal of the Amendment and identified two remedies it sought in the appeal. Only one is relevant to this preliminary decision: seeking an order "… adding tailings impoundment supernatant to s. 1.6 of the Permit." The tailings impoundment supernatant is contained in a tailings storage facility.

[6] After Gibraltar filed its appeal, the Director applied for an order under section 14(c) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), requesting that the Board amend the Permit to include tailings impoundment supernatant as a source of effluent acceptable for discharge. The Director notes that this is one of the two remedies Gibraltar identified in its Notice of Appeal. The amendments that Gibraltar sought included the ability to discharge a number of substances into the Granite Pit, including tailings impoundment supernatant. With his application, the Director provided a draft order with spaces for signatures by representatives of the Board and both parties.

[7] Section 14(c) of the *ATA* states that "In order to facilitate the just and timely resolution of an" appeal, the Board to make an order "… in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings."

[8] Gibraltar opposes the Director's request. Gibraltar submits that the Board has no authority to make an order granting partial summary relief as the Director has requested. Gibraltar submits that the appropriate means of addressing any potential agreement on amending the Permit is for the Board to issue a consent order. Gibraltar suggests alternative wording that may be used to issue a consent order granting the remedy that the Director sought from the Board. In response to the Director's application, Gibraltar provided a draft consent order with spaces for signatures by representatives of the Board and both parties.

[9] The Director says Gibraltar's alternate wording is unnecessary and of no effect, but ultimately, he takes no position on Gibraltar's proposed wording.

[10] Neither the Director's draft order nor Gibraltar's draft consent order have been signed by either of the parties.

ISSUES

[11] There are three issues in this preliminary decision:

1. whether the Board should issue a consent order at this point in this case;
2. whether the Board has the authority, under section 14(c) of the *ATA*, to grant one ground of relief sought by Gibraltar, the Appellant, without its consent; and
3. whether the Board should amend the Permit on a preliminary basis, to add "tailing impoundment supernatant" as a source of effluent acceptable for discharge?

Positions of the Parties

The Director's Submissions

[12] The Director advises that not including "tailing impoundment supernatant" as a source of effluent that is acceptable to discharge under the Permit was an oversight on his part. He says that this issue does not need to be argued in the appeal. Arguing the issue would cost the Board and the parties resources for no useful purpose, while the summary order he requested would better focus the appeal on the issues in dispute.

[13] The Director says that the Board could make the requested order at the conclusion of the hearing, as section 103(c) of the *Act* allows the Board to "make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances." Accordingly, this is an order that the Board can make to "control its own proceedings", under section 14(c) of the *ATA*.

Gibraltar's Submissions

[14] Gibraltar disagrees that the Director's omission of "tailing impoundment supernatant" from the list of effluent acceptable for discharge was an oversight on his part. Further, Gibraltar opposes the request of the Director for two reasons.

[15] First, Gibraltar says that the Board does not have the authority to grant remedies on a preliminary basis. Gibraltar says the legislation relied upon by the Director, section 14(c) of the *ATA*, grants the Board the authority to make orders about its hearing process, not substantive outcomes to appeals.

[16] In support of this position, Gibraltar references Mount Pleasant War Memorial Community Cooperative Association v. Assessor of Area #09, 2017 BCSC 1533 [Mount Pleasant], at para. 26, and Broadway Properties Ltd. v. Vancouver Assessor, Area No. 09, BCSC 1266 [Broadway Properties], at paras. 11 and 33.

[17] Gibraltar also notes that the Board has not previously indicated it is able to grant remedies on a preliminary basis.

[18] Second, Gibraltar says that granting the order would "… allow the [Director] to avoid Board scrutiny of this issue [and] deprive [Gibraltar] an opportunity to have the Board consider the totality of the circumstances that remain relevant to the appeal as a whole." Gibraltar argues that the Director should not get to pick and choose which elements of his decision will attract the scrutiny of the Board, and that both issues are part and parcel of the allegations Gibraltar wishes to advance—specifically, that the Tŝilhqot'in National Government ("TNG") had undue influence on the Director's decision making, and that the Director did not provide Gibraltar with information that TNG provided, in violation of the rules of procedural fairness.

[19] Despite the above, Gibraltar stated it would support a consent order along the terms proposed by the Director:

> … if that was done expressly without prejudice to [Gibraltar]'s right to adduce evidence and make arguments regarding the Requested Amendment, to the extent such evidence and arguments are also relevant to the remaining issues under appeal. This would include evidence and arguments to the effect that

> the [TNG] had undue influence in all aspects of the Director's decision making, and that the Director failed to disclose to [Gibraltar] related information required by the rules of administrative fairness.

[20] Gibraltar says adding this term to the consent order is within the Board's authority under section 16 of the *ATA*, section 17(2) of the *ATA*, or both, provided that the parties agree to the terms of the order.

The Director's Reply

[21] In response, the Director took no position on the inclusion of the term suggested by Gibraltar, but stated that it would be unnecessary and have no effect on the appeal. The Director says Gibraltar can adduce evidence and make arguments relevant to the issues under appeal in any event.

[22] The Director says sections 14(a) and 14(b) of the *ATA* relate to orders made pursuant to rules made by the Board or the Lieutenant Governor in Council, while section 14(c) is not so limited. Quoting from a previous Board decision, the Director notes that section 14(c) "… confers 'broad discretion' to make orders to 'facilitate the just and timely resolution of an appeal'."[1] The Director says Gibraltar is reading the ATA unduly restrictively; requiring the consent of parties to facilitate the just and timely resolution of appeals renders section 14(c) meaningless.

Reasons and Decision

1. *Should the Board issue a consent order at this point in this case?*

[23] The parties do not disagree about wording that would lead to discharge of this preliminary issue by way of a consent order. On the other hand, neither of the parties have signed the consent order that Gibraltar has provided. The Board's Rule 15(1) states:

> If the parties request an order from the Board under section 16(1) or section 17(2) of the *Administrative Tribunals Act*, the parties must provide the Board with a copy of the order, **executed by all parties**, for consideration and signing by the Board. The date must be left blank and will be filled in if the Board signs the order.
>
> [emphasis added]

[24] In the present circumstances, I do not consider it appropriate to issue a consent order. The proposed consent order is unusual in that it was requested by one party in response to an application by the other party for a different type of order, rather than as a joint application or request from both parties. It is not entirely clear that the parties have reached an agreement on the form of the order, given that the Director says the proposed consent order shows that Gibraltar "appears to consent to the form of the order" attached to the Director's application, yet the parties continue to disagree on which statutory power the Board should exercise in granting an order. This is lack of consensus among the parties is also

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[1] See *Re Stannus and British Columbia (Director, Environmental Management Act)*, 2018 CarswellBC 1683, at para. 108.

implied by the fact that neither of the proposed orders have been executed by the parties, which also means these orders do not conform with Rule 15(1). Consequently, it is, at best, premature for the Board to consider granting a consent order.

[25] As a result, I find that the Board should not issue a consent order at this point in this case.

2. *Does the Board have the authority, under section 14(c) of the ATA, to grant one ground of relief sought by the Appellant, without its consent?*

[26] I agree with the Director, that section 14(c) grants the Board "broad discretion" to make orders. The text of that section grants such discretion "… in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings." In addition, the words preceding all subsections in section 14 say that such an order may be issued "In order to facilitate the just and timely resolution of an" appeal.

[27] This wording is not ambiguous. If the Board considers it necessary to make an order, to control its own proceedings, and such an order would facilitate the just and timely resolution of an appeal, it has the authority to make that order. Unlike sections 14(1) and (b), section 14(c) does not require the Board to base its order on a rule. Section 14(c) likewise does not preclude the Board from making an order granting a ground of relief sought by the Appellant.

[28] While Gibraltar argued that such a limitation exists, that would involve reading words into the legislation that is not there. Section 14(c) specifically empowers the Board to make an order "… in relation to <u>any</u> matter that the tribunal considers necessary …."

[29] The caselaw referenced by Gibraltar does not assist its position. In the referenced portion of *Mount Pleasant*, the court stated that the Property Assessment Appeal Board had the ability to make rules as to whether it would add or decline to add an issue in an appeal. This authority stemmed from the Property Assessment Board's enabling legislation and section 11 of the *ATA*. The Court then observed that the Property Assessment Appeal Board could make orders in accordance with those rules, using authority granted by section 14(a) of the *ATA*.

[30] The referenced paragraphs from *Broadway Properties* describe the Property Assessment Appeal Board's authority, under section 11 of the *ATA*, to make its own rules of practice and procedure, and to make orders based on those rules under section 14(a).

[31] Neither *Mount Pleasant* nor *Broadway Properties* address section 14(c) of the *ATA*. Neither offer a comprehensive view of the *ATA*; they describe the authority of the Property Assessment Appeal Board to make rules and to make orders in accordance with those rules. These authorities are not persuasive on the question before me. Similarly, it is not persuasive that the Board has not ruled explicitly on this issue.

[32] There are, of course, additional requirements that the Board must meet. It must adhere to the rules of procedural fairness and must weigh carefully whether to make such an order where an Appellant does not consent, as here. As a general

proposition, however, I find that the Board has the authority, under section 14(c) of the *ATA*, to grant one ground of relief sought by the Appellant, without its consent. As for whether it should do so in this case, the specific circumstances of this case will be considered, below.

3. *Should the Board amend the Permit on a preliminary basis, to add "tailing impoundment supernatant" as a source of effluent acceptable for discharge?*

[33] Gibraltar argues that I should not make the order in the circumstances of this case for two reasons: first, because the Board would not have the broader context available when deciding the remaining issue under appeal; and second, because it would allow the Director to escape Board scrutiny on certain matters.

[34] With respect to the first concern, as the Director argues, Gibraltar would remain able to call evidence that is relevant to the surviving remedy, if the other were granted on a preliminary basis. Gibraltar could proffer evidence to establish that TNG had undue influence over the Director's decision making, and that the Director did not share all information with Gibraltar, in violation of the rules of procedural fairness. The panel would decide, in such circumstances, whether any evidence presented was relevant to the issue(s) under appeal at that time, and admissible.

[35] Gibraltar also takes the position that the Board should have a broader understanding of the decision-making process, and should scrutinize this process. This is not, however, one of the Board's functions.

[36] The Board's authority in the appeal is derived from section 103 of the *Act*. It may:

a) send the matter back to the person who made the decision, with directions,
b) confirm, reverse or vary the decision being appealed, or
c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[37] The common thread within these outcomes is that they focus on the decision. While the decision-making process may form part of the analysis the Board undertakes in appeals, the resolution of the appeal process, on its merits, hinges on the decision being sent back to the decision-maker, confirmed, reversed, varied, or otherwise dealt with by a new decision that the original decision-maker could have made. In this case, whether the Director omitted "tailing impoundment supernatant" as a source of effluent acceptable to discharge through an oversight or intentionally, both parties agree that this omission should not have occurred. Consistent with section 103 of the *Act*, it is the outcome of the decision that the Board must focus on, not the decision-making process.

[38] The parties agree on the outcome of this issue. There is no live controversy about whether "tailing impoundment supernatant" should be included in the Permit as suitable for discharge. Accordingly, focused as it must be on this issue, the Board and the parties would incur expenses on this issue needlessly, if it advanced to the hearing on the merits. As the Director says, this would serve no useful purpose.

[39] The lack of a live controversy on this remedy arguably makes the matter moot. Even if it does not, however, the doctrine of mootness arises in similar situations. The doctrine was described in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, as cited by the British Columbia Court of Appeal in *McKenzie v. British Columbia (Minister of Public Safety and Solicitor General)*, 2007, BCCA 507:

> The doctrine of mootness is an aspect of a general policy or a practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. The essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly, if subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.

[40] Here, I am not considering whether the question, if the Board should grant Gibraltar's requested relief related to the tailings impoundment supernatant, is moot. I am deciding an application for an order under section 14(c); however, in this case a similar rationale applies. Here, the Board may grant a remedy sought by Gibraltar and supported by the Director, and so avoid the complexity and expense of hearing evidence related to that remedy. This will not prejudice Gibraltar's ability to present any case that it wishes with respect to the remaining issue(s) under appeal, or the ability of the panel considering the appeal to properly decide whether to admit evidence and allow arguments on those issues. Granting this order also maintains the Board's focus on the decision outcome, as contemplated in the *Act*.

[41] For these reasons, I find that the Board should amend the Permit on a preliminary basis, to add tailings impoundment supernatant.

Conclusion

[42] I have considered all evidence and submissions that were submitted by the parties, whether or not they were specifically referenced in this preliminary decision.

[43] I grant the order requested by the Director. The following portions of section 1.6 of the Permit is varied to read (additions in red and removed text in strikethrough), as requested by the Director:

> 1.6 **Authorized Source**
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> This section applies to the discharge of tailings impoundment supernatant, tailings main embankment seepage pond water, excess raffinate from an FX-EW plant, open pit drainage, rock dump drainage,

and domestic sewage to the Granite Pit. The site reference number for this discharge is E324211.

…

1.6.3 The discharge is authorized from Authorized Works, which include, but are not limited to, a tailings impoundment facility, a seepage pond, an effluent pipeline and containment ditching system, a mine drainage collection system, mined out pits, a sewage lagoon, pumping systems and related appurtenances, approximately as shown on the attached Site Plan.

…

"Darrell Le Houillier"

Darrell Le Houillier, Chair
Environmental Appeal Board

June 10, 2022