BRITISH COLUMBIA

Environmental Appeal Board

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DECISION NOS. 2016-EMA-130(b); 2016-EMA-144(b), 145(b), 146(b), 147(b) and 149(b) (Group File: 2016-EMA-G05)

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

BETWEEN:	John Pickford John Henry Dressler Rodger Hamilton Ellis O'Toole Angie Delainey Tricia McLellan	**APPELLANTS**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
AND:	Atlantic Power Preferred Equity Ltd.	**APPLICANT / THIRD PARTY**

BEFORE: A Panel of the Environmental Appeal Board
Alan Andison, Chair

DATE: Conducted by way of written submissions concluding on May 22, 2018

APPEARING:

For the Appellants:	
John Pickford	John Pickford
John Henry Dressler	John Henry Dressler
Rodger Hamilton	Rodger Hamilton
For the Appellants:	
Ellis O'Toole	William J. Andrews, Counsel
Angie Delainey	
Tricia McLellan	
For the Respondent:	Johnny Van Camp, Counsel
	Meghan Butler, Counsel
For the Third Party:	Jonathan McLean, Counsel
	Jonathan Buysen, Counsel

PRELIMINARY APPLICATION

[1] On April 13, 2018, Atlantic Power Preferred Equity Ltd. ("Atlantic") applied to the Board to request dismissal of six appeals filed against the September 6, 2016 decision (the "Amendment Decision") of Brady Nelless, Delegate of the Director, *Environmental Management Act* (the "Director"), Ministry of Environment (the

"Ministry"), to amend Air Emissions Permit #8808 (the "Air Permit") held by Atlantic.

[2] Atlantic submits that the appeals should be dismissed on the basis that:

- the Appellants have failed to introduce any evidence from which a reasonable trier of fact could find in the Appellants' favour; and
- alternatively, pursuant to section 31(1)(f) of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "*ATA*"), there is no reasonable prospect that the appeals will succeed.

[3] The application was heard by way of written submissions.

BACKGROUND

Atlantic's facility and air emissions permit

[4] Atlantic owns and operates a 66 megawatt biomass-fired electricity generating facility located at 4455 Mackenzie Avenue North in Williams Lake, BC. The facility has operated since 1993, and has been using a combination of wood waste from sawmill operations and other waste wood as its fuel source.

[5] Atlantic is authorized to discharge specified emissions from the facility to the air under the Air Permit, which was originally issued by the Ministry in 1991. The Air Permit addresses a number of subjects including: the operating parameters of the discharge, the authorized works, monitoring and reporting requirements, and the authorized fuel.

[6] Prior to the Amendment Decision, the authorized fuel was "untreated wood residue", and "wood residue treated with creosote and/or a creosote-pentachlorophenol blended preservative (treated wood)" (e.g., rail ties), provided that:

- the treated wood component <u>did not exceed 5% of the total biomass fuel supply</u> calculated on an annual basis;[1]
- the treated wood was well mixed with untreated wood waste prior to incineration; and
- none of the wood residue had been treated with metal derived preservatives.

[underlining added]

[7] Other authorized fuels were, and still are, set out in clause 2.7.1 of the Air Permit.

[8] According to a "Frequently Asked Questions" sheet issued by Atlantic (updated June 2016), the facility burned rail ties between 2004 and 2010, and rail ties accounted for 4% of the fuel supply in 2009.

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[1] While the Air Permit allowed up to 5% treated rail ties in the feedstock, Atlantic had not burned rail ties at the facility since 2010. (Atlantic's document titled "Frequently Asked Questions", page 2, attached to the affidavit of Rodger Hamilton).

[9] According to a "Fact Sheet" issued by Atlantic, and provided in evidence to the Board, Atlantic supplies power to BC Hydro under a long-term energy purchase agreement. In support of negotiations to renew that agreement, Atlantic wanted to secure additional fibre (feedstock) for the facility to supplement a diminishing local fibre supply. It determined that rail ties, among other alternative fuels, would be a viable option.

[10] Atlantic decided to pursue an amendment to its Air Permit that would allow it to burn a 50/50 mix of rail ties and traditional wood fibre on a periodic basis.

Application to amend the Air Permit

[11] On or about October 15, 2015, Atlantic applied to the Director for an amendment to its Air Permit to allow up to 50% treated rail ties of the total biomass fuel supply on an annual basis. The Ministry considered the application to be a "significant amendment", which triggered broad public notification requirements under the *Public Notification Regulation*, B.C. Reg. 2002/94 (the "*Regulation*"). Atlantic notified the public that, among other things, it was applying to raise the limit on waste rail ties as a proportion of the authorized fuel from 5% to 50%. Atlantic's Fact Sheet appears to have been produced as part of the notification/information distribution process.

[12] Pursuant to section 7 of the *Regulation*, "a person who may be adversely affected" by the application may notify the Director, in writing, stating how that person is affected. Under subsection 7(2) of the *Regulation*, the Director "may" take that information into consideration.

[13] Over the course of late 2015 and early-to-mid-2016, members of the public provided the Director with numerous comments and concerns regarding the proposed amendments. Some of the Appellants sent emails to the Director raising concerns about the adverse impact that burning rail ties may have on local air quality and the environment, as well as concerns with the impact of the resulting ash on the landfill and surrounding area.

The Director's decision

[14] On September 6, 2016, the Director issued the Amendment Decision pursuant to section 16(1)(b) of the *Environmental Management Act* (the "*Act*"). The Amendment Decision allows Atlantic to increase the quantity of treated rail ties that can be incinerated at the facility, subject to various terms and conditions. Specifically, the Amendment Decision allows the "incineration of up to 50% by wet weight of rail tie material and clean, non-hazardous construction and demolition debris", and includes new clauses in relation to rail tie burning, handling, and storage. For example, the Amendment Decision requires that: rail tie material must be received at the facility in an un-shredded state unless prior written permission is obtained from the Director; Atlantic must implement both a waste acceptance plan and a fire control and prevention plan, each certified by a qualified professional, before it may accept rail ties at the facility; un-shredded rail ties must be stored separately from clean biomass and must be protected from precipitation and storm water runoff; a maximum of 3,000 tonnes of shredded rail tie material may be stored at the site and must be in an enclosed bin, protected from the

elements; and fugitive odour and polyaromatic hydrocarbons ("PAH") emissions, within the boundaries of the City of Williams Lake, from the transport, storage and processing of rail tie material, must be controlled and suppressed.

[15] In addition, the Amendment Decision reduces the Total Particulate Matter maximum to 20 mg per cubic metre, from the previous maximum of 50 mg per cubic metre, and sets limits for the discharge of certain substances including hydrogen chloride (HCl), sulphur dioxide (SO_2), and PAH, which were not previously regulated in the Air Permit.

[16] The Amendment Decision also sets out new emission monitoring and reporting requirements. In addition to continuously monitoring NO_2 emissions and opacity at the boiler's stack, which the Air Permit previously required to be monitored, Atlantic must continuously monitor SO_2 and HCl emissions at the stack. Particulates, which were previously required to be monitored in the stack on an annual basis, are now included in requirements for quarterly and annual stack testing. Atlantic must submit an ambient air quality monitoring plan, prepared by a qualified professional, to the Director for approval, and implement that plan before incinerating rail tie material at the facility. Annual reports of monitoring data must be provided to the Director by March 31 of each year, and must be made available to the public at the Williams Lake Public Library within 30 days of submission to the Ministry.

The Appeals

[17] Nine individuals filed separate appeals against the Amendment Decision. Subsequently, three appeals were withdrawn and dismissed pursuant to section 17(1) of the *ATA*; namely, the appeals of Beverly Haskins (2016-EMA-131), Peter Luscombe (2016-EMA-133), and Becky Bravi (2016-EMA-148).

[18] Of the six remaining Appellants, three (Ellis O'Toole, Angie Delainey, and Tricia McLellan) are represented by counsel, and made joint submissions on the appeals and the present application. They are referred to in this decision as the "Represented Appellants". John Pickford, John Henry Dressler, and Rodger Hamilton, are self-represented in the appeals and in this application.

[19] On December 9, 2016, the Director applied to dismiss all nine appeals on the basis that the Appellants lacked standing to appeal the Amendment Decision under section 100(1) of the *Act*. The Director also applied to strike certain grounds for appeal and Notices of Appeal.

[20] On March 29, 2017, the Board issued a decision denying the Director's application to dismiss the appeals for lack of standing, but granting, in part, the application to strike portions of some Notices of Appeal (*John Pickford et al v. Director, Environmental Management Act*, Decision Nos. 2016-EMA-130(a), 131(a), 133(1), 144(a) to 149(a)).

[21] In general, the remaining grounds for appeal raise concerns regarding whether the Amendment Decision adequately protects human health and the environment. The Appellants' specific concerns include: whether the Amendment Decision will adversely affect air quality in Williams Lake due to increases in the emission of SO_2, HCl, and PAH; whether the Amendment Decision provides

adequate controls over the transportation and handling of rail ties; whether the Director erred by relying on the results of a trial burn conducted in 2001; and, whether the monitoring and reporting requirements in the Amendment Decision are adequate. The Appellants request that the Amendment Decision be reversed, or alternatively, that the Amendment Decision be varied to include numerous amendments to address their concerns regarding the storage, handling and incineration of rail ties.

Procedural matters

[22] On June 1, 2017, the Board held a pre-hearing teleconference, and ruled that the appeals should be heard by way of an oral hearing. However, the Board advised that its ruling may be reviewed once the Appellants provided more information about the evidence and arguments they intended to rely on in support of their appeals.

[23] On June 26, 2017, Mr. Hamilton provided his Statement of Points and supporting documents. Those documents include letters written by Mr. Hamilton, portions of a technical assessment report and consultation report that Atlantic had prepared in support of its application for the permit amendment, part of a Ministry technical report regarding the permit amendment application, and part of the "Williams Lake Airshed Management Plan: 2006 – 2016" dated June 2006.

[24] On June 29, 2017, the Board received the Represented Appellants' Statement of Points and supporting documents. Their documents included the technical assessment report and a consultation report that Atlantic had prepared in support of its amendment application, the Ministry technical report regarding the amendment application, and a one-page report by Dr. Peter Jackman (together with his *curriculum vitae*) critiquing the air dispersion modelling that Atlantic relied on in support of its amendment application.

[25] On July 2, 2017, the Board received Mr. Dressler's Statement of Points.

[26] On July 7, 2017, the Board received Mr. Pickford's Statement of Points and supporting documents, including the Ministry's technical report regarding the amendment application.

[27] On October 12, 2017, the Board held another pre-hearing teleconference. At that time, the oral hearing of the appeals was tentatively scheduled for four weeks commencing on April 30, 2018. The Board set a schedule for the parties to exchange their expert reports and Statements of Points prior to the oral hearing. The Board's letter setting out the results of the teleconference stated that, in accordance with the Board's Rule 25, expert reports were due on February 5, 2018, 84 days before the oral hearing commenced, and reply expert reports were due on March 19, 2018, 42 days before the oral hearing commenced.

[28] On December 21, 2017, the Director provided copies of his Statement of Points, the documents that he intended to tender as evidence at the oral hearing, and legal authorities.

[29] On January 30, 2018, Atlantic provided copies of its Statement of Points, the documents that it intended to tender as evidence at the oral hearing, and legal authorities.

[30] On February 2, 2018, the Director and Atlantic provided notices of their intentions to call expert witnesses, and provided copies of their expert witnesses' qualifications and the reports containing expert opinion evidence.

[31] By that time, numerous documents had been provided by the Director and Atlantic. According to the Director, he produced 48 relevant documents. According to Atlantic, it provided five binders of documents including four expert reports.

[32] On February 8, 2018, the Director advised that he was willing to attempt to resolve the appeals through mediation, and he requested that the Board facilitate the mediation. That same day, Atlantic advised that it agreed with the Director's proposal and was willing to participate in a mediation.

[33] On February 16, 2018, Mr. Pickford advised that he was willing to participate in a mediation. However, that same day, Mr. Hamilton, Mr. Dressler, and the Represented Appellants advised that they were unwilling to participate in a mediation, and they requested that the appeals be heard by way of written submissions.

[34] On February 19, 2018, the Board advised the parties that it would not convene a mediation, given that not all parties agreed to participate.

[35] In a letter dated March 1, 2018, after considering submissions from the parties, the Board directed that the appeals would be heard by way of written submissions. Several of the Appellants had advised that they could not afford to participate in a four-week oral hearing, and were prepared to argue their appeals without the benefit of cross-examining the witnesses who would have appeared for the Director and Atlantic. However, the Director and Atlantic opposed proceeding by way of written submissions.

[36] The Board's March 1, 2018 letter states, in part:

> In these appeals, the Board notes that there are complicated technical matters that will require the Board to understand and adjudicate matters that are best explained by experts in the field. The parties have filed expert reports, and other technical documentation, in support of their individual cases.
>
> Except for the reports submitted by the Represented Appellants, no further expert evidence will be tendered by the Appellants. Furthermore, the Represented Appellants advise that they are prepared to rely upon the information provided to date, without the benefit of cross-examining the witnesses for [Atlantic] or the [Director]. The other Appellants have submitted their relevant documents with their Statements of Points, and all believe that they can put in their cases – present their information – in writing. This suggests that, like the Represented Appellants, they are not seeking – do not require – an opportunity to cross-examine the witnesses for [Atlantic] or the [Director].

> While the Board notes that [Atlantic] intends to call 5 fact witnesses to address the issues under appeal, given that the Appellants are willing to forego cross-examination in order to secure a written hearing, such evidence may be provided in affidavit form. Similarly, any oral evidence that the Appellants would have given at the hearing, may be provided by affidavit.

[37] The Board's March 1, 2018 letter established a schedule for the parties to provide written submissions and any affidavit evidence. The Appellants were directed to provide their written submissions and any affidavit evidence by no later than April 3, 2018.

[38] In a letter dated March 16, 2018, Atlantic advised that it intended to "rely on and tender" as evidence numerous documents by four authors (who Atlantic had intended to tender as expert witnesses), including expert reports, which were originally disclosed with Atlantic's Statement of Points and notice of expert evidence. Atlantic also requested that the Board advise whether Atlantic need not file additional copies of those documents with its written submissions.

[39] In a letter dated March 19, 2018, the Board confirmed that Atlantic's documents would be provided to the hearing panel, and Atlantic need not provide further copies of the documents that it intended to rely on.

[40] On March 21, 2018, Mr. Hamilton provided his written submissions and supporting documents. The documents included his Notice of Appeal, which refers to several documents available on the internet, Atlantic's 2017 Annual Report for the Air Permit, and a January 6, 2017 letter from Mr. Hamilton to the Board.

[41] On March 26, 2018, Mr. Pickford provided his written submissions and supporting documents. The documents included: a letter dated October 28, 2015 from the Interior Health Authority to Atlantic regarding the proposed permit amendment; a letter dated August 26, 2016 from the Interior Health Authority to the Director commenting on the proposed permit amendment; an email dated August 31, 2016 from the Ministry to the Interior Health Authority in response to the August 26, 2016 letter; and, excerpts of several documents including the Ministry's technical report on the amendment application, and a report titled "TransCanada Power Emission Survey Report", prepared in 2001 by A. Lanfranco and Associates Inc. (the "Lanfranco Report"). The Lanfranco Report documented the concentrations of certain air pollutants at the (then) TransCanada Power facility in Williams Lake, when burning normal hog fuel (wood waste), and alternatively, when burning 100% chipped railway ties. The information from the 2001 "trial burn" of rail ties was used in the emission modelling that Atlantic submitted to the Ministry in support of its application for a permit amendment.

[42] On March 29, 2018, Mr. Dressler provided his written submissions. He provided no documents or internet links to documents, but his submissions refer to a June 2016 report titled "A Summary of Recent Trends in Levels of Particulate Matter", prepared for the Williams Lake Air Quality Roundtable, which appears to be a document that is available on the Ministry's website.

[43] On April 3, 2018, the Represented Appellants provided their written submissions. They provided no documents with their submissions, but their submissions refer to several of the documents that were previously submitted with

their Statement of Points, as well as several documents that the Director and Atlantic disclosed with their Statements of Points.

Atlantic's application

[44] In a letter dated April 6, 2018, Atlantic noted that the Appellants had filed no affidavits with their written submissions, and advised that it intended to apply for an order that the appeals be dismissed on the basis that:

- the Appellants had failed to introduce any evidence from which a reasonable trier of fact could find in the Appellants' favour (i.e., a "no evidence" motion); and
- alternatively, pursuant to section 31(1)(f) of the *ATA*, there was "no reasonable prospect" that the appeals will succeed (i.e., a "summary dismissal" motion).

[45] On April 13, 2018, Atlantic submitted its application.

[46] The Director supports and consents to Atlantic's application.

[47] All of the Appellants oppose the application.

ISSUES

[48] The issues to be decided in this application are:

1. Whether the appeals should be dismissed on the basis of Atlantic's "no evidence" motion.
2. Alternatively, whether the appeals should be summarily dismissed pursuant to section 31(1)(f) of the *ATA*, on the basis that there is no reasonable prospect that the appeals will succeed.

RELEVANT LEGISLATION

[49] Section 31(1)(f) of the *ATA* 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:

...

(f) there is no reasonable prospect the application will succeed;

...

[50] Section 1 of the *ATA* 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

[51] Thus, for the Board's purposes, the word "application" in section 31 of the *ATA* effectively means "appeal".

[52] The Amendment Decision was issued under section 16 of the *Act*, which states, in part, as follows:

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:

(a) authorizing or requiring the construction of new works in addition to or instead of works previously authorized or required;

(b) authorizing or requiring the repair of, alteration to, improvement of, removal of or addition to existing works;

(c) requiring security, altering the security required or changing the type of security required or the conditions of giving security;

(d) extending or reducing the term of or renewing the permit or approval;

(e) authorizing or requiring a change in the characteristics or components of waste discharged, treated, handled or transported;

(f) authorizing or requiring a change in the quantity of waste discharged, treated, handled or transported;

(g) authorizing or requiring a change in the location of the discharge, treatment, handling or transportation of the waste;

(h) altering the time specified for the construction of works or the time in which to meet other requirements imposed on the holder of the permit or approval;

(i) authorizing or requiring a change in the method of discharging, treating, handling or transporting the waste;

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

[53] Other relevant legislation is set out in the text of this decision, where it is referred to.

DISCUSSION AND ANALYSIS

1. Whether the appeals should be dismissed on the basis of Atlantic's "no evidence" motion.

The parties' submissions

[54] Atlantic submits that the legal test for a "no evidence" motion is "whether the plaintiff [or Appellant, in this case] had led any evidence from which a reasonable trier of fact could find in the plaintiff's favour if the evidence were believed" (*Cost Plus Computer Solutions Ltd. v. VKI Studios*, 2015 BCCA 467, at para. 44) [*Cost Plus*].

[55] Atlantic submits that in *David Avren v. Regional Water Manager*, Decision No. 2006-WAT-003(a), June 29, 2007 [*Avren*], at paras. 65 – 67, the Board dismissed an appeal on the basis that:

- to meet the burden of proof, the appellants needed to deliver some expert evidence to support their concerns; and
- the appellants delivered no such evidence; rather, they expressed their own "concerns" about possible harm occurring.

[56] Atlantic argues that the present appeals are analogous to *Avren*.

[57] Atlantic submits that the Appellants provided no affidavit evidence, and none of the Appellants have been tendered as expert witnesses, yet some of them make unsworn statements that purport to give evidence in the nature of expert opinions on topics such as stack testing, air modelling, and secondary particulate formation. Atlantic argues that such statements are inadmissible as expert opinion evidence or any other form of opinion evidence.

[58] In addition, Atlantic submits that the Appellants have submitted or referred to documents that purport to give expert evidence, but the Appellants failed to provide proper notice of expert evidence, and in some cases the authors of the documents are unknown. Atlantic maintains that such documents cannot be admissible for any purpose.

[59] Atlantic submits that the Appellants bear the evidentiary burden to establish each ground of appeal on a balance of probabilities, as stated on p. 31 of the Board's *Practice and Procedure Manual* and in previous Board decisions (e.g., *Avren*, at paras. 52 – 55; *Wilfred Boardman v. Regional Manager*, Decision No. 2013-WIL-021(a), September 9, 2014 [*Boardman*], at paras. 52 – 53; and, *City of Cranbrook v. Assistant Regional Waste Manager*, Decision No. 1999-WAS-023(c), April 9, 2009 [*Cranbrook*], at paras. 55 - 56).

[60] In particular, Atlantic submits that the Appellants have the burden of establishing, on a balance of probabilities, that the Amendment Decision does not adequately protect human health and the environment, taking into account the legislative scheme in the *Act*, which authorizes the discharge of waste into the environment (*Shawnigan Residents Association v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-015(c), 019(d), 020(b), 021(b), March 20, 2015, at para. 284; *Emily Toews and Elisabeth Stannus v. Director,*

Environmental Management Act, Decision Nos. 2013-EMA-007(g) and 2013-EMA-010(g), December 23, 2015, at paras. 232 – 235; and, *Lynda Gagne et al v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-005(a), 007(a) to 012(a), October 31, 2013, at para. 54).

[61] Regarding each document that the Appellants provided or referred to, Atlantic provided the Board with a document titled "Schedule A" which addresses each issue raised by the appeals, and contains Atlantic's submissions regarding why each document that the Appellants rely on is not evidence, is inadmissible, and/or is insufficient to meet the burden of proof.

[62] The Director adopts Atlantic's legal analysis regarding the Appellants' evidentiary burden to prove their grounds of appeal. In addition, the Director submits that the Appellants' grounds and arguments imply that the Director and other Ministry staff failed to ensure that the Amendment Decision adequately protects human health and the environment. The Director maintains that the Appellants must present evidence to support such allegations, but they have failed to do so.

[63] The Director notes that the appeals proceeded by way of written submissions at the Appellants' request. The Director submits that, having successfully applied to change from an oral hearing to a written hearing, it was incumbent upon the Appellants to provide evidence with their written submissions, and explain how the evidence proves their case. The Director maintains that some of the Appellants have improperly replied to the Director's Statement of Points and supporting documents, rather than making submissions in support of their grounds of appeal. The Director submits that the parties' Statements of Points were merely statements of the arguments they intended to present at the oral hearing; they were not substitutes for written submissions on the merits, nor were the documents filed with the Statements of Points properly considered "evidence". Such documents were simply those that the parties intended to rely on at the oral hearing, at which time they would have been tendered as evidence subject to any objections.

[64] Moreover, the Director submits that none of the Appellants provided sworn affidavits, and Mr. Dressler and the Represented Appellants adduced no evidence with their written submissions. Only Mr. Pickford and Mr. Hamilton provided document evidence with their written submissions.

[65] Additionally, the Director objects to the admissibility of the documents that Mr. Pickford provided. The Director argues that some of those documents are inadmissible hearsay, one is an expert report that Mr. Pickford is not qualified to interpret or opine on, and one is unreliable because it appears to consist of excerpts of Ministry documents that were compiled by Mr. Pickford. The Director argues that, even if the hearsay documents and excerpted documents are admitted as evidence under the Board's less formal rules of evidence, they would not prove, on a balance of probabilities, that that the Amendment Decision unacceptably affects the environment and human health.

[66] Similarly, the Director objects to the admissibility of the documents provided by Mr. Hamilton, on the basis that one is a report that Mr. Hamilton is not qualified to interpret or opine on, two of the documents consist of argument and not

evidence, and those same two documents refer to, but do not include, other documents that consist of inadmissible expert and/or opinion evidence.

[67] In particular, the Director submits that it would be an error for the Board to admit as evidence the Lanfranco Report (portions of which were provided by Mr. Pickford) or Atlantic's 2017 Annual Report for the Air Permit (portions of which were provided by Mr. Hamilton), given the procedural fairness that attaches to the Board's notice requirements regarding expert evidence (*Shawnigan Residents Association v. British Columbia*, 2017 BCSC 107, at paras. 105 – 110). The Director submits that the LanFranco Report was listed as a reliance document in the Director's notice of expert evidence, and Mr. Pickford is improperly attempting to rely on it as expert evidence without giving notice as required by the Board's Rule 25. However, the Director maintains that even if the Lanfranco Report or Atlantic's 2017 Annual Report for the Air Permit were admitted into evidence, they would not prove, on a balance of probabilities, that the Amendment Decision did not adequately protect human health and the environment.

[68] Similarly, the Director objects to any expert evidence relied on by the Represented Appellants, due to their failure to provide notice of expert evidence as required by Rule 25.

[69] In addition, the Director submits that even if the unsworn statements in the Appellants' written submissions are accepted as evidence, they would amount to insufficient evidence because the Appellants need to provide expert evidence to prove their assertions regarding the Amendment Decision. The Director notes that the Board's March 1, 2018 letter stated, in part, "In these appeals, the Board notes that there are complicated technical matters that will require the Board to understand and adjudicate matters that are best explained by experts in the field." The Director argues that the Appellants have attempted to rely on the Director's documents to prove their cases, rather than providing their own evidence, and none of the Appellants are qualified to substantiate their assertions regarding technical matters. The Director argues that, as in *Avren*, the Appellants have simply stated their objections to the Amendment Decision and asserted that the Director should justify why and how the decision was made.

[70] Finally, the Director submits that it would be untenable and unfair to require him to substantively respond to all 31 of the Appellants' grounds of appeal, when the Appellants have adduced no admissible evidence capable of supporting the grounds of appeal.

[71] The Represented Appellants submit that the Board has abundant evidence on record from which the Board can determine the merits of the appeals. They submit that the Board should complete the written hearing process and decide the appeals on their merits. They further submit that the Board's March 1, 2018 letter stated that "The parties have filed expert reports, and other technical documentation, in support of their individual cases." The Represented Appellants maintain that, at the core of the Board's decision to hold a written hearing was the concept that the written information that was before the Board, along with the information that the parties might file later, would be the basis for the parties' submissions. They submit that it is unimportant who has filed the evidence that is now before the

Board; what is important is whether the Board finds merits in the appeals, based on all of the parties' information and submissions.

[72] The Represented Appellants submit that Atlantic and the Director filed substantial volumes of evidence, and all of the Appellants filed written arguments based on the evidence; therefore, the present circumstances are distinguishable from those in the Board's previous decisions in which "no evidence" motions were granted. In particular, the Represented Appellants submit that, in those cases, the respondent and/or third party moved for dismissal of the appeals before tendering their own evidence.

[73] Moreover, the Represented Appellants argue that it would be wrong for the Board to reject the appeals without considering the evidence that has been tendered, regardless of which party filed the evidence, or to dismiss the appeals for lack of evidence. They submit that Atlantic's "no evidence" motion depends on the position that the only fair way to present the evidence would be at an oral hearing, whereby information does not become "evidence" until it is tendered by a witness. They also submit that Atlantic confuses the burden of proof with the method of proof. Although the Appellants bear the burden of showing that the Director erred, that does not mean that the Appellants must meet this burden only by relying on evidence tendered by them.

[74] Additionally, the Represented Appellants submit that the decision in *Cost Plus* demonstrates that a no evidence motion is unavailable where, as here, the decision-maker has evidence from both the party (or parties) with the burden of proof as well as from the party (or parties) opposed. The Represented Appellants also submit that *Cost Plus* is distinguishable from the present case because it involved a civil trial where the plaintiff had to prove the facts comprising the essential elements of the cause of action, and the defendant could request dismissal, before presenting any evidence of its own, on the basis that the plaintiff failed to establish a *prima facie* case that required a response from the defendant. The Represented Appellants emphasize that the test for a no evidence motion does not involve the trier of fact weighing evidence, as the test includes the phrase "… if the evidence were believed." They submit that, in the present case, the evidence of the parties opposed (i.e., the Director and Atlantic) is already on the record, the Appellants made their written submissions based on all of the evidence, and the Board should proceed to weigh the evidence after receiving the remaining written submissions.

[75] Mr. Pickford argues that his written submissions refer to documents provided by the Director and Atlantic which are publicly available on the internet. Regarding the excerpted documents that his written submissions refer to, he maintains that they were created by Atlantic and were posted online, in their entirety, by the Director. In these circumstances, he argues that it is disingenuous to claim that such documents are unreliable or inadmissible. He submits that it is unfair, and contrary to a full discussion of the issues, to claim that that the Appellants cannot discuss documents that were provided by the Director or Atlantic. He also submits that a person need not be an expert to read and interpret the Lanfranco Report, which he obtained from the internet.

[76] Mr. Hamilton submits that none of his points of appeal challenge any technical facts, and a person need not be an expert to test the opinions in expert reports. Mr. Hamilton also submits that it is unreasonable to suggest that the documents provided with the Director's and Atlantic's Statements of Points are not "evidence" simply because the hearing was changed from an oral hearing to a written hearing, or because Mr. Hamilton did not give proper notice that he intended to rely on documents that the Director considered during the permit amendment application process. He argues that the Director and Atlantic rely on the same documents from the permit amendment application process as he does.

[77] Mr. Dressler submits that there is evidence in this case, including evidence provided by the Director and Atlantic, that was considered by the Director before making the Amendment Decision. He objects to the suggestion that such information in inadmissible for any purpose.

[78] In reply, Atlantic submits that the Board's March 1, 2018 letter did not amount to a decision regarding what was (and was not) evidence, nor did it decide any evidentiary issues. Atlantic also submits that neither it nor the Director have provided any "evidence" to the Board so far; rather, they have provided their Statements of Points, the supporting documents they intended to enter into evidence at the oral hearing, and notices of expert evidence.

The Panel's Findings

[79] In *Cost Plus*, the Court of Appeal confirmed a no evidence motion that was granted at the trial level pursuant to the *Supreme Court Civil Rules*. At the trial, the defendant brought the no evidence motion after the plaintiff had closed its case, and the trial judge had ruled that a report, which the plaintiff sought to adduce as expert evidence regarding the quality of the defendant's work, was inadmissible pursuant to the *Supreme Court Civil Rules*. The plaintiff's witness was still permitted to testify, but was not permitted to offer an expert opinion. In those circumstances, the trial judge found that the plaintiff had provided no submissions or evidence regarding alleged misrepresentation by the defendant, and the plaintiff's evidence regarding an alleged breach of contract fell short of establishing a standard against which the defendant's performance could be measured. The trial judge granted the no evidence motion after concluding that the plaintiff's evidence was incapable of establishing the essential elements of the plaintiff's claims of misrepresentation and breach of contract.

[80] As is further discussed below, the Board's powers and practices with respect to admitting evidence, including expert evidence, are more flexible than those in the *Supreme Court Civil Rules*. Given the differences in the evidentiary rules and requirements that apply to trials conducted pursuant to *Supreme Court Civil Rules*, versus those that apply in appeals conducted by the Board, the Panel finds that the test in *Cost Plus* is neither applicable nor relevant to Atlantic's no evidence motion.

[81] In *Avren*, the Board granted a no evidence motion. However, when considering the Board's decision in *Avren*, it is important to bear in mind that the no evidence motion was granted during an oral hearing, after the appellants had presented their cases but before the respondent and third party had presented their cases. In contrast, the present appeals have proceeded in a hybrid manner. The

appeals were originally scheduled to be heard orally, but were converted to a written hearing after the parties had already exchanged their Statements of Points, supporting documents, and notice of expert evidence. In an oral hearing process, documents disclosed with the Statements of Points and notices of expert evidence do not become "evidence" until they are tendered by a witness at the oral hearing (as per the Board's Rule 19), subject to any objections. In written hearings, any documents disclosed with a party's written submissions are assumed to be tendered by that party as evidence (as per the Board's Rule 20), subject to any objections. Thus, in a written hearing procedure, documents are typically considered part of the evidentiary record once they are provided to the Board and the other parties.

[82] In the present case, all parties disclosed the documents they intended to rely on (at the oral hearing), before the written hearing process commenced, which is atypical of written hearings. In these circumstances, it is not surprising that some of the Appellants' written submissions include responses to the Director's and Atlantic's previously disclosed documents and arguments. Further, the Director and Atlantic have not yet provided their written arguments or tendered all of their evidence, and it is understandable that some of their evidence and arguments may now be different from what they had originally intended. However, the Panel finds that this process has not caused prejudice to the Director or Atlantic, as they are still able to make objections to the Appellants' "evidence" (which they have done), and they still have a full opportunity to present their own evidence and respond to the Appellants' cases.

[83] In addition, it is important to consider that although the application in *Avren* was framed as a "no evidence" motion, the Board's decision took into account not only the appellants' evidence (or lack thereof) regarding the facts they asserted, but also the appellants' assertions regarding alleged legal flaws in the appealed decision. At para. 54, the Board stated that the appellants were obliged to lead "some evidence that either the order [under appeal] was wrong in law or fact, or that the process leading to the order was flawed in some way" [underlining added]. Thus, the decision was not solely based on there being a lack of evidence to support the facts asserted by the appellants. It was also based on the Board's preliminary assessment of the appellants' arguments with respect to whether the order under appeal was "wrong in law", "or that the process leading to the order was flawed in some way." In that sense, the Board's decision in *Avren* was more akin to a preliminary assessment of the appellants' cases as a whole, to determine whether the respondent and third party should be required to respond.

[84] It is also important to consider that the Board's decision in *Avren* was decided before section 31 of the *ATA* applied to the Board, and therefore, the Board was relying on its common law power to control its own procedures when it granted the "no evidence" motion. Arguably, an application under one of the specific subsections under section 31 of the *ATA* now provides a more appropriate means for a party to seek summary dismissal of an appeal.

[85] The Panel also finds that *Boardman* is distinguishable from the present appeals. In *Boardman*, the appeal was conducted solely by way of written submissions, and the appellant filed a Notice of Appeal, but made no written submissions and provided no documents to support his appeal. Thus, unlike the

present appeals, the appellant in *Boardman* provided nothing more than a Notice of Appeal. Also the respondent in that case provided detailed written submissions and information, and the Board went on to decide the merits of the appeal based on the respondent's materials.

[86] In *Cranbrook*, the Board did not decide a no evidence motion; rather, the Board addressed the burden of proof in a decision on the merits of the appeal. At para. 56, the Board held that the appellant had the burden of proving the truth of the facts it asserted, on a balance of probabilities, and was responsible for leading sufficient evidence to meet that test. It was insufficient for the appellant to simply discredit the respondent's evidence or argue that the third party had not proved its case. The Panel agrees with those findings in *Cranbrook*.

[87] In summary, the Panel finds that the Board's previous decisions in *Avren*, *Boardman*, and *Cranbrook* do not set out a test that is directly applicable to the present "no evidence" motion. However, some of the findings in those decisions provide guidance in this case. In particular, the Panel finds that the onus is on the Appellants to provide some evidence that is relevant to, and capable of supporting, the facts that they assert. Also, to the extent that the Appellants allege any legal errors by the Director, they must articulate some legal argument that could support a finding that the Amendment Decision was wrong in law, or that the process leading to the Amendment Decision was flawed in some way. Furthermore, as was the case in *Avren*, Atlantic made this preliminary application before the Respondent (Director) and Third Party (Atlantic) have made their cases, and before the Board has begun to weigh any evidence or assess any arguments for the purposes of deciding the merits of the appeals. Consequently, the Panel must decide the "no evidence" motion based on a *prima facie* assessment of the Appellants' cases, to determine whether the Board should continue with a full hearing of the merits of the appeals.

[88] Regarding what constitutes admissible "evidence", section 40 of the *ATA* provides the Board with a broad discretion to accept information, regardless of whether it would be admissible in the courts. Section 40 of the *ATA* states as follows:

40 (1) The tribunal may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law.

(2) Despite subsection (1), the tribunal may exclude anything unduly repetitious.

(3) Nothing is admissible before the tribunal that is inadmissible in a court because of a privilege under the law of evidence.

(4) Nothing in subsection (1) overrides the provisions of any Act expressly limiting the extent to or purposes for which any oral testimony, documents or things may be admitted or used in evidence.

[underlining added]

[89] In addition, the Board's *Practice and Procedure Manual*, states as follows at page 42:

> In an oral hearing, each party has the right to present evidence to support that party's case. "Evidence" is anything that has the potential of establishing or proving a fact. Evidence includes oral testimony, written records, demonstrations, physical objects, etc. It does not include argument or submissions made by a party for the purpose of persuading or convincing the Board to decide the case in a particular way.
>
> …
>
> While most of the information under this heading relates primarily to oral hearings, the principles involved in weighing evidence and applying the correct burden of proof are common to all types of hearings.
>
> [underlining added]

[90] Also, as stated at page 43 of the Board's *Practice and Procedure Manual*:

> The rules of evidence that apply to a hearing before the Board are less formal than the rules applied by the courts. Section 40 of the *Administrative Tribunals Act* states that the Board "may receive and accept information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law." The Board may admit hearsay and circumstantial evidence if it is considered relevant.
>
> Relevance is the primary consideration for the Board when deciding whether to admit evidence. Relevant evidence can be described as evidence (oral or written) that will shed some light on a disputed matter or tends to prove or disprove a fact in issue.
>
> The Board may also exclude evidence. Section 40(2) of the *Administrative Tribunals Act* allows the Board to exclude anything unduly repetitious. In addition, in accordance with general legal principles, the Board may exclude evidence if it is of minimal relevance, is unreliable, may confuse the issues, or may prejudice the other parties. The Board may be obligated to exclude evidence that is privileged or is restricted by a statute such as the *Evidence Act*.
>
> …
>
> All evidence admitted during the hearing will be assessed by the Board to determine what weight, if any, should be given to the evidence. Generally speaking, evidence that is not sufficiently reliable for the Board's purposes will be given less weight when the Board is making its decision on the merits of the appeal.
>
> [underlining added]

[91] Thus, in conducting a *prima facie* assessment of the Appellants' assertions of fact, the Panel has considered whether the Appellants have provided and/or relied on some relevant information that has the potential of establishing or proving at least some of the facts that they assert in their grounds of appeal and written submissions, such that the Board should continue with a full hearing of the merits of the appeals. To the extent that there are concerns about the reliability of any information provided by the Appellants, the Board would take that into account

later, after deciding whether the information is admissible as evidence. The Board decides how much weight to give the evidence as part of the process of deciding the merits of the appeals.

[92] Taking into account the Appellants' written submissions and the documents they have provided or referred to, the Panel finds that this is not a case where the Appellants have provided no evidence that, on its face, is capable of supporting at least some of the facts asserted in their grounds of appeal and written submissions. Although the Appellants provided no sworn statements (i.e., affidavits) in support of their written submissions, it is not unusual for self-represented parties, which includes half of the Appellants in this case, to provide their evidence in the form of unsworn statements which may be intermingled with their written submissions. Although the Represented Appellants also provided no affidavit evidence, they have indicated that they have financial limitations regarding the appeal process. The Board's March 1, 2018 letter stated on page 4 that "The Board's mandate very clearly provides that it must make the hearing process accessible to all parties. Surely that is denied when the appellants to a proceeding cannot participate because of the cost of the hearing." Although those comments were made in the context of the Board's decision to convert the appeals from an oral hearing to a written hearing, the Panel finds that the same principles apply to the costs associated with obtaining sworn affidavits.

[93] In any event, although the Board encourages parties to provide affidavit evidence when hearings are conducted in writing, such evidence is not mandatory. The appeal process, whether conducted orally or in writing, is intended to be less formal and more accessible than the court process, and the Board takes a more flexible approach to admitting evidence than the courts do. Consistent with section 40 of the *ATA*, the Board will generally admit an unsworn statement into the evidentiary record, subject to any concerns about relevance, privilege, or procedural fairness. The fact that a statement is unsworn, as opposed to sworn, may be reflected in the weight it is accorded when the Board assesses the merits of the appeals.

[94] Atlantic and the Director object to the Appellants referring to documents that were disclosed with Atlantic's and the Director's Statements of Points and notices of expert evidence. The Panel recognizes that Atlantic and the Director have not yet filed their written submissions and their "evidence" for the purposes of the written hearing. Although the documents that Atlantic and the Director previously disclosed have not yet been formally tendered by them as "evidence", the Panel finds that most of the documents that the Appellants' submissions refer to were obtained by the Appellants through the internet or another public source. The Panel finds that Atlantic and the Director have no monopoly on the use of public documents as "evidence" in the appeal process. Documents that are accessible to the public are available for any party to use as evidence in support of their case.

[95] In addition, the Panel rejects Atlantic's claim that the Appellants cannot make submissions on the documents described in Atlantic's March 16, 2018 letter. In that letter, Atlantic advised that it intended to "rely on and tender" as evidence numerous documents that were disclosed with Atlantic's Statement of Points and notice of expert evidence. Atlantic requested that the Board advise whether

Atlantic needed to file additional copies of those documents with its written submissions. The Board's March 19, 2018 letter in response confirmed that Atlantic's documents would be provided to the hearing panel, without the need for further copies to be filed with Atlantic's written submissions. Thus, Atlantic has confirmed that it intends to rely on those documents as its "evidence" for the purposes of the written hearing.

[96] The Panel finds that all of the Appellants have provided unsworn statements, and all of their written submissions refer to documents, portions of documents, or internet links to documents that one or more Appellant provided or referred to in their written submissions or their Statement of Points. The documents include the "Williams Lake Airshed Management Plan: 2006-2016", the Lanfranco Report, the consultation report and technical report that Atlantic filed with its amendment application, the Ministry's technical assessment of Atlantic's amendment application, and other documents available on the websites of the Ministry or the Williams Lake Air Quality Roundtable. On their face, those documents appear to be relevant to at least some of the Appellants' grounds for appeal and assertions regarding the Amendment Decision, and admissible under section 40 of the *ATA*.

[97] Atlantic and the Director have raised concerns about the Appellants failure to strictly comply with the Board's procedures, and whether this constitutes a breach of procedural fairness. According to the Board's rules for written hearings, the Appellants should have filed the documents that they rely on as evidence with their written submissions. Specifically, the Board's Rule 20, para. 2, states "All evidence (including affidavits and documents) must be included with the written submissions." In this case, some of the information that the Appellants rely on was filed with their Statements of Points but was not filed a second time with their written submissions. However, the Panel finds that it would be unfair to strictly enforce that Rule against the Appellants but not against Atlantic, given that the Board has stated in its March 19, 2018 letter that Atlantic need not re-file the documents it previously provided with its Statements of Points and notice of expert evidence.

[98] Moreover, the Panel finds that the intention behind Rule 20, para. 2, is to ensure that, when an appeal is conducted solely in writing (as opposed to initially being conducted as an oral hearing, but later converting to a written hearing), each party understands that it is responsible for providing its evidence to the Board and the other parties in an orderly fashion. This ensures that all parties have an opportunity to review the other parties' evidence when they prepare their written submissions. It also ensures that the Board receives all of the information that the parties rely on, recognizing that the Board does not have access to the information that was considered by the person who made the appealed decision.

[99] In the present appeals, the documents referred to in the Appellants' written submissions were disclosed (in whole or in part, or an internet link was provided) either with their written submissions or Statements of Points. In either case, the Director and Atlantic have had ample opportunity to review, and consider their responses to, the Appellants' documents and submissions. In the circumstances, there is no prejudice to the Director or Atlantic if the Board admits documents that

were previously disclosed in the Appellants' Statements of Points, but were not re-filed with their written submissions.

[100] Regarding the concerns of Atlantic and the Director regarding any purported expert opinion evidence provided by the Appellants, the Panel acknowledges that the Board's Rule 25 sets out deadlines and other requirements for giving notice of expert evidence. However, Rule 25 does not appear to apply to any of the information that the Appellant rely on or refer to in their written submissions. None of the Appellants have asserted that their submissions, or the documents they refer to, contain expert opinion evidence. Although the Represented Appellants provided a one-page report by Dr. Peter Jackman (and his *curriculum vitae*) with their Statement of Points, they do not refer to it in their written submissions, and they no longer appear to rely on it. Although some of the documents that the Appellants refer to and discuss in their submissions are technical in nature, none of the Appellants claim to be offering expert opinion evidence. The fact that the Appellants are not qualified as expert witnesses does not preclude them from commenting or making submissions on technical documents. As stated at page 45 of the Board's *Practice and Procedure Manual*:

> … To be "qualified" to give expert opinion evidence on a particular subject matter(s), the Board must be satisfied that the witness has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.
>
> If a person is not qualified to give expert evidence on a particular subject matter, the Board may still receive the witness's evidence. The Board will determine what weight should be given to each witness's testimony. The qualifications and experience of the witness will be a factor in determining the weight to be given to that witness's testimony.
>
> [underlining added]

[101] Thus, any concerns regarding an Appellant's qualifications with regard to their comments on technical information would be taken into account by the Board when deciding how much weight should be accorded to the comments. Also, in terms of procedural fairness, the Panel finds that the Director and Atlantic have had ample time to review and prepare responses to the Appellants' 'non-expert' comments on the technical documents.

[102] Atlantic and the Director also raise objections regarding the admissibility of the Appellants' documents based on concerns about hearsay and/or unreliability. As stated above, the Board takes a more flexible approach to admitting evidence than the courts do, and is not bound by the rules and legal principles on the admissibility of hearsay evidence that apply in court proceedings.

[103] In summary, the Panel finds, on a *prima facie* basis, that the Appellants have provided and/or relied on some relevant information that is admissible and has the potential of establishing or proving at least some of the facts that they assert in their grounds of appeal and written submissions. The fact that some of that evidence had been disclosed or proffered by the Director or Atlantic does not preclude the Appellants from relying on it. Consequently, the "no evidence" motion should be denied. However, the Panel cautions that these findings are only made

for the purpose of deciding whether to grant the no evidence motion. In making this preliminary decision, the Panel has not weighed any of the Appellants' evidence, and the Panel's findings have no bearing on the merits of the appeals.

[104] For all of these reasons, the Panel denies Atlantic's request to dismiss the appeals based on a "no evidence" motion.

2. Whether the appeals should be summarily dismissed pursuant to section 31(1)(f) of the *ATA* on the basis that there is no reasonable prospect that the appeals will succeed

The parties' submissions

[105] Atlantic submits that section 27(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "*Code*"), contains language that is almost identical to that in section 31(1)(f) of the *ATA*. Section 27(1) of the *Code* states:

> **27** (1) A member or panel may, at any time after a complaint is filed and with or without a hearing, dismiss all or part of the complaint if that member or panel determines that any of the following apply:
>
> …
>
> (c) there is no reasonable prospect that the complaint will succeed;

[106] Atlantic submits that judicial decisions interpreting the test for summary dismissal under section 27(1)(c) of the *Cod*e are equally applicable to section 31(1)(f) of the *ATA*. In particular, Atlantic submits that the BC Court of Appeal provided guidance on how summary dismissal powers under the *Code* should be exercised by the BC Human Rights Tribunal in *BC (Workers Compensation Appeal Tribunal) v. Hill*, 2011 BCCA 49 [*Hill*] at para. 27; and, *Lee v. British Columbia (Attorney General)*, 2004 BCCA 257 [*Lee*], at para. 26.

[107] *Hill* states as follows at para. 27:

> It is useful to describe the nature of an application under s. 27 of the *Code* to provide context for the appellants' arguments. That provision creates a gate-keeping function that permits the Tribunal to conduct preliminary assessments of human rights complaints with a view to removing those that do not warrant the time and expense of a hearing. It is a discretionary exercise that does not require factual findings. Instead, a Tribunal member assesses the evidence presented by the parties with a view to determining if there is no reasonable prospect the complaint will succeed. The threshold is low. The complainant must only show the evidence takes the case out of the realm of conjecture. If the application is dismissed, the complaint proceeds to a full hearing before the Tribunal. If it is granted, the complaint comes to an end, subject to the complainant's right to seek judicial review: *Berezoutskaia v. British Columbia (Human Rights Tribunal)*, 2006 BCCA 95, 223 B.C.A.C. 71 at paras. 22-26, leave to appeal ref'd [2006] S.C.C.A. No. 171; *Gichuru v. British Columbia (Workers Compensation Appeal Tribunal),* 2010 BCCA 191, 285 B.C.A.C. 276 at para. 31.

> [underlining added in Atlantic's submissions]

[108] Similarly, *Lee* states as follows at para. 26:

> … Thus the HRC [Human Rights Commission] had to assess this case in a preliminary way and make a judgment whether the matter warranted the time and expense of a full hearing. The threshold is not particularly high: whether the evidence takes the case "out of the realm of conjecture" …

[109] Atlantic argues that the following principles from *Hill* and *Lee* are applicable to the present application:

- section 31(1)(f) of the *ATA* creates a "gate-keeping" function that allows the Board to conduct a preliminary assessment of the appeal;
- the assessment is discretionary; and
- the Board is not required to find facts; rather, it should canvas the evidence that the parties intend to present, and come to a determination as to whether there is "no reasonable prospect" that the appeals will succeed.

[110] Regarding Atlantic's intended evidence, Atlantic submits that the Board should consider the information in its Statement of Points, supporting documents, and expert reports. In particular, Atlantic refers to the five reports disclosed in its notice of expert evidence. Atlantic maintains that the Board's March 19, 2018 letter states that the expert reports would be accepted as evidence.

[111] Atlantic also submits that the Appellants do not seek to cross-examine the witnesses that would have been tendered by the Director and Atlantic, and the Appellants have provided no admissible expert evidence of their own. Atlantic submits that there is no challenge to any of its expert reports, and the Board is not entitled to reject the conclusions in the expert reports. In support of that proposition, Atlantic refers to *Page v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2009 BCSC 493 [*Page*], at paras. 62 – 66:

> While the Hearing Panel is presumed to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction, it is not presumed to have medical expertise.
>
> Where a WCAT panel is faced with a medical diagnosis as to a mental condition that is described in the *DSM-IV* at the time of the diagnosis, it is not equipped to reject that diagnosis, without an appropriate opinion to the contrary.
>
> Here, the Hearing Panel had a diagnosis of PTSD by Dr. Jhetam, a qualified psychiatrist, that it recognized was not "contradicted by other psychiatric or psychological opinion evidence". Although it was open to the Hearing Panel to require that a physician or psychologist appointed by WCAT review Dr. Jhetam's diagnosis, it instead rejected Dr. Jhetam's uncontradicted opinion by presuming that Dr. Meloche, who had not seen the petitioner since 1995, would have disagreed with the opinion of Dr. Jhetam in 2000, and thereafter. Moreover, the Hearing Panel rejected Dr. Jhetam's opinion in the face of his evidence, also uncontradicted, that Dr. Meloche's 1995 diagnosis of Adjustment Disorder with Anxiety "frequently precedes PTSD".

> This is not a case of the respondent's panel preferring one diagnosis to another. As there was no psychiatric or psychological opinion that contradicted the only opinion before them as to the petitioner's condition, this is a case of the Hearing Panel making its own diagnosis, when it clearly has no expertise upon which to do so.
>
> I find that such reasoning and the resulting findings are based upon the arbitrary exercise of the WCAT's discretion in terms of the use of the evidence before it, particularly its reliance predominantly if not entirely on an irrelevant factor, the 1995 opinion evidence of Dr. Meloche. In the result I find that the WCAT's decision on this issue is patently unreasonable.
>
> [underlining added in Atlantic's submissions]

[112] Atlantic argues that, similar to *Page*, the Board has previously applied the principle that it must accept uncontradicted expert evidence on matters that are outside of its expertise: *Barry Burgoon et al v. Regional Water Manager*, Decision Nos. 2005-WAT-024(c) to 2005-WAT-026(c), June 28, 2010, at paras. 172 – 179 and 188 – 190.

[113] In addition, Atlantic submits that the Appellants' written submissions inappropriately select single sentences from Atlantic's documents or the Ministry's technical report on the permit amendment application. Atlantic argues that, without contrary expert evidence, it is unfair and unacceptable to ignore the full recommendations in those documents.

[114] Regarding each of the specific issues raised by the Appellants, Atlantic refers to its Schedule A setting out why, in Atlantic's view, there is "no reasonable prospect" that each issue will succeed. For example, regarding issue #2 – whether the Amendment Decision will lead to more contaminants and fine particulate matter in the airshed – Atlantic submits, in part, that "The mere fact that there will be an increase in contaminant emissions is not the relevant test… The Appellants bear the burden to establish that the amendment Decision could cause unreasonable harm to the environment or human health." Atlantic further submits that to meet this burden, the Appellants must have led some evidence from which the Board could conclude what the expected levels of each contaminant will be, that those expected levels would be harmful, and that the harm is unreasonable. Atlantic submits that the Board is not presumed to have expertise in such matters, and the Board must rely on expert evidence to find such facts. Atlantic maintains that its uncontradicted expert evidence is that the increased emission levels are below air quality standards, and pose a "low" or "negligible" risk to human health and the environment. Therefore, there is no reasonable prospect that this issue will succeed.

[115] In conclusion, Atlantic maintains that it is now known to the Board that Atlantic's expert reports will be accepted as uncontradicted expert evidence, and therefore, the Appellants' issues that assert contrary findings have no reasonable prospect of success and should be dismissed.

[116] The Director did not address whether the appeals should be dismissed pursuant to section 31(1)(f) of the *ATA*.

[117] The Represented Appellants submit that the Board's power under section 31(1)(f) of the *ATA* is discretionary, and the Board has rarely, if ever, utilized it. Although the Human Rights Tribunal utilizes a similar power, the Represented Appellants submit that *Hill* emphasizes that there is a low threshold to resist summary dismissal, stating at para. 27 that a complainant defending an application for summary dismissal "must only show [that] the evidence takes the case out of the realm of conjecture." The Represented Appellants maintain that the present appeals are far beyond the realm of conjecture, given that the Appellants' written submissions refer to a considerable body of evidence, and the Board has already found that the evidence warrants a written hearing.

[118] Mr. Hamilton submits that there is sufficient evidence, beyond the realm of conjecture, available from the records of the permit amendment process that warrants consideration by the Board.

[119] Mr. Pickford submits that the issues raised by the appeals have merit and deserve to be adjudicated by the Board. For example, he submits that a reasonable person would find, on a balance of probabilities, that flaws were evident in the 2001 trial burn of rail ties and stack test documented in the Lanfranco Report. Mr. Pickford submits that the evidence includes a document in which a Ministry meteorologist states that the 2001 test did not include background measurements for SO_2, HCl, and PAH in the Williams Lake airshed. Mr. Pickford argues that this raises concerns about the accuracy of the information obtained from that test, which was used in the emission modelling that Atlantic provided in support of its permit amendment application.

[120] Mr. Dressler supports Mr. Hamilton's submission that there is sufficient evidence beyond the realm of conjecture, available in the records from the permit amendment process, that warrants consideration by the Board.

[121] In reply, Atlantic submits that it is obvious that the appeals have no reasonable prospect of success. In deciding this application, the Board need not find facts or weigh evidence; rather, the Board should canvas the evidence that is expected to be tendered, and consider the fact that the Appellants have provided no expert evidence and agreed not to challenge the expert reports that are intended to be tendered by Atlantic and the Director.

The Panel's Findings

[122] The Board recently considered the test for ordering summary dismissal of an appeal, or part of an appeal, under section 31(1)(f) of the *ATA*. In *Emily Toews et al v. Director, Environmental Management Act*, Decision Nos. 2014-EMA-003(d), 004(d), 005(d), June 25, 2018 [*Toews*], at paras. 120 – 123, the Board considered some decisions of the BC Court of Appeal and BC Supreme Court that, similar to *Hill* and *Lee*, involved reviews of the BC Human Rights Tribunal's summary dismissal of complaints pursuant to section 27(1)(c) of the *Code*. At para. 123 of *Toews*, the Board stated as follows regarding the test for summary dismissal under section 31(1)(f) of the *ATA*:

> 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".
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> [underlining added]

[123] The Panel finds that this reasoning is consistent with the findings in *Hill* and *Lee*, and is equally applicable to the present case.

[124] The Panel also agrees with the Appellants that, based on the judicial decisions cited by Atlantic, the threshold for denying an application for summary dismissal under section 31(1)(f) of the *ATA* is low: the appellant's evidence must simply take the appeal "out of the realm of conjecture".

[125] In addition, the Panel rejects Atlantic's submission that the Board is not presumed to have expertise in the matters that are relevant to deciding key issues in these appeals, such as whether the Amendment Decision adequately protects human health and the environment. The courts have consistently recognized that the Board is an expert tribunal when it comes to adjudicating issues of fact that arise in appeals. As stated in *Lindelauf v. British Columbia*, 2017 BCSC 626, at para. :

> The EAB [Board] is a specialized tribunal. The Legislature's decision to establish such a tribunal reflects "the complex and technical nature of the questions that might be raised" and that the tribunal "plays a role that is essential if the system is to be effective, while at the same time ensuring a balance between the conflicting interests involved in environmental protection": *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 at para. 57.
>
> [underlining added]

[126] Similarly, as stated in *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, 2008 BCSC 1251, at para. 59:

> The jurisprudence establishes that while the EAB has expertise in respect of the technical and factual matters arising in appeals …
>
> [underlining added]

[127] Similarly, as stated in para. 74 of *Shawnigan Residents' Association v. British Columbia (Director, Environmental Management Act)*, 2017 BCSC 107:

> … the Board's decision on this issue was one of mixed fact and law. In particular, the Board's decision that the site of the Facility was not a contaminated site was based on the Board's review of the evidence before it and on the Board's expertise in interpreting matters that arise under the *EMA*.
>
> [underlining added]

[128] In addition, the courts have recognized that the Board has expertise in interpreting and applying the statutes under which it hears appeals, and is entitled to deference by the courts in that regard (e.g., see: *Burnaby (City) v. Environmental Appeal Board*, 2017 BCSC 2267, at paras. 64 and 73).

[129] Furthermore, given the nature of the appeal process and the Board's decision-making powers, the Panel rejects Atlantic's submission that the Board must accept the conclusions in Atlantic's expert reports without question simply because the Appellants have provided no contradictory expert evidence of their own. The fact that Atlantic's expert reports will be accepted (once tendered) as evidence does not necessarily mean that the Board will, when weighing that evidence, fully accept or agree with every opinion contained in that evidence.

[130] The Board has the authority to conduct appeals as a new hearing of the matter (section 102(2) of the *Act*), and the Board has broad decision-making powers in deciding appeals including the power to make any decision that the Director could have made and that the Board considers appropriate in the circumstances (section 103 of the *Act*). The Board has the discretion to decide how much weight to accord a particular piece of evidence, including expert evidence, and to evaluate the evidence's reliability, relevance, and accuracy, among other things. With regard to expert opinion evidence, the Board is not obliged to unquestioningly accept expert evidence from one party simply because no opposing expert evidence was presented by another party, or because opposing parties have decided not to cross-examine the expert witness. The qualifications and experience of the expert report's author will always be a factor in determining the weight to be given to their evidence. The Board must be satisfied that the report's author has the appropriate experience and training to be an expert in the matters for which he or she is giving expert opinion evidence.

[131] The Panel has reviewed the arguments in Atlantic's Schedule A with respect to why each issue raised by the Appellants has no reasonable prospect of success. As noted by Atlantic, Mr. Hamilton's written submission state that he is withdrawing issues 14.1, 22, 23, 26. Accordingly, those issues are dismissed as having been withdrawn.

[132] Turning to the remaining issues, the onus is on Atlantic, as the applicant for summary dismissal under section 31(1)(f) of the *ATA*, to establish that the Appellants' evidence and arguments are insufficient to take the appeals "out of the realm of conjecture". Atlantic's position that the remaining issues have no reasonable prospect of success relies on two main arguments: (1) that the Appellants have provided insufficient evidence (or none that is admissible) to succeed; and/or (2) that the Board "must accept" the conclusions in Atlantic's expert reports because they have not been challenged by the Appellants.

[133] The Panel has already found that the Appellants have provided or relied on some relevant information that is admissible and, on a *prima facie* basis, has the potential of establishing or proving at least some of the facts that they assert in their submissions regarding the issues raised by the appeals. The Panel has also found that the Board is not obliged to unquestioningly accept expert evidence. For example, the qualifications and experience of the authors of Atlantic's expert reports must be considered before the Board determines how much weight it should

give to their evidence. Although the Appellants have not presented opposing expert evidence, the Board is not obliged to unquestioningly adopt the opinions in Atlantic's expert reports. As a result, it is not a foregone conclusion that Atlantic's evidence necessarily leads to the conclusion that the appeals have no reasonable prospect of success.

[134] The Panel finds that Atlantic has not met the onus of establishing that the Appellants' evidence and arguments are insufficient to take the appeals "out of the realm of conjecture". The Panel finds that the Appellants' evidence is, on a *prima facie* basis, sufficient to take the appeals out of the realm of conjecture. The Appellants do not simply express concerns, without any evidentiary support, about the potential effects of the Amendment Decision on human health and the environment. The Panel finds that the Board should proceed to assess the merits of the appeals by weighing the evidence and arguments that are to be presented by all parties, and applying the relevant legislation and legal authorities.

DECISION

[135] In making this decision, the Panel of the Environmental Appeal Board has carefully considered all relevant documents and evidence before it, whether or not specifically reiterated herein.

[136] For the reasons set out above, the Panel denies Atlantic's preliminary application to dismiss the appeals, with the exception of issues 14.1, 22, 23, 26 which have been withdrawn.

"Alan Andison"

Alan Andison, Chair
Environmental Appeal Board

July 27, 2018