



# Environmental Appeal Board

**Citation:** *Kathleen and John Ehrlich v. Water Manager*, 2024 BCEAB 11

**Decision No.:** EAB-WSA-23-A010(a)

**Decision Date:** 2024-05-06

**Method of Hearing:** Conducted by way of written submissions concluding on March 26, 2024

**Decision Type:** Preliminary Decision on Document Production Application

**Panel:** Cynthia Lu, Panel Chair

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

**Between:**

Kathleen and John Ehrlich

**Appellants**

**And:**

Water Manager

**Respondent**

**Appearing on Behalf of the Parties:**

For the Appellants: Self-Represented

For the Respondent: Livia Meret  
Amanda Macdonald

# DOCUMENT PRODUCTION APPLICATION DECISION

## INTRODUCTION

[1] Kathleen and John Erlich (the “Appellants”) own property on Glenora Road in the Cowichan area on Vancouver Island. On July 13, 2023, Sean Staplin, Water Manager, (the “Respondent”), issued an Order to the Appellants under the *Water Sustainability Act*, SBC 2014, c.15 (the “Act”), requiring them to, “in relation to water, stop the diversion, use, including storage, carriage, or distribution of the water for non-domestic purpose(s) from the wells (on their property).” On July 28, 2023, the Appellants appealed the Order to the Environmental Appeal Board (the “Board”).

[2] The government ministry responsible for the Act at the time of the Order was the Ministry of Forests, Lands, and Natural Resource Operations. The current government ministry responsible for the Act is the Ministry of Water, Lands and Resource Stewardship (“WLRS”).

[3] Prior to an appeal hearing, Board staff typically hold a pre-hearing conference (the “PHC”) with the parties to identify, and attempt to resolve, any preliminary issues. A PHC occurred on October 19, 2023, where the Board and the parties identified preliminary issues and the parties agreed to work together on voluntary document disclosure. Correspondence and document disclosure between the parties occurred between December 2023 and February 2024. On December 14, 2023, the Appellants applied for document production to the Board. This application was held in abeyance with the agreement of the parties and the Appellants amended that application on February 28, 2024. This preliminary decision addresses the Appellants’ application for document production.

## BACKGROUND

[4] On February 29, 2016, the Act was brought into force, requiring all non-domestic groundwater users to obtain a water licence from the government. Existing groundwater users, those already using groundwater for non-domestic purposes prior to March 1, 2016, were given until March 1, 2022, to apply for a “Groundwater Existing Use” licence. The time between March 1, 2016, and March 1, 2022, is referred to as the transition period.

[5] If an existing groundwater use licence application was made within the transition period, the individual would be authorized to continue to divert groundwater until the application was decided by the Ministry. Any applications for groundwater use submitted after March 1, 2022, would be considered “new use,” and would require a water licence prior to any non-domestic groundwater use. The PHC identified the preliminary issue of

whether or not an existing groundwater use licence application was submitted and received by the Ministry before the end of the transition period in March 2022.

[6] On November 3, 2023, the Appellants requested a number of documents be disclosed and produced by the Respondent. On December 8, 2023, the Respondent voluntarily disclosed and produced the requested documents to the Appellants. On December 14, 2023, the Appellants applied for document production to the Board and indicated that they also made an information request under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c.165 ("FOIPPA"), for additional documents related to the appeal. The parties agreed to wait for the FOIPPA request to be completed before proceeding with the document production application.

[7] On February 16, 2024, the Appellants confirmed receipt of the FOIPPA request. The Appellants subsequently amended their document production application on February 28, 2024, seeking additional documents which set out protocols of all ministries, addressing what steps should be taken if an application is lost or misplaced.

## RELEVANT LEGISLATION AND RULES

[8] The Board has the authority under section 34(3)(b) of the *Administrative Tribunals Act*, SBC 2004, c.45 (the "ATA"), to make orders to produce a document or other thing:

### **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.

[9] The Board is also empowered by section 11 of the ATA to make rules respecting practice and procedure to facilitate the just and timely resolution of the matters before it. This power specifically includes the power to make rules concerning the exchange of records and documents by the party (section 11(2)(d)). Rule 16 of the Board's Rules deals with general procedure for applications.

### **Application for Documents**

4. Before applying for an order to produce documents under section 34(3)(b) of the [ATA], 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.

[10] Additionally, the Board's Practice and Procedures Manual (the "Manual") provides guidance and policies that parties can expect the Board to follow during the appeal process. Sections of the Manual that are relevant to this application are specified below, where necessary.

## ISSUES

[11] The first and main issue before the Board in this application is whether the documents sought by the Appellants in their amended document production application should be produced. The documents requested by the Appellant relate to protocols for lost or misplaced licence applications. The other documents from the Appellants' initial application have been either voluntarily disclosed or made available to the Appellants through their December 2023 FOIPPA request.

[12] A second issue relates to questions raised by the Appellants in their initial document application on December 14, 2023. The Appellants asked the Board to order the Respondent answer two questions related to the handling of the appeal process and to the continued enforcement of the Order.

## DISCUSSION AND ANALYSIS

### Issue One

#### *Appellants' Submissions*

[13] The Appellants seek documentation of protocols for lost or misplaced applications to government ministries and of protocols for errors made by ministry employees. Specifically, the Appellants request the protocol(s) for all BC ministries for what happens when licence applications sent in by mail are not received. The Appellants note that in their previous experience with other government ministries issuing licences, there was a process in place for when a licence, or other time sensitive information, was not received.

[14] Aside from stating these protocols are important for their preparations, the Appellants did not provide further submissions as to the rationale underlying this request.

#### *Respondent's Submissions*

[15] The Respondent submits the legal tests for ordering document production are "relevance" and "possession and control." The Respondent cites the Board's Manual where consideration is given to *Seaspan ULC (formerly Seaspan International Ltd.) v. Domtar Inc.*, 2013 BCEAB 11 (CanLII):

In *Seaspan*, the Board accepted that to have “possession” requires a proprietary interest in the document, and to have “control” is to have an enforceable right to obtain the documents from the person who has actual possession of them. Regarding relevance, the Board 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. (page 28 of the Manual)

[16] The Respondent argues what is relevant in the document production application should be limited to “documentation of protocol for lost or misplaced existing groundwater applications made to WLRs.” The Respondent submits that he has made all reasonable efforts to disclose relevant documents and any relevant documents within his possession and control have already been disclosed and produced to the Appellants.

[17] The Respondent submits that he took further steps to seek additional information not originally within his possession and control following the Appellants’ document production application. The Respondent submits that all reasonable efforts have been made to obtain any document setting out protocols for lost existing use of groundwater applications; however, it appears that such a document does not exist.

[18] The Respondent submits that even if the documents from other ministries were relevant, he has no enforceable right to obtain them: they are not within his possession or control. The Respondent suggests that if the Appellant seeks information from other ministries or regarding other types of licence applications, they make a *FOIPPA* request for those documents.

### Analysis and Findings

[19] In addition to the guidance presented in the Manual and in *Seaspan*, the Board has considered relevance, and possession and control of documents in previous document disclosure applications.

[20] *Richmond Steel Recycling Ltd. v. Director, Environmental Management Act*, 2023 BCEAB 3 (*CanLII*) (“*Richmond Steel*”), considered relevance and burden of proof this way:

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. (para. 40, emphasis added)

[21] *Greater Vancouver Sewerage and Drainage District v. Director, Environmental Management Act*, 2017 BCEAB 4 (*CanLII*) (“*GVSD*”), considered possession and control in this manner:

The Board’s power to order production is limited to things “in the person’s possession or control”, which the Panel finds are things that exist and are in the person’s possession or control when the order is made. The Panel finds that section 34(3)(b) does not empower the Board to order a person

to produce samples that are not already in their possession, or to take samples that do not already exist. (para. 100, emphasis added)

[22] While I am not bound by previous Board decisions, I find the interpretations in the above decisions helpful in my analysis in this case. I adopt and rely on the reasoning of these previous Board decisions in deciding whether to grant this document production order. The questions I need to answer are:

- 1) Is the Respondent in possession or control of a lost applications protocol for existing groundwater use licence applications?
- 2) Have the Appellants provided evidence to show why, on the balance of probabilities, protocols for lost applications from all BC ministries are relevant? If so, is the Respondent in possession and control of these protocols?

*Is the Respondent in possession or control of a lost applications protocol for existing groundwater use licence applications?*

[23] The parties agree that a WLRS protocol addressing lost or misplaced water licence applications would be relevant to the preliminary issues in this appeal. I have reviewed the affidavits submitted by the Respondent, which include correspondence between WLRS staff and staff from other government agencies. From this evidence and the Respondent's submissions, I understand that existing groundwater licence applications are not accepted by mail: any mailed-in applications would be returned to the sender and are not tracked in the database.

[24] Given this procedure for managing received mail, I am convinced by the Respondent's submissions that it is unlikely a protocol for lost or not received mail exists. I find that all reasonable efforts were made to obtain any protocol relating to lost submissions which were sent by mail. I also find that, with respect to water licence applications, a protocol for lost or misplaced applications sent by mail likely does not exist. A document not likely to exist is therefore not within the Respondent's possession or control and cannot be ordered to be disclosed and produced.

*Have the Appellants provided evidence to show why, on the balance of probabilities, protocols for lost applications from all BC ministries are relevant? If so, is the Respondent in possession and control of these protocols?*

[25] Further to the WLRS protocol for lost or misplaced water licence applications, the Appellants seek protocols for lost licence applications sent in by mail for all BC ministries. The Appellants assert that other ministries overseeing other licencing systems have protocols for this type of issue. However, the Appellants submit no further information indicating what these protocols are, what ministries may be involved, what types of licence applications may be involved, or why they may be relevant to existing ground water licence applications specifically or in general.

[26] According to the Manual, the responsibility for proving a fact is on the person who asserts it. This is referred to as the "burden of proof." This interpretation is also held in

*Richmond Steel* referenced above. For this application, it is the Appellants' responsibility to illustrate why the protocols from all BC ministries would support their preparations in this appeal. Without any further supporting rationale for their application, I find the Appellants' request for protocols from all BC ministries to be vague and overly broad.

[27] I am not convinced by the Appellants' submissions that they have met the burden of proof regarding relevance for protocols from all other BC ministries. As a result, it is not necessary for me to determine if these protocols are within the Respondent's possession or control. Consequently, I decline to order the Respondent to disclose and produce the requested documents.

## Issue Two

### *Appellants' Submissions*

[28] The Appellants ask the Board to order the Respondent answer two additional questions: 1) why the Respondent suggested they are "fishing" for information; and, 2) why the Respondent is continuing with the Order when the Minister of WLRS has asked for a more productive relationship between province and water users.

### *Respondent's Submissions*

[29] The Respondent did not address these additional questions in their submissions on this document production application.

### Panel's Findings

[30] The application before me is for the disclosure and production of documents. The legal test that has been applied by the courts and the Board is well-established at this point. In any application for the production of documents, the Board is limited to ordering parties to produce existing relevant documents within their possession and control. As discussed in *GVSD* above, the Board's powers under these applications are limited to ordering the production of things that existed when the order was made.

[31] The Board cannot order the parties to create documents in this context. The Appellants' additional questions, if answered, would require the Respondent to create a response specific to the context of this appeal. This request is not for the production of an existing document, and therefore is not within the Board's jurisdiction in this application. Consequently, I decline to compel the Respondent to answer the questions posed by the Appellants.

## DECISION

[32] For the reasons above, I dismiss the Appellants' document production application. In making my decision, I have carefully considered all the relevant documents, the parties' submissions to the Board, whether or not they are specifically referenced in the reasons above.

"Cynthia Lu"

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Cynthia Lu, Panel Chair  
Environmental Appeal Board