

ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – December 14, 2018

IN THE MATTER OF sections 121, 122, 124, and 125 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, 213, 225, 228, 229, 230, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Inshore Developments Ltd., with respect to the decision of the Director, Provincial Approvals Section, Alberta Environment and Parks, to refuse to issue Department Licence of Occupation 140225.

Cite as: *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 December 2018), Appeal No. 16-0023-R2 (A.P.L.A.B.).

ORAL HEARING BEFORE:

Ms. A.J. Fox, Board Member, Panel Chair;
Ms. Marian Fluker, Board Member; and
Ms. Meg Barker, Board Member.

BOARD STAFF:

Mr. Andrew Bachelder, Board Counsel; and
Ms. Valerie Myrmo, Registrar of Appeals.

SUBMISSIONS BY:

Appellant: Inshore Developments Ltd., represented by Mr. W. Norval Horner and Ms. Jessie Horner.

Director: Mr. Jon Murray, Director, Provincial Approvals Section, Alberta Environment and Parks represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

WITNESSES:

Appellant: Mr. W. Norval Horner, Inshore Developments Ltd., and Mr. Richard Carson, Senior Biologist and President, RC BioSolutions Ltd.

Director: Mr. Jon Murray, Director, Provincial Approvals Section, Alberta Environment and Parks.

EXECUTIVE SUMMARY

Inshore Developments Ltd. (the Appellant) applied for a Department Licence of Occupation (the DLO) for the purposes of constructing a canal between Gull Lake and an inland marina, located on private land. The canal is the only portion of the project on public lands. The Director, Alberta Environment and Parks (the Director), refused to issue the DLO. The Appellant appealed the refusal to the Public Lands Appeal Board (the Board).

The Board held a hearing by written submission only and provided a Report and Recommendations to the Minister of Environment and Parks (the Minister). The Board found the Director made a material error of fact on the face of the record by failing to turn his mind independently to the application for the DLO. The Board recommended the Minister reverse the Director's decision to refuse to issue the DLO. The Minister accepted the Board's recommendation and issued a Ministerial Order reversing the Director's decision. The Ministerial Order required the Director to issue the DLO to the Appellant.

The Director requested the Board reconsider its Report and Recommendations. The Board requested and received written submissions from the Appellant and the Director regarding the reconsideration request. The Board found it had unintentionally denied the parties procedural fairness by not providing an opportunity to respond to the question of whether the Director had improperly sub-delegated his authority to Alberta Environment and Parks (AEP) field staff. The Board granted the reconsideration request and held an oral hearing, before a newly constituted panel.

Based on the new hearing, the Board found the Director based his decision on the recommendation of AEP field staff and the existence of a Protective Notation (PNT) registered on the public lands, which were the subject of the DLO. The Board found there was insufficient evidence to support the recommendations of the AEP field staff, and the Director did not communicate with the AEP field staff to discuss their recommendations. The Board found the Director improperly sub-delegated his decision-making authority to AEP field staff and did not properly turn his mind to the application independently. Further, the Director allowed his decision-making authority to be fettered by the PNT, acting as if he were bound by the PNT when in the Board's view he is not.

The Board found the Director erred in a material fact on the face of the record by basing his decision on statements from AEP field staff that lacked the necessary evidentiary foundation and erred in law by improperly sub-delegating his authority to the AEP field staff, thereby fettering his discretion.

The Board recommended the Minister reverse the Director's decision to refuse to issue the DLO and order the Director to issue the DLO to the Appellant, on reasonable terms and conditions determined by the Director.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the “Board”) to the Minister, Alberta Environment and Parks (the “Minister”) regarding the refusal of the Director, Alberta Environment and Parks (the “Director”) to issue Department Licence of Occupation 140225 (the “DLO”) to Inshore Developments Ltd. (the “Appellant”). The Board initially held a written hearing on the matter and submitted a Report and Recommendations to the Minister on June 7, 2017.¹ The Minister accepted the Board’s recommendations and issued Ministerial Order 30/2017, on June 13, 2017.

[2] However, on August 3, 2017, the Director requested the Board reconsider its June 7, 2017 Report and Recommendations, alleging the Board erred in its recommendations. After receiving and considering written submissions from the Director and the Appellant (collectively, the “Parties”), the Board determined it would be appropriate to reconsider the June 7, 2017 Report and Recommendations. Therefore, on October 2, 2018, the Board held a new, oral hearing. Based on the evidence presented and oral and written submission received at this new hearing, the Board is again recommending to the Minister that she should order the Director to issue the DLO to the Appellant, on reasonable terms and conditions.

II. BACKGROUND

[3] The Appellant applied for the DLO on October 30, 2014, as part of a project to construct an inland marina with a canal connected to Gull Lake (the “Project”), in Ponoka County, Alberta. The application identified approximately 18.29 acres (7.4 ha) of public land that would be affected by the DLO (the “Lands”). The canal is the only portion of the project on the Lands.

[4] The Lands were subject to Protective Notation PNT020300 (the “PNT”), put in place by Alberta Environment and Parks (“AEP”).² The PNT included the following statements:

¹ *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (7 June 2017), Appeal No. 16-0023-R (A.P.L.A.B.).

² AEP’s website defines PNTs as “regulatory instruments used under the *Public Lands Act* to set aside (reserve) public land (including any interest in public land) for other Government of Alberta departments without executing a disposition for it.” The website states PNTs can “[d]ictate the parameters of land use” and “[p]rohibit land use.” www.aep.alberta.ca/forms-maps-services/industry-online-services/public-lands-dispositions/step-one-pre-application/reservations-notations.aspx.

“This quarter contains important emergent/aquatic vegetation in the vicinity (100 m) of the shoreline. This vegetation is an important habitat for avian, mammal and amphibian species. As well, it provides fish habitat, erosion control and maintains the water quality of the lake. Proposed alterations to the shoreline or this vegetation require consultation with Alberta Sustainable Resource Development - Fish and Wildlife Division staff, Wildlife Management.

The dominant emergent vegetation in this region is Bulrush. Bird species observed in this area include Pied-billed Grebe, Red-necked Grebe, Eared Grebe, Canada Goose, Mallard, Blue-winged Teal, Canvasback, Redhead, Ring-necked Duck, Common Goldeneye, Ruddy Duck, Sora Rail, American Coot, Wilson's Phalarope, Black Tern, Marsh Wren, Red-winged and Yellow-headed Blackbirds. Additional specific information was gathered through field surveys in 2000 and presented in Gull Lake Shoreline Inventory.”³

[5] On February 11, 2015, AEP's Provincial Approvals Section referred the DLO application to the regional branches of Water Management and Fish and Wildlife for review and comment.

[6] Between March 14, 2016 and March 17, 2016, AEP's regional Land Management Specialist and the Senior Wildlife Biologist exchanged emails regarding the DLO application. Some of the comments in the emails included:

- (a) the marina and beach would be located on crown land for the benefit of a small group of homeowners;
- (b) the Lands support a broad diversity of avian and mammalian fauna;
- (c) a number of sensitive species were observed on the Lands;
- (d) there is no single wildlife concern that would result in a definitive rejection of the application;
- (e) there is no endangered species wildlife feature directly on the property;
- (f) Gull Lake may be one of the most important western grebe lakes in the province;
- (g) a sizable colony of western grebe was noted 3 km south of the Lands; and
- (h) the Land Management Specialist also stated if the Wildlife Biologist was willing to stand by the PNT, and even consider strengthening it to include upland wildlife values, then they should reject the DLO application. The

³ Director's Record at Tab 1. Alberta Sustainable Resource Development is a predecessor to AEP. The Board notes the PNT requires consultation. It does not reserve land, nor does it dictate the parameters of land use or prohibit land use. Further, the Board notes the PNT does not reference the Western Grebe, which is the species of interest in this matter.

Senior Wildlife Biologist responded affirmatively.⁴

[7] On March 17, 2016, the Land Management Specialist provided a document entitled “Decision Rationale”⁵ to the District Approvals Manager, AEP, recommending the DLO be refused for the following reasons:

- (a) Gull Lake is one of the most important habitat lakes for the endangered western grebe as well as a number of sensitive species;
- (b) there is increasing private recreational developments on Gull Lake, making the remaining public land valuable for undisturbed waterfowl nesting areas;
- (c) the Lands provide shelter and feed for upland species;
- (d) the proposed marina and beach would greatly interrupt the Lands’ natural habitat;
- (e) only the developer and his clients would benefit from the proposed project; and
- (f) AEP would need a large security deposit to ensure proper reclamation of the Lands.⁶

[8] On March 18, 2016, the Senior Wildlife Biologist clarified the western grebe was listed as “threatened” provincially, instead of endangered.

[9] On April 25, 2016, the Land Management Specialist forwarded the Decision Rationale to the Director.

[10] On May 27, 2016, the Director wrote the Appellant and refused to issue the DLO to the Appellant (the “Decision”), for the following reasons:

- (a) the proposed construction would occur within the boundary of an existing Protective Notation classified as a Lakeshore Habitat Protection Area;
- (b) Gull Lake is one of the most important habitat lakes for the endangered western grebes as well as a number of sensitive species;
- (c) with increasing private recreational developments on the lake, the remaining public land is important for maintaining undisturbed waterfowl nesting areas;
- (d) the Land is in a progressive stage of succession providing shelter and feed for upland species; and

⁴ Director’s Record, at Tab 16.

⁵ Director’s Record, at Tab 18.

⁶ Director’s Record, at Tab 17.

- (e) the proposed marina and beach would greatly interrupt the natural habitat of this land.⁷

[11] On June 14, 2016, the Board received a Notice of Appeal from the Appellant, alleging the Director, in the Decision, erred in the determination of a material fact on the face of the record, and did not comply with a regional plan approved under the *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.⁸

[12] On September 21, 2016, a mediation was held with the Parties, but no resolution was reached. Therefore, the Board scheduled a hearing by written submissions only.

[13] After reviewing the Parties' submissions, relevant legislation, and the evidence before it, including the Director's Record, the Board submitted its June 7, 2017 Report and Recommendations to the Minister.⁹ In its Report and Recommendations, the Board found:

- (b) the evidence showed the Director's Decision copied the Decision Rationale without independently considering the issues;
- (c) there was no evidence in the Director's Record to support the Director's Decision;
- (d) a material error on the face of the record was made when the Decision Rationale claimed the western grebe was "endangered," which was not corrected in the Director's Decision; and
- (e) the Director did not exercise his discretion, and consequently, delegated his authority improperly, and in doing so, made errors of fact.

[14] The Board recommended the Minister reverse the Director's Decision to refuse to issue the DLO to the Appellant. On June 13, 2017, the Minister accepted the Board's recommendation and issued Ministerial Order 30/2017, requiring the Director to issue the DLO.¹⁰

[15] On August 3, 2017, the Director requested the Board reconsider its Report and Recommendations. The Director alleged the Board erred by:

⁷ Director's Record, at Tab 21.

⁸ There is no approved regional plan issued under the *Alberta Land Stewardship Act* for the area of the Province where the Project is located. Therefore, this is not a valid ground of appeal. In the June 7, 2017 Report and Recommendations, and in this Report and Recommendations, the Board does not need to address this concern.

⁹ *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (7 June 2017), Appeal No. 16-0023-R (A.P.L.A.B.).

¹⁰ *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (7 June 2017), Appeal No. 16-0023-R (A.P.L.A.B.).

- (a) concluding the Director did not put his mind to the facts, arguments, and issues in his Decision;
- (b) finding no evidence to indicate information was provided for the Director's consideration regarding the issues outlined in the Decision;
- (c) not considering whether the Decision as a whole, in the context of the Record, was reasonable;
- (d) not considering if the Director's alleged breaches of procedural fairness were, at law, unfair;
- (e) relying on incorrect cases and authorities to allow the review of materials that should have been ruled inadmissible; and
- (f) considering the questions and issues raised by the Board, which were not argued by the Appellant, and not providing the Director with an opportunity to respond.¹¹

[16] The Board received written submissions from the Parties regarding the reconsideration request. The Board found it had unintentionally denied the Parties procedural fairness by not providing an opportunity to respond to the issue of whether the Director had improperly sub-delegated his authority to AEP field staff, which the Board had raised in its Report and Recommendations.

[17] As a result of this procedural error, the Board granted the Director's reconsideration request and scheduled a new, oral hearing. In preparation for the new, oral hearing, the Board also requested the Parties to provide additional written submissions, which were received on September 18, 2018. The hearing was held October 2, 2018, at the Board's Offices in Edmonton, Alberta.

[18] At the October 2, 2018 hearing, the Director made reference to a Ministerial Order 08/2018 (the "Delegation Order"), entitled "Delegation of Authority under the *Public Lands Act*, *Public Lands Administration Regulation*, and *Recreational Access Regulation*." At the request of the Board, the Director provided a copy of the Delegation Order, shortly after the hearing ended.

[19] On October 11, 2018, the Board received a letter from the Appellant (the "Post-Hearing Letter"), providing arguments related to the Delegation Order. The Appellant stated there had not been an opportunity to review the Delegation Order and respond to the arguments

¹¹ Director's Request to Reconsider and Vary the Report of the Panel Dated June 7, 2017, dated August 3, 2017, at paragraph 83.

made by the Director regarding it during the hearing. To preserve procedural fairness, the Board determined it was necessary to provide an opportunity for the Parties to address the Delegation Order. The Board re-opened the hearing and received written submissions from the Parties on the Delegation Order. These written submissions were received between November 2 and November 16, 2018. The Board closed the hearing on November 16, 2018.

III. ISSUES

[20] The Board set the issues for the hearing in its May 31, 2018 letter. The issues for the hearing were:

1. Did the Director, in his decision to refuse the Appellant's application for a DLO, improperly sub-delegate his decision-making authority to his staff?
2. Should the Board recommend the Minister confirm, reverse, or vary the Director's decision to refuse the Appellant's application for a DLO?

[21] The Director, as a preliminary matter, requested the Board address the question of whether sub-delegation is properly part of the appeal, and again consider the question of admissibility of evidence from the Appellant that was not in the Director's Record.

IV. SUBMISSIONS

A. Appellant

[22] The Appellant submitted improper sub-delegation of authority by the Director was an error of law, which is appropriate for the Board to consider in the public interest. The Appellant stated the matter before the Board was not about protecting strategic decisions, but about seeking the public interest.

[23] The Appellant argued it raised the issue of error of law only after receiving and reviewing the Director's Record.

[24] The Appellant noted it is permissible for the Director to delegate his authority further, as long as it is done properly. The Appellant cited the Supreme Court of Canada decision in *Vic Restaurant Inc. v. City of Montreal*,¹² where the City of Montreal had the authority to approve liquor permits and passed a bylaw delegating this power to the police. The Supreme Court held the City's delegation of its authority was improper. The Appellant argued

¹² *Vic Restaurant Inc. v. City of Montreal*, [1959] SCR 58.

the improper delegation in the *Vic Restaurant* case is similar to the appeal before the Board.

[25] The Appellant submitted the legislation grants the Board the powers to admit new evidence. The Appellant argued section 122(2)¹³ of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the “Act”), authorizes the Board to hold a hearing, including the right to call evidence and hear arguments. The Appellant noted section 123(4)¹⁴ of the Act allows the Board to require additional evidence, and section 123(7)¹⁵ allows the Board to hear from other parties.

[26] The Appellant further argued a party has the right to be heard under common law.

[27] The Appellant submitted there was a legitimate expectation throughout the application process there would be an opportunity to respond to any concerns raised by AEP related to the DLO application. The Appellant stated it was not provided with that opportunity in the process leading up to the Director’s Decision. The Appellant noted the Board’s decision in *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks*,¹⁶ outlined a process where the Director expressed her concerns regarding the disposition applications and asked the applicants to respond. The Appellant stated there was no chance to consult with AEP regarding the reasons for refusing to issue the DLO. The Appellant said the new evidence it provided was intended to address the Director’s reasons for refusing to issue the DLO listed in the Decision.

[28] The Appellant argued the Minister would want to make her decision based on a full understanding of the situation, which included witnesses and evidence. The Appellant submitted the evidence should be admitted and given full weight based on its relevance and value to the Board.

[29] The Appellant stated Gull Lake, the location of the Project and the Appellant’s other development, Meridian Beach, is one of three key recreational lakes in central Alberta, and

¹³ Section 122(2) of the *Public Lands Act* provides: “In conducting a hearing of an appeal, the appeal body is not bound to hold an oral hearing but may instead make its decision on the basis of written submissions.”

¹⁴ Section 123(4) of the *Public Lands Act* provides: “The appeal body may require the submission of additional information.”

¹⁵ Section 123(7) of the *Public Lands Act* provides: “The appeal body shall give the opportunity to make representations on the matter before the appeal body to any persons who the appeal body considers should be allowed to make representations.”

¹⁶ *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 August 2018), Appeal Nos. 17-0022, 0025-0027, and 0045-R (A.P.L.A.B.).

the other two lakes are heavily developed with the majority of the shoreline disturbed.¹⁷ According to the Appellant, almost 90 percent of the Gull Lake shoreline is still relatively natural.

[30] The Appellant noted there are only three beaches with public access on the north end of Gull Lake, with two of the beaches located in front of Meridian Beach. The Appellant designed the Project to be similar to Meridian Beach.

[31] The Appellant argued the Project had multiple benefits, which included:

- (a) increased shoreline, which would benefit fish and birds;
- (b) the disturbance to the natural shoreline would be minor, and offset by transplanted natural aquatic plants (reeds) and other natural features along the canal leading to Gull Lake;
- (c) boat mooring would be confined to the canal, resulting in no anchoring or boat lifts in the lake;
- (d) reduction of user pressure on the nearby public boat launch;
- (e) improved public access to Gull Lake for recreation, including beaches, swimming, playgrounds, hiking, and boating;
- (f) employment opportunities for Albertans, with up to 50 jobs for at least 10 years; and
- (g) revenue for local businesses during the construction and post-construction commercial operations.

[32] The Appellant submitted the Project would have the same or better, positive environmental and recreational impacts on Gull Lake as the Meridian Beach project. The Appellant stated knowledge obtained from the construction and operation of Meridian Beach would be used in the design of the Project.

[33] The Appellant said the construction of the Project would be done with minimal environmental damage by doing construction in late winter when the lake is frozen and using silt curtains to protect the lake.

[34] The Appellant stated there was no evidence of sensitive species, including western grebe, nesting in the Project area or adjacent to it. The closest potential western grebe nesting area was two kilometres away from the Project.

¹⁷ The other lakes are Pigeon Lake, located west of Wetaskiwin, and Sylvan Lake, located west of Red Deer.

[35] The Appellant noted there was no evidence in the Director's Record to support the conclusion by AEP field staff the Project would disrupt the natural habitat, or have cumulative adverse effects on the lake's natural environment.

[36] The Appellant submitted the Decision did not match the facts regarding western grebe nesting in the Project area.

[37] The Appellant argued the Project was supported by Ponoka County and was aligned with Ponoka County's East Gull Lake Overview Plan and the multi-municipal Gull Lake Intermunicipal Development Plan.

[38] The Appellant submitted the Project would affect only 70 metres of shoreline, a small portion of the lake's total shoreline.

[39] The Appellant stated it had several concerns regarding the Director's Record:

- (a) some of the documents appeared out of chronological order;
- (b) the Director's Record contains comments from AEP field staff referring to the Project benefiting a small number of homeowners and being closed to the public. The Appellant stated it has focused on public access throughout the planning and application process; and
- (c) correspondence between the Appellant and AEP field staff dated September 1, September 11, and October 7, 2015, were not included in the Director's Record.

[40] The Appellant was surprised when it learned of the Decision, as the Appellant understood the environmental and public access performance of Meridian Beach was highly regarded, and the Appellant had significant communications with AEP field staff, which lead it to believe the Project would be well received.

[41] The Appellant stated the Director should have looked at all aspects of the application and discussed concerns with the AEP field staff but did not do so.

[42] The Appellant submitted the evidence before the Board showed the Decision lacked reasonableness. The Appellant noted in the oral hearing the Director admitted he did not have the expertise to make the Decision.

[43] The Appellant submitted the Director's argument regarding the Delegation Order suggested the PNT had the status of subordinate legislation, which meant the Director did not

have the power to make a decision regarding the Appellant's DLO application. The Appellant stated it was not clear who was responsible for the PNT. At the hearing, the Appellant noted, the Director was unclear who was responsible for the PNT or what status the PNT had.

[44] The Appellant disagreed with the Director's argument section 18(c)¹⁸ of the Act applied to the PNT. The Appellant submitted the section referred to reservations regarding the sale of public lands, and cited instead, section 14 of the Act as being more applicable to issuing PNTs.¹⁹ The Appellant noted the Minister's powers in section 14 to place restrictions on dispositions, such as through PNTs, have not been delegated under the Delegation Order.

[45] The Appellant argued the Act gave the Minister the ultimate power to determine whether to grant a DLO, and the Board has the ability to advise the Minister regarding such matters. The Appellant stated the Director's interpretation of the Delegation Order, that the Delegation Order gave the power to make final decisions regarding a DLO application to the Director, subverts the Minister's authority.

[46] The Appellant submitted, although the PNT required consultation with wildlife officials, the wildlife official who made the decision regarding the DLO did so without having seen the Appellant's DLO application and failed to consult with the Appellant.

[47] The Appellant requested the Board recommend to the Minister the DLO be issued.

B. Director

[48] The Director stated the issue of improper sub-delegation is a question of law, and

¹⁸ Section 18(c) of the *Public Lands Act* provides:

"The Minister may, if in the Minister's opinion doing so will not conflict or be inconsistent with any applicable ALSA regional plan, ...

- (c) reserve public land for any reason and for any period and permit the use of that land for any period and subject to any terms and conditions that the Minister prescribes by the Crown in right of Canada, by any department of the Government or by any person, without executing a disposition for it"

¹⁹ Section 14 of the *Public Lands Act* provides:

"The Minister may

- (a) restrict the disposition of or withdraw from disposition any public land in any specified area in any manner the Minister considers warranted, or
- (b) prescribe, as to any specified public land or as to public land in any area, when and on what conditions applications for dispositions may be made."

the Appellant's Notice of Appeal did not allege the Director erred in law. The Director submitted the Appellant did not raise concerns regarding the issue of sub-delegation at any point before the first hearing.

[49] The Director maintained that to permit the Appellant to argue the Director improperly sub-delegated the Decision to refuse to issue the DLO would have the effect of allowing the Appellant a second appeal of the Decision.

[50] The Director submitted, even if it were determined the Director improperly sub-delegated his authority, the Alberta Court of Queen's Bench in *Ross v. Edmonton (City)*,²⁰ required a reviewer of a decision to consider if the overall decision is reasonable, and this would apply to the Board's review of the Director's Decision.

[51] The Director argued the following facts supported the claim he was the decision-maker:

- (a) all the reasons provided in the Decision letter for refusing to grant the DLO demonstrated the Director signed the Decision letter;
- (b) there is a difference between the wording of the Decision Rationale and the Decision letter;
- (c) the Decision is unambiguous on the face of the Record;
- (d) there is a presumption of integrity and impartiality owed to the Director; and
- (e) the onus is on the Appellant to show the Director improperly sub-delegated.²¹

[52] The Director submitted even if there was an improper sub-delegation, the Appellant did not indicate how, at law, it was unfair.

[53] The Director argued, as he is not a wildlife expert, it was reasonable for him to rely on AEP field staff's Decision Rationale.

[54] The Director stated the Board should not consider whether the Director improperly sub-delegated his authority in making the Decision, but instead limit the hearing to whether the Director erred in determining a material fact on the face of the record.

²⁰ *Ross v. Edmonton (City)* 2016 ABQB 730, at paragraph 5.

²¹ Director's Submission, dated September 18, 2018, at paragraph 139.

[55] The Director argued the Board should find the following evidence is inadmissible:

- (a) the Gull Lake Intermunicipal Plan;
- (b) the letter from Ponoka County, dated June 6, 2016;
- (c) the undated letter from the Gull Lake Watershed Society;
- (d) the letter from Mr. Richard Carson of RC BioSolutions Ltd., dated September 14, 2018; and
- (e) all references, discussions, or conclusions related to the mediation or settlement.

[56] Alternatively, the Director submitted if the Board admitted any of these documents, they should be assigned no weight. The Director quoted from the Board's decision in *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks*:

“... [E]vidence provided by the Appellants at the oral hearing was focused mainly on mitigation measures the Appellants would undertake if the Board reversed the Director's decision to refuse the Appellants' applications. Such evidence was not before the Director at the time of the decision, and therefore, is not part of the record upon which the appeals are based. ...

[S]uch evidence of mitigation would be better presented to the Director as part of an application process, not as evidence before the Board in a hearing, where the question is whether the Director's decision should be confirmed, reversed, or varied....”²²

[57] The Director stated the Supreme Court of Canada, in *British Columbia v. Philip Morris International, Inc.*,²³ determined legislation can limit evidence, even where such evidence may be relevant. The Director argued the Alberta Legislature, in section 120 of the Act,²⁴ chose to limit the scope of evidence to be considered by the Board in an appeal by limiting admissible evidence to the decision and record of the decision-maker, which is defined as “the records of the Department that are considered by the director in making the decision.”²⁵

²² *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 August 2018), Appeal Nos. 17-0022, 0025-0027, and 0045-R (A.P.L.A.B.), at paragraph 148 and 149 (emphasis by the Director).

²³ *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36, at paragraphs 27, 32, and 33.

²⁴ Section 120 of the *Public Lands Act* provides: “An appeal under this Act must be based on the decision and the record of the decision-maker.”

²⁵ Although the Director did not cite the section, section 209 of PLAR defines the “director's file” as: “...[I]n respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision;”

[58] The Director submitted the issue is not whether the evidence is relevant, but whether the legislation permits the evidence to be considered. The Director argued any documents prepared after the Director's Decision could not have been considered by the Director and, therefore, the Board should not admit such evidence, or, in the alternative, if admitted into evidence, the Board should give such evidence low weight.

[59] The Director stated the Gull Lake Intermunicipal Plan, although prepared before the Decision, was not part of the Director's Record. Therefore, the plan should not be considered by the Board. In the alternative, if the plan were admitted into evidence, it should be given no weight.

[60] The Director argued the Appellant previously submitted evidence not part of the Director's Record, which was subject to a confidentiality agreement or protected by settlement privilege, and such evidence is inadmissible.

[61] The Director submitted the Decision should be reviewed by the Board on the standard of reasonableness, meaning the Board should "show deference to the Director."²⁶

[62] The Director cited multiple cases²⁷ to support his assertion that the Board should apply a standard of reasonableness in its review of the Decision. The Director noted *Lum v. Alberta Dental Association and College*,²⁸ stating in the oral hearing the "minister" in *Lum* made the final decision, as does the Minister in appeals to this Board.²⁹

[63] The Director argued a decision being considered by a reviewing body could be accepted under the reasonableness standard as long as the decision falls within a range of

²⁶ The Director's submission, dated September 18, 2018, at paragraph 57.

²⁷ The Director cited the following additional cases in his written submission regarding the standard of review: *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)* 2018 SCC 31; *Delta Air Lines Inc. v. Lukacs*, 2018 SCC 2; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47; *Edmonton School District No. 7 v. Dorval*, 2016 ABCA 8; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26; *Jane Doe v. Alberta (Deputy Minister of Executive Council)*, 2016 ABQB 135; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32; *Lum v. Alberta Dental Assn. and College*, 2015 ABQB 12; *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9; *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399; *Niyonkuru v. Alberta (Executive Director, Delivery Services, Assured Income for the Severely Handicapped Program)*, 2013 ABQB 542; *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62; *Ryan v. Law Society (New Brunswick)*, 2003 SCC 20; *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33; *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4; *Wood Buffalo (Regional Municipality) v. Alberta (Energy & Utilities Board)*, 2007 ABCA 192; and *City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43.

²⁸ *Lum v. Alberta Dental Association and College*, 2016 ABCA 154.

²⁹ The Board notes the *Lum* case does not involve the Minister making a decision.

acceptable outcomes supported by the facts and law.

[64] The Director submitted the fact the Board reports to the Minister, who makes the final decision, does not change the standard of review from reasonableness. The Director stated in the oral hearing the Board's role is not to provide the best advice to the Minister, but to limit itself to a review based on the materials before the Director at the time a decision was made.

[65] The Director argued in the alternative if the Board finds correctness is the proper standard of review, the Decision was also correct.

[66] The Director said he reviewed the Decision Rationale provided by the Land Management Specialist and noted a PNT was registered on the Lands. The Director stated when a PNT is placed on public land the consent from the office that placed the PNT must be obtained before a disposition can be approved if it would affect the PNT's purpose. In the case of the Appellant's application for a DLO, the PNT's purpose was to protect a natural habitat area, and consent to grant the DLO application was required from the Red Deer office of AEP, where the PNT originated. The Director acknowledged the PNT does not require him to refuse to issue the disposition, but the Director stated he deferred to those who were experts and knowledgeable about the lands that are the subject of the application.

[67] The Director stated he tried to keep the same language used in the Decision Rationale when he drafted the Decision to avoid misconstruing the intent of the decision. The Director explained he did not include the statements from the Decision Rationale referring to the Project being of limited benefit to the public, as he disagreed with that conclusion.

[68] The Director submitted he did not disagree with the Appellant the Project could benefit the economy. However, the Director stated his primary concern was the PNT.

[69] The Director stated the word "endangered" as a description of the western grebe was included because the Director relied upon the AEP wildlife expert and accepted his word it was the correct classification. The Director stated "endangered" and "threatened" should be given the same weight, and if the Decision Rationale had used the word "threatened" instead, his decision would have been the same.

[70] At the hearing, the Director submitted he relied on the PNT and AEP field staff for information about sustainability and cumulative effects. In the Director's written

submissions, he stated cumulative effects were one of the aspects he must consider.

[71] The Director argued the Appellant should have inquired with the AEP Red Deer office to obtain consent before filing the DLO application, as the Red Deer office had originally filed the PNT. The Director stated the Appellant could submit another application that addressed the PNT.

[72] The Director acknowledged at the oral hearing the Director's Record could have included a better explanation the concerns of AEP field staff. The Director stated he did not discuss the Decision Rationale with the AEP field staff because of the PNT. If the PNT had not been in place, the Director said he would have sought an explanation of the Decision Rationale from the AEP field staff. The Director stated as the Decision Rationale aligned with the PNT, there was no need to discuss the matter with the AEP field staff and he left it up to the regional office who put the PNT in place.

[73] The Director submitted the PNT does not sterilize the land around the lake as development applications are reviewed on a case-by-case basis, but a new development in the area is a concern.

[74] The Director also stated, while he read the DLO application, the report from the Appellant's consultants (the "Tera Report"), which contradicted some aspects of the Decision Rationale, was not included in the materials he reviewed. However, the Director submitted there were several sensitive species identified in the Tera Report.

[75] The Director noted the Tera Report acknowledged potential habitat for the western grebe was present along the shoreline adjacent to the Project, but human activities such as boating would likely diminish the area's suitability for nesting.

[76] In his response to the Appellant's suggestion the Director had not provided evidence to support the Decision, the Director argued the Appellant's allegation ignored "the numbers [*sic*] emails and other materials in the Record (including the Tera Report); and that the onus of proof is on the Appellant to demonstrate the Public Lands are not important wildlife habitat."³⁰

[77] The Director submitted the PNT is one of many factors considered by the Director

³⁰ Director's Submission, dated September 18, 2018, at paragraph 89.

in making the Decision.

[78] The Director stated the history of the Lands was not relevant to the Decision.

[79] The Director noted the Alberta Court of Appeal in *Edmonton School District No. 7 v. Dorval* (“*Dorval*”), summarized an administrative decision is reasonable if it is:

- (a) justifiable, transparent, and intelligible;
- (b) falls within the range of possible acceptable outcomes that are defensible in respect of the facts and law;
- (c) can stand up to a somewhat probing examination; and
- (d) shows a line of analysis that could lead the decision-maker to its conclusion.³¹

[80] The Director submitted the Decision is reasonable and meets the test as set out in *Dorval*. The Director noted the Alberta Court of Appeal said a decision must be reviewed as a whole, and it would be improper to seize on errors or conduct a “line-by-line treasure hunt for error.”³²

[81] The Director objected to the Board considering the Post-Hearing Letter regarding the Delegation Order. The Director stated the Appellant was aware of all the submissions and arguments made by the Director at the hearing. The Director stated the Appellant was given the opportunity to make closing arguments, but he did not raise the concerns included in the Post-Hearing Letter. The Director argued the Post-Hearing Letter was more concerned with the PNT than the Delegation Order. The Director noted the Appellant did not object to the Delegation Order being provided to the Board during the hearing, nor did he ask for an opportunity to review it. The Director stated allowing the Appellant to make arguments after the hearing was concluded, “improperly and prejudicially splits the Appellant’s case”³³ and was procedurally unfair.

[82] The Director submitted that at no time during the hearing did the Director suggest the PNT had the status of a ministerial order or subordinate legislation.

[83] The Director argued the Appellant’s interpretation of section 18 of the Act was

³¹ *Edmonton School District No. 7 v. Dorval*, 2016 ABCA 8, at paragraphs 36 to 38.

³² *Edmonton School District No. 7 v. Dorval*, 2016 ABCA 8, at paragraph 40.

³³ Director’s Response Submission, dated November 2, 2018, at page 2.

incorrect as section 18(c) and 18(d)³⁴ could not possibly deal with the sale of public land.

[84] The Director stated the Minister does not have the ultimate power to decide whether to grant a DLO, as alleged by the Appellant in the Post-Hearing Letter. The Director stated directors have been granted that the authority to decide whether to grant a DLO, while the Minister has the role of being the final decision-maker for director's decisions that have been appealed.

[85] The Director argued the focus of the appeal should be on the Decision and not on the decision-making process. The Director submitted the Decision falls within the range of possible, acceptable outcomes and therefore, the Board should show deference to the Director and confirm the Decision.

V. ANALYSIS

A. PRELIMINARY MATTERS

1. Consideration of Sub-delegation

[86] The Director submitted the Board should not consider the issue of sub-delegation as this is a question of law, and the Appellant had not raised it before the providing submissions in response to the reconsideration application.

[87] The Board notes the Director raised the issue of sub-delegation in the Director's reconsideration application of the June 7, 2017 Report and Recommendations. The Director argued the Board "committed a material error by concluding the Director impermissibly sub-delegated his authority...."³⁵

[88] The Board further notes the Director, in his application for reconsideration of the Board's June 7, 2017 Report and Recommendations, alleged the Board committed procedural

³⁴ Section 18(c) and (d) of the *Public Lands Act* provides:

"The Minister may, if in the Minister's opinion doing so will not conflict or be inconsistent with any applicable ALSA regional plan, ...

- (c) reserve public land for any reason and for any period and permit the use of that land for any period and subject to any terms and conditions that the Minister prescribes by the Crown in right of Canada, by any department of the Government or by any person, without executing a disposition for it, and
- (d) promote good farm cultural practices and require proper range management efforts and the adoption of farming and grazing practices by disposition holders for conservation purposes."

³⁵ Director's Request to Reconsider and Vary the Report of the Panel Dated June 7, 2017, dated August 3, 2017, at paragraph 83.

errors by determining issues “raised by the Panel on its own initiative” and did not provide the Director with an opportunity to respond.³⁶

[89] Upon reviewing the Parties’ submissions in the reconsideration request, the Board acknowledged it had committed a procedural error and unintentionally denied procedural fairness to both Parties by not providing an opportunity for the Parties to address the issue of sub-delegation.³⁷ The Board remedied the error by granting the Director’s reconsideration request and holding a new, oral hearing with written submissions addressing the issue of sub-delegation.

[90] The issue of sub-delegation is central to the Decision of the Director. It is appropriate for the Board to determine the facts, based on the Director’s Record, the written submissions, and the testimony at the hearing, on whether the Director sub-delegated his decision-making on this matter.

[91] The Director submitted the issue of sub-delegation is a question of law, which was not raised in the Appellant’s Notice of Appeal or during the first hearing.

[92] An appeal to the Board starts with the Board’s receipt of a Notice of Appeal. The appellant must select the grounds of appeal from those listed in section 213 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 (“PLAR”).³⁸ The appellant chooses the grounds of appeal without the benefit of the Director’s record, which is received upon request from the Director after the Board has found the appeal meets the requirements of PLAR. Without the Director’s record, the appellant does not have all the information needed to make an informed

³⁶ Director’s Request to Reconsider and Vary the Report of the Panel Dated June 7, 2017, dated August 3, 2017, at paragraph 24.

³⁷ See: *Reconsideration Decision: Inshore Developments Ltd. v. Director, Alberta Environment and Parks* (30 May 2018), Appeal No. 16-0023-RD (A.P.L.A.B.).

³⁸ Section 213 of PLAR provides:

“A decision is appealable only on the grounds that

- (a) the director or officer who made the decision
 - (i) erred in the determination of a material fact on the face of the record,
 - (ii) erred in law,
 - (iii) exceeded the director’s or officer’s jurisdiction or authority, or
 - (iv) did not comply with an ALSA regional plan,

or

- (b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4).”

decision regarding the grounds for appeal. For this reason, the Board will consider requests to amend the Notice of Appeal.

[93] In the Appellant's Notice of Appeal, the Appellant did not check the box marked "error of law." Failing to check the box marked "error of law" does not mean the Board cannot consider an error of law if a breach of natural justice or procedural fairness has occurred.

[94] Natural justice and procedural fairness are the cornerstones of administrative law. Administrative decision-makers, such as the Board and the Director, must ensure decisions are reached in a procedurally fair manner. If decisions are not procedurally fair, those decisions may be void if reviewed by an appellate body, be it a tribunal or a court.³⁹ The Board has the legislative authority to review the Director's decisions and recommend the Minister confirm, reverse, or vary the Director's decision. In reviewing the Director's decision and advising the Minister, the Board must consider whether the decision was procedurally fair. The Director's Record should provide sufficient evidence for the Board to make such a determination.

[95] In the Director's written submissions, the Director argued the panel hearing an appeal, under certain circumstances, may raise questions and issues on its own initiative, but in this appeal it was inappropriate.⁴⁰ The Director did not explain why the Board's consideration of the issue of sub-delegation by the Director was inappropriate.

[96] The Director acknowledged in the oral hearing the Board could review an error of law that had not been expressly claimed as a ground of appeal, but only if the Director was given proper notice and the opportunity to address it. The Board considers providing written reasons for its reconsideration of the June 7, 2017 Report and Recommendations, followed by written notice to the Parties establishing a schedule to comment on the issue of sub-delegation by written and oral submissions leading to this Report and Recommendations, is sufficient notice and provided the Director with the opportunity to address the alleged breach of natural justice fully.

³⁹ David P. Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014), at page 217.

⁴⁰ Director's Submission, dated September 18, 2018 at page 9, paragraph 25.

[97] The Board determined it was appropriate, in this appeal, to review the matter of sub-delegation by the Director. The Parties provided the Board with written submissions regarding the issue. Further, the Parties were given the opportunity to present arguments at the oral hearing. By providing the Parties with the opportunity to address the matter of sub-delegation at the hearing, any procedural errors made by the Board in the original hearing have been rectified.

2. Evidence

[98] The Director submitted the Board should not consider the following evidence provided by the Appellant, or alternatively, if admitted into evidence, give the evidence no weight:

- (a) the Gull Lake Intermunicipal Plan;
- (b) the letter from Ponoka County dated June 6, 2016;
- (c) the undated letter from the Gull Lake Watershed Society;
- (d) the letter from Mr. Richard Carson of RC BioSolutions Ltd., dated September 14, 2018; and
- (e) all references, discussions, or conclusions related to the mediation or settlement.

[99] In any consideration of the admissibility of evidence, the Board's first step is to review the governing legislation, which in this case is the Act. Section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker."

[100] In appeals before the Board, the "record" is the Director's Record. In an appeal on the record, the Board's decision must be based on the evidence found in the record provided by the Director. However, the Board's decision can also consider other evidence that is rationally connected to evidence found in the Director's Record, meaning evidence that provides details, clarifies, or assists the Board in understanding the evidence found in the Director's Record.

[101] The Nova Scotia Court of Appeal, in its decision in *Kelly v. Nova Scotia Police Commission*, 2006 N.S.C.A. 27 ("*Kelly*"), stated:

"... [T]he Board was within its discretion as to procedure to receive evidence of doubtful relevance and admissibility and to consider its admissibility and weight

during its deliberations after the hearing. This is a common practice in administrative tribunal hearings and it is rarely objectionable and often wise. From a practical perspective, it will be often difficult to take any other approach. Finely tuned judgments about relevance early in an administrative tribunal hearing are often difficult and sometimes impossible to make. As a general rule, the approach the Board took here was one that would be within its discretion and in accordance with common practice and good sense.”⁴¹

[102] The Board, in this appeal, adopted the same general rule for the admissibility of evidence and determination of weight as outlined in *Kelly*. The Board admitted as evidence the Gull Lake Intermunicipal Plan, the letter from Ponoka County dated June 6, 2016, the undated letter from the Gull Lake Watershed Society, and the September 14, 2018 letter from Mr. Carson of RC BioSolutions Ltd. The Board considered these documents and assigned them low or no weight based on how these documents provided details, clarified, or assisted the Board in understanding the evidence found in the Director’s Record.

[103] The Director submitted the Board should refuse to consider, or assign low weight, to all references, discussions, or conclusions related to the mediation or settlement. The Board, in its June 7, 2017 Report and Recommendations, addressed the Director’s concerns regarding evidence related to the mediation between the Parties. In that Report and Recommendations, the Board found the majority of references made by the Appellant to the mediation referred to the fact the Parties had not reached an agreement. These references to the mediation did not breach the Confidentiality Agreement signed by the Parties. The fact a hearing was held indicates no agreement was reached through mediation. The Board found references to proposals made in the mediation meeting or any subsequent negotiations were inadmissible as evidence, and the Board disregarded such statements. This Board agrees with the conclusions in the June 7, 2017 Report and Recommendations⁴² and finds any references to proposals made in mediation or negotiation to be inadmissible.

3. The Appellant’s Post-Hearing Letter

[104] During the hearing, the Director referred to a Delegation Order delegating authority from the Minister under section 18(c) of the Act.⁴³ The Director provided the

⁴¹ *Kelly v. Nova Scotia Police Commission*, 2006 N.S.C.A. 27, at paragraph 36.

⁴² *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (7 June 2017), Appeal No. 16-0023-R (A.P.L.A.B.).

⁴³ Section 18(c) of the *Public Lands Act* provides:

Delegation Order at the Board's request after the close of the October 2, 2018 hearing.

[105] The Board received the Appellant's Post-Hearing Letter on October 11, 2018, after the hearing had closed. The Post-Hearing Letter addressed the Delegation Order provided by the Director. The Board determined the Appellant had not been provided sufficient opportunity to consider the Delegation Order and respond to it during the hearing. Therefore, the Board re-opened the hearing for the sole purpose of allowing for submissions on the Delegation Order.

[106] The Delegation Order provided by the Director was dated April 25, 2018. The PNT was issued on May 5, 2002. The Delegation Order does not authorize retroactive actions by AEP staff. A Delegation Order in effect at the time the PNT was issued would have assisted the Board. With no relevant evidence before it regarding the Delegation Order, the Board was unable to make a determination regarding the delegation of authority under section 18(c) of the Act at the time the PNT was issued.

[107] The Board is satisfied procedural fairness was provided by re-opening the hearing so the Parties could make submissions regarding the Delegation Order. However, the Board found the matter of delegated authority under section 18(c) of the Act could not be determined by the Delegation Order that was provided.

4. Standard of Review

[108] In reviewing the Director's Decision, the Board must determine the proper standard of review to apply. A standard of reasonableness requires a greater degree of deference to the Director, while a standard of correctness requires a lesser degree of deference.

[109] The Supreme Court of Canada has stated an assessment to determine the proper standard of review involves two steps. First, it must be established whether the courts have already done an applicable standard of review analysis. Second, if there is no satisfactory previous analysis of the standard of review, then an analysis of several factors must be conducted

"The Minister may, if in the Minister's opinion doing so will not conflict or be inconsistent with any applicable ALSA regional plan, ...

(c) reserve public land for any reason and for any period and permit the use of that land for any period and subject to any terms and conditions that the Minister prescribes by the Crown in right of Canada, by any department of the Government or by any person, without executing a disposition for it"

to determine the applicable standard of review.⁴⁴

[110] The Board appreciated the Director's efforts to assist the Board in determining the proper standard of review. The Director submitted multiple cases addressing how he argues the Board should apply the standard of review. The Director stated the cases demonstrated the standard of review should be one of reasonableness.

[111] The Board has reviewed the cases provided by the Director and is of the view these cases can be distinguished, as they do not deal with legislative frameworks similar to that under which the Director and the Board operate. The cases cited by the Director involved judicial reviews of tribunal decisions, not a tribunal's review of a decision of a designated statutory authority, where the reviewing tribunal must make a recommendation to the Minister.⁴⁵

[112] To determine the standard of review to apply to the Director's Decision, the Board had regard to the decision of the Alberta Court of Appeal in *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, where the Court identified the following factors that should be considered when establishing the applicable standard of review:

- “(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
- (b) the nature of the question in issue;
- (c) the interpretation of the statute as a whole;
- (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
- (e) the need to limit the number, length and cost of appeals;
- (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and

⁴⁴ *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 57 (“*Dunsmuir*”).

⁴⁵ Section 124(1), (2), and (3) of the *Public Lands Act* provides:

- “(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.”

- (g) other factors that are relevant in the particular context.”⁴⁶

[113] As per the Court in *Newton*, the Board considered all the factors, and determined the most applicable factor in this appeal are:

- (a) the interpretation of the relevant legislation as a whole and the respective roles of the Director and the Board, as determined by interpreting the relevant legislation;
- (b) the relative expertise of the Director and the Board; and
- (c) the nature of the question in issue.

[114] The Board considered the interpretation of the relevant legislation as the most important factor. The Saskatchewan Court of Appeal in *City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43, stated:

“In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill.”⁴⁷

[115] The Act provides a statutory right of appeal of certain decisions made by the Director. The Board was established to hear those appeals and provide recommendations to the Minister. In appeals before the Board there are three legislative purposes to consider:

- (a) section 10(1) of PLAR authorizes the Director to issue or refuse to issue a formal disposition;⁴⁸
- (b) section 211(c) of PLAR,⁴⁹ authorizes the Board to hear appeals of the Director’s refusal to issue a disposition under the Act; and
- (c) section 124 of the Act states the Board must submit a report to the Minister. This section makes the Minister the final decision-maker on appealed decisions.⁵⁰

⁴⁶ *Newton v. Criminal Trial Lawyers’ Association*, 2010 ABCA 399, at paragraph 43.

⁴⁷ *City Centre Equities Inc. v. Regina (City)*, 2018 SKCA 43, at paragraph 59.

⁴⁸ Section 10(1) of PLAR provides: “The director may issue or refuse to issue a formal disposition applied for under section 9.”

⁴⁹ Section 211(c) of PLAR states: “The following decisions are prescribed as decisions from which an appeal is available: ... a refusal to issue a disposition or to renew or amend a disposition applied for under the Act...”

⁵⁰ Section 124(1), (2), and (3) of the *Public Lands Act* provides:

- “(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.

Where the Board hears an appeal, it must recommend to the Minister to confirm, reverse, or vary, the Director's decision. In doing so, the Board must be able to determine if the Director's decision is correct.

[116] Considering the question of relative expertise, the more expertise regarding the issue infers a more deferential approach. Conversely, the lack of relative expertise suggests a less deferential approach.⁵¹ The Director acknowledged multiple times in his written and oral submissions he is not an expert on the wildlife issues that were the basis of his Decision, and he relied on the recommendations of AEP field staff who, he believed, were wildlife experts. The Board has the benefit of a more complete record on which to base its recommendations to the Minister, as the Director's Record was supplemented by evidence referenced in the oral and written submissions that clarified evidence found in the Director's Record. For example, the Board had took the Tera Report into consideration, and had the benefit of being able to ask the Appellant questions about it. The Director, when making the Decision, had information from AEP field staff that was not supported by the evidence. The Board considered the Director's Record and the supplementary evidence that was related to the Director's Record and determined a less deferential approach to the Director's Decision was appropriate.

[117] In determining the nature of the question being determined, the Board must consider if the question being determined is a question of law, fact, or mixed law and fact. The Supreme Court of Canada stated in *Pushpanathan*: "There is no clear line to be drawn between questions of law and questions of fact, and, in any event, many determinations involve questions of mixed law and fact."⁵²

[118] The Director submitted the question of sub-delegation is a question of law. The Board considers the question to be more of mixed law and fact. The Supreme Court of Canada has stated in *Dunsmuir* if the factors considered suggest a standard of reasonableness, and if the

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- (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."

⁵¹ *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at paragraph 33 ("*Pushpanathan*").

⁵² *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at paragraph 33.

question of law is not one of central importance to the legal system and outside the specialized area of expertise, then a reasonableness standard may be applicable.⁵³ As important to the Parties as this appeal may be, it is unlikely to be of such significance to the legal system. On the nature of the question considered alone, a reasonableness standard may apply. However, the Board must consider all factors in context and not in isolation from each other.

[119] Upon reviewing the determining factors, the Board is mainly influenced by the fact the Board must report to the Minister, who has the power to confirm, reverse, or vary, the Director's decision. The Board finds a standard of correctness must be applied otherwise the Minister's powers would be fettered. While the Minister's decisions must be reasonable, this does not mean the Director's decisions are reviewed by the Minister on a standard of reasonableness. This would suggest the Director could overrule the Minister.

[120] During the oral hearing, the Director stated the Board's role is not to provide the best advice possible to the Minister. The Board strongly disagrees with this statement. The Board is an adjudicative body expressly required by the Act to provide advice to the Minister as to how she should resolve appeals. It would be absurd for the Board to offer anything less than its best possible advice to the Minister.

B. DIRECTOR'S DECISION

[121] The Board must rely on the Director's Record and the Director's Decision for evidence on which to base its recommendations to the Minister. The Board found the Director's Record was either poorly compiled or poorly kept, as important information appeared to be missing or not included in the record.⁵⁴ The poor state of the Director's Record made the Board's task of developing its recommendations for the Minister more difficult. The Board appreciated the oral testimony and submissions from the Parties, which provided details and clarifications, and assisted the Board in understanding the evidence found in the Director's Record. The Board notes this is one of the benefits of an oral hearing.

[122] The Board found the Director's Record and the Director's oral testimony demonstrated the Director deferred to the AEP field staff's recommendations and the existence

⁵³ *Dunsmuir v. New Brunswick*, 2008 S.C.C. 9, at paragraph 55.

⁵⁴ The Appellant stated in his submissions, correspondence between the Appellant and AEP field staff, dated September 1, September 11, and October 7, 2015, were not included in the Director's Record.

of the PNT. In the Board's view, he did not make an independent assessment of the application before him. Further, based on the evidence provided, the Board found the AEP field staff did not have sufficient grounds to support their recommendations.

[123] The Director, using the wording from the Decision Rationale, stated in the Decision that Gull Lake was "one of the most important habitat lakes for the endangered western grebes as well as a number of sensitive species."⁵⁵ The Board found no evidence in the Director's Record to support this claim. The March 14, 2016 email, from the Wildlife Biologist references a western grebe survey done in 2015. The 2015 survey would have been important information for the Board to consider, but it was not included in the Director's Record, and the Wildlife Biologist did not testify at the hearing. The only substantial evidence regarding wildlife and wildlife habitat was from the Appellant in the DLO application, which was included in the Director's Record. The Appellant's wildlife survey did not find any western grebes near the Project, and found the "probability of the area in the vicinity of the Project to support a western grebe colony is low"⁵⁶ due to the proximity of existing shoreline developments. The survey only covered one day in the field, but this was more evidence than what was otherwise included in the Director's Record.

[124] The Director stated in the Decision, "[w]ith increasing private recreational developments on the lake, the remaining public land is important for maintaining undisturbed waterfowl nesting areas," wording that was taken from the Decision Rationale. It is unclear to the Board how the AEP field staff or the Director reached this conclusion. The Board found no evidence in the Director's Record of an analysis of cumulative impacts having been done for Gull Lake or any analysis of what an increase in private recreation developments would mean for the lake. The Appellant's DLO application addressed mitigation of impacts the Project may have on the habitat, but there was no evidence in the Director's Record to show the Director undertook any analysis of the Appellant's mitigation proposals. As noted above, the Appellant's wildlife survey had concluded it was unlikely the western grebe would nest in the area due to the existing developments.

[125] The Director, using the wording of the Decision Rationale, stated in the Decision

⁵⁵ Director's Record, at Tab 18.

⁵⁶ Director's Record, Tab 23, letter from CH2M Hill Energy Canada Ltd., June 27, 2014, at page 3.

the DLO lands are “in a progressive stage of succession providing shelter and feed for upland species.” There was no evidence provided in the Director’s Record to support this statement. An email from the AEP Wildlife Biologist dated March 14, 2016, mentions the Appellant’s wildlife survey as having found a “broad diversity of avian and mammalian fauna” on the DLO lands, but the Wildlife Biologist acknowledged the PNT did not extend to the upland. There was no evidence the Director or AEP field staff considered the Appellant’s mitigation proposals in the DLO application.

[126] The Director, again using the wording of the Decision Rationale, stated in the Decision the marina and beach would “greatly interrupt the natural habitat of this land.” The Appellant acknowledged this would occur to some degree, but argued the offsetting benefits of the Project were greater to both wildlife and humans than the interruption of natural habitat. The Appellant provided evidence of the offsetting benefits from the nearby Meridian Beach development, on which the Project is based. The Director’s Record did not contain sufficient information regarding the impact of the Project or any evidence to show the Director or AEP field staff considered offsetting benefits. The Director, in his testimony at the oral hearing, stated he did not disagree the Project would provide economic benefits, but he said he was focused on the PNT.

[127] The Director’s role was to make a decision on the DLO application based on the information available to him, including scientific information and the relevant legislation. In the Board’s view, the Director did not make the decision himself but instead allowed AEP field staff to make the decision for him.

[128] The Director testified at the oral hearing repeatedly that he was not an expert in wildlife matters. He also testified he did not communicate with the AEP field staff regarding the Decision Rationale.

[129] The Board was very concerned the Director, who continually stated he was not an expert in wildlife matters, failed to ask a single question of the AEP field staff to understand the nature of the decision he had to make. While the Director can rely upon the AEP field staff for recommendations, the Director cannot claim the Decision was his when he simply accepted the Decision Rationale, without taking any steps to ensure the information he was provided with was

correct and reliable. The Board determined the Director did not turn his mind to the matter sufficiently.

[130] At the hearing, the Director demonstrated he simply followed the advice of the AEP field staff, and justified it by stating he was not an expert in these matters. By completely deferring to the AEP field staff, the Director improperly sub-delegated his decision-making authority. By improperly sub-delegating his decision-making authority in adopting the recommendations of AEP field staff without considering the merits of the DLO application, the Director violated the principles of natural justice and created an unfair situation for the Appellant.

[131] Further, the Board found the Decision Rationale and the Decision were not founded on transparent evidence. By basing the Decision on statements without a clear evidentiary foundation, the Director erred in the determination of a material fact on the face of the record. Considering the Decision as a whole, the Board is of the view the Decision cannot be sustained because, in effect, the Director made no decision.

[132] In the Decision, the Director also stated the DLO was refused due to the PNT. In the oral hearing, the Director repeatedly stated he relied on the PNT to make the Decision. Although the Board appreciated the Director's honest and forthcoming testimony at the hearing, the Board found the Director's testimony to be inconsistent regarding the PNT. The Director explained for a disposition to be approved on lands where a PNT had been registered, consent was required from the office that issued the PNT. When asked by the Board if the Director considered the PNT to be appropriate, the Director stated the person who put the PNT on the land had to be the one who "signed off" on permitting dispositions on lands subject to a PNT.

[133] Despite the fact the PNT covers most of the shoreline around Gull Lake, the Director denied the PNT was sterilizing the land around the lake and stated he considered each application on a case-by-case basis. The Director testified while the existence of the PNT did not force him to refuse the application, the fact the field staff's recommendation aligned with the PNT was important. The Director stated the PNT was the most influential factor in the Decision. In reviewing the PNT, the Board notes it requires consultation. It does not reserve land, nor does it dictate the parameters of land use or prohibit land use. The Board also notes the PNT does not

reference the western grebe, which is the species of interest in this matter. Therefore, even if the PNT was binding on the Director, all that was required of him was to consult with the issuing office.

[134] The Director acknowledged he did not discuss the Decision Rationale with the AEP field staff due to the presence of the PNT and left it up to the regional office to determine if the PNT should be “lifted” for the application.

[135] The PNT is at best, policy, not legislation. The Director wavered in his oral testimony at the hearing. At times, the Director stated he could not change the PNT, while at other times he stated he could overrule the PNT. The Board carefully considered the Director’s testimony and submissions, the Director’s Record, and the Decision, and found the Director treated the PNT as binding upon him.

[136] The Director allowed the existence of the PNT to fetter his discretion. By letting a policy fetter his discretion, the Director failed to exercise the discretion granted to him by the Act.

[137] It is acceptable for a decision-maker to adopt a policy, “provided each case is individually considered on its merits,”⁵⁷ but the evidence in the Director’s Record and presented at the hearing indicated the Director did not consider the individual merits of the Appellant’s application due to the existence of the PNT.

[138] Although the Board reviewed the Decision on the standard of correctness, if the Board had reviewed the Decision based on reasonableness, it would have found the Decision to be unreasonable. As submitted by the Director, in the Alberta Court of Appeal decision in *Dorval*, an administrative decision is reasonable if it:

- (a) is justifiable, transparent, and intelligible;
- (b) falls within the range of possible acceptable outcomes that are defensible in respect of the facts and law;
- (c) can stand up to a somewhat probing examination; and
- (d) shows a line of analysis that could lead the decision-maker to its

⁵⁷ David P. Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014), at page 207.

conclusion.⁵⁸

[139] The Board found insufficient evidence in the Director's Record to prove the Decision met the test in *Dorval*. There was a distinct lack of transparency in the Director's Record due to an absence of evidence showing any communication between the Director and AEP field staff occurred regarding the Decision Rationale. The Director admitted in testimony at the oral hearing such communication had not happened. A reasonable decision must fall within the range of possible acceptable outcomes that are defensible in respect to the facts and law. While it is not unreasonable for the Director to refuse an application for a disposition on environmental grounds, in this appeal, the Director's Record did not contain sufficient evidence to support the conclusion reached by the Director. After a somewhat probing examination, the Decision could not be justified. The Director's Record did not support a line of analysis that led to the Decision. In making a decision of this magnitude, the Director must have more than the unsubstantiated recommendations of AEP field staff to make an informed and intelligible conclusion.

[140] As the Board has found the Director made an error on the face of the record by failing to conduct a thorough review of the information available to him, the Board recommends the Minister reverse the Director's Decision and order the Director to issue DLO 140225 to the Appellant, Inshore Developments Ltd., on reasonable terms and conditions to be determined by the Director. In developing reasonable terms and conditions, the Director will need to consult thoroughly with AEP field staff and may need to contact the Appellant if further information is required.

VI. ADDITIONAL COMMENTS

[141] While the Board understands PNTs are useful to AEP, the administration and scope of PNTs seem to be unclear, even to AEP staff. The Director explained PNTs are not intended to prohibit any development on public lands. However, the Board is concerned PNTs may be interpreted by some AEP staff in this way. The Board is particularly concerned a PNT can be authorized by AEP staff who does not have a high level of regulatory authority. The Board suggests the ability to place or change a PNT require approval of a "designated director" or above. The Board also suggests AEP review the process of authorizing PNTs, amending

⁵⁸ *Edmonton School District No. 7 v. Dorval*, 2016 ABCA 8, at paragraphs 36 to 38.

PNTs, and how to approve dispositions on lands subject to a PNT.

[142] The Director testified at the oral hearing the only way an applicant for a disposition, or any member of the public, can find a PNT associated with a parcel of public land is to obtain the information from Alberta Energy. As many applicants for dispositions on public land apply to AEP, the Board suggests AEP consider options to make the process of searching for PNTs easier. For example, AEP could improve applicant awareness of PNTs by making the requirement to obtain a copy of all relevant PNTS as part of disposition application process more obvious. The disposition application process should direct applicants to how the search for a PNT should be conducted. AEP could also improve accessibility for the public by making searches on the Electronic Transfer System available on the AEP website. Making it easier for applicants to be aware of PNTs on public land benefits everyone by ensuring the application process is thorough and more efficient.

VII. RECOMMENDATIONS

[143] The Board recommends the Minister reverse the Director's Decision and order the Director to issue DLO 140225 to the Appellant, Inshore Developments Ltd., on reasonable terms and conditions to be determined by the Director.

[144] In accordance with section 124(4)⁵⁹ of the *Public Lands Act*, R.S.A. 2000, c. P-40, a copy of this Report and Recommendations and of any decision by the Minister regarding this appeal is to be provided to:

1. Mr. Norval Horner on behalf of Inshore Developments Ltd.; and
2. Mr. Larry Nelson, Alberta Justice and Solicitor General, on behalf of the Director, Provincial Appeals Section, Alberta Environment and Parks.

Dated on December 14, 2018, at Edmonton, Alberta.

"original signed by"

AJ Fox, Panel Chair

⁵⁹ Section 124(4) of the *Public Lands Act* provides:

"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 persons who the appeal body considers should receive notice of the decision."

“original signed by”
Marian Fluker, Board Member

“original signed by”
Meg Barker, Board Member



ALBERTA
ENVIRONMENT AND PARKS

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

**Ministerial Order
5/2019**

Public Lands Act
R.S.A. 2000, c. P-40;

and

Public Lands Administration Regulation
Alta. Reg. 187/2011.

**Order Respecting Public Lands Appeal Board
Appeal No. 16-0023**

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 an Order Respecting Public Lands Appeal Board Appeal No. 16-0023.

Dated at the City of Edmonton, Province of Alberta, this 16th day of January,
2018.9


Shannon Phillips
Minister



ALBERTA
ENVIRONMENT AND PARKS

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

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 16-0023

With respect to the decision of the Director, Provincial Approvals Section, Alberta Environment and Parks, (the “Director”), to refuse to issue Department Licence of Occupation (“DLO”) 140225, under the *Public Lands Act*, R.S.A. 2000, c. P-40, to Inshore Developments Ltd., I, Shannon Phillips, Minister of Environment and Parks, order that:

1. Ministerial Order 30/2017 is repealed.
2. The decision of the Director to refuse to issue DLO 140225 is reversed.
3. The Director shall issue DLO 140225 to Inshore Developments Ltd., with reasonable terms and conditions as determined by the Director.