



Environmental Appeal Board

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DECISION NOS. 2014-EMA-003(c), 004(c), 005(c)

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

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|-------------------|---|--------------------------------------|
| BETWEEN: | Unifor Local 2301 | APPLICANT/ APPELLANT |
| AND: | Director, <i>Environmental Management Act</i> | RESPONDENT |
| AND: | Rio Tinto Alcan Inc. | THIRD PARTY PERMIT HOLDER |
| AND: | Emily Toews | APPELLANT |
| AND: | Elisabeth Stannus | APPELLANT |
| BEFORE: | A Panel of the Environmental Appeal Board Alan Andison, Chair | |
| DATE: | Conducted by way of written submissions concluding on May 1, 2018 | |
| APPEARING: | For the Applicant: Unifor Local 2301: Jason Gratl, Counsel For the Appellants: Emily Toews: Richard Overstall, Counsel Elisabeth Stannus: Chris Tollefson, Counsel Anthony Ho, Counsel For the Respondent: Ben Naylor, Counsel Peter Ameeralli, Counsel Kaitlyn Chewka, Counsel For the Third Party: Michael Manhas, Counsel Daniel R. Bennett, Q.C., Counsel | |

APPLICATION FOR SEVERENCE AND EXPEDITED HEARING

[1] On November 6, 2014, Unifor Local 2301 ("Unifor") appealed an October 7, 2014 Letter of Approval issued by Ian Sharpe, North Region Director (the "Director"), Regional Operations Branch, Ministry of Environment (the "Ministry"). The Letter of Approval approves an Environmental Effects Monitoring Plan (the "EEM Plan") that Rio Tinto Alcan Inc. ("Rio Tinto") prepared in relation to air

emissions from its aluminum smelter located in Kitimat, BC. Unifor is a union that represents approximately 950 workers at the Kitimat smelter.

[2] Also, on November 6, 2014, Elisabeth Stannus and Emily Toews filed separate appeals against the Letter of Approval (Appeal Nos. 2014-EMA-003 and 004).

[3] On March 14, 2018, Unifor applied to the Board for an order severing a specific issue (set out below) from the other issues in the appeals, and for an expedited hearing of that issue during three days between June 15 and July 15, 2018. Previously, the parties agreed that the appeals would be heard in their entirety from May 6 to 31, 2019.

BACKGROUND

The Permit Amendment

[4] The EEM Plan arose from requirements in an amendment to the air emissions permit for the Kitimat smelter. In February 2013, Rio Tinto sought amendments to its air emissions permit as a result of the Kitimat Modernization Project ("KMP"), which was designed to modernize and increase production at the Kitimat smelter. One of the goals of the KMP was to reduce the smelter's emissions of polycyclic aromatic hydrocarbons, fluorides, and particulate matter. In addition, the smelter's aluminum production would increase, resulting in an increase in sulphur dioxide (SO₂) emissions.

[5] On April 23, 2013, the Director approved certain amendments to the smelter's permit (the "Permit Amendment"). Among other things, the Permit Amendment authorized an increase in total sulphur dioxide emissions to a new maximum of 42 Mg/d (tonnes per day) from the previous maximum of 27 Mg/d. In addition, the Permit Amendment contained the following requirements regarding environmental effects monitoring:

4.2.5 Environmental Effects Monitoring Plan

The Permittee shall submit an Environmental Effects Monitoring (EEM) plan for review and approval by the Director on or before December 30, 2013 and shall implement the EEM plan upon approval. The EEM plan shall, at a minimum, include effects monitoring methods and actions along four lines-of-evidence: human health; vegetation; terrestrial and aquatic environments. The EEM plan shall also include impact threshold criteria either for emission reduction or other mitigations that, when exceeded, would trigger emission reduction and/or other mitigation.

4.2.6 Comprehensive EEM and SO₂ Discharge Limit Review

On or before October 31, 2019, the Permittee shall submit to the Director a comprehensive review of the EEM program results from 2012 to 2019. If any unacceptable impacts are determined through the use of impact threshold criteria pertaining to emission reduction,

then the maximum SO₂ discharge limit shall revert back to 27 Mg/d, unless the Director otherwise amends the discharge limit.

[6] Ms. Toews and Ms. Stannus appealed the Permit Amendment.

[7] On December 23, 2015, the Board dismissed those appeals (*Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(g) & 2013-EMA-010(g)). That decision addressed the merits of the Permit Amendment, including requirements 4.2.5 and 4.2.6.

The EEM Plan and the Letter of Approval

[8] As required by section 4.2.5 of the Permit Amendment, Rio Tinto submitted an initial environmental effects monitoring plan dated December 31, 2013 to the Director. That plan was subsequently revised. The Director approved the 103-page EEM Plan in his Letter of Approval, both of which were dated October 7, 2014.

[9] The EEM Plan states in section 2.2.1 (page 7) that Rio Tinto will continuously monitor atmospheric sulphur dioxide concentrations at four "essential" locations: Haul Road (fenceline); Whitesail (upper Kitimat), Riverlodge (lower Kitimat), and Kitimaat Village (Haisla). However, a footnote on page 7 states that the "number and location of continuous monitoring stations is subject to finalization in 2018."

[10] Also, regarding atmospheric sulphur dioxide concentrations, the EEM Plan states at page 7:

Monitoring at the KMP Camp should also be continued until the analyser is relocated to Lakelse Lake; and then continuous SO₂ monitoring will occur at the new Lakelse Lake site. In addition, MOE [Ministry of Environment] will establish a continuous sampler station at Terrace.

[11] A footnote to that sentence states:

Four lines of evidence will provide insights on spatial distribution of SO₂: 5-6 continuous samplers measuring actual SO₂ concentrations, CALPUFF modelling of SO₂, S content in hemlock needles, and passive samplers.

[12] Regarding timing, frequency, and duration of sampling for atmospheric sulphur dioxide concentrations, the EEM Plan states at page 7 that operation of the continuous analysers will be maintained "through 2018 (this assumes KMP will be fully implemented and at steady-state operations by the end of 2017)."

[13] The EEM Plan also states that the concentrations of atmospheric sulphur dioxide measured at continuous analysers from 2014 to 2018 will be compared to the post-KMP concentrations that were modelled pre-KMP, as set out in the 2013 Sulphur Dioxide Technical Assessment Report (the "STAR") prepared by ESSA Technologies Ltd. Rio Tinto had submitted the STAR to the Director in support of its application for the Permit Amendment. The STAR sought to predict the potential impacts of the increased sulphur dioxide emissions along the four lines of evidence mentioned in section 4.2.5 of the Permit Amendment: human health; vegetation; terrestrial environment; and aquatic environment. In that regard, the EEM Plan states at page 1 that the overall purpose of the sulphur dioxide environmental effects monitoring program is:

... to answer questions that arose during the technical assessment, and to monitor effects of SO₂ along these [four] lines of evidence. Results from the EEM Program will inform decisions regarding the need for changes to the scale or intensity of monitoring, as well as decisions regarding the need for mitigation.

[underlining added]

[14] The Letter of Approval approving the EEM Plan states, in full:

By way of this letter, the Director provides approval of Rio Tinto Alcan's Kitimat Modernization Project Sulphur Dioxide Environmental Effects Monitoring Program: Program Plan for 2013 to 2018 submitted in revised form on October 7, 2014. The initial draft plan was submitted to the Director by December 31, 2013, as required under Section 4.2.5 of the *Environmental Management Act* Permit P2-00001 for review and approval. Since then, the review and revisions to the plan have been completed, and the revised plan was submitted to the Director today.

In addition to creating the requested changes to the draft plan as part of the review and approval process, Rio Tinto Alcan was requested to provide a letter of commitment to participate in the development and implementation of a health study for the Kitimat airshed. This letter was received today, and is appended to this approval, for the record.

Rio Tinto Alcan is also requested to convene a meeting in the next 3 months with representatives of the Haisla First Nation for information exchange regarding some long term questions and issues associated with the SO₂ Environmental Effects Monitoring Plan. These concerns were outlined in an October 1, 2014 email from Candice Wilson, Haisla Environmental Biologist Some of these concerns are related to the prospect of managing impacts from potential new sources of air emissions in the Kitimat airshed. These concerns are shared widely in the area, and the Province is considering various means of dealing with them, including the potential formation of a Kitimat airshed management group.

If you have any questions

[Underlining in original]

[15] On November 6, 2014, Unifor, Ms. Stannus, and Ms. Toews filed separate appeals against the Letter of Approval.

The Appellants' amended grounds for appeal

[16] During a pre-hearing teleconference held on December 8, 2017, the parties agreed to a number of procedural matters regarding the appeals. Among other things, the parties agreed that the appeals would be joined and heard together. Ms. Toews and Ms. Stannus also agreed that, by January 31, 2018, they would confirm the issues that they would be proceeding with.

[17] On January 31, 2018, Ms. Stannus and Ms. Toews provided amended Notices of Appeal. Also, on January 31, 2018, Unifor advised that it concurred with their characterization of the grounds for appeal.

[18] On February 20, 2018, Unifor confirmed that it adopted Ms. Stannus' and Ms. Toews' grounds for appeal as amended on January 31, 2018.

[19] The Appellants' grounds for appeal, as amended on January 31, 2018, are as follows:

1. The Decision [i.e., the Letter of Approval] to approve the Environmental Effects Monitoring Plan ("EEM Plan") is inconsistent with the rights guaranteed to the members of Unifor 2301 and other residents of the Kitimat-Terrace airshed ("Airshed Residents") under section 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*");
2. In making the Decision, the Director failed properly or at all to consider and balance the Charter values underlying section 7 proportionally with the statutory objectives under the [Act];
3. In making the Decision, the Director failed properly or at all to consider whether the EEM Plan adequately protects human health and the environment in relation to cumulative effects that may arise from the Kitimat Modernization Project ("KMP") in combination with other current and future sources of sulphur dioxide (SO₂), nitrogen oxides (NO_x), and particulate matter (PM) emissions within the Kitimat-Terrace airshed;
4. In making the Decision, the Director failed properly or at all to protect human health of Airshed Residents. The particulars of this failure include:
 - a. The Director approved an EEM Plan based on an adaptive management model that exposes Airshed Residents to significantly increased levels of Sulphur dioxide associated with KMP without taking any or adequate steps to gather baseline public health data or conduct a human health risk assessment;
 - b. The Director approved an EEM Plan based on an adaptive management model when the nature of the threats to human health posed by KMP required him to exercise discretion to consider and employ a precautionary approach;
 - c. The Director approved an EEM Plan based on an adaptive management model that fails to properly or at all consider the potential for KMP to increase the incidence of adverse health conditions among Airshed Residents;
 - d. The Director approved an EEM Plan that relies on a Key Performance Indicator or "KPI" that fails to measure impacts of the exposure to increased levels of sulphur dioxide on Airshed Residents and accordingly fails to adequately protect Airshed Residents from adverse health effects;
 - e. The Director approved an EEM Plan that exempts Rio Tinto Inc. from facility-based mitigation requirements unless it can be shown that the

triggering exceedances of the KPI are causally related to emissions from the KMP;

- f. The Director approved an EEM Plan without taking threshold steps to ensure that an adequate and reliable air quality monitoring system was in place prior to plan approval; and
- g. The Director approved an EEM Plan that imposes a rationalization process for ambient air monitoring stations but fails to include a deadline for when the rationalization process must be completed.

[20] During a pre-hearing teleconference held on February 7, 2018, the parties agreed to set aside four weeks from May 6 to 31, 2019, for the hearing of the appeals.

Applications regarding document disclosure and grounds for appeal

[21] On February 14, 2018, Rio Tinto and the Director applied to strike or dismiss grounds 3, 4(a), 4(b) and 4(c) of the amended grounds for appeal. The Director also requested particulars on grounds 1, 2, and 4(e), which the Appellants provided on March 2, 2018.

[22] On February 20, 2018, Unifor applied for the disclosure of certain categories of documents from Rio Tinto and "the Minister".

[23] On March 15, 2018, Ms. Stannus applied to further amend her grounds for appeal and the remedies sought in her Notice of Appeal. On March 27, 2018, Ms. Toews and Unifor adopted Ms. Stannus' application, and similarly sought to amend their Notices of Appeal.

[24] The Board will address those applications separately from Unifor's present application.

Unifor's application for severance and expedited hearing

[25] On March 14, 2018, Unifor applied to the Board for the following orders:

1. An order that the issue of the sufficiency, functionality and location of SO₂ air quality monitoring requirements set out in the Environmental Effects Monitoring and Mitigation Amendment ("EEM") issued October 7, 2014 is to be severed from the remaining issues in appeals 2014-EMA-003, 2014-EMA-004 and 2014-EMA-005 and is to be heard separately at a separate Panel hearing;
2. An order that the hearing into air quality station monitoring requirements is to be expedited and set for a three day hearing commencing between June 15 and July 15, 2018; and
3. Such other relief as the [Board] deems appropriate.

[underlining added]

[26] As stated above, Unifor's application refers to air quality monitoring requirements set out in "the Environmental Effects Monitoring and Mitigation

Amendment ("EEM") issued October 7, 2014". Although Unifor's application does not expressly define that phrase, Unifor's supporting affidavits and exhibits indicate that the phrase refers to the approved EEM Plan.

[27] Ms. Stannus and Ms. Toews support Unifor's application for severance and an expedited hearing of the issue.

[28] Rio Tinto and the Director oppose Unifor's application for severance and an expedited hearing.

ISSUES

[29] The Board has addressed the following issues in this decision:

1. What is the test for ordering the severance and expedited hearing of an issue apart from other issues in an appeal?
2. Whether the Board should order the severance and expedited hearing of "the issue of the sufficiency, functionality and location of SO₂ air quality monitoring requirements set out in" the EEM Plan.

RELEVANT LEGISLATION

[30] Section 14 of the *Administrative Tribunals Act* applies to the Board pursuant to section 93.1 of the *Act*, and states as follows:

General power to make orders

14 In order to facilitate the just and timely resolution of an application the tribunal, if requested by a party or an intervener, or on its own initiative, may make any order

- (a) for which a rule is made by the tribunal under section 11,
- (b) for which a rule is prescribed under section 60, or
- (c) in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings.

[31] The Board's Rule 16 sets out a procedure for making applications to the Board. Rule 16 is procedural and general in nature, and is not specific to the present type of application.

DISCUSSION AND ANALYSIS

1. What is the test for ordering the severance and expedited hearing of an issue apart from other issues in an appeal?

The Parties' submissions

Unifor

[32] Unifor submits that an order of severance "is or ought to be discretionary", and should be determined on a balance of factors including expediency and

efficiency, fairness to the parties, the public interest in health and the environment, and the proper administration of the *Act* in accordance with its purposes. Unifor further submits that the Board should weigh any factors raised by the party that could be considered relevant in the exercise of its statutory obligations.

Ms. Stannus

[33] Ms. Stannus supports Unifor's application, and adopts Unifor's submissions. Ms. Stannus did not directly address the legal test to be applied in deciding the application, but submits that the "sole question for the Board is whether there is sufficient evidence to demonstrate that the air monitoring question is a serious one that warrants a separate, expedited hearing as sought by Unifor."

Ms. Toews

[34] Ms. Toews also supports Unifor's application, and adopts the facts and submissions of Unifor and Ms. Stannus. Ms. Toews did not directly address the legal test to be applied in deciding the application, but submits that the "question of whether the number and siting of the monitoring stations is adequate to assess the impact of [Rio Tinto's] Kitimat Modernization Project under the EEM Plan is a serious one that needs a separate expedited hearing."

The Director

[35] The Director submits that neither the Board's Rules nor the *Administrative Tribunals Act* specifically address the test for this type of application, but as in civil litigation proceedings, there should be a presumption that all issues in an appeal will be decided in one hearing unless it is in the interests of justice to decide an issue in advance of the other issues. The Director maintains that the Board should apply the test used in civil litigation proceedings, as set out in *Tzeachten First Nation v. Canada Lands Co.*, 2014 BCSC 1704 [*Tzeachten*], at paras. 18 – 21:

1. Is there evidence that severance is likely to result in a significant saving of time and money?
2. Is there some evidence that a severed trial will put an end to the action or at least reduce some of the issues that need to be heard?
3. Are the issues to be severed intertwined with issues that will remain for a later hearing?
4. Is there a compelling reason to justify severance other than savings of time and expense?

Rio Tinto

[36] Rio Tinto submits that, under section 14 of the *Administrative Tribunals Act*, the Board has the general power to make orders "in order to facilitate the just and timely resolution of an [appeal]", which is similar to the objective of the BC Supreme Court's Rule 1-3(1) of achieving a "just, speedy and inexpensive determination of every proceeding on its merits." Rio Tinto submits, therefore, that the Board should be guided by common law principles regarding severance

applications. In that regard, Rio Tinto submits that it is well established that the discretion to sever proceedings is only to be exercised in extraordinary cases or where there are compelling reasons to do so. In support, Rio Tinto refers to several decisions of the BC Supreme Court.

[37] For example, Rio Tinto refers to *Tzeachten* at para. 19, where the Court stated that “[c]ases in which severance of an issue is appropriate are ‘the exception rather than the rule’”. Rio Tinto also points to *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180, at paras. 11 – 12:

There is ample authority for the proposition that an applicant must establish that there exist extraordinary, exceptional or compelling reasons for severance, and not merely that it would be just and convenient to order severance: *MacEachern v. Rennie*, 2008 BCSC 1064; *Hynes v. Westfair Foods Ltd.*, 2008 BCSC 637; and *Westwick v. Culbert*, [1992] B.C.J. No. 2121.

It is true that some recent cases have held that a judge’s discretion to sever an issue or issues is not restricted to “extraordinary or exceptional circumstances”: *Nguyen v. Bains*, 2001 BCSC 1130; *Enterprising Minds Technology Inc. v. Lululemon Athletica Inc.*, 2006 BCSC 1168. However, there must be some compelling reasons to order severance, such as a real likelihood of a significant savings in time and expense.

[underlining added in Rio Tinto’s submissions]

[38] Additionally, Rio Tinto refers to *Emtwo Properties Inc. v. Cineplex (Western Canada) Inc.*, 2009 BCSC 1592 [*Emtwo Properties*], in which the Court stated at para. 15 that the onus is on the applicant to demonstrate that severance should be granted, and this onus is “higher than simply demonstrating that it would be ‘just and convenient’ to award severance.” At para. 16 of *Emtwo Properties*, the Court set out the factors it considered in deciding whether to grant severance:

1. Is there evidence that severance is likely to result in a significant saving of time and money?
2. Is there some evidence that a severed trial will put an end to the action?
3. Are the issues of liability and damages intertwined?
4. Is there a compelling reason to justify severance other than savings of time and expenses?

[underlining added in Rio Tinto’s submissions]

[39] Rio Tinto maintains that, consistent with the courts’ discretion to sever matters, the Board recently held that severance “may be appropriate when the issues to be heard first are pure questions of law, or involve questions of mixed fact and law and the parties agree on the relevant facts”: *Deputy Director, Environmental Management Act v. Revolution Organics, Limited Partnership*, (Decision Nos. 2017-EMA-004(c) & 2017-EMA-012(b), December 5, 2017) [*Revolution Organics*], at para. 52.

The Panel's findings

[40] Neither the Board's Rules nor the *Administrative Tribunals Act* specifically address this type of application; however, section 14 of the *Administrative Tribunals Act* provides the Board with the general power to make orders "in order to facilitate the just and timely resolution of an [appeal]". The Panel finds that the Board should exercise this discretion in a manner that is consistent with the language in section 14. As such, granting an order for severance and expedited hearing must, at the very least, facilitate the just and timely resolution of an appeal. However, as is discussed below, further considerations may also be relevant in deciding such applications.

[41] Similar to the BC Supreme Court's comments in *Tzeachten* at para. 19 that "[c]ases in which severance of an issue is appropriate are 'the exception rather than the rule'", the Board typically hears all of the issues and evidence that pertain to the merits of an appeal in one hearing. In most cases, it is not only just and timely, but also efficient and effective for all parties and the Board, to proceed in that way. Indeed, the parties cited no past examples of the Board ordering the severance and expedited hearing of one issue apart from the other issues that pertain to the merits of an appeal. What the Board has done in many past cases, including the present appeals, is hear threshold issues of jurisdiction on a preliminary basis. Jurisdictional issues are routinely heard on a preliminary basis because there is no valid appeal, and no need to hear any other issues, if the Board is left without jurisdiction.

[42] At para. 52 of *Revolution Organics*, the Board held that it has the power to split or bifurcate a hearing as a matter of procedure, and such an application will be granted when the parties consent, and "may be appropriate when the issues to be heard first are pure questions of law, or involve questions of mixed fact and law and the parties agree on the relevant facts." However, at para. 57 of *Revolution Organics*, the Board decided against ordering severance. Besides the fact that there wasn't a proper severance application before the Board, the Board considered that the Appellant opposed proceeding in that way, and there was no consensus on the facts underlying the issues to be severed, as indicated by contradictory expert reports that the parties had already filed.

[43] In somewhat different circumstances, the Board granted an application for severance and expedited hearing of one entire appeal, apart from five other appeals that were scheduled to be heard together. All six appeals related to the remediation of a contaminated site, and were scheduled to be heard in a four-week oral hearing. In *Seaspan ULC v. Director, Environmental Management Act* (Decision No. 2013-EMA-002(a), March 6, 2013) [*Seaspan*], one of the appellants, Seaspan, applied for one of its appeals to be severed and heard by way of written submissions on an expedited basis. Seaspan argued that it was more efficient and effective to proceed in that way, because the appeal only raised a jurisdictional question, and did not require the Board to review the merits of the remediation plans or complex factual evidence which would be addressed in the other appeals. Although several parties opposed the application, the Board granted it, finding at

paras. 29 - 34:

... If [Seaspan's appeal is heard separately on an expedited basis] and the Board finds that the Director did not have jurisdiction to accept both [remediation] plans, his decision will be reversed. As a result, he will be required to reconsider the remediation plans and make a new decision. This has the advantage of providing clarity and greater certainty going into a full hearing on the merits of all of the appeals.

...

Alternatively, if the Board hears Seaspan's appeal first and finds that the Director had jurisdiction to approve both site remediation plans, there will be one less appeal to address at the Fall hearing. In terms of increased complexity and/or delay, the issues and evidence to be presented in relation to Domtar's appeal will not change, therefore, neither of these concerns should be realized.

Finally, the Panel is persuaded by Seaspan's submission that, in the event that the matter is returned to the Director, any ultimate finding by the Director that Domtar's plan is the preferred plan would obviate that need for the hearing of many of the matters currently under appeal.

Having carefully considered Seaspan's Notice of Appeal and all parties' submissions on this application, the Panel agrees with Seaspan that its 2013 appeal raises questions of law that are amendable to being heard by way of written submissions. In particular, the Panel finds that Seaspan's 2013 appeal raises the fundamental question of the Director's jurisdiction to make the January 2013 decision. It is easily viewed, therefore, as a preliminary question of jurisdiction – one that should be decided first, before turning to the merits of the individual site remediation plans. The issues outlined in Seaspan's Notice of Appeal, and summarized in its submissions on this application, are such that there should be no need for evidence.

[underlining added]

[44] In summary, based on *Revolution Organics* and *Seaspan*, the factors that the Board considered in past applications for severance include:

- whether all parties agreed to the application for severance and expedited hearing;
- whether the matter to be severed raised an issue of law and could be decided based on legal arguments only, without the need to consider evidence;
- if the matter to be severed involved questions of mixed fact and law, whether the parties agreed on the relevant facts;
- the outcome of the severed and expedited hearing would either reduce the matters remaining to be heard or provide clarity and greater certainty in a future hearing of those matters, or alternatively, would at least not increase complexity or cause delay in hearing those matters.

[45] Together, those factors are consistent with section 14 of the *Administrative Tribunals Act*: the application for severance and expedited hearing may be granted

if it would facilitate the just and timely resolution of the matter(s) as a whole, and could lead to a more efficient and effective hearing of the remaining matters. The Panel finds that this is also consistent with the factors and rationale discussed by the BC Supreme Court in *Tzeachten* and *Emtwo Properties*, cited above.

[46] Finally, given that an order for severance and expedited hearing is unusual, and that it is generally fair, efficient and effective to hear all of the issues and evidence regarding the merits of an appeal in one hearing, the Panel finds that the onus should be on the applicant to establish why severance and an expedited hearing is warranted. In other words, the applicant must show that severance and an expedited hearing of one aspect of an appeal would facilitate the just and timely resolution of the appeal as a whole (and/or any related appeals), and would lead to a more efficient and effective hearing of the remaining matters.

2. Whether the Board should order the severance and expedited hearing of “the issue of the sufficiency, functionality and location of SO₂ air quality monitoring requirements set out in” the EEM Plan

The Parties’ submissions

Unifor

[47] Unifor submits that the EEM Plan was approved without any requirements for assessing the functioning and location of air quality monitoring stations. Unifor maintains that, under the EEM Plan, Rio Tinto is simply required to maintain four continuous sulphur dioxide concentration analysers from 2013 to 2018, and then review the monitoring data in 2019. Unifor argues that section 2.2.1 of the EEM Plan states that there will be continuous analyser measurements of sulphur dioxide concentrations at four “essential” locations, but there is no requirement or deadline for the evaluation, analysis or rationalization of the monitoring station network. A footnote on page 7 of the EEM Plan simply states that the “number and location of continuous monitoring stations is subject to finalization in 2018”, and condition 2.2.3.3 of the EEM Plan requires that a “rationalization process for ambient air monitoring stations (number and location) will be completed in 2018”. There is no requirement for installing monitoring stations in compliance with the analysis or rationalization process. Unifor also submits that, although the EEM Plan requires a review of its own conditions in 2019 based on the monitoring data, the adequacy of the air quality data depends on adequate siting and functioning of the monitoring station network.

[48] Unifor argues that the current air monitoring station network is inadequate, particularly with respect to human health impacts, and the EEM Plan does little or nothing to impose a timeline on Rio Tinto to rectify that problem. Unifor submits that a January 7, 2017 letter imposed into the EEM Plan a trigger for mitigating human health impacts, but it is subject to a causation requirement in section 7.0 of the EEM Plan, and the EEM Plan does not set out a method to determine KMP causality for human health.

[49] Unifor submits that the “monitoring station issue” is separate and discrete, and there is little factual overlap between it and the “cumulative effect issue” or the

"causation issue". Unifor also submits that the monitoring station issue is urgent because a meaningful assessment of air quality, and future decisions about mitigation, depend on satisfactory air quality data in time for the 2019 reassessment of the EEM Plan's requirements. Unifor asserts that waiting until the appeal hearing scheduled for May 2019 to hear the monitoring station issue would lead to unnecessary delay in resolving this issue, on which proper adaptive management of the airshed depends.

[50] In addition, Unifor submits that a hearing into the monitoring issue would only require three days, and the Director and Rio Tinto will not be prejudiced if the application is granted.

[51] In support of its application, Unifor relies on several affidavits and attached documents including: various emails by Ministry staff; various emails by staff at the Northern Health Authority; a 198-page report prepared for the Ministry by ESSA Technologies, dated April 25, 2014 and titled "Final Report: Kitimat Airshed Emissions Effects Assessment"; and, a 63-page report prepared for Rio Tinto by ESSA Technologies, dated September 30, 2016 and titled "Summary Report: Kitimat Air Quality Monitoring Workshop – Optimization of the Ambient Air Quality Monitoring Network, June 22 and 23, 2016".

Ms. Stannus

[52] Ms. Stannus adopts Unifor's grounds for its application and its statement of facts. In addition, Ms. Stannus refers to a report from Dr. Mark Cherniak dated March 26, 2018, in which he comments on the current locations of the air monitoring stations relative to some predictions made in the STAR report. At page 4 of his report, Dr. Cherniak states that "the air dispersion modelling (as part of the STAR...) shows the monitoring station in Lower Kitimat [Riverlodge] is outside of where emissions "hot spots" are predicted to occur." Also, at page 5 of his report, he states that "no monitor is located to measure SO₂ levels along the Kitimat River where an SO₂ hotspot is predicted to occur where residents (and tourists) of Kitimat likely recreate."

[53] Ms. Stannus submits that Dr. Cherniak's report shows that the air monitoring stations are not properly sited to reflect ambient sulphur dioxide concentrations post-KMP. She further submits that, unless the siting issue is addressed and properly located monitoring stations are in operation, the Board panel hearing those appeals will hear evidence that likely includes the air quality monitoring results from stations that are inadequate to provide meaningful results. As such, she submits that the Board would be deprived of information necessary to properly decide the appeals.

[54] Ms. Stannus submits, therefore, that the adequacy of the air monitoring stations should be dealt with in a separate, expedited hearing. She maintains that, if the Board then found that the stations are inadequate, proper monitoring stations could be ordered so that the hearing on the remaining issues would proceed with some assurance as to the quality of the air quality monitoring data.

Ms. Toews

[55] Ms. Toews adopts the facts and submissions of Unifor and Ms. Stannus.

[56] Ms. Toews submits that Dr. Cherniak's report identifies a predicted "hot spot" of high sulphur dioxide concentrations based on the STAR, yet the closest monitoring station at Riverside is one kilometer away from that hotspot, and is located in an area where the STAR predicted that emissions would be much lower. Ms. Toews, who has asthma, submits that this hotspot includes her residence and the school where she teaches. She submits that the question of whether the number and siting of the monitoring stations is adequate to assess the impacts of the sulphur dioxide emissions arising from the KMP is a serious one that requires an expedited hearing.

The Director

[57] The Director submits that granting Unifor's application would lead to a more cumbersome and duplicative process for hearing the appeals, and there is no evidence that it would lead to cost savings or efficiencies. The Director also submits that the EEM Plan was approved as a comprehensive and integrated whole, and severing one aspect of it would not lead to a fully-informed, effective, efficient, or just hearing of the merits of the appeals regarding the EEM Plan.

[58] Before addressing the test for severance, the Director submits that the Appellants have not identified the relationship between the proposed issue for severance and their grounds for appeal. Moreover, the Director submits that Unifor's description of the proposed issue for severance is neither factually isolated nor a discrete legal issue in the context of the grounds for appeal.

[59] In addition, the Director argues that Ms. Stannus' submissions that the adequacy of the monitoring stations' locations should be assessed in advance so that proper monitoring stations may be ordered and the Board would have some assurance of adequate evidence when it hears the remaining issues, demonstrates that: (1) this issue is inextricably linked to other factual issues raised by the appeals; and (2) the application for severance seeks to compel the creation or collection of evidence that the Appellants believe will assist their case on the remaining issues, but this is an inappropriate basis for granting severance and an expedited hearing.

[60] The Director further submits that even if it were possible to extricate the air monitoring station issue as a separate factual issue, it is unclear which ground(s) of appeal, if any, would be disposed of by addressing the issue in isolation. There is no evidence that severance would potentially reduce the issues to be addressed, let alone resolve the appeals, or result in efficiencies.

[61] On the contrary, the Director maintains that it is likely that the witnesses called to give evidence on the monitoring station issue would also be called to give evidence on other matters raised by the appeals. For example, the Director anticipates that, if severance is granted, Dr. Cherniak would likely be called by the Appellants at both the hearing of the monitoring station issue and a later hearing on the remaining issues. The Director submits that it does not promote efficiency to have witnesses called at two separate hearings, where their evidence in each

hearing will likely overlap. Similarly, the Director submits that the Appellants have not considered how the proposed expedited hearing would affect the Director's document disclosure obligations.

[62] Moreover, the Director maintains that, with five parties and the need to present scientific evidence, it is unlikely that a three-day hearing would provide enough time to hear the issue of whether the current air monitoring stations are adequate. In any event, the Director advises that his counsel is unlikely to be available for a three-day hearing during the period in 2018 that Unifor has proposed.

[63] In summary, the Director submits that the approved the EEM Plan is an integrated whole, and a separate hearing of an issue regarding the location of the monitoring stations would not lead to a fully-informed, effective, efficient or just hearing by the Board. Moreover, granting the application for severance and expedited hearing would result in the duplication of evidence and arguments, and a risk of judicial review that would further delay the appeals.

Rio Tinto

[64] Rio Tinto argues that the Appellants failed to discharge their onus to demonstrate that severance is justified. In particular, Rio Tinto submits that:

- there is no evidence that severance will put an end to the issues between the parties;
- there is no clear consensus on the facts underlying the issues to be determined;
- there will be no significant savings of time and expenses;
- the issues on appeal are intertwined;
- Rio Tinto will be prejudiced by the requested order.

[65] Specifically, Rio Tinto submits that severance will not resolve the appeals, and it would be more efficient to hear all of the issues in the appeals concurrently. Rio Tinto also submits that the overarching issue in the appeals is whether the approval of the EEM Plan provides sufficient protection of the environment and human health, and this issue is not amenable to determination "in slices". There is a connection between the characteristics of the monitoring network required under the EEM Plan (e.g. number and siting of stations) and the other issues in the appeals. The scope and siting of monitoring stations will depend on factors including the amount of sulphur dioxide emissions, predicted concentrations of those emissions at the receptor level, severity and likelihood of health risks arising from those emissions, and the stringency of the air quality standard in effect. Rio Tinto argues that a panel hearing the severed issue could not make a decision about the monitoring network without weighing those other issues. Since the issues are intertwined, a severed hearing of one issue would result in two separate hearings grappling with overlapping issues, which would cause duplication, and increased time and expenses, in hearing the appeals.

[66] In addition, Rio Tinto submits that there is no urgency to hear the issue that Unifor seeks to sever. Although the Appellants submit that it is urgent to hear the monitoring station issue because the monitoring stations are not properly sited, which will affect the meaningfulness of the air quality data, Rio Tinto argues that a panel hearing the main appeal could make the same finding. Moreover, Rio Tinto submits that the purpose of severance cannot properly be to create evidence that would be used in a hearing of the remaining issues.

[67] Moreover, Rio Tinto challenges the evidence provided by Dr. Cherniak, and submits that his report is flawed. Rio Tinto also submits that the actual concentrations of sulphur dioxide measured at monitoring stations have been much lower than those predicted in the STAR, which the Board previously accepted in its decision on the Permit Amendment appeals to be adequate to protect human health. As such, Rio Tinto submits that there is no urgency to sever and hear the monitoring station issue.

[68] In support of its submissions, Rio Tinto provided a report dated April 9, 2018 by Anna Henolson. Rio Tinto argues that her report should be preferred over Dr. Cherniak's report. Rio Tinto submits that, in the past appeals of the Permit Amendment, Ms. Henolson was qualified as an expert in air dispersion modelling and air quality analysis, whereas Dr. Cherniak was qualified as an expert in standards setting and health, but not in air quality monitoring. In the appeals of the Permit Amendment, Ms. Toews and Ms. Stannus relied on Dr. Steyn, who was qualified as an expert in air dispersion modelling and monitoring, rather than Dr. Cherniak, to respond to Ms. Henolson's evidence.

[69] In her report, Ms. Henolson identifies a number of flaws or concerns regarding the assumptions and analysis in Dr. Cherniak's report, particularly regarding his conclusions about predicted "hotspots" for sulphur dioxide concentrations. For example, Ms. Henolson states that Dr. Cherniak's report relies on one-hour maximum concentrations, primarily based on 2006 results, which is inconsistent with the sulphur dioxide Ambient Air Quality Standards that BC has adopted. She states that three or more years of model results should be considered together when selecting monitoring station locations, to increase the probability of identifying the location most likely to measure high concentrations in the future. She also states that it is probable that the high concentrations identified by Dr. Cherniak were due to conflicting wind fields in the two datasets used in the STAR modelling, as conflicting wind fields can cause stagnant conditions in the model, resulting in artificially elevated sulphur dioxide concentrations in convergence zones. She advises that Appendix 7.6.2 of the STAR indicated that this was the case. She further states that when surface-only meteorological data for the entire year of 2006 is used, the two high concentration locations identified by Dr. Cherniak are much lower, and are not higher than surrounding areas. In summary, she states that Dr. Cherniak's focus on one-hour maximum predictions from the model ignores many key factors, such as frequency, year-to-year variations, actual monitoring data, and physical and logistical constraints.

[70] Regarding actual monitoring data from 2016 and 2017, Ms. Henolson provided data which shows that the maximum concentrations in those years were up to 34% of the predicted maximum predicted concentrations at the monitors in

residential areas for short-term averaging periods (one-hour, three-hour, and 24-hour). She also states that the 2017 annual emission rates of about 29.5 tonnes per day were 70% of the permitted maximum. Given that STAR predictions were based on maximum emission rates, she states that the predicted modelled concentrations in the STAR are conservative compared to measured concentrations.

[71] Ms. Henolson's report also describes the steps that are being taken to review and rationalize the placement of monitoring stations, including drafting a network optimization terms of reference based on procedures recommended by the U.S. Environmental Protection agency, surface-only monitoring to evaluate monitoring site locations, and refining the modelling that has been used.

[72] In light of the conflicting reports from Ms. Henolson and Dr. Cherniak, Rio Tinto submits that there is no agreement among the parties regarding the facts, which weighs against ordering severance.

[73] Finally, Rio Tinto submits that it will be prejudiced by the requested order, as it would have insufficient time to prepare its case, including expert evidence, if the severed issue was heard on the dates that Unifor has requested. Furthermore, Rio Tinto submits that even if the order for severance was granted and the Board ordered changes to the monitoring station network, it is unlikely that there would be sufficient time to collect a meaningful amount of new data for use in the hearing scheduled in May 2019.

Unifor's reply

[74] In reply, Unifor submits that it has applied to sever the issue of:

... whether the Ministry should impose a timely deadline for Rio Tinto to evaluate or analyse the suitability of the locations of the monitoring stations on the basis that the location of the monitoring stations undergirds the data used to evaluate air quality and on the basis that this issue is separate and discrete.

[underlining added in Unifor's submissions]

[75] Unifor also submits that Ms. Henolson's report discusses steps that are being taken to rationalize the placement of the monitoring stations, and as such Rio Tinto appears to agree that an analysis of their locations needs to be done. Among other things, Unifor also submits that the only "real" issue to be dealt with at a severed hearing is whether the Ministry failed to impose a timely deadline for that analysis to be done.

The Panel's findings

[76] The Panel finds that neither Unifor nor the other Appellants have identified the relationship between the proposed issue for severance and any particular ground(s) for appeal. Despite the fact that the Director made note of that in his submissions, Unifor provided no clarification in its reply submissions. Instead, Unifor's reply contains a revised and reformulated statement of the issue proposed for severance and expedited hearing, with an emphasis on timely deadlines that was not part of its original request for the order of severance and expedited

hearing. The Panel finds that Unifor's morphing formulations of the issue, and its failure to indicate which ground(s) of appeal the issue (in either formulation) relates to, render the application unclear and ambiguous. Consequently, the Panel finds that Unifor's submissions render it unclear which ground(s) for appeal could potentially be resolved if the application was granted. In addition, Unifor has failed to establish that granting the application could simplify the hearing of any grounds for appeal that would remain to be addressed, if the application was granted.

[77] One thing that is clear from the submissions is that there is no consensus among the parties to proceed in the way that Unifor proposes. It is also clear, given the technical and voluminous nature of the evidence provided by the parties, that the issue proposed for severance (no matter which of Unifor's formulations one considers) is not simply a question of law that could be resolved with little or no need for evidence. Indeed, there is already conflicting evidence from Ms. Henolson and Dr. Cherniak regarding the proper application and interpretation of the STAR's modelling results, the factors that should be considered in determining whether the current monitoring station network is adequate, and whether the current network will likely produce meaningful results. As such, the Panel finds that there is little or no agreement among the parties regarding the facts pertaining to the adequacy of the monitoring network, or the urgency of any need to make changes to that network.

[78] Moreover, Unifor has proposed expedited hearing dates in June through July 2018, yet it has long been known to all parties that the collection of air quality monitoring data under the EEM Plan was to occur from 2013 to the end of 2018. Even if Unifor's application was granted, and even if the Board decided after a June/July 2018 hearing that there should be changes to the air quality monitoring network, there would be little time remaining to gather data. It is unclear why Unifor did not raise this application sooner if, in fact, there is some urgency to decide the issue.

[79] In summary, the Panel finds that Unifor, as the applicant, has failed to establish that the application for severance and expedited hearing should be granted. It has failed to show that severance and an expedited hearing of the one issue (which ever formulation is considered) could resolve any particular ground(s) for appeal, or could simplify the hearing of the grounds for appeal that would remain if the application was granted. There is already conflicting expert evidence from the parties regarding the adequacy of the monitoring station network, and whether there is any urgency to make changes to that network. There is little or no agreement among the parties regarding the facts to be decided. All of the factors, discussed above weigh against granting the application.

DECISION

[80] The Panel has considered all of the submissions and arguments made, whether or not they have been specifically referenced herein.

[81] For the reasons stated above, the application for severance and an expedited hearing is denied.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

May 15, 2018