Environmental Appeal Board

Citation: *Gibraltar Mines Ltd. v. Director, Environmental Management Act* 2023 BCEAB 7

Decision No. EAB-EMA-21-A006(d)

Decision Date: 2023-03-22

Method of Hearing: Conducted by way of written submissions concluding on December 13, 2022

Decision Type: Document Production Decision

Panel: James Carwana, Panel Chair

Appealed Under: *Environmental Management Act,* S.B.C. 2003, c. 53

Between:

Gibraltar Mines Ltd.

Appellant

And:

Director, *Environmental Management Act*

Respondent

Appearing on behalf of the parties:

For the Appellant: Robin Junger and Komal Jatoi

For the Respondent: Trevor Bant and Meghan Butler

TABLE OF CONTENTS

DOCUMENT PRODUCTION DECISION

INTRODUCTION

[1] Gibraltar Mines Ltd. (the "Appellant") has filed an appeal in respect of a decision (the "Decision") made May 13, 2021, by Luc Lachance, who holds the designation of Director (the "Director") under *the Environmental Management Act*, S.B.C. 2003, c.53 (the "*EMA*"). The Decision made amendments to Permit PE-416 (the "Permit") which is held by the Appellant and was issued under the *EMA*. The amendments to the Permit included items which had not been sought by the Appellant and are referred to by the Appellant as the "Unsolicited Amendments".

[2] There have been three previous preliminary applications relating to the appeal. The first application related to the Appellant seeking a stay of the Decision – see *Gibraltar Mines Ltd. v. Director, Environmental Management Act,* 2021 BCEAB 28 (Decision No. EAB-EMA-21-A006(a), December 13, 2021) (the "First Stay Decision"). The second application sought a reconsideration of the First Stay Decision – see *Gibraltar Mines Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 3 (Decision No. EAB-EMA-21-A006(b), January 27, 2022). The third application related to the Respondent seeking to amend the Decision to correct what was characterized as "an oversight on his part" to include the words "tailing impoundment supernatant" to the Permit as a source of effluent that is acceptable to discharge under the Permit – see *Gibraltar Mines Ltd. v. Director, Environmental Management Act*, 2022 BCEAB 18 (Decision No. EAB-EMA-21-A006(c), June 10. 2022, at para. 12).

[3] There are two pre-hearing document production applications before me. The first application is dated October 12, 2022 (the "First Application"). The second application is dated November 10, 2022 (the "Second Application"). By letter dated November 15, 2022, the Board advised the parties that the Board would "adjudicate the two applications together and subsequently issue one ruling addressing both applications."

[4] This decision deals with both applications. The Background to the Appeal section and the Relevant Legislation section of this decision are applicable to both applications, and certain other parts of the First Application are also applicable to the Second Application as indicated later in this decision. For each of the two applications, I have separated the sections dealing with the Background to the Application, the Issue, and the Discussion and Analysis in an effort to improve readability and ensure appropriate distinctions are made between the two applications.

[5] Similar to the panel in *Greater Vancouver Sewerage and Drainage District v. Director, Environmental Management Act*, 2017 BCEAB 4 (Decision No. 2016-EMA-126(c), January 31, 2017) ("*Greater Vancouver Sewerage*"), I also wish to note the following caveat at the outset: except to the extent necessary to decide the applications before me, I "will make no findings regarding the merits of the appeal" and "nothing in this decision should be taken

as a finding that applies to the merits of the appeal" (*Greater Vancouver Sewerage*, at para. 33).

BACKGROUND TO THE APPEAL

[6] The Appellant operates a copper and molybdenum mine known as the Gibraltar Mine (the "Mine"), near Williams Lake, B.C. The background as to how the appeal arose is described in the First Stay Decision, including the following:

> [5] As part of its mining operations, GML [the Appellant] decided to remove water from one previously mined pit (Gibraltar East Pit) and transfer the water to another previously mined pit (Granite Pit). GML wanted to transfer the water so GML could further mine Gibraltar East Pit.
>
> [6] Both Gibraltar East Pit and Granite Pit are located within GML's permitted mining and lease areas under the Mines Act and the Mineral Tenure Act.
>
> [7] The Ministry encouraged GML to seek an amendment to the Permit in respect of GML's proposed water transfer plans.
>
> [8] GML questioned why such an amendment would be necessary. In GML's view, the water transfer would not result in the discharge of waste into the environment, and transferring water within an existing mine site to support mining operations is a standard mining practice.
>
> [9] Notwithstanding GML's position that an amendment was unnecessary, on November 20, 2020, GML applied to amend the Permit. The application sought to add a section to the Permit to allow the discharge of effluent from Gibraltar Pit East to Granite Pit. A space on the application for "additional description" describes it as the "[d]ischarge of tailings impoundment supernatant and seepage pond water, excess PLS/raffinate from an SX-EW plant, open pit drainage, rock dump drainage and domestic sewage to Granite Pit". In support of the application, GML prepared a report dated October 2020. The report explains at pages 26 and 27 that the proposal involved transferring 40 million cubic metres of existing effluent from Gibraltar East Pit to Granite Pit, and directing other discharges to Granite Pit that would have previously been directed to Gibraltar East Pit. The other discharges would be from tailings and seepage ponds, effluent pipelines, surface drainage collection ditches, mined out pits, sewage lagoons, and pumping systems.
>
> [10] On May 13, 2021, the Director issued a decision amending the Permit. In doing so, the Director included a number of amendments that GML had not applied for and that GML claims adversely affect its interests (the "Unsolicited Amendments"). The Unsolicited Amendments are in sections 1.7 (non-point source discharges of mine contact water), 2.10

(site wide water management plan), 3.9 (Cuisson Lake water quality evaluation), 3.11 (groundwater trigger-response plan), 4.1 (general reporting), and table 1.a. (sampling water quality and flow of Granite Pit supernatant) of the Permit.

[11] In a separate document dated May 13, 2021, the Director provided reasons for his decision to amend the Permit.

[12] On June 10, 2021, GML appealed the decision to amend the Permit. In its original Notice of Appeal, GML requested several remedies including a temporary stay of the Unsolicited Amendments pending the Board's decision on the appeal. GML stated that it intended to file a separate application for the stay.

[13] On July 22, 2021, GML filed its application for a stay of the Unsolicited Amendments. The Board offered the Director an opportunity to provide written submissions on the application, and GML an opportunity to reply to the Director's submissions.

[14] On August 25, 2021, GML filed an amended Notice of Appeal, with the Director's consent.

[7] For the purposes of the current applications, there is another background fact to be mentioned. Prior to issuing the Decision, the Director provided the proposed amendments to the Appellant on April 16, 2021, and invited the Appellant to comment. The Appellant responded by letter dated April 26, 2021, taking issue with the Director's actions relating to the proposed amendments and the process which was followed. The Appellant alleged that common law principles of administrative fairness had not been followed by the Director and that it had not been given "an opportunity to 'know the case against it'".

BACKGROUND RELATING TO THE FIRST APPLICATION FOR DOCUMENT PRODUCTION

[8] The Appellant asks the Board to order the Respondent to disclose a number of specific documents. They are:

- Email from S. O'Sullivan to D. Epps, J. Stuart, M. Dyas and N. Dodd dated 21-Apr-21 re ?Esdilagh, TN & BC Gibraltar Mine G2G Sub-Group;
- Email from Y. Qureshi to Jen Stuart and Nikki Dodd dated June 15, 2021 re Gibraltar Mine BC Interests;
- Letter from Chief Don Harris to Minister George Heyman dated March 31, 2021;
- Email from Susan O'Sullivan to Deb Epps and others, dated April 21, 2021 re ?Esdilagh, TN & BC Gibraltar Mine B2G Sub-Group;
- Email from Helga Harlander to Morgan Dyas dated April 22, 2021 re Permit PE-416 comment;

- Letter from Troy Baptiste to Morgan Dyas dated April 22, 2021;
- Email and attachments from N. Dodd to Chief Baptiste dated May 5, 2021 re Gibraltar Mine – EMLI Commitment Letter Attached;
- Email and attachments from Kelsey Norlund to Sean Shaw, dated April 12, 2021 re Gibraltar Mines Act Permit – current Application review;
- Email and attachments from Sean Shaw to Tessa Graham and others dated May 3, 2021 re April 23rd Letter.

(collectively referred to as the "Consultation Correspondences")

[9] The Appellant also asks the Board to order the Respondent to disclose a category of documents which includes the specific documents listed above. The category is:

> Any other emails or other records of communication between the director's delegate and other ministry officials or third parties related to the permit amendments and/or the reasons set out in the memo dated May 13, 2021.

[10] The chronology leading up to this application appears below.

[11] On July 19, 2022, following a pre-hearing conference, counsel for the Respondent provided counsel for the Appellant with a letter dated July 19, 2022 and an index with certain documents, which did not include the specific documents sought on this application.

[12] On August 12, 2022, counsel for the Appellant wrote to counsel for the Respondent regarding documents. A number of document matters were addressed in that letter. Counsel for the Appellant noted there were documents filed as exhibits in an affidavit on the First Stay Application which were not included in the record produced by the Director. Counsel requested the Respondent's position on whether such documents should be considered part of the record of the Director's Decision or, even if not part of the record, whether they would be available for the Board to consider as evidence at the hearing.

[13] In the August 12, 2022 letter, counsel for the Appellant also referred to documents which had been obtained through a Freedom of Information process and requested the Respondent's position regarding such documents. The documents referred to by counsel for the Appellant in this respect included the specific documents sought on this application.

[14] On August 15, 2022, and prior to receiving a response from counsel for the Respondent, counsel for the Appellant again wrote to counsel for the Respondent. In addition to the documents mentioned in the August 12, 2022 letter, counsel for the Appellant also sought the category of documents sought on this application and described previously.

[15] Counsel for the Respondent responded to both letters on September 9, 2022. With respect to the documents filed as exhibits to the affidavit, counsel indicated there was one document among them which the decision maker had relied upon and formed part of the

record of the Director's Decision. According to counsel, the remainder of the exhibits did not form part of the record; however counsel stated that such documents "are available for the Board to consider as evidence and the respondent will likely rely on some or all of them at the de novo hearing of the appeal".

[16] With respect to the documents the Appellant had obtained through the Freedom of Information process, counsel for the Respondent indicated that some of those documents were to be included as part of the record, while others did not form part of the record and were not considered by the decision maker. Regarding the documents issue, counsel stated:

> ...We expect the decision maker's evidence will be that he was aware, both directly and indirectly, of various correspondence exchanged while the appellant's application [for a Permit amendment] was under consideration by subject matter experts within the Ministry; however, he ultimately relied on his staff's summary of same and recommendations made in e.g., the Ministry Assessment Report dated May 12, 2021.

[17] In terms of the request for the category of documents relating to the permit amendments and/or the May 13, 2021 reasons, counsel indicated such documents were not part of the record of the Director's Decision. To the extent voluntary disclosure was requested for such documents, counsel refused indicating that such a request was "overly broad, disproportionate, and irrelevant".

[18] The Appellant subsequently made this First Application on October 12, 2022.

RELEVANT LEGISLATION

[19] The Board has the authority under section 34(3) of the *Administrative Tribunals Act*, SBC 2004, c.45 ("*ATA*") to order the pre-hearing production of documents:

Power to compel witnesses and order disclosure

> **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.
>
> [emphasis added]

[20] The Board also has the discretion to receive documentary evidence in confidence under section 42 of the *ATA*:

Discretion to receive evidence in confidence

> **42** The tribunal may direct that all or part of the evidence of a witness or documentary evidence be received by it in confidence to the exclusion of a party or parties or any interveners, on terms the tribunal considers necessary, if the tribunal is of the opinion that the nature of the information or documents requires that direction to ensure the proper administration of justice. [emphasis added]

ISSUES ON THE FIRST APPLICATION

[21] The issue raised on the First Application is whether the documents sought by the Appellant as previously noted ought to be produced.

DISCUSSION AND ANALYSIS OF THE FIRST APPLICATION

[22] The parties argued this application on the basis of the legal principles of document production as they relate to the documents sought, and not by specifically examining each of the identified documents set out in the application. In that regard, the Respondent grouped the specific documents listed in the application together, without distinguishing between the items, and referred to them as the "Consultation Correspondences", being "nine emails and letters between representatives of Indigenous governments and employees of the Province, sent or received as part of the Province's duty to consult". The Appellant indicated that such items were similar to the general category of documents sought which are described as set out previously involving "records of communication between the director's delegate and other ministry officials or third parties related to the permit amendments and/or the reasons set out in the memo dated May 13, 2021".

[23] My discussion and analysis of the issues will proceed along the same line, with a focus on the arguments made by the parties, the principles involved with the pre-hearing document production sought here, and the application of those principles to the present case.

Summary of the Appellant's Position

[24] The Appellant relies on section 34(3)(b) of the *ATA* as authority for the Board to make an order regarding the pre-hearing production of documents.

[25] The Appellant references the Board's Practice and Procedure Manual (the "Board Manual") and lists the following factors to be considered before ordering production in a pre-hearing context:

- whether the party has requested voluntary compliance before making the request to the Board;
- whether the information sought to be obtained is relevant to the appeal;
- whether the documents are subject to disclosure protection under the *ATA*;

- whether the person from whom production is sought is reasonably likely to be able to supply the information; and
- any other factors that the Board considers relevant.

[26] The Appellant quotes from the Board Manual as follows:

> An application for the production of documents or other items must be made in accordance with Rule 16 [General application procedure]. To ensure that the application proceeds in an expeditious manner, it should include the following information:
>
> (a) the name of the person in possession or control of the documents or things;
>
> (b) a reasonably detailed description of the documents or things that would enable a reasonable person to know what documents, things or information is being sought;
>
> (c) the reasons why such materials are relevant to the subject matter of the appeal; and
>
> (d) the attempts made to have the person voluntarily provide the document or thing. An order will not be granted unless the party or participant has first asked the person to voluntarily produce the documents or things.

[27] The Appellant reviews various legal authorities in support of its application. The Appellant refers to *Seaspan ULC (formerly Seaspan International Ltd.) v. Domtar Inc.* 2013 BCEAB 11 (Decision Nos. 2010-EMA-004(a), 005(a), 006(a) and 2011-EMA-003(a), June 11, 2013) ("*Seaspan*") as quoted in *Emily Toews v. Director, Environmental Management Act*, 2014 BCEAB 32 (Decision Nos. 2013-EMA-007(f) and 2013-EMA-010(f), December 3, 2014) ("*Toews*") at para 18 as follows:

> 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."

[28] Regarding relevance, the Appellant notes the following from *Seaspan* at paragraph 56 of that case:

> The Panel agrees that pre-hearing access to relevant documents is required to ensure that the parties can properly prepare, and effectively argue, their respective cases to the Board. The parties must be able to ascertain the facts (both favourable and unfavourable) in order to properly understand and assess their cases, evaluate the possibility of a settlement, and, if necessary, prepare their cases for a hearing. This can only be done when the parties have access to documents which, it is "reasonable to suppose", may be relevant to proving or responding to an issue in the appeal.

[29] The Appellant further quotes from the decision of the court in *Canada Mink Breeders Association v. British Columbia*, 2022 BCSC 1731, ("*Canada Mink Breeders*") regarding relevance. There the court dealt with what was to be included in the record of proceedings on the judicial review of a cabinet decision. The court found that the record was to include documents which reflected the "information and submissions that were directly or indirectly considered by cabinet in making the impugned decision" (at para. 35).

[30] The Appellant says that whether or not the documents form part of the record *per se*, they are still relevant and it is open to the Board to require production of any relevant documents. The Appellant refers to allegations in the Notice of Appeal that it has not been provided with information relating to the amendments and to issues regarding the administrative fairness of the Director's failure to have disclosed relevant documents to the Appellant.

[31] The Appellant argues that the documents sought involve communications between the Ministry of Environment and Climate Change Strategy (the "Ministry") and First Nations specifically related to the Mine and/or the Appellant and regarding the Unsolicited Amendments to its Permit. The Appellant says that not only is it "reasonable to suppose" that such documents may be relevant to proving or responding to an issue in the appeal (as set out in *Seaspan*), but such documents are by definition relevant to its appeal of the Unsolicited Amendments.

[32] In terms of the statement in Respondent counsel's letter of September 9, 2022, that production of the category of documents sought is "overly broad, disproportionate, and irrelevant", the Appellant says it is "not asking for every document between the Ministry and First Nations, or among Ministry staff, related to the Gibraltar Mine". Further, the Appellant is "not asking for every document related to the Director's relationship with First Nations or third parties generally". The Appellant states that its request for production is limited to only those documents "related to the permit amendments and/or the reasons set out in the memo dated May 13, 2021." The Appellant argues that this "is a clear, finite and properly tailored request that is directly relevant to the issues on appeal".

[33] In support of its request for production, the Appellant notes that the Director has acknowledged that relevant documents which are considered part of the record were not included in the Respondent's document disclosure following the pre-hearing conference. Such documents came to the Appellant's attention through a Freedom of Information request, and the Appellant asserts that there should be an order for the category of

documents requested on this application to ensure full and proper disclosure has occurred.

Summary of the Respondent's Position

[34] The Respondent opposes production of the documents sought on the application. The Respondent says the application should be dismissed for the following reasons:

(a) the requested documents are entirely irrelevant;

(b) the Consultation Correspondences are sensitive; and

(c) there is no basis for a fishing expedition regarding the category of documents sought.

[35] The Respondent argues that the requested documents are irrelevant for three reasons. First, the Respondent says that "procedural fairness does not require the disclosure of every piece of correspondence received by the Director and their staff and colleagues". The Respondent argues that correspondence which the Director did not receive or rely upon is irrelevant to the procedural fairness issue. The Respondent says that all correspondence which was relied upon by the Director are part of the record that has been produced and any further documents are irrelevant. The Respondent says that procedural fairness is assessed contextually and is not without limit. The Respondent relies on the decision in *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 ("*Taseko*") where the court held that the failure to provide the company there with a First Nation submission (attached to a memorandum to the Minister) prior to a Cabinet decision did not violate procedural fairness. The court held there was nothing new or different in the First Nation submission from what had been said at a previous hearing regarding the matter, although the company had argued that portions of the submission were new.

[36] The second reason the Respondent says the requested documents are irrelevant is because it says the Appellant was given the opportunity to respond to a draft of the amended Permit. The Respondent argues that procedural fairness did not require disclosure of the Indigenous governments' concerns, but only required disclosure of how the Director proposed to accommodate those concerns. From that, the Respondent argues the Appellant was given an opportunity to comment on the draft Permit amendments when the Director provided the proposed amendments to the Appellant on April 16, 2021 and invited the Appellant to comment.

[37] The third reason the Respondent says the documents requested are not relevant is that the appeal to the Board will involve a *de novo* process which will cure any procedural unfairness. In that regard, the Respondent relies on comments in the First Stay Decision where the panel made reference to the curative effect of the "*de novo* process", and stated that the hearing on the merits would deal with "technical evidence about the nature of the requirements imposed by the Unsolicited Amendments, and whether they are for the protection of the environment" (First Stay Decision, at paras. 36 and 38). The Respondent

says that the appeal will not turn on the correspondence sought on this application, but on such "technical evidence".

[38] With respect to the Consultative Correspondences, the Respondent says they are sensitive and "the Board should be reluctant to order the production of documents sent or received by Indigenous governments as part of consultation". The Respondent refers to section 16(1)(a)(iii) of the *Freedom of Information and Protection of Privacy Act*, [RSBC 1996], c.165 ("*FOIPPA*") "which exempts from disclosure information that could reasonably be expected to harm relations between the government of British Columbia and an Indigenous government". The Respondent notes the importance of the duty to consult with Indigenous governments and cites the decision in *Taseko* in that regard. While the Respondent does not go so far as to submit the Consultative Correspondences are privileged, the Respondent argues that there should be a "protected zone within which the governments of the Province and Indigenous nations can exchange information confidentially".

[39] The Respondent asserts that the Appellant's request for the category of documents seeks broad disclosure and amounts to a fishing expedition. Although the Respondent acknowledges that it omitted items from the record previously produced, it says the items involved were a small number and there is not a concern over whether there has been full and proper disclosure.

[40] In the alternative, and in the event there is to be an order, the Respondent says it should be limited in a number of ways. The Respondent says that any such production should be limited to documents that "were sent by a representative of an Indigenous government" and contain content which the Director says informed his Decision to amend sections of the Permit. Further the Respondent says there should be provision for the redaction of responsive documents to everything other than what the Director says informed his Decision.

Summary of the Appellant's Reply

[41] With respect to the Respondent's argument that correspondence which was not received and relied upon by the Director is not relevant, the Appellant says "any information or submissions presented by third parties that affected the Director's decision-making (even indirectly), are relevant to this appeal and must be disclosed". In that regard, the Appellant says "it is not necessary that they be received or relied upon by the Director personally, particularly in a case where the Director has made clear he did, in part, rely on materials prepared by staff that engaged with Indigenous representatives".

[42] The Appellant says it is not seeking every piece of correspondence received from Indigenous governments by the Director and their staff and colleagues. Rather, the category of documents sought by the Appellant is limited to those "related to the permit amendments and/or the reasons set out in the [Director's] memo dated May 13, 2021".

[43] With regard to *Taseko*, the Appellant says that case involved whether the failure to disclose a document at the statutory decision-making stage ultimately breached

procedural fairness – it did not involve a document production application. Indeed, the Appellant notes that the document at issue there was "in fact disclosed prior to the hearing and was made available to the Court and the parties (even though it had not been disclosed during the permitting process itself)."

[44] In response to the Respondent's argument that procedural fairness was met in the present case, the Appellant says that this "is not an issue for the Board on this application". The Appellant argues that whether the opportunity provided to the Appellant to respond to a draft of the amended permit was sufficient in this case is a matter to be considered during the hearing of the appeal. It is not relevant to a consideration of what documents ought to be produced and, in any event, at the appeal the Appellant will argue that "sharing a draft of the Unsolicited Amendments (with no explanation as to what caused them to be considered, why they were deemed necessary, which underlying issues they were intended to address, etc.) was not sufficient to comply with the *audi alteram partem* principle".

[45] In terms of the effect of the Board having *de novo* jurisdiction, the Appellant says that "the Board does not have to substitute its decision for the Director in cases where the decision-making process was flawed" and the Appellant "will make various arguments as to why it would be appropriate to send the matter back" to the Director. This includes "not forcing the Board to undertake Indigenous consultation in respect of a statutory decision for which the Board has woefully limited information about the consultations that were undertaken in the first instance". Further, the Appellant says "it most certainly cannot be assumed – for document production purposes – that the Board has predetermined the remedy here and will make its own *de novo* decision at the end of the hearing, rather than remitting the decision back".

[46] Turning to the argument that the Consultative Correspondences are "sensitive", the Appellant says that "the Director does not have the ability to withhold from the Board or other parties otherwise relevant documents that he considers 'sensitive'". The Appellant references section 3(6) of *FOIPPA* which specifically provides that the "Act does not limit the information available by law to a party to a proceeding", and again notes that in *Taseko* the court and the parties did have the key document relating to Indigenous consultation which the company alleged "should have been shared during the statutory decision-making process". The Appellant argues that there is a procedure for the Respondent to apply under the Board's Rules and the *ATA* for evidence to be provided in confidence if the Respondent believes there is a confidentiality concern about a particular document. The Appellant says that the Respondent "cannot ignore these Rules and just engage in a self-help process simply because he feels documents are 'sensitive'".

[47] The Appellant says it is clear "that the Director engaged in extensive communications with third parties (Indigenous groups) specifically with respect to the Unsolicited Amendments" which is the "very matter under appeal". The Appellant says that seeking communications relating to the very matter under appeal "is the furthest thing possible from a 'fishing expedition'". The Appellant argues that its document request "is in fact highly targeted and directly on point".

Panel's Finding on the First Application

[48] In my findings on the issues raised on this application, I will deal first with the arguments raised by the Respondent against pre-hearing production. I will then examine and apply the factors set out in the case law in determining whether to grant the document disclosure requested by the Appellant. In that regard, I adopt the analysis of the Board as set out in *Toews* and *Seaspan* and reflected in the quotes from those cases previously set out in this decision. The key considerations identified at paragraph 18 of *Toews* are:

> (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.

[49] Turning to the Respondent's arguments against production, I find that the scope of relevant documents is not as restricted as submitted by the Respondent. In that regard, I find that pre-hearing document disclosure is not limited to those items which may be considered the record. The Board in *Seaspan* and *Toews* did not say pre-hearing document disclosure was limited in that way and counsel for the Respondent recognized that the scope of relevant documents at a hearing can go beyond the record. In counsel's September 9, 2022 letter, counsel for the Respondent stated that while various exhibits to an affidavit did not form part of the decision maker's record of decision, they were nevertheless "available for the Board to consider as evidence and the respondent will likely rely on some or all of them at the *de novo* hearing of the appeal". Documents which are available for a party to use at a hearing and for the Board to consider as evidence are clearly documents subject to pre-hearing disclosure. Thus, although the Respondent made arguments on this application against production based on the items sought not being part of the record, I find pre-hearing production is not limited to items considered to be part of the record.

[50] Next, while the Respondent argued against the production of items which were not relied upon by the Director or which were summarized for the Director by others, I agree with the Appellant that such circumstances do not prevent production of relevant documents. The Director may very well have decided not to rely on a document, or information in a document, which is unfavourable to the result he has chosen; however, that does not shield a document which is relevant, or the information in such a document, from pre-hearing production. As indicated in *Seaspan*, a party may be required to produce

relevant documents with information both favourable and unfavourable to its case. Similarly, the fact that others may have summarized a relevant document for the Director does not prevent the document itself from being produced, and production can be ordered of documents indirectly considered (e.g. see *Canada Mink Breeders, supra*.). In the present case, I find the Appellant is entitled to see relevant documents which have been summarized to determine whether those summarizing the documents were accurate in their summaries and to see if other parts of the documents may affect the conclusion to be drawn from the documents.

[51] Regarding the Respondent's argument that the opportunity given to the Appellant to comment on the draft amendments satisfied the procedural fairness requirement, I agree with the Appellant that such a determination is for the panel hearing the appeal to make based on the evidence and arguments at the hearing. It is clear this issue is in dispute, and it is not for me on a pre-hearing application to make such determinations for the panel hearing the matter. As I indicated at the outset of this decision, I "make no findings regarding the merits of the appeal" and "nothing in this decision should be taken as a finding that applies to the merits of the appeal".

[52] With respect to the *de novo* process before the Board, while there may be legal authority to the effect that such a process is curative of procedural fairness issues in the decision-making process below, that does not mean evidence about the process before the Director is not relevant. For example, evidence going to a failure to consider certain matters by the Director, or demonstrating a reliance on a subordinate's inaccurate summary of a document, may demonstrate weaknesses in the merits of the Director's Decision. Thus, I find the *de novo* process before the Board does not render the documents sought irrelevant.

[53] Similarly, I find the fact that the Board has *de novo* jurisdiction does not mean the panel hearing the appeal will choose to substitute its own decision rather than refer the matter back to the Director. The Appellant seeks to have the matter referred back to the Director and, again, it is not for this panel dealing with pre-hearing production to determine the appropriate remedy on appeal for the panel hearing the appeal.

[54] Regarding the Respondent's arguments about what was said in the First Stay Decision, I make the following comments. First, in my view the panel on the First Stay Decision was not intending to make a finding for the hearing panel on the procedural fairness questions which have been raised and specifically left those questions to be addressed "later in this appeal process when the matter proceeds to hearing and the appeal is tested on its merits" (at para. 36). Second, I find that when the panel commented that the Board would need "to consider technical evidence about the nature of the requirements imposed by the Unsolicited Amendments and whether they are for the protection of the environment", the panel on the First Stay Decision was not intending to limit the evidence which could be led at the hearing on the merits. The panel was discussing only one of the issues on the appeal and further had made it clear that the First Stay Decision was only to "address the stay application" (at para. 16)

[55] I turn to the Respondent's claim that the Appellant's application amounts to a "fishing expedition", and that the documents sought are "irrelevant or marginally relevant". This raises the question of the relevance of the documents sought and brings me to a consideration of the first of the factors set out in *Seaspan* and *Toew*s in determining whether to grant the document disclosure requested by the Appellant.

[56] The test for determining relevance from the case law is set out in the Board Manual where *Seaspan* is referenced and it is noted that: "Regarding relevance, the Board [in *Seaspan*] found that the question is whether it is 'reasonable to suppose', that the document may be relevant to proving or responding to an issue in the appeal" (emphasis in original, Board Manual at p. 28).

[57] The issues in the appeal here are to be derived from an examination of the amended Notice of Appeal, where the Appellant alleges:

- the Unsolicited Amendments are "unreasonable as they were not necessary for the protection of the environment";
- the Unsolicited Amendments are "an exceedance of the Director's jurisdiction as none of those amendments were part of or necessarily incidental to the amendment applied for";
- the Unsolicited Amendments are "unduly vague" and beyond the scope of the Director's power to impose conditions under the *EMA*;
- there was "a breach of the Director's common law obligations of procedural fairness by failing to disclose to the Appellant the reasons, rationale, and evidence being relied upon by the Director in considering to impose the Unsolicited Amendments"; and
- the Appellant was "not given the opportunity to 'know the case against it' and make responsive submissions" which constituted "a violation of common law principles of administrative fairness - specifically the *audi alteram partem* principle."

[58] The allegation that the Unsolicited Amendments are unreasonable and not necessary for the protection of the environment indicates the merits of imposing the Unsolicited Amendments are at issue in this appeal. To use the words from *Seaspan*, I find it is reasonable to suppose that documents which relate to the Unsolicited Amendments and the reasons for them, as requested by the Appellant, may be relevant to challenging the merits of imposing the Unsolicited Amendments. As previously indicated, this includes documents both favourable and unfavourable to the Director's Decision, and goes beyond whether the Director relied on the documents or whether such documents may be considered part of the record of the Director's Decision.

[59] This finding that the documents sought are relevant applies even if, as the Respondent alleges, it is determined that the appeal is limited to a consideration of "technical evidence about the nature of the requirements imposed by the Unsolicited Amendments, and whether they are for the protection of the environment". In that

respect, I find it is reasonable to suppose that the documents sought on this application may be relevant in examining the reasons for the Unsolicited Amendments, and proving whether or not the requirements imposed are necessary for the protection of the environment.

[60] The Appellant has also raised whether the Unsolicited Amendments were necessarily incidental to the amendment it had applied for. While there may be legal arguments in that regard, there will also be factual considerations in determining the connection between the Unsolicited Amendments and the amendment applied for. In my view, it is reasonable to suppose that documents related to the Unsolicited Amendments may be relevant to proving whether they were necessarily incidental to the amendment applied for.

[61] In terms of the allegations surrounding the process followed by the Director, the *de novo* process before the Board does not mean, as previously noted, that what occurred before the Director is irrelevant. In my view, it is reasonable to suppose that the documents sought may be relevant in demonstrating weaknesses in the Decision by demonstrating errors in the Director's decision-making.

[62] Thus, for the reasons given, I find that the documents sought by the Appellant on the First Application are relevant.

[63] Having determined the documents sought are relevant, the next question from *Seaspan* and *Toews* is whether the documents sought are privileged. As previously noted, the Respondent does not go so far as to submit that the Consultative Correspondences are privileged; rather the Respondent argues they are sensitive. In my view, whether or not the documents are sensitive does not preclude production of relevant documents as long as they are not privileged. Further, I agree with the Appellant that, in the event the Respondent is concerned that some documents or parts of them contain information warranting a confidentiality order, the Respondent may make an application pursuant to the Board's Rules and the *ATA* in that respect.

[64] The last item from *Seaspan* and *Toews* is whether the documents are in the possession and control of the Respondent. The Respondent has not argued he does not have possession and control of such documents and I find, as set out in *Seaspan* and *Toews*, that the Respondent "is reasonably likely to be able to supply the information."

[65] I turn now to the Respondent's claim for restrictions on the production order. Having found that the documents sought by the Appellant are relevant, I find that the production of such documents should not be limited to those documents that "were sent by a representative of an Indigenous government", as requested by the Respondent. I find that documents between the Director and other Ministry officials related to the amendments, as sought by the Appellant, are also relevant and ought to be produced. I further find that production should not be limited to documents with content which the Director says informed his decision to amend sections of the Permit. As I previously found, the Appellant is entitled to pre-hearing production of relevant documents which are both unfavourable and favourable to the Decision, and information in documents contrary to the Decision and/or Unsolicited Amendments is nevertheless relevant. In that respect, one

of the grounds of appeal challenges the reasonableness of the Decision itself and documents unfavourable to the Decision are relevant to that issue.

[66] The Respondent has also requested that a pre-hearing production order should direct that there be redactions to the documents "applied to everything other than content that informed the Director's decision to amend" the Permit. I deny the Respondent's request for a number for reasons. First, I have found that the scope of relevant production goes beyond information relied upon by the Director to amend the Permit. Second, as previously noted, if the Respondent believes a confidentiality order is warranted, the Respondent may make an application in that respect. Third, if the concern is about information becoming public, there is an implied undertaking, which restricts all parties in appeals before the Board, that documents which are produced will only be used for the purposes of the current litigation. Moreover, documents which are disclosed by parties in the appeal process do not automatically become part of the record – rather it is only when documents are entered into evidence that they become part of the public record, and the panel hearing the matter may make a confidentiality order regarding such documents if it determines such an order is warranted.

[67] Thus, I find that the Appellant's request for the pre-hearing production of documents on the first application satisfies the tests for disclosure as set out in *Seaspan*, *Toews*, and the Board Manual, and I find they are to be disclosed. Further, I find that such disclosure should not be limited as submitted by the Respondent in the alternative. This does not preclude the Respondent making an application for the documents ordered to be received in confidence under the Board's Rules and the *ATA*.

BACKGROUND RELATING TO THE SECOND APPLICATION FOR DOCUMENT PRODUCTION

[68] In its Second Application, the Appellant "adopts and relies on the factual basis outlined in its first document production application" with certain additions.

[69] The additions to the factual basis relate to a further process pursued by the Appellant under *FOIPPA*. On November 4, 2022, the Appellant obtained, through *FOIPPA*, an email dated April 30, 2021 from the Director to various Indigenous group representatives making himself available to go over the draft Permit with them and offering to schedule meetings in that respect. The Appellant says that the April 30, 2021 email makes it clear that the Director was proposing his direct engagement with the groups.

[70] The Appellant made this Second Application on November 10, 2022. In this application the Appellant seeks:

a. The April 30, 2021 email from the Director to the Indigenous group representatives;

b. Any responses from the Indigenous group representatives;

c. Any calendar entries of any staff (including but not limited to the Director) related to the scheduling of the meetings proposed by the Director;

d. Any notes of any staff (including but not limited to the Director) of the discussions at any meetings held with Indigenous groups in relation to the April 30, 2021 invitation; and

e. Any other documents (including but not limited to internal briefing materials or correspondence among government staff) related to meetings with Indigenous groups held in response to the Director's April 30, 2021 email invitation.

ISSUE ON THE SECOND APPLICATION

[71] The issue raised on this preliminary application is whether the documents sought on the Second Application ought to be produced.

DISCUSSION AND ANALYSIS OF SECOND APPLICATION

Summary of the Appellant's Position

[72] On the Second Application, the Appellant relies on the same legislation, provisions of the Board Manual, and case law as previously mentioned in respect of the First Application.

[73] The Appellant says that the April 30, 2021 email is direct evidence that the Director sought to engage personally with Indigenous groups to the exclusion of the Appellant. The Appellant asserts that both the email and the records pertaining to the meetings held in response to the email ought to be produced.

[74] The Appellant argues that it is "hard to imagine a more relevant document" than the April 30, 2021 email, "it is difficult to understand why it would not have been disclosed by the Director" previously in the proceedings, and the Appellant should not have been required to make a request under *FOIPPA* "to ferret out such documents". The Appellant argues that similar points apply to other records pertaining to the meetings held pursuant to the email.

[75] The Appellant says that that it is essential for the Board to assess and consider what submissions were made to the Director related to the Unsolicited Amendments. The Appellant says that such disclosure is necessary to determine whether the right to procedural fairness was breached.

Summary of the Respondent's Position

[76] The Respondent begins by noting that the Appellant delivered its Second Application on November 10, 2022 without previously providing notice of its intention to

bring the application, and without asking the Respondent to produce the requested documents voluntarily.

[77] The Respondent points out that, contrary to the Appellant's assertion, the April 30, 2021 email was, in fact, included in the decision record produced by the Respondent in July 2022. The Respondent notes that the document was even referred to by the Appellant in its Reply on the First Application. In the result, the Respondent says that the Second Application for the April 30, 2021 email was unnecessary, and the Appellant's sense of surprise that the document had not already been produced is without foundation.

[78] In addition to the April 30, 2021 email, the Respondent says there are a number of documents sought which have already been produced in the decision record, and a production order is unnecessary. Regarding the calendar entries and meeting notes sought, the Respondent says they are irrelevant and the request is too broad in scope based on the issues on appeal. The Respondent repeats the submissions on the First Application and says that the Appellant does not address the First Stay Decision where the Respondent says the Board determined this appeal will ultimately be resolved on "technical evidence about the nature of the requirements imposed by the Unsolicited Amendments" (First Stay Decision at para. 38).

[79] In addition to its submissions in response to the Second Application, the Respondent seeks an order requiring the Appellant to pay the costs of the Second Application in any event of the cause. The Respondent says the Appellant "ought not to have described the April 2021 Email as 'previously undisclosed' without reviewing the decision record more carefully", and further says that the Appellant "ought not to have applied for production of the April 2021 Email without first requesting voluntary production (which would have enabled the Director to point out where the document exists in the record already disclosed)".

[80] The Respondent notes the Board has the power to award costs under section 47 of the ATA. The Respondent recognizes that the "Board awards costs only in special circumstances" but says that the Appellant's conduct negatively impacts the integrity of the Board's processes". The Respondent references the Board decision in *Seaspan ULC (formerly Seaspan International Ltd) v. Director, Environmental Management Act*, 2015 BCEAB 7 (Decision Nos. 2010-EMA-005(c) and 2010-EMA-006(c), April 1, 2015), and says "an award of costs in this circumstance would send a useful message to parties and discourage such conduct in the future".

Summary of the Appellant's Reply

[81] The Appellant "acknowledges and apologizes for the inadvertent error in stating that the April 30, 2021 email was not previously disclosed other than through the freedom of information request". Nevertheless, the Appellant says that it is clear there were communications between the statutory decision-maker and the First Nations and argues that "in order to assess whether procedural fairness was breached, the Board must be able to review all records of those communications".

[82] As with the Respondent's position on the First Application, the Appellant says that many of the Respondent's arguments go to whether the Appellant was afforded procedural fairness or the appropriate remedy for any breach, which are issues for the Board to decide at the hearing of the appeal with the benefit of all relevant documents.

[83] Regarding the Respondent seeking costs, the Appellant says that its "inadvertent and admitted error should not give rise to an award of costs" and there has not been unreasonable or abusive conduct. The Appellant says that the amount of time for the Respondent to correct the Appellant's mistake was minimal and to the extent its error "occurred in a second application, this did not materially complicate the matter and the Board is, in any case, ruling on the two applications concurrently".

Panel's Finding on the Second Application

[84] I begin with the Board Manual. Rule 10 deals with pre-hearing applications for documents. Among other things to be included in an application, section 10 of the Board Manual states:

> ...
>
> (d) the attempts made to have the person voluntarily provide the document or thing. An order will not be granted unless the party or participant has first asked the person to voluntarily produce the documents or things.
>
> [emphasis in the Board Manual]

[85] It is not disputed that the Appellant did not first ask the Respondent to voluntarily produce the documents set out in the Second Application. In particular, there was no request for the April 30, 2021 email and a request for that document would have made it clear the Appellant already had that document.

[86] In my view, the wording of the Board Manual is clear about what is to occur when a party does not first request the documents be voluntarily produced – the order "will not be granted". The Appellant has not satisfied me as to why this aspect of the Manual should not be applied to its request here, and the fact that the Board Manual emphasizes that the order will not be granted in such circumstances emphasizes the importance placed on it.

[87] In the circumstances, I dismiss the Appellant's Second Application for documents based on its procedural failure to first ask the Respondent for such documents as required by the Board Manual.

[88] In addition to finding the Second Application fails on procedural grounds, I further find the Second Application should also be dismissed for other reasons. First, it is acknowledged that the Appellant already has the April 30, 2021 email and, as such, I find it is unnecessary to order it be produced. Second, I find the order requested is unnecessary because I have already ordered production of "records of communication between the director's delegate and other ministry officials or third parties related to the permit

amendments and/or the reasons set out in the memo dated May 13, 2021". Third, I find the Appellant's request for documents on this application is too broad and, unlike the request on the First Application, is not limited to documents related to the Unsolicited Amendments and the Decision.

[89] I turn to the Respondent's request for costs. As the Respondent notes, the Board has the power to award costs under section 47 of the ATA; however, the Board awards costs only in special circumstances. The Board Manual states that the "objectives of the Board's costs policy are to encourage responsible conduct throughout the appeal process and to discourage unreasonable and/or abusive conduct" (at p.57). In the case on costs quoted by the Respondent, the Board stated, among other things, that "an award of costs is a way for the Board to dissociate itself from misconduct" (at para. 191).

[90] In my view, the Appellant ought to have been more careful in the steps taken in respect of the Second Application and made sure it was complying with the process set out in the Board Manual. However, I find that the Appellant's failure to do so was due to inadvertence rather than unreasonable or abusive conduct, and the Appellant has apologized for its error.

[91] There are many documents involved with this appeal, and there was already a pre-hearing document production application before the Board when the Appellant received further documents pursuant to its *FOIPPA* request. The Appellant was relying on the same factual basis and relevant legal principles on the Second Application, and it may have seemed the applications were connected. In that respect, the Board decided that it would "adjudicate the two applications together and subsequently issue one ruling addressing both applications." In terms of the effect of the Appellant's error, I agree with the Appellant that, in the circumstances with the two applications being dealt with together, the Appellant's error did not materially complicate the matter.

[92] With respect to sending a message, the submissions on the two applications before me have indicated that there have been inadvertent errors on the part of counsel for both parties. Counsel for the Respondent has indicated that certain documents were omitted from the record initially produced through inadvertence. Similarly, counsel for the Appellant has indicated it was through inadvertence that the April 30, 2021 email was not recognized as already having been received. Going forward, counsel for both parties are encouraged to avoid inadvertent errors.

[93] In the result I dismiss the Appellant's request for documents in the Second Application and dismiss the Respondent's request for costs of the Second Application.

DECISION

[94] For the reasons given, I order the following documents set out in the First Application be produced:

- Email from S. O'Sullivan to D. Epps, J. Stuart, M. Dyas and N. Dodd dated 21-Apr-21 re ?Esdilagh, TN & BC Gibraltar Mine G2G Sub-Group;

- Email from Y. Qureshi to Jen Stuart and Nikki Dodd dated June 15, 2021 re Gibraltar Mine BC Interests;
- Letter from Chief Don Harris to Minister George Heyman dated March 31, 2021;
- Email from Susan O'Sullivan to Deb Epps and others, dated April 21, 2021 re ?Esdilagh, TN & BC Gibraltar Mine B2G Sub-Group;
- Email from Helga Harlander to Morgan Dyas dated April 22, 2021 re Permit PE-416 comment;
- Letter from Troy Baptiste to Morgan Dyas dated April 22, 2021;
- Email and attachments from N. Dodd to Chief Baptiste dated May 5, 2021 re Gibraltar Mine – EMLI Commitment Letter Attached;
- Email and attachments from Kelsey Norlund to Sean Shaw, dated April 12, 2021 re Gibraltar Mines Act Permit – current Application review;
- Email and attachments from Sean Shaw to Tessa Graham and others dated May 3, 2021 re April 23rd Letter.

[95] For the reasons given, I further order the following documents set out in First Application also be produced:

> Any other emails or other records of communication between the director's delegate and other ministry officials or third parties related to the permit amendments and/or the reasons set out in the memo dated May 13, 2021.

[96] These orders do not preclude the Respondent from making an application for the documents ordered to be received in confidence under the Board's Rules and the ATA.

[97] For the reasons given, I dismiss the Appellant's Second Application and deny the Respondent's request for costs of the Second Application.

[98] In reaching my decision, I have considered all of the submissions and relevant evidence provided by the parties, whether specifically referenced in my reasons or not.

"James Carwana"

James Carwana, Panel Chair
Environmental Appeal Board