Environmental Appeal Board
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DECISION NO. EAB-EMA-22-A008(b)

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

BETWEEN:	Richmond Steel Recycling Ltd.	**APPELLANT**
AND:	Director, *Environmental Management Act*	**RESPONDENT**
BEFORE:	A Panel of the Environmental Appeal Board Linda Michaluk, Panel Chair	
DATE:	Conducted by way of written submissions concluding December 9, 2022	
APPEARING:	For the Appellant:	Robert M. Lonergan, Counsel Christopher Elrick, Counsel
	For the Respondent:	Ashley Caron, Counsel Shaun Ramdin, Counsel

DECISION ON APPLICATION FOR DOCUMENT PRODUCTION

INTRODUCTION

[1] Richmond Steel Recycling Ltd. ("RSR") operates a metal recycling facility (the "Facility") in Richmond, British Columbia. On April 28, 2022, Daniel Bings, a delegate of the Director, *Environmental Management Act*, in the Ministry of Environment and Climate Change Strategy (the "Ministry"), issued Pollution Abatement Order 111135 (the "PAO").[1] The PAO imposes a range of requirements on RSR.

[2] On May 25, 2022, RSR appealed the PAO to the Environmental Appeal Board (the "Board"). One of the remedies RSR sought from the Board was a temporary stay of certain requirements in the PAO, pending the Board's final decision on the merits of the appeal (Appeal No EAB-EMA-22-A008, "Appeal A008"). Following a written hearing to determine if a temporary stay was appropriate in the circumstances, the Board refused the stay application on October 2, 2022.

[3] On January 22, 2022, RSR applied to the Director for a waste discharge authorization under section 15 of the *Environmental Management Act,* SBC 2003, c. 53 (the "*Act*"). On July 4, 2022, Sajid A. Barlas, a delegate of the Director, notified

[1] For simplicity, Mr. Bings is referred to in this decision as "the Director".

RSR of his decision to reject the Discharge Authorization Application (the "Application Decision"). RSR appealed the Application Decision to the Board on July 28, 2022 (Appeal No EAB-EMA-22-A010, "Appeal A010").

[4] On November 17, 2022, RSR filed an application for document production for Appeals A008 and A010. This decision addresses the application for document production in Appeal A008. The decision for Appeal A010 will be issued separately, as these appeals are, at least at present, proceeding independently.

BACKGROUND

[5] The RSR facility is located on Mitchell Island, which lies in the Fraser River (the "River"). RSR recovers recyclable metals from a variety of materials and sends the leftover material to landfills for disposal.

[6] Historically, rainwater at the Facility was collected and passed through an oil/water separator, grit chamber and bioswale. The stormwater then ran into a drainage ditch (the "Ditch") which discharged into the River.

[7] Following an extremely heavy rainfall event on December 12, 2019, stormwater runoff was seen flowing directly from the Facility into the River, bypassing the Facility's drainage and treatment works. Over the next two years, RSR planned and implanted a drainage improvement program at the Facility.

[8] On August 5, 2021, the Ministry issued Pollution Prevention Order Number 110800 ("PPO 110800"), which was subsequently amended on August 10, 2021, September 1, 2021, November 30, 2021, December 13, 2021, and January 14, 2022.

[9] On April 28, 2022, the Ministry issued the PAO under appeal. The PAO states that effluent from the Facility had caused pollution by substantially altering or impairing the usefulness of the environment. The PAO requires RSR to immediately cease all waste discharges to the environment, undertake certain actions and submit a variety of reports.

[10] As noted previously, RSR appealed the PAO to the Board on May 25, 2022, and requested a stay of specific requirements. The Board has denied the stay application.

[11] I have briefly summarized RSR's stated grounds for Appeal A008 as follows:

1. the PAO is based on "outdated and irrelevant information" that had become irrelevant due to changed circumstances from the time the Director gathered the information and data upon which the PAO is based, and the PAO makes an unfounded assumption that the effluent will cause pollution;
2. the PAO requires RSR to achieve certain results or meet certain obligations in a timeline that is impossible and beyond the RSR's control;
3. the PAO requires RSR to "undertake unlawful actions" contrary to directives from DFO and FLNRORD [then the Ministry of Forests, Lands, Natural Resource Operations and Rural Development, now the Ministry of Water, Land and Resource Stewardship];

4. the PAO violates principles of natural justice and procedural fairness in that, among other things, the process leading to the issuance of the PAO "was motivated in part as a response to a complaint received from a third party and the failure or refusal to provide a copy of the complaint to RSR deprived RSR of its fundamental right to know and meet the case against it"; and
5. the PAO is an abuse and exceedance of statutory authority in that the PAO was issued for "collateral purposes".

[12] RSR requests, in summary, that the PAO be set aside or, in the alternative, that certain requirements of the PAO be set aside.

[13] The grounds of appeal are relevant to this decision in so much as they set out the parameters of RSR's appeal. The merits of the appeal itself will be determined by the Board on hearing the appeal and will not be touched upon in this decision.

[14] Following a pre-hearing conference (the "PHC") on September 27, 2022, the parties agreed to work together to determine whether additional documentation requested by RSR could be resolved voluntarily without an application to the Board.

[15] By letters dated September 8 and 29, 2022, RSR demanded that the Director produce the following categories of documents:

> Category 1 – correspondence with the City of Richmond relating to the PAO;
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> Category 2 – email exchanges, memoranda, reports and analysis exchanged between Ministry staff and the director related to pollution concerns at, and effluent discharges from, the Facility before the issuance of the PAO;
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> Category 3 – email exchanges between Ministry staff or the Director and any third party, and any memoranda, reports and analysis prepared by any third party at the request or direction of Ministry staff, or the Director related to pollution concerns at, and effluent discharges from, the Facility before the issuance of the PAO;
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> Category 4 – other internal emails with the Director or Environmental Protection Officer Oana Enick regarding the PAO;
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> Category 5 – analysis, technical memorandum/reports or experts reports regarding the PAO, including any analysis, technical memoranda/reports or expert reports related to the impact of the effluent discharges from the Facility on the environment; and
>
> Category 6 – briefing or update materials prepared for any Ministry executive (Director, Executive Director, ADM or DM) regarding the PAO.

[16] On October 7, 2022, the Director advised that all documents in Categories 1 and 5 had been produced, and the Director refused to produce documents in Categories 2-4 and 6 as the scope of the disclosure request was overbroad.

[17] On November 17, 2022, RSR filed an application with the Board pursuant to section 34(3)(b) of the *Administrative Tribunals Act* (the "*ATA*"). RSR asks that the Board compel the Director to produce further documents relevant to the decisions

that lead to the issuance of the PAO. Specifically, RSR seeks orders requesting that the Ministry produce the following categories of documents:

> Category A: email exchanges, memoranda, reports and analysis exchanged between Ministry staff and the Director related to pollution concerns at, and effluent discharges from, the Facility before the issuance of the PAO and the Application Decision;
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> Category B: email exchanges between Ministry staff or the Director and any third party, and any memoranda, reports and analysis prepared by any third party at the request or direction of Ministry staff, or the Director related to pollution concerns at, and effluent discharges from, the Facility before the issuance of the PAO and the Application Decision;
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> Category C: other internal emails with the Director or Oana Enick regarding the PAO and the Application Decision; and,
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> Category D: briefing or update materials prepared for any Ministry executive (Director, Executive Director, ADM or DM) regarding the PAO and the Application Decision.

[18] The Director asks that the applications be dismissed.

RELEVANT LEGISLATION AND RULES

[19] The Board has the authority under section 34(3)(b) of the *ATA* to make orders to produce a document or other thing:

> **Power to compel witnesses and order disclosure**
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> **34** (3) Subject to section 29, at any time before or during a hearing, but before its decision, the tribunal may make an order requiring a person
>
> (a) …
>
> (b) to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application.

[20] Section 34(3)(b) should be considered together with section 40 of the *ATA*, which states:

> **Information admissible in tribunal proceedings**
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> **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.

[21] Rule 16 of the EAB Rules states:

Applications for Documents

4. Before applying for an order to produce documents under section 34(3)(b) of the *Administrative Tribunals Act*, the applicant must ask the person in possession or control of the documents, in writing, to voluntarily produce the documents.

5. In addition to the requirements in Rule 16(2), an application for an order for documents must describe the attempts made to have the person voluntarily produce the documents.

ISSUE

[22] I must decide one issue in this application: whether to grant RSR's application for orders requiring the Ministry to produce certain categories of documents (i.e., Categories A, B, C and D) that pertain to Appeal A008.

DISCUSSION AND ANALYSIS

RSR's Submissions

[23] RSR submits that at this preliminary stage in a proceeding, a party must only demonstrate that the documents sought *may* be relevant to an appeal, and points to several Board decisions in support of this conclusion[2]. RSR submits that evidence is relevant where it sheds light on a disputed matter or tends to prove or disprove a material fact in issue, and that the potential relevance of documents may also be framed in relation to the specific grounds of appeal[3].

[24] RSR submits that the Category A documents are central to its appeal and should form part of the decision record. RSR alleges that the PAO was based on inaccurate information. Further, RSR submits that it was never advised of the case it had to meet and was denied the opportunity to know and meaningfully respond to the information that was available to the Director. RSR says the requested documents are necessary for RSR to be able to properly prepare for and argue the appeal.

[25] RSR submits that the Director's earlier refusal to produce the documents while conceding that RSR will have "the opportunity to cross examine the decision-maker at the hearing" does not hang together. If the Director may be cross-

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[2] *Seaspan ULC (formerly Seaspan International Ltd.) v. Domtar Inc*., June 11, 2013, Decision Nos. 2010-EMA-004(a), 005(a), 006(a); and 2011-EMA-003(a) ("*Seaspan*") at 56; see also Practice and Procedure Manual, Environmental Appeal Board, July 1, 2016 (Amended April 2019) at p. 28; *Toews 2*; *Greater Vancouver Sewerage v. British Columbia (Director, Environmental Management Act),* January 31, 2017, Decision No. 2016-EMA-126(c) at 30.

[3] *Woodland Heights Investments, Ltd. v. British Columbia (Ministry of Environment)*, July 24, 2020, Decision No. EAB-EMA-20-A002(a) at 104; *GFL Environmental Inc. v. British Columbia (Ministry of Environment*), May 16, 2019, Decision Nos. 2018-EMA-021(b), 2018-EMA-021(c) at para. 66.

examined on matters relating to these documents, the documents are relevant and must be produced.

[26] RSR submits that the Director's earlier stated position that there "is no evidence to suggest that there are internal staff emails that will cast light on the process afforded the Appellant" is not the test for document production. The Director may confirm, after a search, that there are no documents related to this ground to produce, but the Director cannot reverse the onus and require RSR to show that such documents exist.

[27] RSR submits the Category B documents are relevant for the same reason as the Category A documents. Further, if the Director received evidence from third parties regarding pollution concerns, basic fairness requires that RSR know the case to meet and to be provided with an opportunity to review and respond to the evidence.

[28] RSR submits that the Category C documents are relevant for the same reasons as the Category A documents. Further, the grounds of appeal allege the Director exceeded his jurisdiction in making the decision and issued the PAO for a collateral purpose, and correspondence with the Director bears directly on this issue.

[29] RSR submits that the Category D documents are relevant for the same reasons as stated in Categories A and C.

[30] RSR submits that these documents are at the heart of the appeal, and relate to whether it was appropriate for the Director to make the PAO. RSR is of the view that the documents exist and that the Director does not suggest otherwise. RSR submits that cross-examination does not stand in place of document production.

Director's Submissions

[31] The Director submits that the documents he used in deciding to issue the PAO were provided to RSR on August 12, 2022[4] (the "Record Documents"). According to the Director, the Record Documents consist of all relevant documents from that time, and include correspondence between the parties, analytical reports of sampling events spanning a period of over two years, and the initial complaint from the City of Richmond.

[32] The Director submits that the demands for documents made by RSR on September 8 and 29, 2022, are overly broad and that RSR has not identified why these categories of documents are relevant to the appeal. The Director submits that the August 12, 2022 document production would have included some of the requested documents, if they existed[5].

[33] The Director says the requested documents capture all internal and external correspondence to and from Ministry staff related to RSR from its first contact to an unknown date, and any and all drafts of the multiple orders and amendments

[4] Affidavit of C. Brossard, Exhibit A (the "Brossard Affidavit").

[5] Brossard Affidavit, Exhibit C.

issued to RSR over the years. The Director submits there is no principled basis for the demands and that it amounts to a fishing expedition.

[34] The Director submits that the Board has previously held[6] that:

- the legal standard for document production calls for more than a hypothetical possibility that records "may" be relevant;
- the Applicant must establish it is *reasonable to suppose* that a record *may be relevant to proving or responding to an issue in the appeal*;
- a document is relevant where it tends to prove or disprove a material fact in issue or sheds light on a disputed matter; and,
- relevance must be assessed using issues raised in the Notice of Appeal which ensures that document producing requests do not become overly broad fishing expeditions, impose unnecessary delays on the appeal process, or create unreasonable burdens for the responding party.

[35] When assessing the potential relevance of the categories of documents sought by RSR in the context of the grounds for Appeal A008, the Director submits that Grounds 1, 2, 3 and 5 challenge the Director's authority to issue the PAO, and as such, do not provide a basis for further document production.

[36] The Director submits that the proceeding before the Board will be conducted as a new hearing. In adjudicating Grounds 1, 2, 3 and 5, the Panel's determination of whether RSR is causing pollution within the meaning of section 83 of the *Act* will be based on the technical evidence presented during the hearing. The Director has already disclosed all technical data that was or could have been relied upon by the Director. Further, the Director submits that Ministry correspondence and executive briefing notes are irrelevant to the Board's determination of whether the test in section 83 of the *Act* is met.

[37] The Director submits that the procedural issues raised by Ground 4 will be addressed by the Board during the *de novo* proceeding. The Board has repeatedly affirmed that any procedural defects can be cured on appeal[7]. Further, the Brossard Affidavit makes it clear that RSR has all correspondence between Oana Enick and the City of Richmond via requests under the *Freedom of Information and Protection of Privacy Act* (*'FOIPPA')* [8].

[38] The Director submits that Ground 5, i.e. that the Director exceeded his jurisdiction by issuing the PAO for an "improper purpose", does not alter the legal test that the Board must apply in determining whether the PAO satisfies the requirements under section 83 of the *Act*. Further, RSR has not provided any

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[6] *Seaspan*; *Emily Toews v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-007(b), 2013-EMA-007(c), 2013-EMA-010(b) and 2013-EMA-010(c), 22 August 2014), at paras. 85 and 96 [*Toews 1*].

[7] *Mount Polley Mining Corporation v. Director, Environmental Management Act* (Decision No. EAB-EMA-A003(b), 22 August 2022), at para. 95; *Emily Toews v. Director, Environmental Management Act* (Decision Nos. 2013-EMA-007(g), 2013-EMA-010(g), 23 December 2015), at paras. 100-101; *Michael and Joaney Lindelauf v. Assistant Regional Water Manager* (Decision Nos. 2013-WAT-003(a), 004(b), 005(a), 17 August 2015), at paras. 279-282.

[8] Brossard Affidavit, Exhibit F.

material facts to support the assertion that the PAO was issued for a collateral purpose and, as such, has not established a proper factual foundation to justify further document production. Bare assertions of collateral purpose cannot justify document production under section 34(3)(b) of the *ATA*.

[39] The Director argues that Categories A, B and D, in particular, are overly broad. The Director says all documents relied upon by the decision-maker have been produced and, as such, any "inaccurate information", if it exists, will be found in the Record Documents. In terms of the second basis, i.e. that RSR did not know the case to meet, procedural fairness does not require the disclosure of every piece of correspondence received and sent by the Director and his staff related to RSR. The Director submits that RSR's procedural fairness ground is narrow and determinable on the Record Documents. Further, the Director submits that as proceedings before the Board are *de novo*, the appeal will cure any procedural fairness concerns. Finally, the Director submits that the onus is on RSR to demonstrate that requested documents are relevant to an issue, not on the Director to demonstrate that they are not.

[40] The Director submits that Category D documents, i.e., briefing or update materials prepared for any ministry executive, are wholly irrelevant in that there is no evidence nor facts pled that any "ministry executive" was involved in the process leading to the PAO. Further, RSR does not demonstrate how this category of documents will tend to prove or disprove a material fact.

[41] The Director submits that RSR is attempting to use section 34(3)(b) of the *ATA* as a form of discovery, which is not the intended purpose of the *ATA*. The Director submits that document production of the magnitude sought by RSR imposes an enormous burden on the Ministry as it requires the search and review of all files for correspondence of all staff members with any reference to RSR for an unidentified period. The Appeal centres around whether there are reasonable grounds to determine that RSR's discharge into the River constitutes pollution for the purposes of section 83 of the *Act*. The Ministry has provided all technical evidence and documents that the Director relied on in making the PAO. The additional documents sought have no bearing on the issues before the Board. Further, any procedural defects in the process leading up to the issuance of the PAO will be remedied by the Board's *de novo* hearing and, therefore, do not support further document production.

RSR's Reply

[42] RSR replies that the Director's test for producing documents, i.e. that the documents are relevant to the issues raised in the appeal, is overly strict. RSR argues that at the pre-hearing stage, the test is whether the documents "may be relevant", as set out by the Board in *Seaspan*:

> Section 34(3) [of the ATA] should, in my opinion, be read as requiring an applicant to establish only that the documents in question are arguably or potentially relevant or, in other words, that the documents may be relevant. To set the standard higher, and require an applicant establish that a document is both relevant and admissible, outside the context of the hearing, would defeat the clear intention of s 34(3).

[43] RSR replies that their document request is not so broad as submitted by the Director in that RSR has not requested the disclosure of every document and correspondence sent by the Ministry related to RSR. RSR notes that the request relates to documents and correspondence regarding the PAO and specific subject matter which provides a specific and narrow time span for document retrieval.

[44] RSR replies that in terms of the Director's assertion that documents relating to procedural fairness issues are not necessary owing to the Board conducting the appeal as a new hearing, section 102(2) of the *Act* only grants the Board *discretion* to conduct an appeal by way of a new hearing and does not require it. Therefore, while the Board has discretion to conduct the hearing *de novo*, the Board may also decide to hear the matter as a true appeal. As such, the Ministry cannot rely on the possibility that the Board may conduct a new hearing to deny RSR documents that may be relevant and necessary. Further, RSR asserts that documents and correspondence that address RSR's submissions are directly relevant to whether RSR was given a reasonable opportunity to respond and to the reasonableness of the Director's decision to issue the PAO. These communications and documents likely indicate who considered RSR's submissions, how the submissions were considered, what weight they were given, and the intention of receiving such submissions. As such, RSR submits that the documents are relevant to the grounds of appeal asserted in the Appeal.

[45] RSR replies that they have pled material facts supporting the assertion that the PAO was issued for a collateral purpose, including: that the Director issued PPO 110800 to monitor discharge at the Facility; that RSR complied with the PPO; that the Director then issued the PAO; and, that the primary requirement of the PAO was to cease discharge of the pollution which would fully satisfy the purpose for which the Director may issue an order under section 83(1) of the *Act*, and remove the reasonable grounds on which to rely on such an order.

[46] In conclusion, RSR replies that they must only satisfy the Panel that the documents "may be" relevant in the appeal, that RSR has met this burden, and that the Ministry has not denied their existence.

Analysis and Legal Test

[47] Document disclosure is a necessary part of the appeal process. When parties have timely access to the relevant information used to inform the decision-maker in making the impugned decision and an appellant in challenging that decision, proceedings can proceed in an orderly and efficient manner. Requiring parties to investigate the existence of categories of documents, gather and review the documents, determine their relevance to the scope of the appeal, and finally disclose, list and produce the documents (redacted where appropriate to comply with relevant privacy legislation), can be onerous and time consuming. The legal tests that have been developed through the courts and adopted and modified by previous panels of the Board serve to strike a balance between ensuring that document disclosure achieves both the purpose of providing the relevant information to all parties and protecting those same parties from unnecessary expenditures in time and costs to disclose irrelevant or otherwise non-admissible documents. These tests help ensure that documents sought by parties are relevant

to the issues under appeal, as opposed to simply pertaining to the matter as a whole so as to avoid what is colloquially known as a "fishing expedition".

[48] This is not to say that there can be no burden placed on the parties to disclose documents. So long as they meet the legal test, simply because disclosing documents would be difficult does not limit the right of the parties to know and evaluate the evidence that is contained within those documents.

[49] In order to facilitate a review and analysis of a decision under appeal, relevant documents that pertain to that decision must be available. Frank and full document disclosure assists the parties in knowing the case they need to meet, as well as the relative strengths of the evidence that relates to that case,

[50] Document disclosure is, however, not discovery. Discovery, crucial to the process of civil litigation, involves the questioning of parties to the litigation, either through examinations for discovery or interrogatories, with the aim uncovering further information that will assist the parties in preparing their respective cases. The process of discovery is not present in appeals before the Board. Rather, parties before the Board are entitled to receive, from each other, documents that meet the test for disclosure.

[51] In addition to the Rules of the Board, the legal test for ordering the disclosure of documents is found in sections 34 and 40 of the *ATA*. A panel of the Board may order an individual "to produce for the tribunal or a party a document or other thing in the person's possession or control, as specified by the tribunal, that is admissible and relevant to an issue in an application]. If a party to an appeal seeks to have a panel of the Board make this order, the party making the application bears the onus to prove that the documents are both admissible and relevant to the appeal in which the application is made.

[52] Previous panels of the Board have rendered decisions on applications for document disclosure, notably *Emily Toews and Elisabeth Stannus v. Director, Environmental Management Act*, Decision Nos. 2013-EMA-007(f) and 010(f), issued December 3, 2014, (*Toews 2*), and *Seaspan*. At paragraph 18 of *Toews 2*, the Board adopted the following findings from its decision in *Seaspan:*

> In paras. 56 to 64 of *Seaspan*, the Board identified the key considerations for ordering document disclosure in a pre-hearing context, as follows: (1) whether it is reasonable to suppose that the requested documents may be relevant to proving or responding to an issue in the appeal, based on the issues raised in the applicant's Notice of Appeal and (if available) statement of points; (2) whether the requested documents are admissible (i.e., whether the requested documents are subject to a recognized form of privilege); and (3) whether the person who is being asked to disclose the documents has possession and control of the documents. If there is no evidence before the Board regarding possession or control, the Board will consider the applicant's submissions on the basis of whether "the person is reasonably likely to be able to supply the information."
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> [underlining added]

[53] I adopt and rely on the reasoning above for the purposes of deciding whether to grant the present application.

[54] In summary, document disclosure is a vital part of any appeal, and orders for disclosure of documents are treated seriously and are not made as a matter of course. If an application for disclosure of documents is made by a party to an appeal, that party bears the onus, on a balance of probabilities, to prove that the documents should be disclosed. If the party cannot do so, the application for disclosure must fail.

[55] In assessing any application for disclosure of documents, I find I must consider:

1. if the documents are relevant to the current appeal by being capable of proving or disproving a material fact in issue or shedding light on a disputed matter, based on the stated grounds of appeal;
2. if an individual has the documents in their possession or control; and,
3. if the documents are admissible, by assessing if the documents are protected by an established form of privilege.

[56] In considering these factors, I am able to determine that the parties have the relevant information before them, while protecting the parties against unnecessary disclosure of documents such as is found in fishing expeditions.

Panel's Findings

[57] In deciding this preliminary application, I will first consider whether each requested category of documents may be relevant to proving or responding to an issue in the appeal, based on the grounds stated in RSR's Notice of Appeal and the subsequent submissions. Then I will consider whether the Director has possession or control of the requested documents, and finally whether a form of privilege may apply to the requested documents.

[58] As noted by the parties, the Board has consistently found that procedural fairness requires that parties have access to relevant documents to properly prepare and effectively argue their respective cases to the Board. Indeed, while the Board's Practice and Procedure Manual sets out that parties are required to disclose documents they are going to rely upon in advance of a hearing – at least 30 days for the appellant and at least 15 days for the respondent – the Board also undertakes pre-hearing case management which attempts to facilitate the voluntary disclosure of relevant information. Either party may request the voluntary disclosure of documents from another party, and must do so before making an application for disclosure. The procedural requirements for disclosure, as well as the availability of further disclosure exists, in part, so that parties can be prepared at the hearing and the matter can proceed in an orderly and efficient manner.

[59] RSR contends that the categories of documents requested are relevant to the issues under appeal. The Director argues that all documents relied upon by the decision-maker have been produced, and that the relevance of the other, overly broad, information requested has not been demonstrated.

[60] As an assessment of the necessity for document disclosure requires consideration of the issues under appeal, I will deal with this application by reviewing the grounds of appeal individually. I will apply the legal test to each of

the requested categories of documents for each of the grounds and will set out my findings in this same manner.

Ground One:

[61] RSR alleges in Ground One that the PAO is based on outdated and irrelevant information and makes unfounded assumptions that the effluent will cause pollution. Further, RSR alleges that they were never advised of the case to be met and was denied the opportunity to know and meaningfully respond to the information that was available to the Director.

[62] According to the Director's submission, which was not challenged by RSR, the Director has disclosed all information considered by the decision-maker in making the decision to issue the PAO, including all relevant documents before the decision-maker, and correspondence between the parties and analytical reports of sampling events spanning a period of over two years.

[63] Based on this ground of appeal, and in considering the information previously disclosed, RSR has not demonstrated that the requested documents are relevant to the appeal. I find no basis for ordering the production of the information referenced in any of the Categories.

Ground Two:

[64] Ground Two alleges that the PAO requires RSR to achieve or perform certain things in an impossible timeline.

[65] RSR did not provide any submissions addressing this ground that support an order for the production of the information referenced in any of the Categories. As RSR bears the onus to demonstrate how these documents meet the legal test to be produced, I find that they have failed to meet this onus. I find no basis for ordering the production of the information referenced in any of the Categories.

Ground Three:

[66] Ground Three alleges that the PAO requires RSR to undertake unlawful actions.

[67] RSR did not provide any submissions addressing this ground that support an order for the production of the information referenced in any of the Categories. As RSR bears the onus to demonstrate how these documents meet the legal test to be produced, I find that they have failed to meet this onus. I find no basis for ordering the production of the information referenced in any of the Categories.

Ground Four:

[68] Ground Four alleges that the PAO violates the principles of natural justice and procedural fairness and that the Director failed to meaningfully consider information or data including expert reports. This Ground also alleges that the issuance of the PAO was motivated in part as a response to a third party complaint.

[69] The Director's submission that the procedural issues raised by Ground Four will be addressed by the Board during the *de novo* proceeding is countered by RSR on reply because the *Act* only provides the Board with discretionary authority to

conduct the appeal as a *de novo* proceeding and does not mandate that requirement.

[70] All hearings before the Board are conducted as *de novo* proceedings unless otherwise decided. Were the Board to determine that another manner of hearing was appropriate, it would inform the parties and request submissions on the matter. Were any party to believe that another manner of hearing was appropriate, they are at liberty to make such an application to the Board. Based on the submissions, the parties to this appeal appear to agree that this matter is being heard as an appeal *de novo*. Indeed, it is anticipated that an application to the contrary would have to be made at the earliest possible opportunity, based on the significant impact such a change would have on the appeal process.

[71] Further to section 103 of the *Act*, the Board, after a hearing on the merits of an appeal, "stands in the shoes" of the decision-maker in first instance. This means that the Board has the jurisdiction not only to confirm, reverse or vary a decision of a decision-maker, but also to make any determination that was legally possible for the decision-maker to make. Based on the information before it, the Board may make a new decision in substitution of the original decision. This cures any procedural defects that may have occurred when the Director made the impugned decision, as the appeal process is a new administrative process. As such, the Board, on hearing the appeal, will have the opportunity to issue orders for relevant documents at that time on their own initiative or by application of a party to ensure that the Board has the information it requires to make a decision. This applies to documents with information that influenced or was relied upon by the Director.

[72] Based on the submissions made in this matter, I find that the Director produced both the Record Documents and the complaint from the City of Richmond. The Director's previous production of the complaint by the City of Richmond and the Record Documents allows for RSR to prepare for a hearing before a panel of the Board on the merits of these issues. Based on this ground of appeal, RSR has not demonstrated that the requested documents are relevant to the appeal. I find no basis for ordering the production of the information referenced in any of the Categories.

Ground Five:

[73] Ground Five alleges that the PAO is an abuse and exceedance of statutory authority in that it was issued for collateral purposes.

[74] The Director submits that RSR's assertion of collateral purpose was not supported by any material facts, and that the *de novo* proceeding before the Board will cure any abuse or exceedance in authority should they be found to have occurred.

[75] I find that RSR did not provide submissions addressing the collateral purpose allegation that support an order for the production of the documents referenced in any of the Categories. As RSR bears the onus to demonstrate how these documents meet the legal test to be produced, I find that they have failed to meet this onus. RSR has failed to provide any pleading or argument that particularizes its broad claim that the permit was issued for a collateral purpose. Further, RSR has not provided any pleading or argument that forms the basis for an order from this

Panel, as it has not identified how any documents may prove or disprove this ground of appeal. As set out above under Ground Four, hearings before the Board are conducted as *de novo* proceedings and therefore any abuse or exceedance of authority will be addressed when the appeal is before the board. I find no basis for ordering the production of the information referenced in any of the Categories.

[76] In summary, I find that, based on the issues raised in RSR's Notice of Appeal and the subsequent submissions, RSR has not demonstrated that the requested categories of documents are relevant to proving or responding to the issues in this appeal. I therefore dismiss the application to produce further documents in this appeal.

[77] As I have found that no documents within any of the categories of any ground of appeal are relevant, it is not necessary for me to consider whether the Director is in possession or control of any of these documents, or whether any form of privilege may apply to these documents.

CONCLUSION

[78] For the reasons above, I deny RSR's application for document production in Appeal A008.

[79] In deciding this preliminary application, I have considered all evidence and submissions provided to the Board, whether or not specifically mentioned in this preliminary decision.

"Linda Michaluk"

Linda Michaluk, Panel Chair
Environmental Appeal Board

January 24, 2023