

ALBERTA
PUBLIC LANDS APPEAL BOARD
REPORT

Decision Date: June 19, 2017

IN THE MATTER OF sections 119(d), 121, and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 15, 211(c), 213, 228 and 235 of the Public Lands Administration Regulation, A.R. 187/2011;

- and -

IN THE MATTER OF an appeal filed by Barry Marquardt under section 211 of the Public Lands Administration Regulation, and a request for reconsideration filed by the Director, Approvals and Disposition Services Unit, Alberta Environment and Parks, under section 125 of the *Public Lands Act* and Rule 26.5 of the Interim Appeals Procedure Rules for Complex Appeals.

Cite as: Reconsideration Decision: *Marquardt v. Director, Alberta Environment and Parks*, (June 19, 2017) Appeal No. 15-0023-RD2 (A.P.L.A.B.)

Panel Members

Mr. Eric McAvity, Q.C., Board Chair;

Mr. Jim Barlishen; and

Dr. David Evans, Panel Member.

Appearances

Andrew Bachelder, Legal Counsel to the Public Lands Appeal Board;

Larry Nelson and Michelle Williamson, Legal Counsel to the Director; and

Harry J. Jong, Legal Counsel to the Appellant.

EXECUTIVE SUMMARY

The Public Lands Appeal Board (“Board”) held an oral hearing with written submissions regarding the PLAB Appeal 15-0023. The parties to the appeal were Barry Marquardt (“Appellant”) and the Director, Approvals and Disposition Services Unit, Alberta Environment and Parks (“Director). The Board made three recommendations in its Report and Recommendations (“Report”) to the Minister of Alberta Environment and Parks, which the Minister accepted and ordered in Ministerial Order 20/2016:

- “1. That the Director’s refusal to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of the lease be confirmed and upheld. The appeal is dismissed without costs.
2. That the Department develop a standard decision-making document that provides a synopsis of all information used by a Director to reach a decision regarding non-renewal of grazing leases.
3. That a letter notifying all grazing leaseholders that failure to submit Stock Return Forms on an annual basis may result in non-renewal of the lease accompany all mail-outs of the Stock Return Form.”*

The Director requested that the Board exercise its powers under section 125 of the *Public Lands Act* and in accordance with Rule 26.5 of the Board’s Interim Appeals Procedure Rules for Complex Appeals (“Rules”), and reconsider the second and third recommendations included in Ministerial Order 20/2016.

The Board had, and continues to have, serious concerns regarding Alberta Environment and Parks’ (“AEP”) decision-making process for renewal of grazing leases and the lack of notice surrounding stock return forms, which could lead to non-renewal of a lease if the forms are not returned on time. However, after reviewing the submissions of the Appellant and the Director, the Director’s Record, and the relevant legislation, rules and case law, the Board determined the

* Ministerial Order 20/2016, Order Respecting Public Lands Appeal Board Appeal No. 15-0023.

Director provided sufficient evidence to meet the criteria of Rule 26.5 of the Board's Rules, which reads:

“The Board will not exercise its powers under section 125 of the *Public Lands Act* in absence of the following:

- (a) New facts, evidence or case law information which was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
- (b) A procedural defect during the hearing which prejudiced one or more of the parties,
- (c) Material errors which could reasonably change the outcome of the decision, or
- (d) Any other circumstance the Board considers reasonable and substantive.”

The Board grants the Director's request for reconsideration and modifies its Report as follows:

1. The heading “RECOMMENDATIONS”, located after paragraph 42, be deleted and be inserted before paragraph 45.
2. Paragraph 43 and 44 of the report and the following is substituted:

“[43] The Panel noted that at key junctures in the decision-making process, the record lacked complete documentation of staff communication, information provided and recommendations made that enabled the Director to make her decision. In particular, for the period between July 8, 2015 and July 22, 2015, the Panel was left to infer that further input had been provided by the department's agrologist in arriving at the decision to not renew the lease, but was not captured in the record. In the Panels' view, the

department would benefit from developing a standard decision-making document that provides a synopsis of all the information used by a Director to reach a decision regarding non-renewal of grazing leases.

[44] The Panel concluded that the annual submission of Stock Return Forms are a key element necessary for ensuring grazing leases are being properly utilized and public lands are being properly managed. The Panel believes it would be fairer to all concerned if a letter were to accompany the next mail-out of the annual Stock Return Forms to all grazing leaseholders reminding them of the importance of these forms and notifying lessees that failure to submit these forms on an annual basis could result in a non-renewal of the lease.”

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I INTRODUCTION

- [1] The *Public Lands Act* (“PLA”) contains provisions that allow the Public Lands Appeal Board (“Board”) to “reconsider, vary or revoke any report made by it.”¹ This is the decision by the Board regarding a request by the Director, Approvals and Dispositions Services Unit, Alberta Environment and Parks (“Director”) for a “review pursuant to Section 26.1 of the Interim Appeals Procedure Rules for Complex Appeals.”²

II BACKGROUND

- [2] Alberta Environment and Parks (“AEP”) issued Grazing Lease 810263 (“GRL”) to Mr. Barry Marquardt (“Appellant”) on March 7, 1984. The lease was renewed for a second time on March 29, 2004. In a letter dated July 22, 2015, the Director provided a written decision to the Appellant advising that AEP was not going to renew the GRL a third time.³
- [3] The Appellant appealed the decision by the Director to the Board on August 5, 2015. The Board assigned the appeal number 15-0023, and an oral hearing along with written submissions was held on February 24, 2016.

REPORT AND RECOMMENDATIONS TO THE MINISTER

- [4] The Board made its Report and Recommendations (“Report”) to the Minister on March 23, 2016, and made three recommendations:

“[43] The Panel noted that at key junctures in the decision-making process the record lacked complete documentation of staff communication, information provided and recommendations made

¹ *Public Lands Act*, R.S.A. 2000, c. P-40, s. 125.

² Letter from Harry J. Jong to PLAB, June 17, 2016.

³ Director’s Record at Tab 44.

that enabled the Director to reach her decision. In particular, for the period between July 8 2015 and July 22, 2015 the Panel was left to infer that further input had been provided by the department's agrologist in arriving at the decision not to renew the lease, but was not captured in the Record. The Panel recommends that the department develop a standard decision-making document that provides a synopsis of all the information used by a Director to reach a decision regarding non-renewal of grazing leases.

[44] The Panel concluded that the annual submission of Stock Return Forms are a key element necessary for ensuring grazing leases are being utilized and public lands are being properly managed. The Panel recommends a letter accompany the next mail-out of the annual Stock Return Forms to all grazing leaseholders reminding them of the importance of these forms and notifying lessees that failure to submit these forms on an annual basis could result in a non-renewal of the lease.

[45] The Panel recommends that the Minister confirm the Director's decision to refuse to renew Grazing Lease 810263 for poor utilization and improper management of the lease, and dismiss the appeal without costs."⁴

[5] The Minister accepted the Board's recommendation and signed Ministerial Order 20/20156, which ordered:

"1. That the Director's refusal to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of

4 Report and Recommendations, *Marquardt v. Director, AEP*, PLAB 15-0023, at paragraphs 43-45.

the lease be confirmed and upheld. The appeal is dismissed without costs.

2. That the Department develop a standard decision-making document that provides a synopsis of all information used by a Director to reach a decision regarding non-renewal of grazing leases.
3. That a letter notifying all grazing leaseholders that failure to submit Stock Return Forms on an annual basis may result in non-renewal of the lease accompany all mail-outs of the Stock Return Forms.”⁵

RECONSIDERATION REQUEST

[6] In a letter dated July 26, 2016, the Director requested that the Board reconsider the recommendations in paragraphs 43 and 44 of the report. The Director and the Appellant were both invited to provide submissions to the Board regarding the reconsideration request, which both parties did on September 1, 2016, with the Director also providing⁶ a rebuttal submission on September 30, 2016.

III ISSUES

[7] Did the Director meet the criteria set in Rule 26.5 for reconsideration?

IV LEGISLATION AND RULES

[8] The relevant sections of the PLA are section 10(1), 124 and 125. These sections provide:

⁵ Ministerial Order 20/2016, Order Respecting Public Lands Appeal Board Appeal No. 15-0023.

“10(1) The director may issue or refuse to issue a formal disposition applied for under section 9. ...

124(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.

(2) The report may recommend confirmation, reversal or variance of the decision appealed.

(3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision.

(4) The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the person who the appeal body should receive notice of the decision.

(5) On complying with subsection (4), the appeal body shall publish or otherwise make available the appeal body’s report, or a summary of it, and a notice of the Minister’s decision in the manner the appeal body considers appropriate.

125 The appeal body may reconsider, vary or revoke any report made by it.”

[9] The relevant sections of the *Interpretation Act*⁶ are sections 2, 3(1), and 10, which state:

“2 This Act applies to every enactment whether enacted before or after the commencement of this Act.

3(1) This applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment. ...

10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.”

[10] The relevant sections of the Public Lands Administration Regulation (“PLAR”)⁷ is section 235, which states:

“235 A report of an appeal body under section 124 of the Act must contain the following in addition to the matters required to be included under that section:

- (a) a summary of the evidence;
- (b) a statement of the issue to be decided;
- (c) the reasons for the appeal body’s recommendations;
- (d) the reasons for any dissent, in the case of a panel consisting of 3 members.”

INTERIM APPEALS PROCEDURE RULES - RULE 26.5

[11] The relevant section of the Board’s Rules of Practice is section 26.5, which provides:

6 R.S.A. 2000, c. I-8.

7 A.R. 187/2011.

- “(a) New facts, evidence, or case law information which was not reasonably available at the time of the hearing. The new facts, evidence or case law must be significant enough to have a bearing on the outcome,
- (b) A procedural defect during the hearing which prejudiced one or more of the parties,
- (c) Material errors that could reasonably change the outcome of the decision, or
- (d) Any other circumstance the Board considers reasonable and substantive.”

V SUBMISSIONS

SUBMISSIONS OF THE APPELLANT

[12] The Appellant’s submissions consisted of arguments relating to the Appellant’s request for reconsideration, which the Board decided in 15-0023-RD1.⁸

SUBMISSIONS OF THE DIRECTOR

[13] The Director reviewed section 125 and 123(9) of the PLA, and Rule 26.5 of the Board’s Interim Appeals Procedure Rules for Complex Appeals, and set out the grounds on which the Director was requesting the reconsideration, which the Director submitted were:

- “1) the decision of the panel to include the Departmental Recommendations as ‘recommendations’ to the Minister for inclusion in the Order is a material error of law as this exceeds the Board’s jurisdiction under section 124(1) and d(2) of the Act,

⁸ Reconsideration, *Marquardt v. Director, AEP, Appellant’s Application*, PLAB 15-0023-RD1.

- 2) the inclusion of the Departmental Recommendations is using the Report for an improper purpose; it is an unreasonable interference with the division of powers between the executive functions of government carried out by Members of Cabinet and adjudicative functions delegated to statutory decision makers,
- 3) in the alternative, if the Panel is of the view that it has the jurisdiction (which is not admitted but denied) to include in the Report recommendations reflecting ‘...any other decision a Director could make...’, the Panel erred in law because a Director does not have the power to establish new Department wide policies and procedures, and
- 4) In the further alternative, if the Panel determines that it has jurisdiction to make recommendations to the Minister other than simply confirming, reversing or varying the decision appeal (which the Director does not admit), by not granting the Director an opportunity to comment or respond to the Departmental Recommendations, the Panel breached the duty of procedural fairness owed to the Director, and thereby committed a procedural defect to the prejudice of the Director.”⁹

ANALYSIS

[14] The *Interpretation Act* sets out how legislation in Alberta is to be interpreted. Sections 2 and 3(1) of the *Interpretation Act* provide for the scope of the Act:

“2 This Act applies to every enactment whether enacted before or after the commencement of this Act.

⁹ Director’s Submission – Final Marquardt Reconsideration – September 1, 2016 at paragraph 17.

3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.”

[15] The Board was unable to find any wording to suggest the *Interpretation Act* does not apply to the PLA or PLAR.

[16] Section 10 of the *Interpretation Act* requires a fair, large and liberal reading of Alberta legislation. It reads: “An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.” Section 10 of the *Interpretation Act* is supported by the Supreme Court of Canada. In *Bell Express Vu Limited Partnership v. Rex*,¹⁰ the Supreme Court of Canada confirmed that the “fair large and liberal construction” is the proper approach to legislative interpretation. The Court stated:

“In Elmer Driedger’s definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

‘Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.’

Driedger’s modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: [citations omitted]

I note that as well, in the federal legislative context, this Court’s preferred approach is buttressed by s. 12 of the *Interpretation Act*, R.S.C. 1986, c. I-21, which provides that every enactment is ‘deemed remedial, and shall be

10 2002 SCC 42.

given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects’.

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article ‘Statute Interpretation in a Nutshell’ (1938), 16 *Can. Bar Rev.* 1, at p. 6, ‘words, like people, take their colour from their surroundings’. This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger’s principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867. 2001 SCC 56 (CanLII), at para. 52, as ‘the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter’.”¹¹

[17] In the submissions from the Director a very narrow and restrictive interpretation of the Board’s jurisdiction is advocated, instead of the “fair, large and liberal construction and interpretation” as required under the *Interpretation Act* and by the Supreme Court of Canada. The “preferred approach” emphasised by the Supreme Court of Canada and the *Interpretation Act* allows the objectives of the PLA and PLAR to be achieved. That objective is to enable the Minister to make informed decisions on appeals of public lands decisions that are before the Board.

[18] As established in the PLA and PLAR, the public lands appeal system is a bifurcated decision-making structure. The Minister exercises her legislated decision-making powers only after receiving advice and recommendations from an expert quasi-judicial body, the Board. The Board makes recommendations to the Minister after hearing the evidence

¹¹ 2002 SCC 42 at paragraphs 26 and 27.

from the parties through an impartial, fair and just appeal process. In order to effectively advise the Minister on how to decide the appeal, the Board must provide more than just a recommendation to “confirm, reverse, or vary” the Director’s decision. Section 235 of PLAR sets out the requirements for a report to the Minister:

“A report of an appeal body under section 124 of the Act must contain the following in addition to the matters required to be included under that section:

- (a) A summary of the evidence;
- (b) A statement of the issue to be decided;
- (c) The reasons for the appeal body’s recommendations;
- (d) The reasons for any dissent, in the case of a panel consisting of 3 members.”

[19] Section 235 of PLAR states the Board must provide a rational explanation for its recommendations and advice, which includes providing background, context, and a discussion on the implications of the appeal. Restricting the Board’s ability to recommend to just “confirm, reverse or vary” undermines the advisory role of the Board and deprives the Minister of the advice and recommendations she needs to exercise her authority under section 124(3) of the PLA, which is to “confirm, reverse or vary the decision appealed and make any decision the person whose decision was appealed could have made, and make any further order the Minister considers necessary for the purpose of carrying out the decision.” The narrow approach advocated by the Director is not in keeping with the intent of the legislation.

[20] The Director argues that the Board does not have the jurisdiction to recommend any decision that the Director could have made. The Legislature chose to empower the Board through the PLA to recommend the Minister “confirm, reverse, or vary” the decision of the Director being appealed, if the Board finds there are grounds to do so. The ability to confirm, reverse, or vary an appealed decision is only limited by the Minister’s legislated

powers. Obviously, the Board cannot recommend the Minister do something that she does not have the jurisdiction to do. Likewise, the Board cannot recommend that the Minister do something that the Board does not have the jurisdiction to recommend.

[21] With regard to the Board's Report for PLAB Appeal 15-0023, the Board can comment on the evidence before it, draw conclusions from that evidence, and make recommendations to the Minister based on those conclusions. However, if those recommendations relate to matters beyond the substantive issues in the appeal (e.g. matter of process or procedure), the Board must confine these recommendations to passing comment (i.e. *obiter dicta*) and not advise the Minister to incorporate the recommendations into an order. The Board refers to these as "small r" recommendations.

[22] "Large R" recommendations are recommendations in the Board's report to the Minister that are intended to be incorporated into a Ministerial Order, if the Minister approves. "Large R" recommendations should be focused on the recommendation to the Minister regarding to confirm, reverse, or vary the decision under appeal.

[23] Upon reviewing the reconsideration request, the Board found that the recommendations made in paragraphs 43 and 44 of the Report are "small r" recommendations, as they are related to procedural matters. Accordingly, it would not be appropriate for the Board to recommend that the Minister include them in the Ministerial Order related to PLAB Appeal 15-0023. The Minister may issue a Ministerial Order incorporating the Board's "small r" recommendations, as she can with any matter, but such direction should be separate from an order related to the Board's Report on the appeal.

[24] The Board, having heard evidence from the Director and the Appellant, reiterates that it has serious concerns regarding the decision-making process followed by AEP for the renewal of grazing leases. The Board is also highly troubled that AEP does not provide notice to leaseholders of a change in enforcement practices regarding stock return forms and the possibility that the Director could refuse to renew a grazing lease if the forms are not returned. Despite these concerns, the Board acknowledges that, for the reasons given

above, the Ministerial Order for this appeal is not the proper vehicle for dealing with those concerns.

VI DECISION

[25] Regarding the Director’s grounds for reconsideration, the Board finds paragraphs 43 and 44 of the Board’s Report, to the extent that they purport to make recommendations that are beyond the Board’s authority to recommend to the Minister, exceed the jurisdiction of the Board. The Board finds that there was no evidence of an “improper purpose.” Comments on alternative arguments are not required as the Board accepts that paragraphs 43 and 44 are inappropriate as “Large R” recommendations.

[26] The Board finds that the Director has met the criteria of Rule 26.5(d) of the Interim Appeals Procedure Rules for Complex Appeals, by demonstrating the existence of circumstances that the Board considers reasonable and substantive enough to warrant exercising its power und section 125 of the *Public Lands Act*.

[27] The Board, under the authority of section 125 of the *Public Lands Act*, and in accordance with Rule 26.5 of the Interim Appeals Procedure Rules for complex Appeals, makes the following changes to its Report and Recommendations in 15-0023:

1. The heading “RECOMMENDATIONS”, located after paragraph 42, be deleted and be inserted before paragraph 45.
2. Paragraph 43 and 44 of the report and the following is substituted:
“[43] The Panel noted that at key junctures in the decision-making process, the record lacked complete documentation of staff communication, information provided and recommendations made that enabled the Director to make her decision. In particular, for the period between July 8, 2015 and July 22, 2015, the Panel was left to infer that

further input had been provided by the department's agrologist in arriving at the decision to not renew the lease, but was not captured in the record. In the Panels' view, the department would benefit from developing a standard decision-making document that provides a synopsis of all the information used by a Director to reach a decision regarding non-renewal of grazing leases.

[44] The Panel concluded that the annual submission of Stock Return Forms are a key element necessary for ensuring grazing leases are being properly utilized and public lands are being properly managed. The Panel believes it would be fairer to all concerned if a letter was to accompany the next mail-out of the annual Stock Return Forms to all grazing leaseholders reminding them of the importance of these forms and notifying lessees that failure to submit these forms on an annual basis could result in a non-renewal of the lease.”

_____ (*original signed by*) _____

Eric McAvity, Q.C., Chair

_____ (*original signed by*) _____

Jim Barlishen, Panel Member

_____ (*original signed by*) _____

Dr. David Evans, Panel Member



ALBERTA
ENVIRONMENT AND PARKS

*Office of the Minister
Minister Responsible for the Climate Change Office
MLA, Lethbridge-West*

ALBERTA ENVIRONMENT AND PARKS

*Public Lands Act
RSA 2000, c P-40.*

**MINISTERIAL ORDER
29/2017**

**ORDER RESPECTING PUBLIC LANDS APPEAL BOARD
APPEAL NO. 15-0023-RD2**

I, Shannon Phillips, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being the Order Respecting Public Lands Appeal Board Appeal 15-0023-RD2.

DATED at the City of Edmonton, in the Province of Alberta, this 2nd day of August, 2017.

Shannon Phillips
Minister

APPENDIX

ORDER RESPECTING PUBLIC LANDS APPEAL BOARD APPEAL NO. 15-0023-RD2

With respect to Public Lands Appeal Board Appeal No. 15-0023-RD2, I, Shannon Phillips, Minister of Alberta Environment and Parks, order that:

1. M.O. 20/2016 be repealed; and
2. The Director's refusal to renew Grazing Lease 810263 to Mr. Barry Marquardt for poor utilization and improper management of the lease be confirmed and upheld. The appeal is dismissed without costs.