BRITISH COLUMBIA

Environmental Appeal Board

Fourth Floor, 747 Fort Street
Victoria BC V8W 3E9
Telephone: (250) 387-3464
Facsimile: (250) 356-9923

Mailing Address:
PO Box 9425 Stn Prov Govt
Victoria BC V8W 9V1

Website: www.eab.gov.bc.ca
Email: eabinfo@gov.bc.ca

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

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

BETWEEN:	Elisabeth Stannus	**APPELLANT**
AND:	Emily Toews	**APPELLANT**
AND:	Unifor Local 2301	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Rio Tinto Alcan Inc.	**THIRD PARTY PERMIT HOLDER**

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 Appellants:	
Unifor Local 2301:	Jason Gratl, Counsel
Emily Toews:	Richard Overstall, Counsel
Elisabeth Stannus:	Chris Tollefson, Counsel
	Anthony Ho, Counsel
For the Respondent:	Ben Naylor, Counsel
	Peter Ameerali, Counsel
	Kaitlyn Chewka, Counsel
For the Third Party:	Michael Manhas, Counsel
	Daniel R. Bennett, Q.C., Counsel

PRELIMINARY APPLICATIONS

[1] On November 6, 2014, Unifor Local 2301 ("Unifor") appealed a Letter of Approval issued by Ian Sharpe, North Region Director (the "Director"), Regional Operations Branch, Ministry of Environment (the "Ministry")(Appeal No. 2014-EMA-005). The Letter of Approval approves a Sulphur Dioxide Environmental Effects Monitoring Program Plan for 2013 to 2018 (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). Ms. Stannus and Ms. Toews are residents of Kitimat.

[3] On February 14, 2018, Rio Tinto and the Director each applied to strike or summarily dismiss some of the Appellants' grounds for appeal as amended on January 31, 2018. The Board offered all parties an opportunity to make submissions on those applications.

[4] On March 15, 2018, Ms. Stannus applied to further amend her grounds for appeal and the remedies sought in her Notice of Appeal. By a letter dated March 15, 2018, the Board accepted her application to amend, subject to any objections from the other parties. On March 16, 2018, the Director and Rio Tinto objected. On March 27, 2018, Unifor and Ms. Toews adopted Ms. Stannus' application. Unifor also requested the addition of a further remedy that was not included in Ms. Stannus' application to amend. The Board offered all parties an opportunity to make submissions on the Appellants' applications to amend their Notices of Appeal.

[5] These preliminary applications were conducted by way of written submissions.

BACKGROUND

[6] The smelter began operations in about 1954. The smelter operates under a permit to discharge waste under the *Environmental Management Act* (the "*Act*").

[7] The Letter of Approval with respect to the EEM Plan represents the second stage in a staged decision-making process that began with an amendment to the smelter's permit in 2013. That amendment was the subject of appeals by Ms. Stannus and Ms. Toews. The following background information is derived from the Board's decision on those previous appeals (*Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(g) & 2013-EMA-010(g), December 23, 2015) [*Toews and Stannus*], as well as the parties' submissions on the present appeals.

The 2013 Permit Amendment

[8] In or about 2007, Rio Tinto began discussions with the Ministry about a proposal known as the Kitimat Modernization Project ("KMP"), which was designed to modernize and increase the smelter's aluminum production. One of the goals of the KMP was to reduce the smelter's emissions of polycyclic aromatic hydrocarbons, fluorides, and particulate matter. Another goal was to increase the efficiency of aluminum production. However, Rio Tinto contemplated that as part of the KMP, the smelter's sulphur dioxide (SO_2) emissions would likely increase. Rio Tinto anticipated that sulphur dioxide emissions would reach an upper range of up to 42 Mg/d (tonnes per day) once the modernized smelter was fully operational in about 2018. Rio Tinto expected that the KMP would, however, improve how sulphur dioxide and other air emissions are dispersed, by using taller stacks.

[9] In February 2013, Rio Tinto applied to amend the smelter's permit to reflect the changes proposed in the KMP. In support of its application, Rio Tinto submitted several reports, including the "*Sulphur Dioxide Technical Assessment Report*" dated April 10, 2013 (the "STAR"). The STAR is a three-volume report focusing on the predicted sulphur dioxide emissions from the smelter post-KMP, and their predicted impacts on human health and the environment.

[10] The STAR includes an estimate of the smelter's sulphur dioxide emissions before and after implementing the KMP based on emission dispersion modelling and data from ambient air quality monitoring stations, and an assessment of the predicted impacts of the sulphur dioxide emissions on four receptors: human health, vegetation, soils, and surface water. The sulphur deposition predictions were generated using an emission dispersion model. First, the model was run using historic emissions from the smelter, so that the modelled concentrations of sulphur dioxide and sulphur deposition could be compared to and validated against historic data from monitored concentrations and deposition results, to test its outputs. The model was also run prospectively to predict sulphur dioxide concentrations and sulphur deposition after the KMP is fully operational, and those results informed the STAR's studies of the four receptors.

[11] The STAR established a study area totalling 2,895 square km, which was designed to include the main plume from the smelter, areas that may be affected by sulphur dioxide, and soil and water receptors which may be affected by the deposition of sulphur. Generally, the study area extended from Kitimat northward through a valley to Terrace, an area which has been referred to as the Kitimat-Terrace airshed.

[12] On April 23, 2013, the Director approved an amendment to the smelter's permit (the "Permit Amendment"), pursuant to section 16 of the *Act*. Among other things, the Permit Amendment authorized an increase in total sulphur dioxide emissions to a maximum of 42 Mg/d (tonnes per day), compared to the previous maximum of 27 Mg/d. In addition, the Permit Amendment contained the following requirements:

> 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 SO_2 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 SO_2 discharge limit shall revert back to 27 Mg/d, unless the Director otherwise amends the discharge limit.

[13] In May 2013, Ms. Toews, Ms. Stannus, and several other individuals or organizations appealed the Permit Amendment. Ultimately, the appeals filed by Ms. Stannus and Ms. Toews proceeded to a hearing in mid-2015, after the conclusion of judicial reviews of the Board's preliminary decisions that the other appellants lacked standing to appeal the Permit Amendment.

The EEM Plan

[14] Meanwhile, as required by section 4.2.5 of the Permit Amendment, Rio Tinto submitted a sulphur dioxide environmental effects monitoring program plan dated December 31, 2013 to the Director. Subsequently, Rio Tinto submitted the EEM Plan dated October 7, 2014, which was approved by the Director. The EEM Plan is 103 pages long. Certain portions of it are summarized below.

[15] The EEM Plan describes the monitoring and modelling of sulphur dioxide that would occur from 2013 to 2018, and the thresholds for increased monitoring or mitigation if monitoring results indicate that such actions are warranted. The Executive Summary of the EEM Plan states that "Rio Tinto will implement SO_2 mitigation strategies if the outcomes of monitoring and modelling described in this plan show adverse impacts causally related to SO_2 that are considered unacceptable."

[16] The EEM Plan states at page 1 that the overall purpose of the monitoring program is:

> … to answer questions that arose during the technical assessment, and to monitor effects of SO_2 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.

[17] Thus, whereas the STAR attempted to predict the effects of the increased sulphur dioxide emissions along four lines of evidence, the EEM Plan sets out methods and procedures for determining the actual effects of the emissions along the four lines of evidence, and the thresholds at which further monitoring and/or mitigation measures are triggered. The EEM Plan establishes key performance indicators ("KPI's"), which trigger additional monitoring or modelling, receptor-based mitigation measures, and/or facility-based mitigation measures.

[18] Regarding human health, the EEM Plan states that a KPI "will be applied when provincially applied SO_2 ambient air guidelines come into effect." As is discussed below, the Ministry adopted ambient air quality standards for sulphur dioxide after the EEM Plan was approved. In the meantime, the EEM Plan contained an "informative indicator" for human health: the predicted annual number of sulphur dioxide-associated restricted airway responses, based on a three-year rolling average.

[19] Regarding the monitoring of atmospheric sulphur dioxide concentrations, the EEM Plan states at page 7 that Rio Tinto will continuously monitor 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." At page 7, the EEM Plan also states:

> Monitoring at the KMP Camp should also be continued until the analyser is relocated to Lakelse Lake; and then continuous SO_2 monitoring will occur at the new Lakelse Lake site. In addition, MOE [Ministry of Environment] will establish a continuous sampler station at Terrace.

[20] A footnote to that sentence states:

> Four lines of evidence will provide insights on spatial distribution of SO_2: 5-6 continuous samplers measuring actual SO_2 concentrations, CALPUFF modelling of SO_2, S content in hemlock needles, and passive samplers.

[21] In addition, 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)." The EEM Plan states that the concentrations of atmospheric sulphur dioxide measured at continuous analysers from 2014 to 2018 will be compared to the concentrations that were predicted based on the modelling (conducted pre-KMP) as set out in the STAR.

[22] Regarding possible facility-based mitigation measures, Table 18 on page 49 of the EEM Plan lists several sulphur dioxide reduction options, their potential range of reduction, and their timelines for implementation. The options listed include procuring lower sulphur content coke, importing anodes with lower sulphur content, and adding scrubbers to certain works at the smelter. A footnote on page 49 states that these options are "not binding, as the efficacy and availability of some options may vary with time and other options may become available in the future." The footnote also states that reduction options "would only be implemented if there is: a confirmed environmental impact related to KMP SO_2 emissions, an EEM [Plan] KPI source-based mitigation trigger is reached, and the needed amount of SO_2 reduction has been determined through the methods described in sections 3-6 of this document."

[23] At page 50, the EEM Plan provides that Rio Tinto will publish annual reports summarizing the monitoring activities and results, and information on aluminum production and sulphur dioxide for the previous year. In addition, a comprehensive review of the results from 2013 to 2018 will be conducted in 2019, and a report must be prepared by October 31, 2019, as specified in section 4.2.6 of the Permit Amendment.

The Director's Letter of Approval

[24] The Director approved the EEM Plan on October 7, 2014. The Letter of Approval states:

> 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 SO_2 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]

Appeals of the Letter of Approval

[25] On November 6, 2014, Unifor, Ms. Stannus, and Ms. Toews filed separate appeals against the Letter of Approval. In their Notices of Appeal, the Appellants requested the following remedies:

- quash the Letter of Approval;
- alternatively, remit the Letter of Approval back to the Director for reconsideration with directions from the Board;
- in the further alternative, vary the Letter of Approval in a manner that ensures adequate protection of human health and the environment; and
- any other relief the Board considers appropriate in the circumstances.

Board's Jurisdiction Decision - whether the Letter of Approval was appealable

[26] By a letter dated November 13, 2014, the Board requested written submissions from the parties on whether the Letter of Approval was an appealable decision under section 99 of the *Act*, and whether Unifor had standing to appeal under section 100(1) of the *Act* as a "person aggrieved" by the Letter of Approval.

[27] On December 4, 2014, the Board released its decision in *Elisabeth Stannus, Emily Toews and Unifor Local 2301 v. Director, Environmental Management Act*,

Decision Nos. 2014-EMA-003(a), 004(a) and 005(a)); [2014] B.C.E.A. No. 33 (Q.L.) (the "Jurisdiction Decision"), in which it found that the Letter of Approval was not an appealable "decision" under section 99 of the *Act*. The Board rejected all three appeals on that basis.

Judicial review of the Jurisdiction Decision – BC Supreme Court

[28] Unifor sought a judicial review of the Jurisdiction Decision. On September 4, 2015, the BC Supreme Court released its judgment in *Unifor Local 2301 v. British Columbia (Environmental Appeal Board),* 2015 BCSC 1592 [*Unifor 1*]. The Court found that the Letter of Approval ought to have been considered the second stage of a staged decision-making process on Rio Tinto's application for a permit amendment. The Court concluded that the Letter of Approval was an appealable "decision" under section 99 of the *Act*, and remitted the matter to the Board for reconsideration.

The Board's reconsideration of whether the Letter of Approval was appealable

[29] In a reconsideration decision dated November 16, 2015 (*Unifor Local 2301 v. Director, Environmental Management Act*, Decision No. 2014-EMA-005(b)), the Board found that the Letter of Approval was a "decision" under section 99 of the *Act*, based on the reasons in *Unifor 1*. The Board also found that Unifor had standing to appeal the Letter of Approval as a "person aggrieved" within the meaning of section 100(1) of the *Act*.

[30] In a separate decision dated November 27, 2015, the Board also found that Ms. Stannus and Ms. Toews had standing to appeal the Letter of Approval (*Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2014-EMA-003(b) & 004(b)).

The Board's decision on the merits of the Permit Amendment

[31] On December 23, 2015, after hearing 21 days of evidence and submissions, the Board issued its decision dismissing the appeals of the Permit Amendment (*Toews and Stannus*). In that decision, the Board considered a number of issues, some of which are relevant to the present applications.

[32] Among other things, the appellants argued that the Director was bound to apply the "precautionary principle" when amending the smelter's permit under section 16 of the *Act*, due to the public health risks associated with the Permit Amendment. The Board rejected that argument at para. 263 of *Toews and Stannus*, after providing a lengthy analysis of the statutory language, leading Canadian judicial decisions on the precautionary principle, judicial decisions in other Commonwealth jurisdictions, and the Board's previous decisions regarding whether the precautionary principle applies to decisions under the *Act*.

[33] The appellants also argued that the Director was obliged to consider the cumulative effects of the increased sulphur dioxide emissions when exercising his discretion under section 16 of the *Act*. At para. 243 of *Toews and Stannus*, the Board concluded that the appellants had identified no such requirement in the *Act*.

[34] Regarding the potential for the increased sulphur dioxide emissions to cause adverse human health impacts, the Board considered expert evidence from the appellants and Rio Tinto before finding as follows at para. 356 of *Toews and Stannus*:

> For the reasons that follow, the Panel finds that the Appellants have not established that, even in a so-called "worst case scenario" of the maximum SO_2 emissions allowed under the Amendment, there is "reasonable scientific plausibility" that: (i) the incidence of asthma in the Kitimat airshed is likely to increase as a result of exposure to SO_2 gas emissions from the smelter; (ii) premature mortality (including death caused by heart attacks, serious asthma attacks, or respiratory infections) in the Kitimat airshed is likely to increase due to exposure to SO_2 gas emissions from the smelter; and (iii) premature mortality in the Kitimat airshed is likely to increase due to exposure to PM2.5 (including SFPM2.5 formed from SO_2) from the smelter. …

[35] At para. 377 of *Toews and Stannus*, the Board further stated:

> In addition, the information before the Panel regarding the risk to human health associated with the increased SO_2 emissions, including the information in the STAR and the expert evidence presented at the hearing, confirms the Director's conclusion that the risk to human health is moderate, in that it is acceptable but should be subject to monitoring to confirm that the actual impacts match those predicted. The Panel finds that this conclusion reflects a cautious and conservative approach, given the assumptions used in the STAR's dispersion modeling and the health impacts assessment. The conclusion that the human health impacts are "moderate" is very cautious given that Dr. Carlsten, an independent medical doctor and professor of medicine who reviewed the STAR, concluded that the SO_2 increases post-KMP "can be considered trivial in terms of health effects", and given that the Northern Health Authority and BC Centre for Disease Control concluded that the STAR's "approach was acceptable, the conclusions were generally consistent with the wider literature, and mitigation efforts were appropriate."

[36] In their appeals of the Permit Amendment, the appellants also expressed concerns about the EEM Plan, which had been approved by the time the appeals of the Permit Amendment were heard. The appellants requested an order declaring that the human health portion of the EEM Plan was inconsistent with the precautionary principle and was of no force and effect. After considering expert evidence from the appellants and Rio Tinto, the Board concluded as follows at para. 378 of *Toews and Stannus*,:

> … the Panel finds that it was prudent for the Director to include an informational measure for human health (i.e., expected respiratory response events) in the EEM Plan pending the approval of the CAAQs [Canadian Ambient Air Quality Standards], given that the KMP is not expected to be fully operational until 2018, and the CAAQs are expected to be published in 2016. This will still allow time for the collection of three years of monitoring data, which the CAAQs will likely require. In the alternative, the Panel finds that the Director may impose further requirements on Rio Tinto at any time, including

> if there is a demonstrated need for a human health trigger to be established in the EEM Plan before the CAAQs are approved.

[37] In addition, the Board concluded at paras. 427 - 428 of *Toews and Stannus* that the soil monitoring plan in the EEM Plan was "scientifically sound" and the KPIs for soil were "designed to be prudent, cautious, and forward-looking." Similarly, at para. 463 of *Toews and Stannus*, the Board confirmed the adequacy of the vegetation monitoring program in the EEM Plan.

[38] However, regarding its findings on the EEM Plan, the Board made the following comment at para. 70 of *Toews and Stannus*:

> Although the Panel makes certain findings in the present decision regarding the Appellants' concerns about the EEM Plan, it is important to note that this decision is not binding on any future panel that may hear the merits of the appeals regarding the EEM Plan.

Further review of the Jurisdiction Decision - BC Court of Appeal

[39] Meanwhile, Rio Tinto appealed *Unifor 1* to the BC Court of Appeal, and the case was heard on September 9, 2016.

[40] On August 18, 2017, the Court of Appeal issued its decision in *Unifor Local 2301 v. Rio Tinto Alcan Inc.*, 2017 BCCA 300 [*Unifor 2*], dismissing Rio Tinto's appeal. At para. 35, the Court agreed with the finding in *Unifor 1* that "the permit amendment here was done in two stages." At paras. 21 and 35, the Court clarified that the imposition of the EEM Plan requirements was an exercise of power under sections 14(1)(e) and 16(4)(j) of the *Act*.

[41] The Court of Appeal also found that an appeal must be focused on the particular decision under appeal. At para. 40, the Court stated:

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

[42] By a letter dated October 11, 2017, the Board contacted the parties regarding the status of the appeals.

[43] In late October 2017, the Appellants requested that the Board hold a case management teleconference, to discuss how the appeals should proceed.

The Appellants' January 31, 2018 amended grounds for appeal

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

[45] It should be noted that during 2016 - 2017, after the appeals against the Letter of Approval were filed, and after the decision in *Toews and Stannus* was

issued, the Ministry adopted new ambient air quality standards for sulphur dioxde[1]. According to Rio Tinto's submissions, the ambient air quality standards for sulphur dioxide have been incorporated into the EEM Plan, including the provincial interim standards for 2017 – 2019, and final standards for 2020 and 2025 derived from the federal Canadian Ambient Air Quality Standards ("CAAQS").

[46] 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.

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

[48] 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 Appellants 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 (SO_2), 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

[1] See: https://www2.gov.bc.ca/assets/gov/environment/air-land-water/air/reports-pub/aqotable.pdf

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.

[49] On March 2, 2018, Unifor and Ms. Stannus provided particulars for grounds 1, 2, and 4(e). On that same date, Ms. Toews advised that she agreed with Ms. Stannus' response regarding the particulars.

[50] The particulars provided by Unifor and Ms. Stannus are worded similarly, but not exactly the same. It should be noted that, in their particulars for ground 1, both Unifor and Ms. Stannus allege a breach of the section 7 *Charter* rights of "Airshed Residents", and define that phrase to mean "the Appellant, her students, and other residents of the Kitimat-Terrace airshed". Although the Panel reviewed the particulars provided by both Unifor and Ms. Stannus, only Ms. Stannus' particulars are set out below, for the sake of brevity:

> ***Ground 1*:** "The Decision to approve the Environmental Effects Monitoring Plan ('EEM Plan') is inconsistent with the rights guaranteed to the Appellant, her students, and other residents of the Kitimat-Terrace airshed ('Airshed Residents') under section 7 of the *Canadian Charter of Rights and Freedoms* (the '*Charter*')."
>
> Particular:
>
> In making the Decision, the Director failed properly or at all to protect human health of Airshed Residents, thereby depriving Airshed Residents of their right to life and their right to security of the person. Further, the Airshed Residents' rights to life and security of the person were deprived in a manner that does not accord with the principles of fundamental justice. These principles include:
>
> 1. arbitrariness;
>
> 2. gross disproportionality;
>
> 3. overbreadth;
>
> 4. vagueness; and,

5. procedural principles including the requirement for notice and a hearing when rights guaranteed under this section have been or may be infringed.

***Ground 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 *Environmental Management Act*."

Particular:

When making a discretionary decision, a decision-maker must balance the affected *Charter* protections with the statutory objectives of the relevant legislation.

The right to life under s. 7 protects a person from death or an increased risk of death imposed by state action, either directly or indirectly. The right to security of the person under s. 7 protects a person from state interference with bodily integrity.

An overarching statutory objective of sections 14 & 16 of the Act is to protect human health.

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 of the Act.

Particular 4(e)

In Ground 4, the Appellant alleges that the "Director failed properly or at all to protect human health of Airshed Residents". Subparagraphs (a) to (g) are "particulars of this failure". Particular 4(e) states:

> The Director approved an EEM Plan that exempts Rio Tinto Alcan 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.

… For greater certainty, 4(e) impugns the Director's decision to exempt Rio Tinto from mitigation requirements under the EEM Plan absent proof that the "triggering exceedances of the KPI are causally related to emissions from the KMP"; we do not impugn the validity of any other *EMA* authorizations.

Applications to strike or summarily dismiss certain grounds for appeal

[51] On February 14, 2018, the Director and Rio Tinto applied to strike or summarily dismiss some of the Appellants' grounds for appeal as amended on January 31, 2018. They request that grounds 1, 2, 3, 4(a), 4(b) and 4(c) be struck or summarily dismissed. Rio Tinto makes its application pursuant to sections 31(1)(a), (c), and/or (g) of the *Administrative Tribunals Act*. The Director makes his application pursuant to those same sections, as well as subsection (f).

[52] The Appellants oppose those applications.

Unifor's application for document disclosure

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

[54] By a letter dated February 22, 2018, the Board held that the exchange of submissions on that application will commence 14 days after the Board issues its decision regarding the Director's and Rio Tinto's applications to strike or summarily dismiss certain grounds for appeal.

Unifor's application for severance and expedited hearing

[55] 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.

[56] On March 14, 2018, Unifor applied to the Board for an order severing an issue from the remaining issues in the appeals, and an expedited hearing of that issue.

[57] In a decision dated May 15, 2018, the Board denied Unifor's application for severance and an expedited hearing (Decision No. 2014-EMA-003(c), 004(c), 005(c)).

Appellants' applications to further amend their Notices of Appeal

[58] On March 15, 2018, Ms. Stannus applied to further amend her grounds for appeal and the remedies sought in her Notice of Appeal. She seeks to add the following ground for appeal and have it become ground 3, with the previous grounds 3 and 4 becoming grounds 4 and 5:

> Subsection 16(1) of the *Act* is of no force and effect to the extent of its inconsistency with section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*"), by depriving the appellant, her students and other residents of the Kitimat-Terrace airshed ("Airshed Residents") their rights guaranteed under section 7 in a manner that is not in accordance with the principles of fundamental justice and not justifiable under section 1 of the *Charter*.
>
> Particular
>
> The words "for the protection of the environment" found in subsection 16(1) of the *Act* fail to properly or at all protect human health of Airshed Residents, thereby depriving them of their rights to life and the security of the person.
>
> The words "for the protection of the environment" found in subsection 16(1) of the *Act* are unconstitutionally vague for reasons including that they set a standard that is not intelligible, cannot provide a basis for coherent judicial interpretation, and not capable of guiding legal debate.

[59] In addition, Ms. Stannus sought to add the following requested remedies to her Notice of Appeal:

- an order under section 103(a) of the *Act* remitting the Letter of Approval back to the Director with the direction that the words "for the protection of the environment" under subsection 16(1) of the *Act* shall be read in a manner consistent with the rights guaranteed under section 7 of the *Charter*;
- alternatively, an order under subsection 24(1) of the *Charter* remitting the decision back to the Director with the direction that the words "for the protection of the environment" under subsection 16(1) of the *Act* shall be read in a manner consistent with the rights guaranteed under section 7 of the *Charter*; or,
- in the further alternative, an order pursuant to subsection 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Constitution Act, 1982*"), remitting the decision back to the Director with the direction that the words "for the protection of the environment" under subsection 16(1) of the *Act* shall be read in a manner consistent with the rights guaranteed under section 7 of the *Charter*;
- and such other relief as counsel may advise.

[60] On March 27, 2018, Ms. Toews and Unifor adopted Ms. Stannus' application, and requested similar amendments to their Notices of Appeal.

[61] In addition, Unifor sought to add the following remedies to its Notice of Appeal:

> In the further alternative, an order under subsection 24(1) of the *Charter* and/or the principles of statutory interpretation remitting the decision back to the Director with the direction that the words "for the protection of the environment" under subsection 16(1) of the *Act* shall be read to include the following legal requirements:
>
> (i) the permit or amendment must serve a pressing and substantial public interest;
>
> (ii) the permit or amendment cannot be issued unless risks to individual life and health are as mitigated or reduced as is reasonably practicable; and
>
> (iii) the public interest in granting the permit or amendment must significantly outweigh the post-mitigation harm and risk of harm to individual life and health.

[62] The Director and Rio Tinto oppose the applications to amend the Notices of Appeal.

ISSUES

[63] The Panel has addressed the following issues in this decision:

1. Whether the disputed grounds for appeal should be struck or summarily dismissed.
2. Whether the Board should grant the Appellants' applications to further amend their Notices of Appeal.

RELEVANT LEGISLATION

[64] The BC Court of Appeal determined in *Unifor 2* that the imposition of the EEM Plan requirements was an exercise of power under sections 14(1)(e) and 16(4)(j) of the *Act*. Those sections are provided below:

Permits

14 (1) A director may issue a permit authorizing the introduction of waste into the environment subject to requirements for the protection of the environment that the director considers advisable and, without limiting that power, may do one or more of the following in the permit:

...

(e) specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste that the permittee must fulfill;

...

Amendment of permits and approvals

16 (1) A director may, subject to section 14 (3), this section and the regulations, for the protection of the environment,

(a) on the director's own initiative if he or she considers it necessary, or

(b) on application by a holder of a permit or an approval,

amend the requirements of the permit or approval.

...

(4) A director's power to amend a permit or an approval includes all of the following:

...

(j) changing or imposing any procedure or requirement that was imposed or could have been imposed under section 14 *[permits]* or 15 *[approvals]*.

[65] In section 1 of the *Act*, "environment" is defined as "air, land, water and all other external conditions or influences under which humans, animals and plants live or are developed".

[66] Section 31 of the *Administrative Tribunals Act* applies to the Board pursuant to section 93.1 of the *Act*, and states as follows:

Summary dismissal

31 (1) At any time after an application is filed, the tribunal may dismiss all or part of it if the tribunal determines that any of the following apply:

(a) the application is not within the jurisdiction of the tribunal;

> ...
>
> (c) the application is frivolous, vexatious or trivial or gives rise to an abuse of process;
>
> ...
>
> (f) there is no reasonable prospect the application will succeed;
>
> (g) the substance of the application has been appropriately dealt with in another proceeding.

[67] Section 1 of the *Administrative Tribunals Act* defines "application" as follows:

> **"application"** includes an appeal, a review or a complaint but excludes any interim or preliminary matter or an application to the court

[68] Thus, for the Board's purposes, the word "application" in section 31 of the *Administrative Tribunals Act* effectively means "appeal".

[69] Sections 1 and 7 of the *Charter* state as follows:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> ...
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

DISCUSSION AND ANALYSIS

1. Whether the disputed grounds for appeal should be struck or summarily dismissed.

a. General submissions and legal tests to be applied

Rio Tinto's submissions

[70] Rio Tinto submits that grounds 1, 2, 3, 4(a), 4(b) and 4(c) are outside the scope of both the Board's jurisdiction and the appealed decision, or have been appropriately dealt with in another proceeding. In addition, Rio Tinto submits that many of those grounds were addressed in *Toews and Stannus*, and the Appellants' attempt to re-litigate them is an abuse of process. Rio Tinto requests summary dismissal of those grounds pursuant to sections 31(1)(a), (c), and/or (g) of the *Administrative Tribunals Act*.

[71] Regarding the scope of the appeals, Rio Tinto submits that *Unifor 2* states that an appeal must be "narrowly focussed" on the decision under appeal, which is the Letter of Approval in this case. Challenges to the quantity of sulphur dioxide emissions allowed under the Permit Amendment, and any issues ancillary to that, are outside the scope of these appeals.

[72] Rio Tinto argues that the Board's decision in *Thomas H. Coape-Arnold v. Director, Environmental Management Act* (Decision No. 2017-EMA-011(a), November 6, 2017) [*Coape-Arnold*], at paras. 40 – 41, is consistent with this approach:

> The Panel agrees with the Director that the Board's jurisdiction on this appeal is governed by the particular decision that was appealed within the 30-day appeal period. That decision is the Amendment.
>
> Further, the Panel agrees that an appeal of the Amendment does not invite a wholesale review of the original decision to issue the permit, nor the terms and conditions of that original permit. Accordingly, the Panel agrees that the grounds for appeal must relate to, and be limited to, the Amendment. …

[73] In addition, Rio Tinto submits that the approved EEM Plan arose from section 4.2.5 of the Permit Amendment, which states that the EEM Plan would address "monitoring methods and actions" and "impact threshold criteria". Rio Tinto maintains, therefore, that only those issues are within the scope of the present appeals. The EEM Plan is a monitoring and information gathering tool, and did not authorize the increase in sulphur dioxide emissions.

[74] Regarding the test for striking all or part of an appeal pursuant to section 31(1)(a) of the *Administrative Tribunals Act*, Rio Tinto submits that the test is not whether it is "plain and obvious that the appeal, or ground for appeal, is beyond the statutory jurisdiction of the Board", as stated by the Board in *Cobble Hill Holdings Ltd. v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-017(a), 019(a), 020(a), 021(a), February 5, 2014) [*Cobble Hill*]. Rio Tinto maintains that although the Board has applied the test in *Cobble Hill* to subsequent applications to strike, that test was developed before section 31(1) of the *Administrative Tribunals Act* applied to the Board. Rio Tinto argues that the proper question is whether the "substance of the appeals" is within the tribunal's jurisdiction, as stated by the Forest Appeals Commission in *Canadian Forest Products Ltd. v. Government of British Columbia* (Decision Nos. 2017-FA-001(a) to 008(a), June 22, 2017 [*Canfor*]). Rio Tinto submits that the test in *Canfor* was developed with section 31(1)(a) of the *Administrative Tribunals Act* in mind.

[75] Regarding sections 31(1)(c) and (g) of the *Administrative Tribunals Act*, Rio Tinto submits that an attempt to re-litigate a matter that has been appropriately dealt with in another proceeding may amount to an abuse of process. Regarding what constitutes an abuse of process, Rio Tinto maintains that the test from *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 [*CUPE*] should apply to the present applications. Rio Tinto notes that the *CUPE* test was set out in *Revolution Organics, Limited Partnership. v. Director, Environmental Management Act* (Decision No 2017-EMA-012(a), September 27, 2017) [*Revolution*]. Although the Board did not need to apply the *CUPE* test in that case, the Board quoted portions of *CUPE* at para. 46 of *Revolution*:

> 37. In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.),

at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
>
> One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.
>
> [underlining added by the Court]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. …

[underlining added in Rio Tinto's submissions]

38. … The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):

> The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[76] Regarding the Board's power to dismiss all or part of an appeal where its substance "has been appropriately dealt with in another proceeding", Rio Tinto argues that the Supreme Court of Canada interpreted similar language in the *Human Rights Code* when it decided *British Columbia (Workers' Compensation Board) v. Figiola*, 2011 SCC 52 [*Figliola*], at para. 47:

> "Relitigation in a different forum" is exactly what the complainants in this case were trying to do. Rather than challenging the Review Officer's decision through the available review route of judicial review, they started fresh proceedings before a different tribunal in search of a more favourable result. This strategy represented, as Stromberg-Stein J. noted, a "collateral appeal" to the Tribunal (para. 52), the very trajectory that s. 27(1)(f) and the common law doctrines were designed to prevent:

> ... this case simply boils down to the complainants wanting to reargue the very same issue that has already been conclusively decided within the same factual and legal matrix. The complainants are attempting to pursue the matter again, within an administrative tribunal setting where there is no appellate authority by one tribunal over the other. [para. 54]
>
> [underlining added in Rio Tinto's submissions]

[77] Rio Tinto submits that the present appeals should be restricted to issues that did not arise, or could not have arisen, in the appeals of the Permit Amendment.

The Director's submissions

[78] The Director submits that grounds 1, 2, 3, 4(a), 4(b) and 4(c) of the Appellants' January 31, 2018 grounds for appeal should be summarily dismissed pursuant to section 31(1)(a), (c), (f), and (g) of the *Administrative Tribunals Act*. The Director submits that it is critical to recognize the difference between the Permit Amendment, which authorized the increase in sulphur dioxide emissions, and the approval of the EEM Plan, which provides a means for monitoring and mitigating the potential effects of those emissions.

[79] Regarding section 31(1)(a) of the *Administrative Tribunals Act*, the Director submits that the question of whether the Board has jurisdiction involves determining: (i) whether the appeal (or the part of the appeal) relates to the appealed decision; and (ii) whether the appeal (or the part of the appeal) raises questions and seeks remedies that the Board is empowered to answer and grant. The Director submits that the words "plain and obvious" do not appear in section 31, and most of the specific powers under section 31 are not analogous to striking pleadings. The Director submits that the question of whether the Board has jurisdiction over a particular ground for appeal is a threshold question of law. Although *Unifor 2* confirmed that the Letter of Approval is an appealable decision, the Court's reasons provide that the present appeals should be narrowly construed, and should not open up the existing permit to attacks at large. Thus, the Board has no jurisdiction to revisit the Permit Amendment.

[80] Regarding subsection 31(1)(c) of the *Administrative Tribunals Act*, the Director adopts Rio Tinto's submissions with respect to abuse of process. The Director argues that a ground for appeal that amounts to a collateral attack, or otherwise seeks to re-adjudicate issues that were previously decided by the Board, is an abuse of process. In addition, the Director argues that an abuse of process may arise if an appeal is advanced in an unfair manner.

[81] Regarding subsection 31(1)(f) of the *Administrative Tribunals Act*, the Director submits that the Board should conduct a preliminary assessment of the likelihood of success of a ground for appeal based on: the likely available evidence; the legal arguments; and, the available remedies. In terms of the likely available evidence, the Director submits that the question is whether the evidence takes the case out of the realm of conjecture (*Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, at paras. 22 - 26) [*Berezoutskaia*]. The Director also refers to the application of that test in *Chiang v. British Columbia (Human Rights Tribunal)*, 2014 BCSC 1859 [*Chiang*]. In terms of the legal arguments, the

Director submits that the assessment could include an evaluation of whether the evidence that will be offered could ultimately support the legal arguments advanced. Similarly, if the remedies sought do not logically proceed from the facts or legal arguments, the appeal (or ground for appeal) is bound to fail.

[82] The Director submits that subsection 31(1)(g) of the *Administrative Tribunals Act*, which contemplates dismissal where the ground for appeal has been adequately dealt with in another proceeding, is essentially an expansion of the principles of issue estoppel and *res judicata*. The Board may dismiss issues that would require it to revisit a previous decision on related points.

Ms. Stannus' submissions

[83] Ms. Stannus submits that the main question in the present appeals is whether the EEM Plan adequately protects human health and the environment. Ms. Stannus argues that the EEM Plan is of "considerable importance", as stated in *Unifor 2*, because the increased emissions authorized under the Permit Amendment become permanent if the monitoring data confirms that the increased emissions are not causing unacceptable impacts. Ms. Stannus argues that the EEM Plan was intended to reduce the uncertainties of predictions made in the STAR and in the Permit Amendment process, and it provides a mechanism for implementing mitigation measures if unacceptable health impacts are detected. She maintains that if the EEM Plan is inadequate for any of those purposes, the approval of the EEM Plan could lead to unacceptable adverse health impacts for the Appellants and other residents of Kitimat.

[84] Ms. Stannus argues that section 31(1)(a) of the *Administrative Tribunals Act* is irrelevant here, because the courts have confirmed that the Board has jurisdiction to hear these appeals. Alternatively, Ms. Stannus submits that the Board should apply the test from *Cobble Hill*. Although that test was developed before section 31 of the *Administrative Tribunals Act* applied to the Board, she argues that section 31(1)(a) simply codified the Board's common law power to summarily dismiss claims for lack of jurisdiction. Ms. Stannus submits that the test in *Canfor* was meant to address whether an appealed decision is within a tribunal's jurisdiction, and not whether a particular ground for appeal should be struck for lack of jurisdiction. In the present case, the courts have confirmed that the Letter of Approval is an appealable decision within the Board's jurisdiction, and the applications only seek to strike certain grounds for appeal. In any event, Ms. Stannus submits that all of the impugned grounds for appeal are within the Board's jurisdiction.

Unifor's submissions

[85] Unifor submits that the applications to strike reflect a refusal to accept the reasons in *Unifor 2*. In addition, Unifor notes that the Board stated in para. 71 of *Toews and Stannus* that its findings with respect to the EEM Plan were "not binding on any future panel that may hear the merits of the appeal regarding the EEM Plan". Unifor submits that it is implausible to assert that the present appeals are an abuse of process or an attempt to re-litigate the Permit Amendment.

Rio Tinto's reply submissions

[86] Rio Tinto submits that the Permit Amendment, which was confirmed in *Toews and Stannus*, forms part of the smelter's permit and may not be attacked in the present appeals. While there is necessarily some overlap between the content of the Permit Amendment and that of the approved EEM Plan due to the Director's staged decision-making process, the present appeals should not raise issues that were, or should have been, addressed in the appeals of the Permit Amendment.

[87] In particular, Rio Tinto maintains that the Board could not have confirmed the Permit Amendment, and the associated increase in emissions, if the Permit Amendment did not contain sufficient protection for human health and the environment. Rio Tinto argues that, although the Board confirmed the Permit Amendment based on predicted effects rather than actual effects from the increased emissions, the EEM Plan is a tool for determining whether the actual effects are materially worse than predicted. Therefore, the scope of the appeals should be limited to whether the EEM Plan fulfills that objective. Rio Tinto submits that any ground for appeal that addresses the increase in emissions, or assumes that the permitted emissions will cause harm to Kitimat residents, should be barred. The current appeals should focus on the adequacy of the monitoring conditions and impact threshold criteria imposed by the EEM Plan.

[88] Rio Tinto accepts that the Appellants may challenge the approval of the EEM Plan, even insofar as *Toews and Stannus* contains findings about the EEM Plan, but Rio Tinto objects to any attempt to re-litigate issues that arise from the Permit Amendment rather than the EEM Plan.

[89] Rio Tinto notes that, even if its application is successful, the Appellants would still be able to challenge whether the EEM Plan adequately protects human health on the basis of grounds 4(d) through (g).

The Director's reply submissions

[90] The Director maintains that in *Unifor 2*, the Court described the decision to impose the EEM Plan as "the approval and imposition of monitoring requirements", that was "not concerned with the type or amount of waste emissions allowed" (*Unifor 2*, at paras. 39 and 41).

[91] In addition, the Director notes that he retains the ability to amend the smelter's permit at any time, and he may do so as a result of information gained through the annual reviews of the emissions and monitoring results, and the comprehensive review in 2019. He submits that the EEM Plan requires him to turn his mind to whether the impacts of the increased emissions are unacceptable, and if so, he may exercise his discretion to revert to the previous sulphur dioxide emission limit of 27 Mg/d or some other limit.

[92] Regarding the Board's findings regarding the EEM Plan in *Toews and Stannus*, the Director submits that even if those findings are not binding on future panels of the Board, they are not irrelevant. Subsequent panels of the Board are free to find *Toews and Stannus* to be informative or persuasive, or find that the substance of the present appeals was appropriately dealt with in the previous appeal proceeding.

The Panel's findings

The nature of the decision under appeal

[93] In *Unifor 2*, the Court confirmed that the Letter of Approval is a "decision" as defined in section 99 of the *Act* that may be appealed to the Board. However, this does not mean that parts of the present appeals, including specific grounds for appeal, may not be dismissed under section 31(1) of the *Administrative Tribunals Act*.

[94] Based on the findings in *Unifor 2*, it is clear that the present appeals must be "narrowly focussed on the particular impugned decision"; namely, the Letter of Approval by which the Director approved the EEM Plan. It is also clear from *Unifor 2* that the appeals of the Letter of Approval do not lay the smelter's existing permit "open to attacks at large." Consequently, the present appeals cannot challenge the merits of the decision to increase the sulphur dioxide emission limit as authorized under the Permit Amendment, which was confirmed in *Toews and Stannus*.

[95] When considering the nature of the appealed decision, it is also important to consider the statutory powers that were exercised in making that decision. *Unifor 2* clarified that the imposition of the EEM Plan requirements pursuant to the Letter of Approval was an exercise of power under sections 14(1)(e) and 16(4)(j) of the *Act*, and was the second stage in a staged decision-making process. Together, sections 14(1)(e) and 16(4)(j) empowered the Director to amend the smelter's permit "for the protection of the environment", and particularly, to "specify procedures for monitoring and analysis, and procedures or requirements respecting the handling, treatment, transportation, discharge or storage of waste…". Consistent with the powers in those sections, *Unifor 2* characterized the approval of the EEM Plan as a permit amendment "which incorporated specific monitoring and analysis procedures into the permit" (*Unifor 2*, para. 22), and "the approval and imposition of monitoring requirements" that did not change the type or amount of waste emissions allowed (*Unifor 2*, at paras. 39 and 41).

[96] Although the Director's power to impose the EEM Plan requirements came from sections 14 and 16 of the *Act*, and not from the Permit Amendment, the language in section 4.2.5 of the Permit Amendment contains direction about what the Director required Rio Tinto to do in terms of preparing and implementing the EEM Plan. As stated in section 4.2.5 of the Permit Amendment, 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.

[97] A review of the approved EEM Plan (as set out in the Background of this decision) reveals that it seeks to address the criteria described in section 4.2.5 of the Permit Amendment. Although the Appellants challenge the adequacy of the EEM Plan, there is no question that the EEM Plan itself has no effect on the types or amounts of emissions authorized under the smelter's permit. The increased sulphur dioxide emissions were authorized in the Permit Amendment, and the

predicted impacts of the increased sulphur dioxide emissions on human health and the environment were thoroughly considered and addressed in *Toews and Stannus*. A key purpose of the EEM Plan is to try to find out whether the actual impacts of the increased sulphur dioxide emissions align with the predicted impacts. If the monitoring program reveals that unacceptable adverse impacts are occurring based on the KPIs in the EEM Plan, mitigation may be triggered. Mitigation could include a further amendment to the smelter's permit. Any amendment to the permit that the Director may make following a review of the results generated by the EEM Plan would be a new "decision" under the *Act* that may be appealed to the Board.

[98] Accordingly, the present appeals must be narrowly focused on, and limited to, the subject matter of the EEM Plan as approved in the Letter of Approval, and particularly, the EEM Plan's methods and procedures for monitoring and analyzing actual sulphur dioxide emissions, and the impact threshold criteria that may trigger mitigation.

Test for striking or summarily dismissing grounds for appeal pursuant to section 31(1)(a) of the Administrative Tribunals Act

[99] In *Cobble Hill*, the Board established a test for striking a ground for appeal from a Notice of Appeal filed under the *Act*. The Board noted that, to determine whether a ground for appeal is within its jurisdiction, the first step is to consider the relevant statutory provisions. The Board then applied the following test at para. 50 of *Cobble Hill*:

> … whether, based upon a generous reading, it is plain and obvious that the appeal, or the ground for appeal, is beyond the statutory jurisdiction of the Board.

[100] In *Fitzpatrick v. British Columbia (Ministry of Environment)*, (Decision No. 2013-WAT-004(a), June 16, 2014), the Board explained at para. 29 the reasons for giving a generous reading of a ground for appeal when deciding an application to strike:

> The Panel also notes that many of the paragraphs at issue contain multiple points and arguments, some of which are of debatable relevance. Unfortunately, the nature of an application to strike at this juncture forces a preliminary determination of relevancy. Given the potentially serious consequences to an appellant that may flow from the Board's decision on an application to strike (i.e., it can limit the scope of an appeal and the arguments to be made), as stated in *Cobble Hill*, the test establishes a high threshold and the paragraphs should be read "as generously as possible". To achieve the latter, the Panel will attempt to evaluate the main theme or thrust of the disputed paragraphs, rather than focusing on the minutiae, in order to determine whether it is plain and obvious that the paragraphs are beyond the Board's jurisdiction, or are clearly irrelevant to the appeal. If it is not plain and obvious that the paragraph should be struck, the Applicants' jurisdictional concerns, and their concerns with factual and legal relevancy, will have to be raised again and addressed in the usual way during the hearing.
>
> [underlining added]

[101] The Board continued to apply the *Cobble Hill* test after section 31 of the *Administrative Tribunals Act* applied to the Board[2], including in recent decisions such as *Coape-Arnold* and *Pickford et al v. Director, Environmental Management Act*, (Group File 2016-EMA-G05, March 29, 2017). In the latter case, the Board summarized the *Cobble Hill* test at para. 118:

> In summary, as stated in *Cobble Hill*, a high threshold will be applied to an application to strike. Unless it is plain and obvious, on a general reading of a ground for appeal, that the Board does not have jurisdiction over the matter or that the ground is completely irrelevant to the subject of the appeal, the Board should hear the evidence and argument in a hearing of the merits. An application to strike should only be granted in clear cases. If, from a jurisdictional perspective, a ground for appeal is "borderline", it would not be fair to strike it in a preliminary application: such matters must be determined at the hearing of the merits where all parties have an opportunity to present evidence and further explain their points.
>
> [underlining added]

[102] Although the test in *Cobble Hill* was developed before section 31 of the *Administrative Tribunals Act* applied to the Board, the Panel disagrees with Rio Tinto that the test in *Canfor* is more appropriate in the present case. Unlike the present case, the question in *Canfor* was not whether a specific ground for appeal ought to be struck or dismissed for lack of jurisdiction. In *Canfor*, the Respondent sought to strike the appeals in their entirety on the basis that the appealed decisions were not decisions that may be appealed to the Forest Appeals Commission. Thus, in *Canfor*, the Respondent's application under section 31(1) of the *Administrative Tribunals Act* raised a threshold question of jurisdiction regarding the types of decisions that may be appealed to the Forest Appeals Commission, and whether that tribunal could hear the appeals at all. In those circumstances, it was appropriate to consider whether "the substance of the appeals" was within that tribunal's jurisdiction.

[103] Conversely, in the present case, the courts have confirmed that the Letter of Approval is a decision that may be appealed to the Board. Also, there is no question that the Appellants have standing as "persons aggrieved" under section 100 of the *Act* to appeal the Letter of Approval. As in *Coape-Arnold*, the present applications seek to strike or dismiss certain grounds for appeal for lack of jurisdiction (among other things). The Forest Appeals Commission recognized this important distinction at paras. 40 - 41 of *Canfor*, where it stated:

> Although both an application to summarily dismiss an appeal and an application to strike grounds for appeal may result in decisions with significant impacts, the Panel agrees with the Government that, based upon the case law presented, the courts have not applied the "plain and obvious" test to both types of applications. Rather, when a claim or an appeal is accepted as being

---

[2] On December 17, 2015, the *Administrative Tribunals Statutes Amendment Act*, 2015, S.B.C. 2015, c. 10, was brought into force by regulation. It included amendments that applied many sections of the *Administrative Tribunals Act* to the Board, including section 31.

> within the jurisdiction of the court or tribunal generally, it will only interfere with the litigant's pleadings or grounds for appeal if the high threshold of the plain and obvious test is met. In other words, when the very issue to be decided is whether the initiating proceeding – in this case the appeal - is within jurisdiction, or falls within one of the express grounds for summary dismissal, the question is whether, as a matter of law, the appeal is within jurisdiction or falls within one of the other section 31(1) categories.
>
> Although Canfor submits that the Environmental Appeal Board has applied the plain and obvious test to section 31(1) of the *ATA*, this is not correct. At paragraph 42 of *Cobble Hill*, the Board expressly states that section 31(1) of the *ATA* did not (at that time) apply to the Board. Further, the Board adopted and applied that test to consider whether the grounds for appeal were within the Board's jurisdiction; it was not a threshold jurisdictional issue of whether the decision sought to be appealed was, itself, appealable. In the present case, the Government's jurisdictional argument is that, in substance, Canfor is really trying to appeal the section 1.5.2 direction, not the section 105(1) redetermination.
>
> [underlining added]

[104] The Panel agrees with that reasoning. Given that the courts have confirmed that the Letter of Approval is a decision that may be appealed to the Board, and there has been no challenge to the Appellants standing under the *Act* to appeal that decision, the Panel finds that the test in *Cobble Hill* should be applied for the purposes of deciding whether to strike or dismiss the impugned grounds for appeal for lack of jurisdiction pursuant to section 31(1)(a) of the *Administrative Tribunals Act*.

[105] However, the Panel agrees with the Director that, in deciding whether the Board has jurisdiction over a ground for appeal in the context of an application under section 31(1)(a) of the *Administrative Tribunals Act*, it is also relevant to consider whether the ground for appeal, if successful, may lead to a remedy that the Board is empowered to grant. The Oil and Gas Appeal Tribunal recently considered this question, and concluded that even if there are grounds for appeal that are within a tribunal's jurisdiction, an appeal (or ground for appeal) may be summarily dismissed for lack of jurisdiction if the appellants do not seek a remedy that is within the tribunal's jurisdiction to grant (*Olaf and Francis Jorgensen v. Oil and Gas Commission*, Decision No. 2017-OGA-023(c), February 1, 2018, at para. 64).

[106] Thus, there are two separate but related questions that the Board may need to consider when deciding an application under section 31(1)(a) of the *Administrative Tribunals*: whether it is plain and obvious that the Board has no jurisdiction over the ground, or the ground is completely irrelevant to the subject of the appeal; and, whether the remedy sought with respect to the ground for appeal is within the Board's jurisdiction.

Test for striking or summarily dismissing a ground for appeal as an abuse of process (section 31(1)(c) of the Administrative Tribunals Act)

[107] As stated in para. 37 of *CUPE*, "the doctrine of abuse of process engages 'the inherent power of the court to prevent the misuse of its procedure, in a way that would … bring the administration of justice into disrepute'". Although the Board does not have the inherent powers of a superior court, the Board, as an administrative tribunal, has common law procedural powers to manage its own procedures in a manner that is consistent with the principles of procedural fairness, in addition to its statutory procedural powers. As stated in *Unifor 2* at para. 38:

> … The tribunal undoubtedly has the power, as master of its own procedures, to ensure that appeals before it proceed efficiently and are not abusive of the process. It can, for instance, order the consolidation of appeals, or schedule appeals in a manner and in an order that it considers efficient. It can, as long as it did not violate the requirements of procedural fairness, direct that appeals be heard in a more summary fashion than usual where issues have already been fully aired in previous proceedings.
>
> [underlining added]

[108] Further, the Board has broad statutory powers under the *Administrative Tribunals Act* to control its own procedures, in addition to its summary dismissal powers under section 31 of that Act. For example, section 14(c) of the *Administrative Tribunals Act*, which applied to the Board as of December 17, 2015, states that "[i]n order to facilitate the just and timely resolution of an [appeal]", the Board, at the request of a party or on its own initiative, "may make any order … in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings." In the Board's recent decision in *Unifor Local 2301 v. Director, Environmental Management Act* (Decision Nos. 2014-EMA-003(c), 004(c), 005(c), May 15, 2018), the Board found at para. 40 that an order under section 14 must, at least, facilitate the just and timely resolution of an appeal, and further considerations may be relevant depending on the circumstances. Thus, the Board has broad discretion to control its own proceedings, including making orders to prevent abuses of the appeal process, regardless of whether the power stems from the common law or the statutory powers provided under the *Administrative Tribunals Act*.

[109] At para. 37, *CUPE* states that the doctrine of abuse of process is a "flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel." Para. 37 further states that:

> … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.
>
> [underlining added]

[110] Based on the principles expressed in *CUPE* regarding the doctrine of abuse of process, and in *Unifor 2* regarding the Board's common law powers to manage its own procedures in accordance with the principles of procedural fairness, the Panel finds that the Board may take a flexible approach when considering an application under section 31(1)(c) of the *Administrative Tribunals Act*. When deciding whether allowing the ground for appeal to proceed to a full hearing on the merits would amount to an abuse of the appeal process, the Board may consider factors such as whether the matter has been "fully aired in previous proceedings" as stated in *Unifor 2*, or whether allowing the ground to proceed would "violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice" as stated in *CUPE*.

Test for striking or summarily dismissing a ground for appeal on the basis that its substance has previously been dealt with in another proceeding (section 31(1)(g) of the Administrative Tribunals Act)

[111] The parties noted that there is potential for overlap between sections 31(1)(c) and (g) of the *Administrative Tribunals Act*. If the substance of a ground for appeal has been argued and decided in previous proceedings, it may be summarily dismissed as an abuse of process (subsection (c)), and/or on the basis that "the substance of the [appeal or part of the appeal] has been appropriately dealt with in another proceeding" (subsection (g)), depending on the circumstances. However, the parties did not provide submissions on the legal test or relevant considerations with respect to summary dismissal under section 31(1)(g) of the *Administrative Tribunals Act*.

[112] The *Administrative Tribunals Act* does not define "proceeding". However, the Panel finds that the word "proceeding" is used in that Act in ways that imply that "proceeding" includes hearings and other processes conducted by a tribunal for the purpose of carrying out its mandate (sections 7, 11(2)(p) and (s), 14(c), 20, 26(7) and (8), 35, 40, 46, 48, 49(3), 55(2), 61(2)(d)), and court actions (sections 29, 47(2), 54(2), 55(1), 56(2)) including judicial reviews (sections 58(2), 59(1)).

[113] Also, the phrase "substance of the application" (i.e., substance of the appeal or the part of the appeal) in section 31(1)(g) of the *Administrative Tribunals Act* is not defined in that Act. Black's Law Dictionary defines "substance" as meaning "the essence of something; the essential quality of something, as opposed to its mere form". In the context of section 31(1)(g), this could be interpreted to mean that the impugned appeal, or ground of appeal, need not be exactly the same in both the previous proceeding and the present proceeding, but that the essence or essential qualities of the question or issue raised by the appeal, or the ground of appeal, is the same in both proceedings.

[114] Similarly, the phrase "appropriately dealt with" in section 31(1)(g) of the *Administrative Tribunals Act* is not defined in that Act. The Oxford dictionary defines "appropriately" as meaning "in a manner that is suitable or proper in the circumstances." The Panel notes that section 31(1)(g) does not state that the substance of the appeal, or the substance of the ground of appeal, has been "conclusively" or "finally" dealt with in another proceeding.

[115] The Board has previously applied the doctrine of res judicata, including the branch of that doctrine known as issue estoppel, to prevent the re-litigation of issues that the Board has previously decided (for example, see: *Revolution Organics, Limited Partnership v. Director, Environmental Management Act*, Decision No. 2017-EMA-012(a), September 27, 2017, at paras. 66 – 73; *Dustin Kovacvich v. Regional Manager*, Decision No. 2014-WIL-021(a), January 26, 2014 [*Kovacvich*], at paras. 85 - 90; *Alpha Manufacturing Inc. et al v. Assistant Regional Waste Manager*, Appeal No. 99-WAS-30, February 3, 2000 [*Alpha*], at pages 9 – 11).

[116] The principle underlying the doctrine of res judicata is that, subject to certain exceptions, the decision of a court or tribunal must be treated as final and conclusive, and may not be questioned or attacked in subsequent proceedings. Issue estoppel is a branch of the doctrine of res judicata, and is intended to preclude re-litigation of issues that have been determined in a prior proceeding. The Board discussed the doctrine in *Kovacvich* at paras. 86 - 87:

> Res judicata (and issue estoppel) generally apply where the issue in dispute has been decided in a prior proceeding, where the decision in that proceeding was final, and where the parties to both proceedings are the same (*Danyluk v Ainsworth Technologies Inc.,* 2001 S.C.J. No. 46 (Q.L.); 2001 SCC 44). Res judicata applies not only to the matters expressly addressed by the court or tribunal in the prior decision, but to all matters which were properly part of the prior proceeding and which were or could have been raised. For that reason, the fact that the Board did not, in the Prior Appeals, specifically address the potential unfairness of a new sealed tender and written proposal process due to the disclosure of Mr. Douglas' confidential information, would not preclude the application of res judicata.
>
> Application of res judicata is subject to an over-riding requirement of fairness (*Penner v Niagara (Regional Police Services Board),* 2013 S.C.J. No. 19 (Q.L.).
> ...
>
> [underlining added]

[117] The Board has previously stated that issue estoppel may apply even if the grounds for appeal are not exactly the same in both proceedings, and even if the parties in both proceeding are not exactly the same but their privies were involved in both proceedings. At page 11 of *Alpha*, the Board applied the doctrine of issue estoppel on that basis:

> The Panel finds that the doctrine of issue estoppel applies to the boundary issue. The Board's 1996 decision was final and conclusive regarding this issue. Mr. Bauer and Ms. Anderson were involved in that appeal as Alpha's principles, and were owners and officers or directors of the other Appellants at that time. Consequently, Mr. Bauer and Ms. Anderson participated in that appeal as privies of the other Appellants. Although the grounds for appeal are not exactly the same in these two appeals, the Order now under appeal flows from the orders involved in the 1996 appeal. In any event, since different causes of action do not bar the application of issue estoppel, neither would different grounds for appeal. Finally, the Panel finds that no over-riding question of

> fairness requires a re-hearing of this issue, since the Appellants have provided no new evidence relating to this matter.
>
> [underlining added]

[118] It is notable that, in contrast to the requirements of issue estoppel, subsection 31(1)(g) does not state that the parties, or their privies, must have been the same in both proceedings.

[119] In the absence of submissions from the parties regarding the test or relevant considerations when applying section 31(1)(g) of the *Administrative Tribunals Act*, the Panel takes some guidance from the Board's previous decisions regarding the doctrines of res judicata and issue estoppel, given that the objective of section 31(1)(g) of the *Administrative Tribunals Act* appears to be similar to that of the doctrine of res judicata: preventing the re-litigation of matters that have been previously decided by the tribunal or the courts. However, the decisions in which the Board applied the doctrine of res judicata, including issue estoppel, did not discuss the language in section 31(1)(g) of the *Administrative Tribunals Act*, which does not contain the same requirements as res judicata or issue estoppel. For these reasons, the Panel finds that the language in subsection 31(1)(g) of the *Administrative Tribunals Act* provides the Board with broader discretion than the tests for res judicata or issue estoppel.

Test for striking or summarily dismissing a ground for appeal on the basis there is no reasonable prospect it will succeed (section 31(1)(f) of the Administrative Tribunals Act)

[120] Regarding the test to be applied when considering an application under section 31(1)(f), the Director cited *Berezoutskaia* and *Chiang*. The Appellants did not challenge the applicability of the test set out in those cases.

[121] In *Berezoutskaia*, the Court of Appeal reviewed the Human Rights Tribunal's decision to dismiss a complaint under section 27(1)(c) of the *Human Rights Code*, which provided that "all or part of the complaint" may be dismissed at any time if "there is no reasonable prospect that the complaint will succeed". At para. 22 of *Berezoutskaia*, the Court agreed with the Tribunal's approach, which involved a preliminary assessment of the evidence "in order to determine whether that evidence warrants going forward to the hearing stage". At paras. 24 – 26, the Court confirmed that the evidentiary threshold in such circumstances is "whether the evidence takes the case 'out of the realm of conjecture'".

[122] Similarly, in *Chiang*, the BC Supreme Court confirmed that the Human Rights Tribunal applied the correct test when assessing an application to dismiss a complaint on the basis of no reasonable prospect of success. At paras. 40 – 43 of *Chiang*, the Court found that the Tribunal's decision set out the relevant legal principles, and the Court quoted portions of the Tribunal's decision:

> [12] As set out in more detail in *Rajigadu v. UBC and others*, 2012 BCHRT 7, 2012 BCHRT 7, paras. 74-78, consideration of an application under s. 27(1)(c) involves an assessment, on the whole of the material before the Tribunal, whether it takes the complaint "out of the realm of conjecture", or whether there is "no reasonable prospect that findings of fact that would support the

> complaint could be made on a balance of probabilities after a full hearing of the evidence".
>
> [13] Although the Tribunal does not find facts on an application to dismiss, it may consider conflicting material, even that given by affidavit, as part of its assessment of whether a complaint has no reasonable prospect of success: *Evans v. University of British Columbia*, 2008 BCSC 1026, 2008 BCSC 1026.
>
> [14] On an application under s. 27(1)(c), the burden is not on the complainant to establish a *prima facie* case. Rather, the burden is on the respondents to show that she has no reasonable prospect of success in proving her complaint: *Stonehouse v. Elk Valley Coal (No. 2)*, 2007 BCHRT 305.
>
> [underlining added]

[123] The Panel finds that, given the similar wording in section 31(1)(f) of the *Administrative Tribunals Act* and section 27(1)(c) of the *Human Rights Code*, and in the absence of any arguments to the contrary from the Appellants, the test in *Berezoutskaia* and *Chiang* is equally applicable to applications for summary dismissal under section 31(1)(f) of the *Administrative Tribunals Act*. Thus, the question is whether the evidence takes the impugned ground for appeal "out of the realm of conjecture", such that the evidence justifies allowing that ground to be heard at a full hearing of the merits. The onus is on the applicant for dismissal to show that there is "no reasonable prospect that findings of fact that would support the [ground for appeal] could be made on a balance of probabilities after a full hearing of the evidence".

b. Whether grounds 1 and/or 2 should be struck or summarily dismissed

[124] Grounds 1 and 2, and the particulars for those grounds, are set out in the Background of this decision and are reproduced here for convenience:

1. The Decision [i.e., the Letter of Approval] to approve the EEM Plan is inconsistent with the rights guaranteed to the Appellants and other residents of the Kitimat-Terrace airshed under section 7 of the *Charter*;

   Particular:

   In making the Decision, the Director failed properly or at all to protect human health of Airshed Residents, thereby depriving Airshed Residents of their right to life and their right to security of the person. Further, the Airshed Residents' rights to life and security of the person were deprived in a manner that does not accord with the principles of fundamental justice. These principles include:

   1. arbitrariness;
   2. gross disproportionality;
   3. overbreadth;
   4. vagueness; and,
   5. procedural principles including the requirement for notice and a hearing when rights guaranteed under this section have been or may be infringed.

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*;

   Particular:

   When making a discretionary decision, a decision-maker must balance the affected *Charter* protections with the statutory objectives of the relevant legislation.

   The right to life under s. 7 protects a person from death or an increased risk of death imposed by state action, either directly or indirectly. The right to security of the person under s. 7 protects a person from state interference with bodily integrity.

   An overarching statutory objective of sections 14 & 16 of the Act is to protect human health.

   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 of the Act.

[125] Rio Tinto submits that grounds 1 and 2 are an impermissible attack on the Permit Amendment, and are an attempt to re-litigate claims that have already been decided regarding the alleged effects of the sulphur dioxide emissions on human health. Specifically, Rio Tinto argues that, to demonstrate a violation of section 7 of the *Charter*, the Appellants must show that there has been a deprivation of their life, liberty, or security of the person that is not in accordance with the principles of fundamental justice. To demonstrate that in the present case, the Appellants must allege harm to human health, but the EEM Plan is only a monitoring and information-gathering tool - it does not authorize an increase in sulphur dioxide emissions. Rio Tinto maintains that, on its face, the Letter of Approval with respect to the EEM Plan cannot engage the Appellant's section 7 *Charter* rights, because approval of the EEM Plan did not "impose death or an increased risk of death" (*Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter*], at para. 84) or cause "serious physical suffering or serious psychological suffering" (*Carter*, at para. 64; *Chaoulli v. Quebec (Attorney General*), 2005 SCC 35, at para. 123). Rio Tinto maintains that there is no direct causal link between the monitoring requirements and such potential harms.

[126] In addition, Rio Tinto submits that the human health impacts of the increased emissions were assessed in the appeals of the Permit Amendment. Rio Tinto argues that, although section 7 of the *Charter* was not directly at issue in that case, the Board made multiple findings regarding human health, including that there was no "reasonable scientific plausibility" that the increased emissions would increase the incidence of asthma or premature mortality, and that the risk to human health was, conservatively, moderate (*Toews and Stannus*, paras. 356 – 358, 377). Thus, Rio Tinto argues that, to prove a claim in relation to section 7 of the *Charter*, the Appellants would have to re-litigate the question of the health risks arising from the Permit Amendment, which would amount to rearguing an issue that has been decided (*Figliola*) contrary to section 31(1)(g) of the *Administrative Tribunals Act*.

[127] Regarding ground 1, the Director submits that:

- this ground is beyond the Board's jurisdiction, because the Appellants have no standing to advance the argument as currently framed (section 31(1)(a) of the *Administrative Tribunals Act*);
- there is no reasonable prospect that this ground will succeed, because the Appellants have relied on an incorrect *Charter* analysis (section 31(1)(f) of the *Administrative Tribunals Act*); and
- alternatively, if the Board disagrees with the Director regarding the correct *Charter* analysis to be applied, the Director's submissions regarding ground 2 apply to this ground (see below).

[128] Specifically, the Director submits that the Appellants have no standing to seek relief for an alleged infringement of the *Charter* rights of "students and other residents" of the Kitimat-Terrace airshed. The Director argues that the rights guaranteed by section 7 are individual rights (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], at para. 125), and the power to litigate such rights resides with the persons whose rights are infringed. The Director submits, therefore, that Ms. Stannus and Ms. Toews may only advance their own *Charter* rights.

[129] Similarly, the Director submits that Unifor has no standing to seek *Charter* remedies on behalf of Airshed Residents, or advance claims under section 7 of the *Charter* on behalf of its members unless it establishes standing to do so on its members' behalf (*Christian Labour Assn. v. British Columbia (Transportation Financing Authority*), 2001 BCCA 437). The Director submits that the rights under section 7 of the *Charter* are inherently personal, individual rights, and Unifor bears the burden of establishing its standing to advance such rights on behalf of its members, such as by providing specific information about how its members are personally affected.

[130] In addition, the Director submits that the *Charter* values balancing approach advanced in ground 2 is the appropriate analysis to be applied in an appeal of a decision made under the *Act*. The Director maintains that, in *Doré v. Barreau du Québec*, 2012 SCC 12) [*Doré*], the Supreme Court of Canada expressly considered the analytical framework to be applied when reviewing administrative decisions for compliance with *Charter* values. In that case, the Court rejected the test set out in *R. v. Oakes* [1986], 1 S.C.R. 103, which was developed for reviewing laws for compliance with the *Constitution*, in favour of "a richer conception of administrative law, under which discretion is exercised 'in light of constitutional guarantees and the values they reflect'" (*Doré*, at para. 35). In the present case, the proper approach is to consider whether the Director failed to proportionately balance the Appellants' *Charter* rights with the purpose of the *Act*.

[131] Regarding ground 2, the Director submits that:

- this ground is beyond the Board's jurisdiction, because the Appellants seek to review the emissions authorized by the Permit Amendment (section 31(1)(a) of the *Administrative Tribunals Act*);

- there is no reasonable prospect that this ground will succeed, because the EEM Plan is protective in nature and does not infringe the Appellants' section 7 *Charter* right to life, liberty, or security of the person (section 31(1)(f) of the *Administrative Tribunals Act*); and
- the Appellants seek to revisit issues that were appropriately dealt with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*).

[132] The Director submits that if the Appellants seek to challenge the Letter of Approval on *Charter* grounds, the correct approach is found in *Doré*, as summarized in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at para. 4:

> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* — both the *Charter*'s guarantees and the foundational values they reflect — the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[133] Thus, the Director submits that the Appellants must establish that: the Letter of Approval gives rise to a deprivation of their right to life, liberty or security of the person; and, the deprivation was contrary to a principle of fundamental justice. The Director submits that this test has not been met, because the Letter of Approval did not authorize any emissions.

[134] In addition, the Director argues that ground 2 is an attempt to re-litigate matters that were decided in *Toews and Stannus*; particularly, the impact on human health of the emissions authorized under the Permit Amendment. The Director notes that, at paras. 362 and 368 – 371 of *Toews and Stannus*, the Board considered the alleged impacts of the emissions on human health. The Director maintains that, to the extent that the Appellants are asking the Board to reconsider the alleged human health risks associated with the increased emissions, this ground for appeal was adequately dealt with by the Board.

[135] Ms. Stannus submits that although para. 125 of *Bedford* refers to section 7 *Charter* rights as "individual rights", it does not state that the Appellants cannot allege a *Charter* breach on behalf of others, as they have in ground 1. In addition, she submits that the Board's 2015 decision on her standing to bring the present appeals supports the proposition that she can allege a *Charter* breach on behalf of her students, because her standing was confirmed based on the Board's 2013 decision which stated that the emissions "may adversely affect Ms. Stannus' health, the health of her students …" (*Lynda Gagne et al v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-005(a), 2013-EMA-007(a) to 2013-EMA-012(a), October 31, 2013, at para. 90).

[136] Regarding the relevant legal test for ground 1, Ms. Stannus submits that the alleged *Charter* breach follows the analysis in *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, at paras. 117, 119 – 136) [*PHS*]. Specifically, she argues that the Letter of Approval is an administrative decision that engaged the section 7 *Charter* rights of herself and other residents of the Kitimat-Terrace airshed, and was not in accordance with the principles of fundamental justice.

[137] Regarding whether grounds 1 and 2 are within the Board's jurisdiction and have a reasonable prospect of success, Ms. Stannus submits that the EEM Plan is not merely a tool for monitoring and gathering information; it also contains a mechanism for triggering and implementing mitigation measures if there are "unacceptable impacts" based on the results from the EEM Plan. Ms. Stannus argues that the triggering and implementation measures in the EEM Plan are inadequate, and the approval of the EEM Plan enables unacceptable adverse health impacts for the Appellants and Kitmat residents. Consequently, Ms. Stannus maintains that the approval of the EEM Plan failed to adequately protect human health, thereby infringing the Appellants' rights under section 7 of the *Charter*.

[138] Regarding whether grounds 1 and 2 are an abuse of process and an attempt to re-litigate matters decided in *Toews and Stannus*, Ms. Stannus submits that these grounds challenge the EEM Plan's adequacy to address human health impacts, and not the adequacy of the Permit Amendment to do so. She maintains that the EEM Plan has a material effect on the risk of human health impacts, because it contains inadequate safeguards to detect and address unacceptable impacts that would expose Kitimat residents to adverse health consequences. Ms. Stannus also submits that using an adaptive management approach to manage adverse impacts on human health from a single source of industrial emissions is a novel approach in BC, and that the appeals raise novel issues that have not been previously decided in Canada.

[139] Unifor did not specifically address grounds 1 and 2 in its submissions on the applications to strike or summarily dismiss. However, in Unifor's submissions on the applications to amend the Appellants' Notices of Appeal, it made submissions regarding the legal test for establishing an infringement of the rights under section 7 of the *Charter*, and Unifor's standing to bring the *Charter* arguments.

[140] In reply, Rio Tinto submits that Ms. Stannus' submissions do not address the proper legal tests to be applied regarding claims that state action has breached the person's section 7 *Charter* rights. Rio Tinto maintains that section 7 *Charter* rights apply where state action directly or indirectly imposes death or an increased risk of death, or causes serious physical or psychological suffering. If those rights are engaged at all for the Appellants, it would be from the increased emissions authorized under the Permit Amendment, and not from the approval of the EEM Plan. Moreover, Rio Tinto submits that sufficient facts were available during the appeals of the Permit Amendment to raise those arguments.

[141] The Director replies that Ms. Stannus is entitled to seek relief on her own behalf under section 24(1) of the *Charter* for an alleged infringement of her *Charter* rights, but she cannot seek such relief on behalf of others: *R. v. Ferguson*, 2008 SCC 6, at para. 61.

[142] The Director accepts the principle that administrative decisions must conform to the *Charter*. However, the Director maintains that the legal test in *Doré* applies to grounds 1 and 2. The legal test in *PHS* is inappropriate with respect to ground 1 because *PHS* did not involve an argument that the *Charter* breach was justified under section 1 of the *Charter*. As a result, *PHS* did not address the framework to be applied when reviewing administrative decisions for *Charter* compliance, or how to balance statutory objectives with the severity of the interference with *Charter*

protection. The Director argues that in *Doré*, decided one year after *PHS*, the Court expressly addressed the framework to be applied when reviewing administrative decisions for *Charter* compliance, and concluded that administrative decision-makers must balance *Charter* values with the statutory objectives of the impugned legislation: *Doré*, at paras. 24, 55 – 58.

[143] However, the Director further submits that the *Doré* analysis is premised on the threshold question of whether a *Charter* right is engaged. The Director submits that even if one were to accept that the EEM Plan is inadequate (which the Director denies), its inadequacy would not engage the Appellants' section 7 *Charter* rights, as any alleged adverse health effects are a consequence of the emissions authorized under the Permit Amendment.

[144] Moreover, the Director submits that just because the Appellants have standing as "persons aggrieved" under section 100 of the *Act* does not mean that they have standing to raise a *Charter* argument on behalf of others. In addition, the Director submits that Unifor does not have public interest standing to bring such arguments based on the test set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

The Panel's findings

[145] The Panel finds that it is not plain and obvious, on a general reading of grounds 1 and 2, that the Board has no jurisdiction over these grounds, or that these grounds are completely irrelevant to the subject matter of the appeals. An application to strike or summarily dismiss a ground for appeal for lack of jurisdiction should only be granted in clear cases, and this is not one of those cases. Even if a ground for appeal is "borderline", it would be unfair to strike the ground in a preliminary application. Such matters should proceed to a full hearing.

[146] Whereas the appeals of the Permit Amendment, and the resulting findings in *Toews and Stannus*, focused on the predicted effects of the increased sulphur dioxide emissions authorized under the Permit Amendment, these grounds for appeal focus on the monitoring program's results regarding the actual effects of the emissions, and whether the EEM Plan's thresholds or indicators that trigger mitigation adequately protect human health. The EEM Plan is not merely a tool for monitoring and gathering information about sulphur dioxide emissions and their effects. If the triggering thresholds and mitigation measures in the EEM Plan are inadequate to protect human health, the approval of the EEM Plan may not adequately address any unacceptable adverse health impacts that may arise. It is on this basis that the Appellants maintain that the approval of the EEM Plan fails to adequately protect human health, thereby infringing the right to life, liberty, and security of the person under section 7 of the *Charter*. On their face, these matters are relevant to the merits of the decision to approve the EEM Plan, and could not have been argued in the appeals of the Permit Amendment since there was no post-KMP monitoring data at that time, and the human health KPI in the EEM Plan was not finalized until after those appeals were decided.

[147] For these reasons, the Panel finds that grounds 1 and 2 should not be dismissed for lack of jurisdiction under section 31(1)(a) of the *Administrative Tribunals Act*, and do not amount to an attempt to re-argue matters that were

appropriately deal with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*). Similarly, these grounds are also not an abuse of process (section 31(1)(c) of the *Administrative Tribunals Act*).

[148] The Panel has also considered whether the evidence takes these grounds "out of the realm of conjecture", such that the evidence justifies allowing the grounds to be heard at a full hearing. The Panel finds that the Director and Rio Tinto have failed to show that there is no reasonable prospect that findings of fact supporting these grounds could be made after a full hearing of the evidence. The information gathered through the monitoring program from 2013 to 2018 with respect to human health impacts will presumably be available and subject to argument at the hearing scheduled for May 2019. Accordingly, grounds 1 and 2 should not be summarily dismissed pursuant to section 31(1)(f) of the *Administrative Tribunals Act*.

[149] In addition, although the Director and Rio Tinto challenge the applicability of the legal test that the Appellants seek to apply regarding the *Charter* breach alleged in ground 1, and challenge the Appellants' standing to bring the *Charter* arguments in grounds 1 and 2 on behalf of other persons, the Panel finds that those matters are more appropriately dealt with at a full hearing of the appeals. The parties' submissions have raised complex questions of law regarding the appropriate legal test, as well as questions of mixed fact and law with regard to standing to bring *Charter* arguments, which cannot be fully and fairly adjudicated in these summary proceedings.

[150] For these reasons, the Panel finds that grounds 1 and 2 should proceed to a full hearing on the merits of the appeals. Accordingly, the applications for summary dismissal with respect to grounds 1 and 2 are denied.

c. Whether ground 3 should be struck or summarily dismissed

> 3. In making the Decision [to approve the EEM Plan], 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 KMP in combination with other current and future sources of sulphur dioxide, nitrogen oxides (NO_x), and particulate matter (PM) emissions within the Kitimat-Terrace airshed;

[151] Rio Tinto submits that this ground should be dismissed under sections 31(1)(c) and/or (g) of the *Administrative Tribunals Act*, as an abuse of process and an attempt to re-litigate an issue decided in *Toews and Stannus*. Rio Tinto argues that the Board stated at para. 243 of *Toews and Stannus* that section 16 of the *Act* did not require the Director to consider "the cumulative effects of SO_2 emissions from other facilities that may be built in the area sometime in the future." Also, at para. 244, the Board concluded that emissions from potential projects that may be built in the future were "too speculative" to be considered "by the Director, or by the Panel."

[152] Rio Tinto submits that the present issue regarding the consideration of cumulative effects under the EEM Plan is the same as in *Toews and Stannus*,

because the legal and factual circumstances are the same as when the Director issued the Permit Amendment.

[153] The Director submits that:

- this ground is beyond the Board's jurisdiction, because it seeks to impose a statutory requirement to consider cumulative effects, and the Board found in *Toews and Stannus* that no such requirement exists under the *Act* (section 31(1)(a) of the *Administrative Tribunals Act*);
- this ground is a collateral attack and an abuse of process, to the extent that it impugns the Board's findings in *Toews and Stannus* (section 31(1)(c) of the *Administrative Tribunals Act*);
- there is no reasonable prospect that this ground will succeed, because it asks the Board to address issues for which there is insufficient evidence available to either the Director or the Board (section 31(1)(f) of the *Administrative Tribunals Act*); and
- the Appellants seek to revisit issues that were appropriately dealt with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*).

[154] The Director submits that, as was the case when *Toews and Stannus* was decided, the smelter is the only permitted major industrial emitter in the Kitimat airshed, and it is impossible for the Director to predict the emissions that may be discharged from projects that have not been fully planned or approved. Any future permitting decisions will involve an evaluation of a project's proposed emissions and the airshed conditions that exist at that time. In any case, the Board found in *Toews and Stannus* at paras. 242 – 244 that the *Act* contains no requirements to consider cumulative effects in the permitting process. The Director argues that, similarly, there is no requirement under the *Act* to consider cumulative effects in approving a monitoring plan as part of a permitting process.

[155] Ms. Stannus submits that even if there is no obligation under the *Act* to consider cumulative effects, that does not mean that the Director could not, or should not, have considered cumulative effects when he approved the EEM Plan under section 16 of the *Act*. Ms. Stannus also submits that the Board can hear the appeals as a new hearing of the matter, and as such, a future hearing panel can decide whether cumulative effects should be considered in this case. Further, Ms. Stannus submits that it is premature, at this stage of the proceedings, for the Director to argue that there is insufficient evidence to conclude that this ground for appeal has no reasonable prospect of success.

[156] Ms. Stannus also submits that ground 3 is neither an abuse of process nor an attempt to re-litigate matters that were decided in *Toews and Stannus*. Ms. Stannus argues that this ground raises new issues, such as whether cumulative effects assessments of the mitigation options under the EEM Plan ought to be carried out in order to evaluate their efficacy for protecting human health and minimizing the infringement of section 7 *Charter* rights. Moreover, by the time the appeals are heard, additional industrial polluters may be operating in the airshed.

[157] Unifor submits that after *Toews and Stannus* was decided, the Appellants became aware of a Ministry report, prepared six months before the EEM Plan was

approved, that raises concerns about the cumulative effects of emissions from the smelter and "LNG" (the Panel assumes that "LNG" refers to liquid natural gas, but Unifor's submissions do not specify what liquid natural gas project or proposal it is referring to). Based on that report, Unifor questions the truthfulness of the Director's testimony, noted at para. 244 of *Toews and Stannus*, that "he made inquiries about the proposed projects, but was unable to obtain sufficient information to assess cumulative effects." Unifor claims that the Director requisitioned the cumulative effects report before the Letter of Approval was issued. Unifor submits that a core issue in the present appeals is whether the EEM Plan is inadequate to manage the cumulative air quality effects of LNG and the smelter.

[158] In reply, Rio Tinto submits that the alleged failure to consider cumulative effects was properly addressed in *Toews and Stannus*, and the Appellants should not be allowed to re-litigate the issue.

The Panel's findings

[159] Although the Board may conduct an appeal under the *Act* by way of a new hearing, and the Board's past decisions are not legally binding on future panels of the Board, this does not mean that a panel hearing the merits of the present appeals is obliged to re-hear or reconsider matters that have been appropriately dealt with by the Board in a previous appeal proceeding, or to hear and consider matters that are irrelevant to the appealed decision or that amount to an abuse of the appeal process. Even if the appealed decision is within the Board's jurisdiction, as in this case, the Board has the discretion to dismiss part of an appeal, including a particular ground for appeal, pursuant to any applicable provision under section 31(1) of the *Administrative Tribunals Act*, or pursuant to its broad power to control its own proceedings in the interests of fairness and the timely resolution of appeals.

[160] The Panel finds that this ground for appeal rests on the proposition that the Director, in approving the EEM Plan, was obliged to consider "cumulative effects that may arise from the KMP", according to the Appellants' formulation of this ground. However, it was the Permit Amendment, and not the EEM Plan, that authorized the emissions that "may arise from the KMP". *Unifor 2* clearly provides that the present appeals must be narrowly focused on the decision to approve the EEM Plan. The appeals of the Permit Amendment focused on the sulphur dioxide emissions that "may arise from the KMP" (based on predictions) and their potential effects, whereas the present appeals should be focused on the methods and procedures for monitoring and analyzing the actual sulphur dioxide emissions from the KMP, their actual effects, and the impact threshold criteria that may trigger mitigation. Applying the test in *Cobble Hill*, the Panel finds that this ground for appeal appears to be irrelevant to the subject matter of the decision to approve the EEM Plan, and therefore, is outside of the Board's jurisdiction in deciding this appeal (section 31(1)(a) of the *Administrative Tribunals Act*).

[161] Moreover, the Panel finds that the issue of whether the Director was obliged to consider the "cumulative effects that may arise from the KMP" was addressed in *Toews and Stannus*, and this ground amounts to an attempt to re-argue the issue. In *Toews and Stannus*, the Board found that the question of whether a director is obliged to consider cumulative impacts before amending a permit under section 16

of the *Act* is a question of statutory interpretation, and the appellants had identified no provisions in the *Act* that expressly or impliedly required the Director to consider the cumulative effects when exercising his discretion under section 16 of the *Act*. At paras. 242 – 243 of *Toews and Stannus*, the Board stated:

> In *Xwemalhkwu First Nation*, the Board found at para. 255 that the question of whether a statutory decision-maker is obliged to consider the broad cumulative environmental impacts of human activity prior to issuing a water licence is a question of statutory interpretation, and the answer must be found by examining the provisions of the relevant Act, which in that case was the *Water Act*.
>
> Similarly, this Panel finds that the relevant provisions of the *EMA* must be considered in determining whether the Director was obliged to consider, for the purposes of assessing Rio Tinto's application under section 16, the cumulative impacts of future projects that may, if they proceed, produce SO_2 emissions. The Panel finds that the Appellants have pointed to no provisions in the *EMA* that expressly or impliedly indicate that the Director was obliged to consider the cumulative effects of SO_2 emissions from other facilities that may be built in the area sometime in the future.
>
> [underlining added]

[162] The Board's decision in *Toews and Stannus* was a final decision on the merits of those appeals, and it dealt with the issue of whether a director is obliged to consider cumulative effects when exercising his discretion under section 16 of the *Act*. Similar to the circumstances in *Toews and Stannus*, the approval of the EEM Plan was a permit amendment pursuant to section 16 of the *Act*. Although ground 3 is not framed in exactly the same way as the cumulative effects issue was in the previous appeals, the Panel finds that the question raised by ground 3 is, in essence, the same question of statutory interpretation that was dealt with in *Toews and Stannus*. The Appellants have identified no material change in section 16 or any other section of the *Act*, with respect to the consideration of cumulative effects, since *Toews and Stannus* was decided. The Appellants make arguments with respect to the proper statutory interpretation of section 16 when considering the *Charter*, but they identify no legal basis for the proposition that the Director has an obligation to consider cumulative effects under section 16 of the *Act*, especially when the decision under appeal does not relate to the type or amount of emissions permitted to be discharged. They simply argue that even if the Director was not obliged to do so, he could or should have done so.

[163] The Panel finds that the Board's decision in *Toews and Stannus* appropriately dealt with the question of whether the Director was obliged to consider cumulative effects "that may arise from" the KMP's emissions when exercising his discretion under section 16 of the *Act*. As such, this ground should be summarily dismissed pursuant to section 31(1)(g) of the *Administrative Tribunals Act*. Although Unifor was not involved in the previous appeal proceeding, the Panel has already found that section 31(1)(g) of the *Administrative Tribunals Act* does not require that both the previous and present proceedings must include the same parties or their privies, or that the form of the ground for appeal be exactly the same, unlike the

common law test for issue estoppel (which the Board applied before section 31 of the *Administrative Tribunals Act* applied to the Board).

[164] Moreover, section 31(1)(c) of the *Administrative Tribunals Act*, as well as the common law test for abuse of process expressed in *CUPE*, allow the Board to take a flexible approach in determining what constitutes an abuse of the appeal process. The Panel finds that the present appeals should not be used as a means to re-argue a matter of statutory interpretation involving a similar question that was appropriately addressed in *Toews and Stannus*. The statutory interpretation question raised by ground 3 was appropriately dealt with in *Toews and Stannus*, the appellants have pointed to no material change in the *Act* since that decision was issued, and it would be contrary to the interests of judicial economy, and unfair to the Director and Rio Tinto, to do so. In addition, the Panel finds that there is no over-riding question of fairness to any of the Appellants that requires a re-hearing of this issue. Even if this ground of appeal is summarily dismissed, the appeals will proceed to a full hearing, and the Appellants will have the opportunity to argue other grounds for appeal that challenge the Director's application of section 16, both on the basis of facts and the law including the *Charter*. As such, this ground should be summarily dismissed pursuant to section 31(1)(c) of the *Administrative Tribunals Act*.

[165] In addition, the Panel finds that the Director's submissions acknowledge that any future facility that may require a permit to discharge air emissions would undergo a permitting process similar to that which preceded the Permit Amendment. For example, if a future LNG facility applies for an air emissions permit, the facility's emissions would be evaluated based on the air quality conditions in the airshed at that time, including emissions from existing sources such as the smelter. The Panel finds that the present appeals should not be used as a forum to speculate about the possible emissions from projects which may be built in the future and that, if built, would be the subject of future permitting decisions which could be appealed to the Board.

[166] In summary, the Panel finds that this ground for appeal should be struck or summarily dismissed under section 31(1) of the *Administrative Tribunals Act*, because:

- the premise underlying this ground appears to be irrelevant to the decision to approve the EEM Plan (section 31(1)(a) of the *Administrative Tribunals Act*); and/or
- the substance of this ground was appropriately dealt with in the Board's previous appeal proceedings that led to the decision in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*); and/or
- proceeding to hear this ground at a full hearing would be an abuse of process on the basis that: (a), the substance of this ground was appropriately addressed in *Toews and Stannus*; and (b) it would be contrary to the interests of judicial economy, and would be unfair to the Director and Rio Tinto, to re-hear the issue, or make findings based on speculation about future projects that, if built, would be the subject of future permitting decisions (section 31(1)(c) of the *Administrative Tribunals Act*).

[167] Accordingly, the applications for summary dismissal with respect to ground 3 are granted.

d. Whether ground 4(a) should be struck or summarily dismissed

4. In making the Decision [to approve the EEM Plan], 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;

[168] Rio Tinto submits that this ground is outside the scope of the appeals because the adaptive management approach was approved by the Director as part of the Permit Amendment, and this ground is an attempt to re-litigate issues that were decided in *Toews and Stannus*. Rio Tinto maintains that the EEM Plan is a continuation of the adaptive management approach which combines predictive modelling of health effects with ongoing monitoring to confirm whether the predicted effects match the actual effects. Moreover, Rio Tinto submits that the decision to take this approach was based on baseline public health data and health risk assessment information that was available as of April 23, 2013.

[169] Rio Tinto submits that the Appellants cannot argue that the EEM Plan was approved in error because it "expose[d] Airshed Residents to significantly increased levels of sulphur dioxide" without taking steps to gather baseline health data or conduct a health risk assessment, as stated in this ground for appeal, without challenging the fact that residents are exposed to increased sulphur dioxide emissions from the Permit Amendment through an adaptive management approach. In other words, to succeed on this ground, the Appellants must first demonstrate that it was an error to increase sulphur dioxide emissions before collecting the information they say is required. In the appeal of the Permit Amendment, the appellants (in their final arguments) requested a public health study "aimed at providing baseline health information" and a comprehensive quantification of the "human health risks" associated with the KMP, but the Board rejected those requests.

[170] The Director submits that:

- this ground is beyond the Board's jurisdiction, because it seeks to impose a requirement that does not exist under the *Act* (section 31(1)(a) of the *Administrative Tribunals Act*);
- this ground is a collateral attack and an abuse of process, to the extent that it impugns the Board's findings in *Toews and Stannus* (section 31(1)(c) of the *Administrative Tribunals Act*); and
- the Appellants seek to revisit issues that were appropriately dealt with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*).

[171] The Director submits that this ground is based on his alleged failure to gather baseline public health data or conduct a human health assessment, but those things are not within the jurisdiction of the Director or the Ministry of Environment. The authority for such action rests with the Ministry of Health and the Northern Health Authority, which do not make decisions under the *Act*. The Director submits that the Board recognized this in its non-binding recommendations offered at the conclusion of *Toews and Stannus* in the event that the Province had not adopted sulphur dioxide ambient air quality objectives by 2016. Specifically, the Board recommended that the Director and Ministry executive "support" and "encourage" a provincial Kitimat region health study. While the Director could consider such data if it was available, there is no legislative authority for the Director to obtain it independently, and in any case, the EEM Plan did not authorize an increase in emissions.

[172] Ms. Stannus submits that the Director has broad discretion to require a proponent to provide information as part of a permit amendment application under section 16 of the *Act*. Even if the *Act* does not expressly empower the Director to collect baseline data on human health or initiate a human health risk assessment, the *Act* does not prevent the Director from seeking such information from other government ministries before approving the EEM Plan, or requiring the collection of such information as part of the EEM Plan. Accordingly, she submits that the Board has the jurisdiction to consider this ground for appeal.

[173] In considering whether ground 4(a) is an abuse of process and is an attempt to re-litigate matters that were decided in *Toews and Stannus*, Ms. Stannus argues that she is not challenging the absence of adequate baseline data on human health or a human health risk assessment prior to the Permit Amendment; rather, she is challenging the absence of such information prior to the approval of the EEM Plan, and the absence of provisions in the EEM Plan for gathering such information. Ms. Stannus emphasizes that the EEM Plan contains mechanisms for triggering and implementing mitigation measures if adverse impacts are identified. She advises that she intends to argue that adequate baseline information is essential to the proper functioning of an adaptive management regime to detect unacceptable impacts, and the lack of adequate baseline information compromises the EEM Plan's ability to have meaningful triggers for mitigation. Ms. Stannus notes that, at para. 5 of *Unifor 2*, the Court of Appeal stated as follows:

> The monitoring plan was of considerable importance. It was ultimately to be used to determine whether the increase in permissible emissions would become permanent: … [section 4.2.6 of the Permit Amendment]

[174] In summary, Ms. Stannus argues that the question in *Toews and Stannus* was whether adaptive management ought to be used at all to manage human health impacts, but in the present appeals, the focus is on the efficacy and adequacy of the adaptive management approach adopted in the EEM Plan for the purposes of protecting human health.

[175] Unifor did not specifically address ground 4(a).

[176] In reply, Rio Tinto argues that the alleged failure to collect baseline data was properly addressed in *Toews and Stannus*.

The Panel's findings

[177] To the extent that this ground alleges that the Director had an obligation to conduct a human health risk assessment, the Panel finds that although such an assessment may have been relevant to the decision to issue the Permit Amendment, such an assessment appears to be irrelevant to the approval of the EEM Plan. Indeed, in the appeal proceedings regarding the Permit Amendment, the Director provided evidence that he considered a human health risk assessment before he issued the Permit Amendment. At para. 115, *Toews and Stannus* states that the Director "considered impact assessment methods, as set out in the STAR, based on a human health risk assessment …" when he determined the sulphur dioxide limit in the Permit Amendment. As a predictive tool, it would be useful to consider a human health risk assessment when assessing the potential effects on human health of the increased sulphur dioxide emissions, and that is what the Director did prior to issuing the Permit Amendment. In contrast, a key purpose of the EEM Plan is to monitor the actual sulphur dioxide emissions and their effects on human health, and compare that information to the predictions that the Director relied on when he decided to issue the Permit Amendment. In these circumstances, it is unclear to the Panel how a human health risk assessment would be relevant to the Director's subsequent decision to approve an EEM Plan focused on monitoring and assessing actual impacts, setting KPIs, and setting triggers for mitigation.

[178] Regarding the aspects of ground 4(a) that relate to baseline public health data, the Panel finds that baseline data about the indicators or receptors being monitored is generally relevant in an adaptive management approach. For example, baseline public health data pre-KMP could potentially be relevant to identifying any changes in human health post-KMP. Such baseline information may be relevant to determining the efficacy and adequacy of the EEM Plan's adaptive management approach with respect to human health. Also, the relevance of any baseline public health data to the approval of the EEM Plan was not conclusively addressed in *Toews and Stannus*.

[179] For those reasons, the Panel finds that, except for the reference to the human health risk assessment, it is not plain and obvious, on a general reading of ground 4(a), that the Board has no jurisdiction over this ground, or that this ground is completely irrelevant to the subject matter of the appeal (section 31(1)(a) of the *Administrative Tribunals Act*). The Panel also finds that, except for the reference to the human health risk assessment, this ground does not amount to an attempt to re-argue matters, the substance of which was appropriately deal with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*), and is not an abuse of process (section 31(1)(c) of the *Administrative Tribunals Act*).

[180] For all of these reasons, the Panel finds that this ground, except for the reference to the human health risk assessment, should proceed to a full hearing on the merits of the appeals. The applications for summary dismissal with respect to ground 4(a) are allowed, in part. Accordingly, ground 4(a) should be amended to read as follows:

4. In making the Decision [to approve the EEM Plan], 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;

e. Whether ground 4(b) should be struck or summarily dismissed

4. In making the Decision [to approve the EEM Plan], the Director failed properly or at all to protect human health of Airshed Residents. The particulars of this failure include:

   ...

   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;

[181] Rio Tinto submits that this issue was decided in *Toews and Stannus*, in which the Board found that decisions under section 16 of the *Act* did not require consideration of the precautionary principle. Rio Tinto argues that the factual and legal matrix has not changed, and this ground is an attempt to re-litigate an issue that was decided in *Toews and Stannus*. Moreover, Rio Tinto submits that any argument about the precautionary principle is not properly directed at the EEM Plan, a monitoring plan with impact thresholds, which cannot cause harm independent of the increased emissions approved in the Permit Amendment.

[182] The Director submits that:

- this ground is beyond the Board's jurisdiction, because it seeks to impose a requirement to apply the precautionary approach/principle that does not exist under the *Act*, and asks the Board to review the Director's reasoning/methodology rather than his decision (section 31(1)(a) of the *Administrative Tribunals Act*); and
- the Appellants seek to revisit issues that were appropriately dealt with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*).

[183] The Director submits that this ground is predicated on the existence of threats to human health, and the Appellants have not specified the threats to human health that are caused by the EEM Plan. The Director also submits that, in *Toews and Stannus*, the Board considered ample evidence and arguments on the alleged impact of the sulphur dioxide emissions on human health, and found that the Permit Amendment was sufficiently protective of human health. Furthermore, at paras. 225 – 236 of *Toews and Stannus*, the Board provided lengthy reasons for its conclusion that the precautionary principle or approach does not apply when making decisions under the *Act*. The Director maintains that such reasoning should be followed here, such that an alleged failure to adopt a precautionary approach or apply the precautionary principle cannot be a ground for these appeals.

[184] Regarding the Board's jurisdiction over ground 4(b), Ms. Stannus submits that the Board may conduct an appeal by way of a new hearing, the Board's jurisdiction is not narrowly confined.

[185] Regarding whether ground 4(b) is an abuse of process and an attempt to re-litigate matters that were decided in *Toews and Stannus*, Ms. Stannus submits that the Board's findings regarding the precautionary principle are not binding on future panels. Ms. Stannus intends to argue that the precautionary approach is an appropriate lens for assessing the adequacy of the EEM Plan to protect human health. Moreover, Ms. Stannus submits that Canadian jurisprudence on the precautionary principle has advanced since *Toews and Stannus*. In that regard, she cites, as an example, the decision in *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1099 [*Taseko*], at paras. 122 - 124, which involved an environmental assessment decision under Canadian federal legislation.

[186] Unifor did not specifically address ground 4(b).

[187] In reply, Rio Tinto argues that this issue was properly addressed in *Toews and Stannus*, and the Appellants should not be allowed to re-litigate the issue.

The Panel's findings

[188] The Panel finds that the principles it applied in summarily dismissing ground 3 apply similarly to ground 4(b).

[189] The Panel finds that the issue of whether the Director was obliged to "consider and employ a precautionary approach" when exercising his discretion under the *Act* to amend a permit was addressed in the Board's decision on the appeals of the Permit Amendment. In lengthy reasons provided at paras. 225 – 236 of *Toews and Stannus*, the Board explained why the precautionary principle or approach does not apply when making decisions under the *Act*. Although the Panel is not bound by the Board's previous findings, the Panel finds that those reasons are equally applicable with respect to the decision to approve the EEM Plan, given that the courts have confirmed that the approval of the EEM Plan was, like the Permit Amendment, an amendment to the smelter's permit. Although Ms. Stannus submits that Canadian jurisprudence on the precautionary principle has advanced since *Toews and Stannus*, and cites *Taseko* as an example, the Panel agrees with the Board's findings in *Toews and Stannus* that this issue comes down to a matter of statutory interpretation. The Appellants have not argued that there have been any material changes to the *Act* after *Toews and Stannus* which would draw into question the Board's findings in that decision regarding the inapplicability of the precautionary principle or approach when exercising discretion under section 16 of the *Act*.

[190] Additionally, the Panel finds that the applicable legislation in *Taseko* is significantly different from the *Act* in this regard. The decision under review in *Taseko* was made under legislation that expressly required the precautionary principle to be applied when making decisions. Specifically, sections 4(1)(b) and (g) of the *Canadian Environmental Assessment Act, 2012*, required projects to be assessed in a "precautionary manner", and section 4(2) required that the powers

under that Act be exercised in a manner that "applies the precautionary principle." In contrast, the *Act* contains no mention of the precautionary principle or approach.

[191] As such, this ground should be summarily dismissed pursuant to section 31(1)(g) of the *Administrative Tribunals Act*. Although the doctrine of issue estoppel does not apply here because Unifor was not involved in the previous appeal proceeding, the Panel has already found that section 31(1)(g) of the *Administrative Tribunals Act* provides the Board with broader discretion than the test for issue estoppel. Section 31(1)(g) does not require that both the previous and present proceedings must include the same parties or their privies, or that the form of the ground for appeal be exactly the same.

[192] Moreover, section 31(1)(c) of the *Administrative Tribunals Act*, as well as the common law test for abuse of process expressed in *CUPE*, allow the Board to take a flexible approach in determining what constitutes an abuse of the appeal process. The Panel finds that this ground amounts to an attempt to re-argue an issue of statutory interpretation that was appropriately dealt with in *Toews and Stannus*. It would be contrary to the interests of judicial economy, and unfair to the Director and Rio Tinto, to do so. In addition, no over-riding question of fairness to the Appellants requires a re-hearing of this issue. The appeals will proceed to a full hearing and the Appellants will have the opportunity to argue several other grounds for appeal that challenge the Director's application of section 16, both on the basis of facts and the law, including the *Charter*. As such, this ground should be summarily dismissed pursuant to section 31(1)(c) of the *Administrative Tribunals Act*.

[193] In summary, the Panel finds that ground 4(b) should be struck or summarily dismissed under section 31(1) of the *Administrative Tribunals Act*, because:

- the substance of this ground was appropriately dealt with in the Board's previous appeal proceeding that led to the decision in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*); and/or
- proceeding to hear this ground at a full hearing would be an abuse of process on the basis that the substance of this ground was appropriately dealt with in *Toews and Stannus*, and it would be contrary to the interests of judicial economy, and unfair to the Director and Rio Tinto, to re-hear the issue (section 31(1)(c) of the *Administrative Tribunals Act*).

[194] Accordingly, the applications for summary dismissal with respect to ground 4(b) are granted.

f. Whether ground 4(c) should be struck or summarily dismissed

> 4. In making the Decision [to approve the EEM Plan], the Director failed properly or at all to protect human health of Airshed Residents. The particulars of this failure include:
>
> ...
>
> 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;

[195] Rio Tinto submits that this ground largely overlaps with ground 4(a), as it is predicated on there being a link between increased emissions and adverse health conditions among Airshed Residents, and this issue was considered and rejected in *Toews and Stannus*.

[196] The Director submits that ground 4(c):

- is a collateral attack and an abuse of process, to the extent that it impugns findings in *Toews and Stannus* (section 31(1)(c) of the *Administrative Tribunals Act*);
- has no reasonable prospect of success, because it asks the Board to address issues for which there is insufficient evidence available to either the Director or the Board (section 31(1)(f) of the *Administrative Tribunals Act*); and
- seeks to revisit issues that were appropriately dealt with in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*).

[197] The Director submits that the concern underlying this ground is "the potential for the KMP to increase the incidence of adverse health conditions among Airshed Residents", and the Board made extensive findings on this issue at paras. 354 – 358 of *Toews and Stannus*. The Director submits that, based on those findings, there was no scientific plausibility to the claims that "(i) the incidence of asthma in the Kitimat airshed is likely to increase as a result of exposure to SO_2 gas emissions from the smelter; (ii) premature mortality (including death caused by heart attacks, serious asthma attacks, or respiratory infections) in the Kitimat airshed is likely to increase due to exposure to SO_2 gas emissions from the smelter; and (iii) premature mortality in the Kitimat airshed is likely to increase due to exposure to PM2.5 (including SFPM2.5 formed from SO_2) from the smelter" (*Toews and Stannus*, at para. 356). Thus, the Director argues that re-opening this issue is beyond the Board's jurisdiction in the present appeals, and would amount to an abuse of process.

[198] Ms. Stannus submits that ground 4(c) is not an abuse of process or an attempt to re-litigate matters that were decided in *Toews and Stannus*. She submits that the finding in para. 356 of that decision was that "the Appellants have not established … there is a 'reasonable scientific plausibility' that" the increased emissions would increase the incidence of adverse health conditions. This is not the same as finding that there was "no reasonable scientific plausibility". Given the Board's ability to conduct appeals as a new hearing of the matter, the present appeals are an opportunity to provide fresh evidence that was not before the Director when he approved the EEM Plan or the Permit Amendment. In any event, Ms. Stannus maintains that it is important to bear in mind that, if the results from the EEM Plan show "unacceptable impacts", the permitted sulphur dioxide discharge limit reverts to 27 Mg/d. She asserts that the EEM Plan's inadequacy to properly detect "unacceptable impacts" and trigger mitigation measures may cause local residents to be locked in to a level of sulphur dioxide exposure that poses a risk of serious health impacts.

[199] Regarding whether ground 4(c) has any reasonable prospect of success, Ms. Stannus submits that it is premature to argue that there is insufficient evidence to support this ground, and the Board should not bar the Appellants from having an opportunity to provide new evidence, which has not been considered by the Director, at the appeal hearing.

[200] Unifor did not specifically address ground 4(c).

[201] In reply, Rio Tinto argues that this issue was properly addressed in *Toews and Stannus*, and the Appellants should not be allowed to re-litigate the issue.

The Panel's findings

[202] The Panel finds that this ground overlaps with ground 4(a), in that it alleges inadequacies in the adaptive management approach adopted in the EEM Plan. However, whereas ground 4(a), as amended by the Panel, makes allegations regarding baseline public health data and raises questions that were not addressed in *Toews and Stannus*, ground 4(c) focuses on the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents" in the context of an adaptive management approach. Some overlap is to be expected, given that both the Permit Amendment and the EEM Plan adopt an adaptive management approach, and the Permit Amendment and the approval of the EEM Plan were successive stages in a staged decision-making process. However, it is important to recognize that the respective decisions to issue the Permit Amendment and approve the EEM Plan relate to different stages and components of the adaptive management approach. The sulphur dioxide limit in the Permit Amendment was approved based on the predicted or "potential" impacts of the emissions post-KMP. Conversely, the approval of the EEM Plan imposed requirements for monitoring the actual impacts of those emissions and comparing their actual impacts to the predicted impacts, as well as setting the thresholds or KPIs that trigger further action such as mitigation.

[203] The Panel finds that ground 4(c) rests on the proposition that the Director, in approving the EEM Plan, was obliged to consider the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents", according to the Appellants' formulation of this ground. However, it is clear from *Toews and Stannus* that the Director, and then the Board, considered the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents" with respect to the increased sulphur dioxide limit in the Permit Amendment. While the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents" was a relevant consideration in relation to the Permit Amendment, it is unclear how this would be relevant to the approval of the EEM Plan. Whereas the appeals of the Permit Amendment addressed the potential for the sulphur dioxide emissions from the KMP to increase the incidence of asthma and premature mortality (including death caused by heart attacks, serious asthma attacks, or respiratory infections) in the Kitimat-Terrace airshed, the present appeals must be narrowly focused on the decision to approve the EEM Plan, which contains the methods and procedures for monitoring and analyzing the actual effects of the sulphur dioxide emissions from the KMP, and the thresholds or KPIs that trigger mitigation. Applying the test in *Cobble Hill*, the Panel finds that it is plain and

obvious that this ground for appeal is irrelevant to the subject matter of the decision to approve the EEM Plan, and is outside of the Board's jurisdiction in the present appeals. As such, it should be struck or summarily dismissed pursuant to section 31(1)(a) of the *Administrative Tribunals Act*.

[204] Alternatively, recognizing that there is some overlap between the facts in the previous appeals and those in the present appeals, the Panel finds that this ground for appeal is much more relevant to the decision to issue the Permit Amendment than it is to the decision to approve the EEM Plan, and the substance of it was appropriately dealt with in *Toews and Stannus*. Indeed, the question of the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents" in the context of an adaptive management approach was discussed at length in *Toews and Stannus*, at paras. 354 – 379. In that case, the appellants focused on three end-points with respect to human health: the potential for post-KMP sulphur dioxide emissions to increase the incidence of asthma; the potential for post-KMP sulphur dioxide emissions to increase the incident of premature mortality (including death caused by heart attacks, serious asthma attacks, or respiratory infections); and the potential for post-KMP PM2.5 emissions to increase the incidence of premature mortality. The Board considered extensive scientific literature and expert evidence regarding the potential for emissions from the KMP to increase the incidence of those adverse health conditions among residents of the Kitimat-Terrace airshed. At paras. 376 - 377, the Board found that:

> In summary, based on all of the evidence, the Panel finds that the Appellants' have not met the onus of proof required to warrant setting aside or suspending [the sulphur dioxide limit in] paragraph 4.2.2 of the [Permit] Amendment, or ordering the Director to obtain further information (i.e., literature review, quantitative assessment, etc.) regarding the risks that the SO_2 emissions authorized under the Amendment pose to the three health endpoints that were addressed by the Appellants.
>
> In addition, the information before the Panel regarding the risk to human health associated with the increased SO_2 emissions, including the information in the STAR and the expert evidence presented at the hearing, confirms the Director's conclusion that the risk to human health is moderate, in that it is acceptable but should be subject to monitoring to confirm that the actual impacts match those predicted. The Panel finds that this conclusion reflects a cautious and conservative approach, given the assumptions used in the STAR's dispersion modeling and the health impacts assessment. The conclusion that the human health impacts are "moderate" is very cautious given that Dr. Carlsten, an independent medical doctor and professor of medicine who reviewed the STAR, concluded that the SO_2 increases post-KMP "can be considered trivial in terms of health effects", and given that the Northern Health Authority and BC Centre for Disease Control concluded that the STAR's "approach was acceptable, the conclusions were generally consistent with the wider literature, and mitigation efforts were appropriate."

[205] The Panel finds that, in *Toews and Stannus*, the Board appropriately dealt with the "potential for KMP to increase the incidence of adverse conditions among Airshed Residents" in the context of an adaptive management approach. The

present appeals should not be used as a means to re-argue a matter that was conclusively and appropriately addressed in *Toews and Stannus*. Among other things, it would be contrary to the interests of judicial economy and unfair to the Director and Rio Tinto, to do so.

[206] In summary, the Panel finds that this ground for appeal should be struck or summarily dismissed under section 31(1) of the *Administrative Tribunals Act*, because:

- this ground is plainly and obviously beyond the Board's jurisdiction in the present appeals (section 31(1)(a) of the *Administrative Tribunals Act*); and/or
- the substance of this ground was appropriately dealt with in the Board's previous appeal proceeding that led to the decision in *Toews and Stannus* (section 31(1)(g) of the *Administrative Tribunals Act*); and/or
- proceeding to hear this ground at a full hearing would be an abuse of process on the basis that: (a) the substance of this ground was appropriately addressed in *Toews and Stannus*; and (b) it would be contrary to the interests of judicial economy, and unfair to the Director and Rio Tinto, to re-hear the issue (section 31(1)(c) of the *Administrative Tribunals Act*).

[207] Accordingly, the applications for summary dismissal with respect to ground 4(c) are granted.

2. Whether the Board should grant the Appellants' applications to further amend their Notices of Appeal

[208] For convenience, the Appellants' proposed additional ground for appeal is reproduced below:

> Subsection 16(1) of the *Act* is of no force and effect to the extent of its inconsistency with section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*"), by depriving the appellant, her students and other residents of the Kitimat-Terrace airshed ("Airshed Residents") their rights guaranteed under section 7 in a manner that is not in accordance with the principles of fundamental justice and not justifiable under section 1 of the *Charter*.
>
> Particular
>
> The words "for the protection of the environment" found in subsection 16(1) of the *Act* fail to properly or at all protect human health of Airshed Residents, thereby depriving them of their rights to life and the security of the person.
>
> The words "for the protection of the environment" found in subsection 16(1) of the *Act* are unconstitutionally vague for reasons including that they set a standard that is not intelligible, cannot provide a basis for coherent judicial interpretation, and not capable of guiding legal debate.

[209] The additional remedies that the Appellants seek to add are set out in the Background of this decision.

Ms. Stannus' submissions

[210] Ms. Stannus submits that the factors to be considered when deciding an application to amend a Notice of Appeal were set out in *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-007(b), 2013-EMA-007(c), 2013-EMA-010(b), 2013-EMA-010(c), August 22, 2014), at paras. 47 - 50:

> The Panel finds that the Board's analysis in *Cobble Hill* provides assistance in deciding the present application. The Panel finds that a threshold issue in deciding whether to grant an application to add a new ground for appeal is whether the ground is, on a generous reading, within the Board's jurisdiction.
> …
>
> However, the Panel finds that, in an application to add a new ground for appeal, as opposed to an application to strike existing grounds for appeal, there are additional considerations. In particular, the Panel finds that, even if the new ground for appeal is, on a generous reading, within the Board's jurisdiction, the other parties' right to procedural fairness is also a relevant consideration in deciding whether to allow a material amendment to the grounds for an appeal. In this regard, the Panel finds the Board's decision in *Sell* to be instructive.
>
> In *Sell*, the Appellants requested that the Board consider, in writing, a preliminary motion to quash a permit on the ground that the decision-maker had fettered his discretion. Fettering had not previously been raised as a ground for the appeal, and an oral hearing of the merits of the appeal was scheduled to commence approximately six weeks later. The Board found that it had the jurisdiction to allow an amendment to a Notice of Appeal, and that it would not be a breach of procedural fairness to allow the appellants to add a new ground for their appeal, because the other parties had received adequate advance notice of the material change to the grounds for appeal. However, the Board declined to hear the preliminary motion in writing, prior to the oral hearing, because the subject matter of the motion would best be dealt with at the full hearing on the merits of the appeal.
>
> … The Panel finds that the common law test set out in *Imperial Tobacco* provides a more restrictive approach than the Board has used in previous cases, and sets a threshold that may be unduly difficult for appellants to meet in the context of a preliminary application before an administrative tribunal where the parties often are unrepresented by legal counsel. Although the Appellants in the present case are represented by legal counsel, the Board held in *Cobble Hill* that one of the reasons for the existence of administrative tribunals is to provide a process that is more accessible than the civil court process. For that reason, the threshold for striking a ground for appeal, and in this case denying an application to add a ground for appeal, must be generous to ensure that appellants have a chance to be heard on matters that are within the Board's jurisdiction. However, an appellant's right to a fair opportunity to

> be heard must be balanced against any potential prejudice to the other parties. …
>
> [underlining added in Ms. Stannus' submissions]

[211] Ms. Stannus submits that the present application satisfies these considerations. She submits that the new ground and requested relief are within the Board's jurisdiction. The Board has the jurisdiction to decide questions of law in appeals under the *Act*, including the constitutional validity of section 16 of the *Act*. The Board also has the jurisdiction to grant a remedy under section 24(2) of the *Charter*, and to consider and apply section 52(1) of the *Constitution Act, 1982*. In addition, she submits that the other parties will not be procedurally prejudiced if the application is granted, as the parties have yet to exchange their Statements of Points and expert reports.

[212] In support of those submissions, Ms. Stannus refers to *Martin v. Nova Scotia (Workers' Compensation Board)*, 2003 SCC 56, at paras. 23, 28 – 29, and 48; and, *R. v. Conway*, 2010 SCC 22 [*Conway*], at paras. 81 – 82. In particular, *Conway* sets out the test for determining whether a tribunal can grant remedies under section 24(1) of the *Charter*.

Unifor's submissions

[213] Unifor adopts Ms. Stannus' application. In addition to the remedies that Ms. Stannus' application sought to add, Unifor seeks to add a further remedy, which is also set out in the Background of this decision (see para. 61).

Ms. Toews' submissions

[214] Ms. Toews adopts Ms. Stannus' application.

The Director's submissions

[215] The Director submits that the Appellants' *Charter* challenge ought to be summarily dismissed on the basis that it has no reasonable prospect of success. The Director maintains that the Appellants cannot satisfy the first stage of the *Doré* analysis for an alleged breach of section 7 of the *Charter*, because the words "for the protection of the environment" in section 16(1) are protective in nature, and section 16(1) does not interfere with or deprive the Appellants of their life, liberty, or security of the person.

[216] Moreover, the Director argues that the Appellants cannot satisfy the second stage of the *Doré* analysis, because section 16 of the *Act* is not impermissibly vague so as to offend section 7 of the *Charter*. In particular, the Director submits that "unintelligibility" rather than "uncertainty" is the threshold for finding vagueness: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 [*Nova Scotia Pharmaceutical*], at paras. 60 – 62. The Director submits that this is a high threshold; as long as the section of legislation provides "sufficient guidance for legal debate", it is not void for vagueness: *Nova Scotia Pharmaceutical*, at para. 71.

[217] Regarding the additional remedy sought by Unifor, the Director submits that even if the Board accepts that section 16(1) of the *Act* violates the Appellants'

rights under section 7 of the *Charter*, this remedy appears to be asking the Board to direct the Director to apply the precautionary principle when applying section 16(1) of the *Act*. The Director notes that the Board expressly rejected that argument in *Toews and Stannus*, at para. 236.

Rio Tinto's submissions

[218] Rio Tinto submits that the Appellants' application to amend their Notices of Appeal should be denied for the same reasons as grounds 1 and 2 should be summarily dismissed: the proposed ground is a collateral attack on the Permit Amendment. In addition, Rio Tinto argues that the Appellants' applications to amend their Notices of Appeal at this stage in the proceedings is abusive of the appeal process, as the applications were made only six weeks after they were given an opportunity to amend their grounds for appeal, and the new ground is substantially similar to grounds 1 and 2. Rio Tinto also submits that there are no new facts or circumstances that have arisen since they provided their previous amended grounds for appeal. The Appellants have had considerable time to determine their grounds for appeal, and were given ample opportunity to raise this ground previously.

Ms. Stannus' reply submissions

[219] Ms. Stannus argues that the Board should not dismiss the proposed ground at this early stage, and the questions raised by the proposed ground for appeal should proceed to the full hearing of the appeals. For the Board to summarily dismiss the proposed ground before the parties have even exchanged Statements of Points would deprive the Appellants of the opportunity to fully argue their cases, and would deprive the Board of the opportunity to make a ruling based on full submissions from the parties.

[220] In addition, Ms. Stannus submits that Rio Tinto is not prejudiced by the timing of this application, as the parties have yet to exchange Statements of Points, and the proposed ground will not significantly add to the complexity of the issues already raised by grounds 1 and 2.

Unifor's reply submissions

In reply, Unifor submits that neither Rio Tinto nor the Director have demonstrated any prejudice to their positions if the proposed amendments are allowed. Regarding the remedy that Unifor seeks to add, Unifor submits that it is asking the Board to direct the Director to reconsider his decision based on three *Charter* requirements, none of which are, or amount to, the "precautionary principle".

The Panel's findings

[221] The Panel finds that the proposed additional ground is, on a generous reading, within the Board's jurisdiction. Put another way, it is not plain and obvious, on a general reading of the proposed additional ground, that the Board has no jurisdiction over the ground, or that the ground is completely irrelevant to the subject matter of the appeals. The Panel has already found with respect to grounds 1 and 2, that the EEM Plan is not merely a tool for monitoring and gathering

information about the sulphur dioxide emissions and their effects. The Panel's reasons with respect to the relevance and jurisdiction to hear those grounds apply equally to the proposed additional ground. If the triggering thresholds and mitigation measures in the EEM Plan are inadequate to protect human health, the approval of the EEM Plan may not adequately address any unacceptable adverse health impacts that may arise. On that basis, the Appellants maintain that the approval of the EEM Plan fails to adequately protect rights provided under section 7 of the *Charter*. On their face, these matters are relevant to the merits of the decision to approve the EEM Plan, and could not have been argued in the appeals of the Permit Amendment since there was no post-KMP monitoring data at that time, and the human health KPI in the EEM Plan was not finalized until after those appeals were decided.

[222] In addition, although the Director and Rio Tinto challenge the applicability of the legal test that the Appellants seek to apply regarding the alleged *Charter* breach, and the Appellants' standing to bring the *Charter* arguments on behalf of other persons, the Panel finds that those matters are more appropriately dealt with at a full hearing of the appeals. The parties' submissions have raised complex questions of law about the appropriate legal tests, as well as questions of mixed fact and law with regard to standing to bring *Charter* arguments, which cannot be fully and fairly adjudicated in these summary proceedings.

[223] The Panel also finds that allowing the addition of this ground will not adversely affect the other parties' rights to procedural fairness, because the other parties have received plenty of advance notice of the change to the grounds for appeal. The appeals are scheduled to be heard in May 2019, and the parties have not yet exchanged their Statements of Points or expert evidence. Furthermore, the Panel finds that adding this ground for appeal will not unduly lengthen or delay the appeal proceedings, as it appears that the evidence and legal submissions on this ground will overlap somewhat with those pertaining to grounds 1 and 2.

[224] For these reasons, the Panel finds that the proposed additional ground should proceed to a full hearing on the merits of the appeals. Accordingly, the applications to add the additional ground are allowed.

[225] Regarding the remedies sought to be added, the Board's powers in deciding appeals under the *Act* are as follows:

> **103** On an appeal under this Division, the appeal board 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.

[226] Thus, it is clear that the Board has the power to send the appealed decision back to the Director with directions, which is the first additional remedy sought by Ms. Stannus.

[227] Section 24(1) of the *Charter* states:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[228] Section 52(1) of the *Constitution Act, 1982*, states:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[229] According to the test set out in *Conway*, the Board is considered a "court of competent jurisdiction" for the purposes of section 24(1) of the *Charter*, because it has the jurisdiction to decide questions of law, and there are no express or implied restrictions on the Board's ability to assess the constitutional validity of the legislation it applies. The text in section 52(1) of the *Constitution Act, 1982* contains no limits on which adjudicative bodies may grant this remedy. In any event, none of the parties have argued that the Board lacks the ability to assess the constitutional validity of the *Act*.

[230] However, it should be noted that the Board has previously found that it has no jurisdiction to issue a declaration of constitutional invalidity (*Halme's Auto Service Ltd. v. Regional Waste Manager*, Decision Nos. 1998-WAS-018(c) & 1998-WAS-031(a), March 24, 2014, at paras. 307 - 309). Although the Board has the power to consider questions of law, and therefore, to assess the constitutional validity of the legislation it applies, the Board's remedial powers are limited to those provided by its enabling legislation, and those powers do not include issuing declarations of constitutional invalidity. If an impugned provision is found to be constitutionally invalid, the Board can read the provision down and treat it as invalid in the matter before it.

[231] Thus, the Panel finds that in deciding appeals under the *Act*, the Board may generally grant remedies pursuant to section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*, but the specific remedies that the Board may grant are limited to those provided under section 103 of the *Act*.

[232] The Panel has considered the Director's submission that the additional remedy sought by Unifor (as well as the remedy sought by Unifor with respect to ground 2) appears to be asking the Board to direct the Director to apply the precautionary principle when applying section 16(1) of the *Act*. The Panel disagrees. On their face, Unifor's submissions state that the additional relief is "intended to reflect the *Charter* values and principles expressed in the jurisprudence … both within the *Oakes* framework and as principles of fundamental justice." While the Director draws similarities between the relief sought by Unifor and the precautionary principle as articulated by the appellants in *Toews and Stannus* (at para. 203), the Panel finds that this question should properly be addressed at a full hearing of the appeals, where the parties can make full submissions regarding the relevant legal principles.

DECISION

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

[234] For the reasons stated above, the applications of the Director and Rio Tinto to strike or summarily dismiss the Appellants' grounds for appeal, as amended on January 31, 2018, are granted, in part. Specifically, the applications are:

- denied with respect to grounds 1 and 2;
- granted with respect to grounds 3, 4(b) and 4(c); and
- granted in part with respect to ground 4(a), which shall be amended in accordance with the directions set out in this decision.

[235] Additionally, for the reasons stated above, the Appellants' applications to amend their Notices of Appeal are granted.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

June 25, 2018