



Environmental Appeal Board

Citation: *Peace River Coal Inc. v. Director, Environmental Management Act*,
2023 BCEAB 8

Decision No.: EAB-EMA-21-A008(b)

Decision Date: 2023-03-21

Method of Hearing: Conducted by way of written submissions concluding on
February 14, 2023

Decision Type: Decision on Application to Cross-Examine a Witness

Panel: Brenda Edwards, Panel Chair

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

Between:

Peace River Coal Inc.

Appellant(s)

And:

Director, Environmental Management Act

Respondent

Appearing on Behalf of the Parties:

For the Appellant(s): Robin Junger, Counsel
Komal Jatoi, Counsel

For the Respondent: Andrew S. Grant, Counsel

DECISION ON APPLICATION TO CROSS-EXAMINE A WITNESS

INTRODUCTION

[1] Peace River Coal Inc. ("Peace River") is seeking an order that Leslie Payette, formerly a Compliance Operations Manager designated as a director under the *Environmental Management Act* and the Respondent in this appeal (the "Director"), attend for cross-examination on her affidavit dated December 12, 2022, which was filed in support of the Respondent's written submissions.

BACKGROUND

[2] Peace River owns a metallurgical coal mine near Tumbler Ridge, British Columbia. Although the mine has not been operational since 2015, runoff from the mine site continues to discharge regulated substances into surface water in the area. These discharges are authorized under Permit 17762 (the "Permit"), issued by the Director under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "Act").

[3] The Permit was initially issued on October 31, 2005. It authorises effluent from the mine site to be discharged into a set of sedimentation ponds, subject to certain terms and conditions. One sedimentation pond has an associated water treatment facility that reduces the concentration of selenium in the water before discharging the water back into the sedimentation pond system.

[4] The Permit required Peace River to construct and start operating a second water treatment facility on Gordon Creek downstream of the sedimentation ponds by March 31, 2017 (the "Second Facility"). This requirement was introduced in order to reduce the level of selenium in Gordon Creek. In May 2016, Peace River applied for an amendment to the Permit, seeking to delay the construction of the Second Facility.

[5] On November 15, 2016, the Director granted Peace River's application and amended the Permit (the "November 2016 Letter Amendment"). According to Peace River, the Ministry of Environment and Climate Change Strategy (the "Ministry") has acknowledged that any elevated selenium levels at one particular selenium monitoring site—numbered G2 and located downstream of the planned location for the Second Facility—would not be used in determining if Peace River was in compliance with its permit. Therefore, any exceedance of the permitted selenium level at monitoring site G2 could not give rise to an administrative penalty. This is not documented in the amended Permit.

[6] The amended Permit imposes other requirements on Peace River. Those include that Peace River must:

- a) supply the Ministry with quarterly and annual reports; and
- b) maintain selenium concentrations below a certain threshold at various locations, relative to the interim Site Performance Objective (the "SPO"), which is defined in the Permit.

[7] On September 9, 2021, the Director issued an administrative penalty based on two types of Permit violations (the "Determination").

[8] Firstly, the Director concluded that Peace River had breached conditions of the Permit by failing to submit, as required, six quarterly reports and one annual report. She imposed a \$4,200 penalty as a result of those violations. Her reasons do not appear in the Determination, but rather the Determination incorporates by reference the reasons contained in an earlier "notice and penalty assessment form." Peace River has not appealed this aspect of the Determination.

[9] Secondly, the Director determined that selenium concentrations exceeded the SPO at two monitoring stations. The first monitoring station, numbered B-5, had one exceedance. The Director considered this to be a "moderate" contravention, so imposed a \$5,000 penalty, plus 10% to reflect the economic benefit that the Director says Peace River experienced as a result of its noncompliance with the Permit.

[10] The Director also determined that there were 40 exceedances at a second monitoring station, numbered Gu/sGT33. Site Gu/ sGT33 is downstream of the planned location of the Second Facility. The Director considered this to be a "major" contravention, with an associated base amount of \$20,000 per day. The Director declined to impose the extra 10% penalty factor as a result of the demonstrated efforts of Peace River to prevent recurrence of the exceedance level. The Director applied the penalty 40 times to reflect the repeated or continuous nature of the noncompliance, for a total penalty of \$800,000, in respect of the exceedances at Site Gu/sGT33.

[11] In total, the Director imposed an administrative penalty of \$809,200.

[12] Peace River appealed the Determination. In its initial Notice of Appeal and a more recent amended Notice of Appeal, Peace River raised the following issues (as characterized by the Chair of the Environmental Appeal Board (the "Chair") in *Peace River Coal Inc. v. Director, Environmental Management Act*, 2022 BCEAB 17 (the "Method of Hearing Decision")):

- a) that the Director:

- i. improperly sub-delegated decision-making functions to other Ministry staff;
 - ii. destroyed, permitted the destruction of, or failed to take reasonable steps to prevent the destruction of decision drafts that show the input of other Ministry staff into the Director's decision-making;
 - iii. failed to prepare or retain records of how she assessed or came to conclusions about both Peace River's response to the Notice of Determination and input from other Ministry staff; and
 - iv. sought and entertained comments from Ministry staff that showed bias against, or hostility toward, Peace River, without advising Peace River about those comments and giving it the chance to respond;
- b) that the penalty for Site B-5 should be reversed because:
- i. the Director did not identify what steps Peace River could and should have taken, beyond what it had done, in the circumstances;
 - ii. the Director did not establish actual or likely harm to animal health; and
 - iii. it was not relevant whether selenium levels exceeded water quality guidelines, given that the levels authorized under the Permit do as well;
- c) that the penalty for Site Gu/sGT33 should be reversed because:
- i. that site is downstream of the planned site for the second water treatment facility, and (like Site G2), should not be subject to any penalty;
 - ii. the Director unreasonably relied on analyses provided by a sub-delegate because it failed to consider the question of what (if any) penalty was appropriate separate from the question of whether the authorized discharges exceeded levels authorized in the Permit; and
 - iii. the Director misunderstood Peace River's submissions insofar as the locations of various sampling sites were concerned; and
- d) that the penalty imposed for Site Gu/sGT33 should be reduced because:
- i. the daily multiplier was not warranted,

- ii. the contravention should not be considered "major",
- iii. the Director failed to identify any economic benefits Peace River received from the alleged noncompliance, and
- iv. the Director failed to give sufficient weight to the efforts Peace River had taken to prevent any recurrence.

[13] On June 10, 2022, the Chair issued a preliminary decision in which he ordered that the appeal would be considered by written submissions, subject to later applications for individual oral testimony or cross-examination: the Method of Hearing Decision at paras. 1 and 56.

[14] There is now a dispute between the parties as to whether the Director, Leslie Payette, ought to be ordered to attend for cross-examination by Peace River.

ISSUE(S)

[15] The issue arising from Peace River's application is:

Whether the Board ought to order that the Director attend for cross-examination, conducted by counsel for Peace River, on her affidavit dated December 22, 2022.

RELEVANT LAW

[16] The group appeal is governed by sections 100(1) and 103 of the *Act*.

100 (1) A person aggrieved by a decision of the director or a district director may appeal the decision to the appeal board in accordance with this Division.

103 On an appeal under this Division, the appeal board may

- a) send the matter back to the person who made the decision, with directions,
- b) confirm, reverse or vary the decision being appealed, or
- c) make any decision that the person whose decision is appealed could have made, and that the appeal board considers appropriate in the circumstances.

[17] Also relevant to this preliminary matter is the Board's Practice and Procedure Manual, which provides for applications to cross-examine witnesses at pp. 32-33:

If it becomes apparent that credibility is a significant factor in the appeal, the panel may, on its own initiative or at the request of a party, require evidence to be presented at an oral hearing to allow cross-examination of some or all of the witnesses.

If a party seeks to cross-examine an affiant on an affidavit included in the written submissions of another party, Rule 20 requires the party to apply to the Board in accordance with Rule 16 [General application procedure].

[18] Rule 20 of the Board Rules governs written hearings and provides for cross-examination of affiants at paragraph 4:

20 (4) If a party:

- a) Seeks to cross-examine an affiant on the contents of an affidavit, or
- b) Seeks to have a portion of the written hearing conducted orally,

The party must apply to the Board.

[19] Part 4 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 (the "ATA") applies to Board hearings under the *Act*. Section 14 of the *ATA* provides that, on application by a party, intervener, or on its own motion, the Board may make any order that it considers necessary to control its own processes.

DISCUSSION AND ANALYSIS

Whether the Board ought to order that the Director attend for cross-examination, conducted by counsel for Peace River, on her affidavit dated December 12, 2022

Peace River's submissions

[20] Peace River asserts that where there are controversial facts in a proceeding, such as here, the Board ought to grant the opportunity for cross-examination: *Plant v. Emergent Designs Science & Technology Consulting Limited*, 2008 BCSC 729 at paras. 17-18. Further, the Supreme Court of Canada has held that tribunals must listen fairly to both sides, giving the parties to the controversy a fair opportunity to correct or contradict any relevant statement that is prejudicial to their views: *Kane v. University of British Columbia* (1980), 18 BCLR 124.

[21] Peace River submits that the Board has previously stated that if there are disputes regarding the evidence such that it needs to be tested, this may occur by cross-examination on the affidavits. Peace River cites *Richardson International Limited v. District Director, Environmental Management Act, 2021 BCEAB 2* ("*Richardson*") at para. 63 in support of its application.

[22] Peace River says that it ought to be permitted to cross-examine the Director on paragraphs 15, 16, 17, 18, 20, 27 and 28 of her affidavit. I will briefly summarize Peace River's position for each of the Director's affidavit paragraphs which it seeks cross-examination on.

[23] Peace River states that the Director's evidence at para. 15 is inconsistent with the record. In her affidavit, the Director affirmed that she emailed and requested a staff member's comments on their understanding of the Permit. However, the email actually seeks the staff member's opinion of the Appellant's submission with respect to the November 2016 Letter Amendment. Peace River submits that it ought to be allowed to cross-examine the Director on this discrepancy in terminology since the decision to allow Peace River to defer construction of the Second Facility is a core element of this appeal.

[24] Peace River says that, at para. 16 of her affidavit, the Director asserts the specific location of the various compliance sites was not significant to the Determination. However, the Notice Prior to Determination of Administrative Penalty (the "Notice") made clear that at least one of the sites (site G2) was relevant to the Determination. Peace River also states that the change of language during the penalty process is highly relevant, raises credibility issues, and cannot be fully examined without cross-examination.

[25] Peace River submits that a fair and thorough hearing requires that it be permitted to cross-examine the Director on whether, how, and to what extent she shared the views of at least some Ministry staff about Peace River. Peace River submits that the views of particular Ministry staff were both relevant and influential in reaching the Determination. The views of Ministry staff are known to the parties, as evidenced by particular emails from staff to the Director dated August 24, 2021. The Determination is silent on the matter.

[26] Peace River asks that it be permitted to cross-examine the Director on her statement at paragraph 17 of her affidavit where she asserts that "[t]he Permit allows methods other than the operation of a water treatment facility to improve effluent quality." Peace River says that this suggests that the Permit identifies such methods, yet none are noted by the Director. Further, in the Determination, the Director stated only that "[p]ermittees may use methods other than water treatment to improve effluent quality." Peace River asserts that the wording change is important and warrants cross-examination as to why different wording was used.

[27] Peace River submits that the Director further stated at paragraph 17 of her affidavit that the Permit requires that the interim SPO for selenium be met at all times and under all conditions, including operational periods and periods of care and maintenance, and regardless of the location of a particular compliance site. Peace River argues that the Permit makes no such express statements; the Director is offering a legal conclusion that warrants cross-examination.

[28] Peace River submits that it ought to be able to cross-examine the Director with respect to her evidence at paragraph 18 of her affidavit that she did not include exceedances at Compliance Site G2 because she determined that the administrative penalties for Compliance Sites B-5 and Gu/sGT33 were “appropriate” and sufficient to compel compliance. Peace River says the Director did not reference what is an “appropriate” penalty.

[29] Peace River contends that the Director offered new evidence at paragraph 20 of her affidavit when she cited reasons for imposing a daily multiplier that were not cited in the Determination. Peace River says that procedural fairness requires that it be given the opportunity to cross-examine the Director on this new evidence.

[30] Peace River asks that it be allowed to cross-examine the Director on her use of the *Administrative Penalties Handbook* (the “*Handbook*”) reference at paragraph 27 of her affidavit. Peace River asserts that neither the Notice nor the Determination indicated that the Director considered the document. Peace River says that how and why the *Handbook* was used is important, especially as it relates to the application of a daily multiplier. Peace River asserts that this is new evidence and procedural fairness requires that Peace River be given the opportunity to cross-examine the Director on the matter.

[31] Peace River seeks to cross-examine the Director as to the purpose for her referencing the documents she lists at paragraph 28 of her affidavit (including whether and how she may have used them).

The Director’s submissions

[32] The Director submits that, although framed in terms of credibility, Peace River is actually seeking to delve into the Director’s reasoning process. This appeal is a *de novo* hearing and the Director’s reasoning process is not relevant to the Board’s decision. Further, if this was a pure appeal of the Director’s decision, ordering cross-examination would not accord with the general principles regarding cross-examination on judicial review.

[33] The Director says that since this is a *de novo* hearing at which the Board owes the Director no deference, her original reasoning process is not necessary and will not assist the Board in making its decision on the appropriate administrative penalty.

[34] The Director asserts that changes in language or discrepancies in terminology are not credibility issues. Rather, credibility suggests an affiant is obscuring or lying about facts.

[35] The Director says that, although this is not a judicial review under *the Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "JRPA"), general principles suggest that orders for cross-examination of the original decision-maker should be sparingly made: *D.K. v. The Law Society of British Columbia*, 2022 BCSC 82.

[36] The Director argues that the Appellant's proposed topics of cross-examination with respect to paragraphs 14, 16, 18 and 19 of Peace River's application (i.e., regarding discrepancies in terminology regarding an email soliciting staff input, and permitted methods to improve effluent quality, the significance of the location of various compliance sites, and Permit requirements when Interim SPOs for selenium must be met) relate to the Director's reasoning process. The Director says that the Board has the expertise to read and interpret the Permit and Permit-related documents and the Director's understanding of the Permit would be of no assistance to the Board in this task. The Director argues that if Peace River believes that the Director was incorrect in her interpretation, its remedy is to convince the Board that its interpretation is the correct one.

[37] As to paragraph 17 of Peace River's application (i.e., regarding the effect of staff opinions toward the Permittee influencing the Director), the Director submits that the Director denies that she was biased in any way and, ultimately, the determination of that issue is for the Board, not the Director.

[38] The Director says, in response to the topics referenced at paras. 15, and 20 to 22 of Peace River's application (i.e., the rationale for not including exceedances for Compliance Site G2 in the Determination), the Director sought to explain her reasoning process in response to issues raised by Peace River in the preliminary decision regarding the method of hearing. The Director suggests that the Board could potentially disregard parts of the Director's affidavit as "supplemental reasons" if the Board disagrees or wishes to employ its own reasoning process. These additional explanations are not facts.

[39] The Director asserts that the documents referenced by the Director in paragraph 28 (a) to (c) of her affidavit are relevant whereas those at paragraphs (d) to (f) are not relevant to the Determination (they were part of a disclosure package) and the Director consents to them being removed from the document binder in this appeal.

Peace River's final reply submissions

[40] Peace River replies by stating that orders for cross-examination of evidence is not something that should be sparingly made in the Board's hearing process. The Rules provide for parties to apply to cross-examine an affiant in a written hearing. An appeal

before the Board is not a judicial review; appeal proceedings are subject to Part 8 of the *Act*, not the *JRPA*.

[41] Peace River contends that credibility is an issue, but credibility only forms one part of the foundation of its application. It also says that cross-examination to test evidence is part of an administratively fair hearing. Peace River cites *Hefnawi v. Health Care Practitioners Special Committee for Audit Hearing*, 2018 BCSC 1311, at para. 73, where the court noted the importance of the right to cross-examine as part of the duty to be fair.

[42] Peace River says that the Director's reliance on the Board having *de novo* jurisdiction supports the Appellant's application for cross-examination. If the Board chooses to exercise *de novo* jurisdiction, it is imperative that it be based on a full and fair hearing where relevant evidence that has been put before it can be appropriately tested.

[43] Peace River argues that the Director could have relied on the evidence that was already in the record from the original decision-making process, and let the evidence speak for itself. However, the Director chose to file an affidavit that contained additional evidence, not in the record, with added commentary and rationale. Having done so, Peace River says that the Director cannot have its cake and eat it too. Peace River says, that if the Director wishes to rely on that new evidence, it must, as a matter of fairness, be open to testing.

[44] Peace River further argues that the Board is not required to exercise *de novo* jurisdiction. It may decide to send the matter back to the Director with directions pursuant to section 103(a) of the *Act*. The Director's decision-making process and rationale, whether in the original record or the Director's additional affidavit evidence, is highly relevant to the Board's determination and warrants fair testing.

[45] Peace River submits that a statutory decision-maker ought not to be able to issue a decision (with reasons) and then seek to augment those reasons through an affidavit on appeal, while simultaneously avoiding cross-examination to test that augmented evidence. Procedural fairness demands that the Director's evidence disclosed through her affidavit be fairly tested through cross-examination.

[46] Peace River does not consent to removing portions of the Director's affidavit. It asserts that the proper process, if the Director seeks to modify a previously filed affidavit, is for her to apply under Rule 16 and the Board would then consider and rule on the application. Peace River reserves the right to cross-examine the Director on those portions of her affidavit.

The Panel's findings

[47] In any hearing, the Board seeks to make a decision based on the best available evidence. When considering appeals under Part 8, Division 2 of the *Act*, the Board may receive evidence that was not before the Director. To the extent the Board receives new evidence from a party during an oral hearing, the other parties ought to be permitted, as a matter of procedural fairness, to cross-examine the witness on relevant matters.

[48] The purpose of cross-examination of a witness in any hearing is to test the evidence they give. The party cross-examining the witness may do so for several reasons, including: to challenge the witness' credibility; to ascertain the basis for the witness' evidence; or, to solicit further information that might assist the Board in reaching its decision.

[49] Ultimately, the purpose of cross-examination is to ensure that the decision-maker (in this case, the Board) may be confident that the evidence tendered is reliable and based on relevant factors. This places the Board in the best position to have a tested and reliable factual basis for deciding what weight to give the evidence introduced by the witness.

[50] Written hearings are often ordered when the issue(s) under appeal are primarily legal and there is no factual dispute that goes to the heart of the appeal. That said, where evidence tendered for the first time on appeal raises factual issues, the principles of procedural fairness require that the Board consider whether the other party should be permitted to test that evidence.

[51] In such circumstances, cross-examination of affiants serves the same purpose as it does in an oral hearing: it assists the Board in resolving conflicts in the evidence and in understanding the context and rationale for the evidence that is offered by the affiant. It also has the potential to bring further evidence before the Board to fill any gaps in the evidence that might otherwise arise from untested affidavits or from the record at first instance. In this way, cross-examination (when appropriate) helps to ensure that the Board has the "best available evidence" on which to base its decision.

[52] Further, if the Board determines that it is appropriate to send the matter back for reconsideration, evidence produced during cross-examination may assist the Board in understanding frailties in the original decision-making process and inform directions for a subsequent reconsideration.

[53] In my view, Peace River erred when it cited the appellants' submissions in *Richardson* as if they represented the Board's rationale in the decision. The sole issue before the Board in *Richardson* was whether the appeal should be heard in stages, with the constitutional question being heard first. At para. 63, the Chair referenced the appellant's reply submissions, stating:

63. Richardson maintains that this evidence may be tendered through an agreed statement of facts, supplemented by affidavit evidence. If there are disputes regarding the evidence such that it needs to be tested, this may occur by cross-examination on the affidavits.

[54] The Chair did not begin his findings until para. 68 of the decision. In his rationale for the decision, the Chair did not rule on whether disputes in the evidence could be tested by cross-examination on affidavits. Rather, at para. 95, he concluded that the evidence likely to be relevant to the issues under appeal were likely to require a live hearing where witnesses could testify before the panel, speak to the documents being tendered, and be cross-examined.

[55] In the Method of Hearing Decision, the Chair determined that the matter would proceed in writing and also recognized that as a matter of fairness Peace River remained free to raise any specific concerns that it might have about the sufficiency or quality of the Director's evidence. The Chair put the Director on notice that Peace River might wish to pose questions to the Director (or her staff), seek an order compelling the Director to give evidence, or apply to cross-examine affiants, in the normal course of the appeal. the Method of Hearing Decision at paras. 54 and 55.

[56] As directed by the Chair in the Method of Hearing Decision) at para. 55, Peace River has identified the subject matters it seeks to address in cross-examination and has identified why it believes that cross-examination is required or would assist the Board in deciding the appeal. I will address each subject matter separately.

[57] Peace River has applied to cross-examine the Director regarding paragraph 15 of her affidavit where she deposes that she sought staff input regarding Permit term(s). I agree with the Director, the legal effect of the November 2016 Letter Amendment on Peace River's obligations under the Permit is a question for the Board to determine. Staff's understanding of the legal effect of language in the Permit (including the amendment to the Permit), or of Peace River's submission on the matter to the Director, is not relevant to the Board and does not raise an issue of credibility. I decline Peace River's request to cross-examine the Director regarding paragraph 15 of her affidavit.

[58] It is clear that the Director and Peace River have different understandings of the legal effect of the November 2016 Letter Amendment; that does not equate to a conflict in the evidence. Ultimately, the Board must arrive at its own interpretation of the Permit (including any amendments to it) and apply that understanding to the facts. The Board may find that it agrees with the Director's interpretation of the Permit (however she arrived at that understanding) and reach the same Determination as she did, or it may interpret the Permit differently and arrive at a different result. The Board will have to determine whether it has a sufficient factual and legal basis to confirm, reverse or vary the Determination, arrive at its own determination, or if it needs to send the matter back to

the Director with directions. It is not an appropriate use of cross-examination to elicit an opinion on the ultimate issue before the Board. I decline to allow cross-examination of the Director regarding the legal effect of the November 2016 Letter Amendment.

[59] I find that Peace River's request to cross-examine the Director regarding paragraph 16 of her affidavit where she deposes that the location of the compliance sites was not significant to the Determination, is appropriate. There is a clear conflict between the Director's factual basis for arriving at the result in the Notice as compared to the Determination that cries out for explanation. I find that it would benefit the Board to have the Director's evidence in her affidavit tested on the subject of the significance of compliance site locations to her Determination. I will allow Peace River's application to cross-examine the Director regarding the consideration, if any that she gave to the location of compliance sites in arriving at the administrative penalties in the Determination.

[60] As to Peace River's broader request that it be allowed to cross-examine the Director on "whether, how and to what extent she shared (the views expressed in the email found at Tab 16 of Volume 1 of the Joint Book of Documents) or were influenced by ministry staff", I find that this request is so broadly worded that it may be characterized as a fishing expedition for bias in the absence of an evidentiary basis for the claim. I find that it is not an appropriate use of cross-examination in this written hearing to question the Director on whether she shared the views of another statutory decision-maker as expressed by that person in an email, absent some suggestion that the Director may not have been impartial in her decision-making. Nothing in the Director's affidavit suggests that she considered staff opinions regarding Peace River's conduct as a permittee in arriving at the administrative penalties. There is no conflict in the evidence that needs to be resolved and there is no persuasive basis in the evidence to suggest that the Director was biased in arriving at her Determination. I decline to allow cross-examination on the subject matter described in paragraph 17 of Peace River's application.

[61] As to paragraph 17 of the Director's affidavit, I find that the correct interpretation of the Permit—including subtle interpretations of the language pertaining to improving effluent quality in the Permit—is a matter for the Board. I further find that there is no conflict in the evidence that requires clarification. Neither is there an issue of credibility that might be resolved by cross-examination. The issue is one of legal interpretation of a statutory instrument. I decline to order cross-examination of the Director on the subject of whether the Permit contemplates methods other than water quality treatment to improve effluent quality. The parties are, of course, at liberty to argue the matter in their written submissions to the Board. I also decline Peace River's request to cross-examine the Director about her interpretation, in paragraph 17 of her affidavit of the Permit's language related to the improvement of effluent quality and whether Interim SPOs for selenium must be met at all times and under all condition.

[62] Peace River also seeks to cross-examine the Director regarding paragraph 18 of her affidavit wherein the Director introduces evidence regarding why she did not include alleged contraventions of the Permit related to Compliance Site G2. The appeal before the Board is with respect to administrative penalties that *were* ordered by the Director. There may be many reasons why a Permittee is not penalized for being out of compliance with Permit provisions. I do not understand Peace River to be suggesting that it should have been more broadly penalized. I see no benefit to the Board to delving into matters that are not the subject of the appeal. I decline Peace River's request to cross-examine the Director regarding paragraph 18 of her affidavit.

[63] I find that it would benefit the Board to understand the new evidence adduced by the Director in paragraph 20 of her affidavit explaining why she imposed a daily multiplier in her Determination. The total monetary amount of the administrative penalties in the Determination is significant because of the multiplier applied. The Board needs to have confidence in the rationale for applying the multiplier used by the Director to either confirm, reverse or vary the Determination, make another decision that the Director could have made, or send the matter back to the Director with directions (including whether to apply a multiplier in any reconsideration). Further, as a matter of procedural fairness, Peace River is entitled to know the case it has to meet, including the reason why an otherwise far less onerous penalty was multiplied 40-fold. I allow Peace River's application to cross-examine the Director regarding her rationale for applying a daily multiplier to the administrative penalties in the Determination.

[64] I further find that it would benefit the Board to understand the use that the Director made of the *Handbook* that she referenced at paragraph 27 of her affidavit. A mere reference to a guidance document for the first time on appeal, without explanation of the importance of the document, the use to which it was put and the basis on which its guidance may be considered reliable for a decision-maker, leaves a gap in the evidence that is not helpful to the Board. I will allow Peace River's application to cross-examine the Director regarding her consideration of the *Handbook* in arriving at the administrative penalties in the Determination.

[65] The documents referenced in the Director's affidavit at subparagraphs 28 (a), (b) and (f) appear to relate to one or more applications to amend the Permit. In her response to Peace River's application, the Director concedes that the documents referenced in subparagraphs 28 (a) to (c) are relevant but neither her affidavit nor her submissions in response to Peace River's current application explain the relevance to the Determination. The Director submits that the document relating to a Permit amendment at subparagraph 28(f) is not relevant to the appeal. To the extent that the Director has tendered documents into evidence in her affidavit, and not explained whether and how she considered them in the Determination, Peace River should be allowed to question her. To the extent that the referenced documents are relevant, it would benefit the Board to understand what use the Director made of them. I will allow cross-examination of the Director with respect to

the relevance of the documents referred to in subparagraphs 28(a)(b)(c) and (f) of her affidavit to the Determination.

[66] Finally, as to Peace River's request to cross-examine the Director on the content of subparagraphs 28 (d) (e) and (g) of her affidavit, I am not persuaded that these documents are relevant and will assist the Board in the ultimate issue, i.e., whether to uphold, rescind or vary the Determination, issue a new determination, or send the matter back to the Director with directions. I find that subparagraphs (d) and (e) refer to correspondence notifying Ministry staff and Indigenous communities that the Notice and Determination were issued. I see no relevance in those documents to the matter before the Board, i.e., the quantum of the Determination. Further, subparagraph 28 (g) refers to correspondence related to publication of information related to the Determination. That correspondence postdates the Determination and could not have been considered by the Director. I decline to allow Peace River to cross-examine the Director with respect to the documents referenced at subparagraphs 28 (d), (e) and (g). Having said that, I decline to order that these subparagraphs be struck from the record before the Panel on the appeal on the merits, as the application before me concerns Peace River's ability to cross-examine the Director, and not striking material from the record. If the Director wishes to make an application to amend evidence filed in the appeal, she is at liberty to do so. In this decision, I have considered only Peace River's application to cross-examine the Director on her affidavit.

DECISION

[67] In making this decision, I have considered the parties' submissions in their entirety. I have referenced only those parts of the submissions which are necessary to this decision. For all the reasons identified above, I am exercising my authority under Board Rule 20 and section 14 of the *ATA* to grant Peace River's application to cross-examine the Director, in part.

[68] Leslie Payette is ordered to be present at a date, time and in the manner set by the Board in consultation with the parties, to be cross-examined by Peace River on the following subject matters, as referenced by in her affidavit affirmed December 12, 2022:

- a) the consideration, if any that she (as the Director at the time) gave to the location of compliance sites in arriving at the administrative penalties in the Determination;
- b) her rationale for applying a daily multiplier to the administrative penalties in the Determination;
- c) her consideration of the *Handbook* in arriving at the administrative penalties in the Determination; and

- d) the relevance of the documents referred to in subparagraphs 28(a)(b)(c) and (f) of her affidavit to the Determination.

“Brenda L. Edwards”

Brenda L. Edwards, Panel Chair
Environmental Appeal Board