ALBERTA

PUBLIC LANDS APPEAL BOARD

DECISION

Decision Date: April 13, 2018

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 Gionet Holdings Corporation under section 211 of the *Public Lands Administration Regulation* with respect to Miscellaneous Permit No. MLP 060011.

Cite as: *Gionet Holdings Corporation* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* (13 April 2018), Appeal No. 17-0001-D (A.P.L.A.B.).

BEFORE:	Mr. Eric McAvity, Q.C., Panel Chair; Ms. Marian Fluker, Acting Board Chair; and Mr. Dave McGee, Board Member.
SUBMISSIONS BY:	
Appellant:	Gionet Holdings Corporation, represented by Mr. Matthew Farrell, Guardian Law Group LLP.
Alberta Environment and Parks:	Ms. Shelly Currie, Provincial Approvals Section, Alberta Environment and Parks, represented by Ms. Lisa Semenchuk and Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Gionet Holdings Corporation ("Gionet") filed a Notice of Appeal with the Board after the Director, Provincial Approvals Section, Alberta Environment and Parks (the "Director") terminated Gionet's overholding month-to-month tenancy on public lands near Fort McMurray, Alberta.

The Director applied to have the Board review its jurisdiction to hear the appeal. The Board established a process and considered the Director's Record and written submissions from the parties on the following issue:

> Does the Board have jurisdiction to hear an appeal of the Department's decision to terminate the Appellant's month-to-month overholding tenancy and make a recommendation to the Minister?

The Board found that in making determinations of jurisdiction, the Director's Record was required. The Board requested that, as a matter of practice going forward, when the Board receives a Notice of Appel, the Director should prepare the Director's Record and provide it to the Board. Given that appeals before the Board are appeals on the record, the Board will not in most circumstances make a determination regarding an appeal without the Director's Record.

The Board also confirmed its practice with respect to setting the issues and the process to be followed in an appeal. Both the issues and the process for determining the issues will be established by the Board. It is not open to one party to say an appeal is restricted to the issue(s) as defined by that party.

Following a review of the Director's Record provided in this appeal, the written submissions, and the legislation, the Board determined it did not have jurisdiction to hear the appeal filed by Gionet. Therefore, the appeal filed was dismissed.

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I BACKGROUND

[1] In 2008, Alberta Environment and Parks ("AEP") issued Miscellaneous Lease Permit ("MLP") 060011 for approximately 30 acres of public lands located near Fort McMurray, to Gionet Holdings Corporation (the "Appellant"). The MLP was for the purposes of a storage site, a laydown site, shop, and office.

[2] The MLP was initially for a one-year period and appears to have been renewed annually until 2014. The MLP expired in 2014 and the tenancy continued on a month-to-month basis.

[3] Starting in 2014, discussions occurred between the Appellant and AEP with respect to alleged sub-tenants operating on the property. The circumstances surrounding any sub-tenants and any compliance issues are not matters before the Public Lands Appeal Board (the "Board") in this appeal.

[4] On March 13, 2017, the Director sent a letter to the Appellant indicating her intent to terminate the overholding month-to-month tenancy with an effective date of June 1, 2017.

[5] On April 18, 2017, the Board received a Notice of Appeal from the Appellant.

[6] The Notice of Appeal appeals the decision made by the Director on March 13, 2017, to terminate the Appellant's month-to-month tenancy. A copy of the letter terminating the tenancy was appended to the Notice of Appeal.

[7] The relief sought by the Appellant was:

- to be permitted to continue its occupation of the subject lands as a month-to-month tenant;
- to be given direction, with respect to the actions to be taken with unauthorized parties occupying the subject lands;
- to be given direction as to what steps must be taken, prior to reapplication for a long term lease, and

- for leave to reapply for a long term lease when such steps are taken.[1]

[8] On April 18, 2017, the Board, in keeping with its practice, acknowledged receipt of the Notice of Appeal and requested the Director's Record relating to this decision be forwarded to the Board.

[9] On May 15, 2017, the Board received an application from the Director asking the Board to determine whether it had jurisdiction to deal with the appeal. The Director indicated the Board should determine jurisdiction based on the face of the Notice of Appeal and, as a result, she would not be providing the Director's Record.

[10] In response to the Director's application to determine jurisdiction, the Board issued a letter on May 16, 2017, to the Appellant and the Director (collectively the "Parties"). The letter set a schedule for receipt of written submissions on the following issue:

> Does the Board have jurisdiction to hear an appeal of the Department's decision to terminate the Appellant's month-to-month overholding tenancy and make a recommendation to the Minister?

[11] Following receipt of the Parties' submissions, on June 15, 2017, the Board requested a copy of the Director's Record to assist in its deliberations.

[12] On June 20, 2017, the Director's Record was received. The Director reaffirmed her view that the Board was required to determine whether it had jurisdiction based only on its review of the Notice of Appeal.

[13] A further submission schedule was set by the Board on July 14, 2017, to allow the Parties to review the Director's Record. A subsequent request for an extension of time to file the written submissions was made by the Appellant and opposed by the Director. The extension was granted by the Board in its August 1, 2017 letter.[2]

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1 See: Page 3 of the Notice of Appeal dated April 18, 2017.

2 The Board will provide separate reasons for its decision to grant the extension.

II ISSUES

[14] The preliminary issue to be determined is:

> Does the Board have jurisdiction to hear an appeal of the Department's decision to terminate the Appellant's month-to-month overholding tenancy and make a recommendation to the Minister?

[15] The Parties provided initial and supplemental submissions which were lengthy and, in the case of the Director, repetitious. A summary of the main arguments advanced by the Parties is provided below.

III SUBMISSIONS

A. Director

[16] In summary, the Director took the position the Board had no jurisdiction to hear this matter as the decision to terminate an overholding tenancy was not listed in section 211 of the *Public Lands Administration Regulation,* Alta. Reg. 187/2011 ("PLAR").[3] Further, the Director submitted the Board was confined to a review of the Notice of Appeal and did not

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[3] Section 211 provides:
"The following decisions are prescribed as decisions from which an appeal is available:

(a) the issuance, renewal, amendment or suspension of a disposition issued under the Act;
(b) the rejection of an application under the Act for a disposition;
(c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;
(d) the imposition or variation under the Act of a term or condition of a disposition;
(e) a deemed rejection under section 15(1);
(f) an order under section 35(1) to vacate vacant public land;
(g) a refusal under section 43(1) of the Act;
(h) an enforcement order, a stop order or an administrative penalty;
(i) a removal under section 69(2)(f)(iii) of the Act;
(j) an order under section 182;
(k) a refusal to admit, or a requirement to remove, a pet animal under section 194(2);
(l) an order under section 201(b) to vacate a public land recreation area;
(m) an order under section 204(1) to vacate a campsite;
(n) an order under section 205."

require the Director's Record in order to make a decision on jurisdiction. The Director further asserted the Board was confined to responding on this application to the question framed and posed by the Director.

B. Appellant

[17] In summary, the Appellant submitted the process undertaken by AEP was unfair and misleading. The Appellant submitted the termination should be treated as a refusal to renew the month-to-month tenancy or as a deemed rejection of the renewal, and that either the refusal or the deemed rejection should be the basis for the appeal. The Appellant submitted the month-to-month tenancy was an authorization and thereby provided the basis for an appeal. Finally, the Appellant suggested the Board should, by necessary implication, find jurisdiction to review the conduct of the Director. The Appellant argued the conduct of the Director deprived the Appellant of the right to appeal as was the case in *Greene* v. *Alberta (Environment and Sustainable Resource Development)*.[4]

IV ANALYSIS

A. Jurisdiction

[18] Jurisdiction is a foundational matter of prime importance to the Board and always merits serious consideration. The Board will always take any challenges or concerns about its jurisdiction seriously.

[19] The Board's jurisdiction is set out in the *Public Lands Act*, R.S.A. 2000, c. P-40 ("Act") and PLAR. As a creature of statute, the Board does not have any other authority other than that found in the enabling legislation.

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[4] *Greene* v. *Alberta (Environment and Sustainable Resource Development)* 2014 APLAB 14-0006 Interim Decision #1 ("*Greene*").

[20] Macaulay and Sprague in their book, *Hearings Before Administrative Tribunals*,[5] observe that tribunals generally have two procedural choices in conducting reviews of jurisdiction. First, they may review jurisdiction when that matter is raised substantively or second, they may consider jurisdiction as part of the overall determination of the matter.

[21] As a matter of preference, this Board would prefer to deal with matters of jurisdiction as part of the overall consideration of a matter. The reason is the Director's Record and the entire context of the matter are often fundamental to making a proper decision.

[22] As occurred in this appeal, attempting to proceed to resolve an issue in the absence of the Director's Record is challenging and will likely result in a request for the Director's Record in any case.

B. Process In Reviewing Jurisdiction

[23] The Director made a number of submissions with respect to the Board's processes that need to be addressed. These submissions were focussed on three elements: reviews of Notices of Appeal, acceptance of Notices of Appeal, and the materials the Board may consider in reaching a decision on jurisdiction.

[24] The first matter raised by the Director relates to the Board being required to review Notices of Appeal when they are filed.

[25] The Director submitted that "before accepting a Notice of Appeal, the Board is required to review it to determine if it meets the requirements under sections 211, 212, 213, 216 and 217 of the PLAR."[6] The Director cites as authority paragraph 6 of the Board's decision in *Wiebe* v. *Alberta Environment and Parks*.[7]

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[5] Robert W. Macaulay & James L.H. Sprague, *Hearings Before Administrative Tribunals*, 3rd ed. (Scarborough: Thomson Carswell, 2007) at pages 12-124 and 12-124.1.

[6] Director's submission, dated May 15, 2017, at paragraph 25, and restated in paragraph 20 of the Director's submission, dated June 5, 2017. Sections 212, 213, 216 and 217 provide:

"212(1) The following persons have standing to appeal a prescribed decision:
(a) a person to whom the decision was given;

(b) a person, including a commercial user referred to in section 98, that is directly and adversely affected by the decision.

(2) A person referred to in subsection (1)(a) or (b) is a prescribed person for the purposes of section 121 of the Act.

(3) An appeal body must not consider an appeal unless it is satisfied that the appellant is a person described in subsection (1)(a) or (b), and the appeal body's decision on that matter is final.

(4) Where the decision objected to was made in respect of land that is the subject of one or more dispositions or that adjoins other land, any of the disposition holders and any of the owners of the adjoining land that are directly affected by the decision may elect to participate as parties in the appeal.

(5) Subject to the rules established by the Board, the appeal body may allow persons other than those referred to in subsection (4) to be parties to the appeal if the appeal body considers it appropriate.

213 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).

216(1) A notice of appeal must

(a) identify the director or officer who made the decision objected to,

(b) identify the provision of the enactment on which the appeal is based,

(c) include a copy of the decision objected to or, if the decision is not written, a description of it including the date on which it was made,

(d) include the legal description of, or the approximate global position system co-ordinates of the location of, the area of public land to which the appeal relates,

(e) set out the grounds on which the appeal is made,

(f) contain a description of the relief requested by the appellant,

(g) where the appellant is an individual, be signed by the appellant or the appellant's lawyer,

(h) where the appellant is a corporation, be signed by a duly authorized director or officer of the corporation or by the corporation's lawyer, and

(i) an address for service for the appellant.

(2) If a notice of appeal does not comply with subsection (1), the appeals co-ordinator must reject it and immediately notify the appellant in writing of the rejection.

217(1) A notice of appeal must be served on the appeals co-ordinator within

(a) 20 days after the appellant received, became aware of or should reasonably have become aware of the decision objected to, or

(b) 45 days after the date the decision was made,

whichever elapses first.

(2) The appeals co-ordinator may, either before or after the expiry of a period described in subsection (1)(a) or (b), extend the time for service of a notice of appeal if, in the opinion of the appeals co-ordinator, it is not contrary to the public interest to do so.

[26] With respect, the Board does not share the Director's interpretation of PLAR, the decision in *Wiebe,* and the Board's letter of April 18, 2017.

[27] Section 219 of PLAR grants the appeals co-ordinator the discretion to reject a notice of appeal if it is not served in accordance with section 217 or if, in the Appeals Co-ordinator's opinion, the notice of appeal does not meet the requirements of section 219.[8]

[28] This discretionary provision enables the Appeals Co-ordinator to reject a notice of appeal for a failure of form (section 216) or for a failure in service. While both matters of form and service may affect jurisdiction, the discretionary decision being made by the Appeals Co-ordinator in section 219 is not a formal determination of jurisdiction by the Board.

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(3) A notice of appeal must be served on the appeals co-ordinator
  (a) at the physical address of the appeals co-ordinator as shown in any publicly-available records of the Department, by
    (i) personal service, or
    (ii) a method of delivery that provides a signature proving receipt by the office of the appeals co-ordinator,
  (b) by fax to the fax number for the appeals co-ordinator as shown in any publicly-available records of the Department, or
  (c) by e-mail to the e-mail address for the appeals co-ordinator as shown in any publicly-available records of the Department.

(4) Despite subsection (3)(b) and (c), service by fax or e-mail is not effective unless the appeals co-ordinator acknowledges receipt of the fax or e-mail.

(5) On being served with a notice of appeal, the appeals co-ordinator must provide a copy of it to the director or officer who made the decision objected to.

[7] *Wiebe* v. *Alberta (Environment and Parks),* (22 July 2016), APLAB 15-0020-R (*"Wiebe"*). Paragraph 6 of *Wiebe* states:

"The Board reviewed the Notice of Appeal and found that it met the requirements under sections 211, 212, 213, 216, and 217 of PLAR and accepted the Notice of Appeal on July 24, 2015. The appeal was assigned appeal number PLAB 15-0020 (the "Appeal"), the Parties were notified by letter, and the Director's Record (the "Record") was requested to be provided by August 17, 2015. The Board specified that it could not hear any appeal involving the sale or exchange of land, and could only hear the appeal of the refusal to grant an agricultural disposition."

[8] Section 219 provides:

"(1) The appeals co-ordinator may, in his or her discretion and within 5 days after being served with a notice of appeal, reject the notice of appeal if it was not served in accordance with section 217 or if, in the opinion of the appeals co-ordinator, it does not meet the requirements of section 216.

(2) Where the appeals co-ordinator rejects a notice of appeal, the appeals co-ordinator must provide a notice of a rejection to the appellant and must make the notice available to the public."

[29] Paragraph 6 of the *Wiebe* decision, which the Director cites, is a factual narrative of events undertaken by the Board in that case. It is not a statement of the Board's practice, nor is it a direction to parties in future appeals. It is not a helpful or useful reference in the current appeal.

[30] The second matter raised by the Director is the concept of "acceptance" of Notices of Appeal.[9] In particular the Director references the Board's acceptance of the Notice of Appeal in its April 18, 2017 letter. This language seems to be linked back to paragraph 6 in *Wiebe*.

[31] The Board's letter of April 18 2017, does not speak of "acceptance". The letter, in keeping with the Board's practice, references the receipt of a Notice of Appeal, provides a summary of the Notice of Appeal, requests information (the Director's Record) and contact information for the parties, and outlines the Board's anticipated procedure.

[32] To be clear, in acknowledging receipt of a Notice of Appeal in this way, the Board makes no determination of jurisdiction nor any finding on the merits of an appeal. This type of letter is merely procedural and informational and does not circumvent the parties' ability to raise preliminary motions or to fully advance arguments on the merits of the matter.

[33] The final matter raised by the Director is the materials the Board may consider in determining jurisdiction. There are two points in issue here: first, the documents the Board may review and, second, how the Board may address the matters before it.

[34] In her submissions,[10] the Director suggested that in reviewing jurisdiction the Board was limited to reviewing the Notice of Appeal. No authority was cited for this proposition. In reviewing any matter to determine jurisdiction the Board is not limited to a review of the Notice of Appeal.

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[9] See: Director's submission dated May 15, 2017, at paragraph 25; Director's submission dated June 5, 2017, at paragraphs 9, 12, and 20; and Director's submission dated September 29, 2017, at paragraph 12.

[10] See: Director's submission dated June 5, 2017, at paragraph 6; and Director's submission dated September 29, 2017, at paragraph 70.

[35] The Board is mindful that most appellants seeking to obtain relief through an appeal to the Board are not lawyers and will be doing their best to explain their concerns and the issues as they see them. It would be imprudent and unfair to simply look to the form of a Notice of Appeal as the basis for making a decision on jurisdiction. The Board must be concerned with substance and, therefore, the Board is entitled to request and consider the Director's Record.

[36] The Board seeks to understand the nature of the decision in question and the appellant's concerns. To be clear, the Board is interested in the substance of the decision in question and not simply the characterization of it by any of the parties.

[37] In nearly every case, to properly evaluate and make a decision on jurisdiction, the Board will require the Director's Record of the impugned decision. As noted above, the complete Director's Record relating to the decision in question allows the Board to have a clear understanding of the actual decision taken, the context in which the decision was made, and the considerations that were before the decision-maker.

[38] A further benefit of obtaining the Director's Record is that it provides all parties with a common base of information upon which to make submissions. This is important both as a matter of fairness and evidence.

[39] Finally, it is important to note that section 120 of the Act requires that an appeal under the Act must be based on the decision and the record of the decision-maker.[11]

[40] It would be helpful if the Director always provided a copy of the Director's Record to the Board when it is requested by the Board. A false economy is achieved by thinking that time will be saved by refusing to provide the Director's Record or sending it in later.

[41] The Director also asserted in her submissions that the Board was constrained to consider only the question that had been framed by the Director and is "unable to otherwise reframe or revise the question asked by AEP."[12]

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11 Section 120 of the Act provides:

"An appeal under this Act must be based on the decision and the record of the decision-maker."

12 Director's submission dated September 29, 2017, at paragraphs 13 and 17.

[42] This is simply wrong. The Board has complete power to frame the matters that are before it.[13]

[43] The Board rejects the submissions made by the Director[14] that:

(a) "if the Board does not understand the question asked or requires clarification, it must ask the Department;" and

(b) the Board "must not on its own initiative reframe or revise the question asked by the Department."

[44] These submissions seriously misapprehend the decision-making power of the Board provided for in the Act and PLAR.

[45] The Board clearly is responsible for its process and does not answer to nor is it bound by the parties or their submissions. The Board, not the parties, is in charge of its process.

C. Authority to Terminate an Overholding Tenancy

[46] Turning to the substantive matter, the question before the Board is whether the decision to terminate an overholding tenancy under section 20(3) of PLAR constitutes a decision which is capable of review by the Board under section 211 of PLAR[15].

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13 Section 123(9) of the Act states:
"Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it."

14 Director's submission dated September 29, 2017 at paragraphs 14-17.

15 Section 20(3) provides:

"Where a disposition expires without being renewed and the former holder of the disposition does not vacate the subject land, the former holder is deemed to be an overholding tenant on a month-to-month basis in respect of the subject land, and the director may do one or more of the following as the director considers appropriate in the circumstances:

(a) take one or more enforcement actions in respect of the subject land or any activity on it;
(b) issue a formal disposition to the holder of the expired disposition in place of the expired disposition, whether or not an application has been made for the formal disposition;
(c) issue an authorization to the holder of the expired disposition to carry out any work on the subject land that the director considers necessary, whether or not an application has been made for the authorization;
(d) dispose of chattels and improvements in accordance with section 62 of the Act;
(e) direct that any interest of the holder in the subject land be offered for sale by public tender or auction."

[47] In order to make a determination in this regard, a number of considerations must be taken into account.

[48] The first is to appropriately characterize the letter of termination provided by the Department to the Appellant.

[49] While counsel for the Director indicated on several occasions this is a clear and straightforward point, there was no guidance or clarification as to the source of the authority for the March 13, 2017 letter referenced.

[50] As mentioned, in discharging its duties, the Board is not content with simply characterizing the decision or action of the Director. The Board needs to appropriately understand the decision or action complained of, which requires all relevant information be provided to the Board.

[51] Fundamental to discharging this duty, the Board is concerned about the authority of the Director to terminate a month-to-month overholding tenancy. Neither the Act nor PLAR speak of this authority. It would have been useful for the Director to state where this authority comes from.

[52] Fundamentally, there can only be three potential sources of authority for the termination letter: legislation, contract, or the common law.

[53] In this case, there is no authority to be found in the legislation that provides for termination of an overholding tenancy, and a review of the MLP in question does not provide any contractual basis for the Director to terminate an overholding tenancy. This leaves the common law as the only potential source of authority to terminate the tenancy.

[54] Where there is a lease for a period longer than one year, and where there has been consent by the landlord to the overholding, the common law implies an overholding tenancy based on the same terms and conditions found in the original lease on an annual basis. In such cases, the landlord has the right to terminate those overholding tenancies by giving one's year notice.

[55] In this case, section 20(3) of PLAR has amended the common law by providing that an overholding tenancy is on a month-to-month basis.

[56] While not clearly addressed by the Director, the Board finds the common law is the valid basis for the Director exercising authority to terminate an overholding tenancy. If the Board did not reach this conclusion, the Director would be placed in the untenable position of not being able to terminate overholding tenancies. This would be an unreasonable result.

[57] The Board finds the common law provides a legitimate basis for the Director to terminate the overholding tenancy.

D. Is a Decision to Terminate Appealable?

[58] The next issue is whether the Director's decision to terminate a month-to-month overholding tenancy pursuant to the common law is an appealable decision.

[59] On its face, section 211 does not specifically reference termination as an appealable decision. The Board reviewed this section to determine if the effect of the decision could be characterized as one of the listed decisions which can form the basis of an appeal.

[60] The Appellant argued, in part, the termination should be treated either as a refusal to renew the month-to-month tenancy (section 211(c)) or a deemed rejection of a renewal (section 211(e)). Further, the Appellant submitted the month-to-month tenancy was an authorization.

[61] To be successful in arguing either that there has been a refusal to renew a month-to-month tenancy or that there has been a deemed rejection of an application for renewal, the Appellant must successfully argue that an overholding month-to-month tenancy is a "disposition."

[62] There are at least two definitions found in the Act that deal with dispositions. The first is found in section 1(e) of the Act which provides that:

> "Disposition" means:
>
> "any instrument executed pursuant to this Act, the Former Act, the Provincial Lands Act RSA 1942 c.62 or the Dominion Lands Act (Canada) RSC 1927 c.113 whereby
>
> (a) any estate or interest in land of the Crown, or

(b) any other right or privilege in respect of the land of the Crown that is not an estate or interest in land is or has been granted or conveyed by the Crown to any person, but does not include a grant."

[63] A second definition of a "formal disposition," is found in section 1(o) of PLAR. It provides:

> "'formal disposition' means a disposition issued under the Act before or after the coming into force of this Regulation and bearing a title and number assigned by the Department for the purposes of identifying the disposition in the records of the Department, and includes numbered instruments bearing the title... or any other instrument issued in a form prescribed under section 6 of the Act."

[64] Further, section 19 of PLAR requires that a disposition must be in writing.[16]

[65] The fundamental issue with respect to an overholding tenancy is that it does not exist pursuant to any instrument. As pointed out by the Director, section 20(3) of PLAR deems the former holder of the disposition to be an overholding tenant where a disposition has expired and the former holder of the disposition remains in possession of the land.

[66] As the underlying disposition has expired and has no further force or effect, there is no written instrument that creates the month-to-month tenancy.

[67] If an overholding tenancy is not capable of being a disposition, the provisions of section 211 relating to refusals to renew a disposition or a deemed rejection of an application or to renew a disposition, cannot apply. The Board need not address or consider the question of "renewal" any further.[17]

[68] The Appellant also argued that "authorizations and approvals are also forms of dispositions that could found the basis for an appeal".[18] While the Appellant is correct that authorizations or approvals are other forms of dispositions, they must comply with the

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16 Section 19 provides:

"A disposition must be in writing and may be issued by electronic means."

17 A "disposition" is a fundamental requirement for appeals under section, 211(a) to (e) of PLAR.

18 The Appellant outlined the definitions of these terms as found in PLAR.

requirements of dispositions. As discussed above, a key element is that they must be in writing. Here the month-to-month tenancy is not created by a written instrument.

[69] The Appellant also argued the letter sent on May 15, 2016,[19] by AEP constitutes authority to be on the land and may be viewed as an authorization.

[70] The Board does not accept this argument. The letter of May 15, 2016, does not constitute a letter authorizing the Appellant to be on the land. Rather, it is principally about enforcement concerns, and the sentence quoted clearly is an expression of AEP's view of the Appellant's status.[20] It is not a letter granting authorization to the Appellant to be on the land.

[71] Having reached the conclusion that an overholding tenancy is not a disposition, it becomes apparent that none of the remaining categories listed in section 211 would apply to the decision made in this case.

E. Implied Jurisdiction

[72] The final point made by the Appellant was that, given the unfair treatment of the Appellant by AEP, the Board should find jurisdiction to accept the appeal. The Appellant submits the facts here are similar to those in *Greene*.

[73] The Appellant submitted that, given the nature of the longstanding relationship between the Appellant and AEP, the representations to the Appellant by AEP on needed steps to remedy concerns with the tenancy, and the Board's role to protect interested parties from AEP dealing unfairly with people, it is critical and a necessary implication that the Board has the power to review decisions of AEP.

[74] Further, the Appellant argued that AEP created such confusion with respect to the lease that the Appellant was effectively deprived of notice that the lease had expired and,

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[19] See: Tab 6 of the Appellant's submission, May 30, 2017. The Board further notes this information is not contained in the Record – which under PLAR is meant to be the principle source of evidence in an appeal. The use of affidavit evidence is not encouraged by the Board as it contravenes this basic premise of the Act and Regulation. Where there is a concern about the completeness of the Director's record such evidence would be appropriate.

[20] The May 15, 2016 letter provides, in part:

> "As you are aware, [the Appellant] is an overholding tenant and as such, authorized to occupy the lands for the purpose authorized by the expired MLP only and is required to comply with the terms and conditions set out therein."

therefore, was unable to file an appeal. No formal notification had been provided to the Appellant of the expiry of the lease.

[75] For these reasons the Appellant argued this Board's decision in *Greene* is similar and applicable.

[76] In reviewing the Director's Record and the written submissions of the Parties, it would be fair to say that AEP has not been consistent in its advice to the Appellant. Some of the advice found in the Director's Record dealt with the status of the MLP, some of it dealt with the payment of rent, and other portions of the Director's Record dealt with the investigation undertaken by AEP with respect to sub-tenants.

[77] It seems that within AEP there was some mixture of the issues around this MLP. For example, the February 15, 2017 memorandum from Logan Huscraft to Shelly Currie[21] is a useful summary of much of the correspondence and interaction between the Appellant and AEP. It also addresses the issue of compliance concerns with a recommendation regarding the termination of the overholding tenancy.

[78] The memorandum also points out that AEP could provide clarity to overholding tenants as to: who is the decision-maker on those tenancies and who provides advice to the decision-maker. This would undoubtedly be of assistance to the tenant and would also be of assistance to the Board.

[79] The Director in her submissions repeatedly referred to the "department" as having made the decision to terminate the overholding tenancy. While AEP might do some things, it is clear that Shelly Currie, Team Lead of the Continuation Unit, made the decision to terminate the overholding tenancy. For the purposes of this decision, the Board has referred to her as the Director regardless of her title. In future cases, it would be helpful for counsel for the Director to outline the authority of the decision-maker. It would also be helpful for the decision-maker to make this clear when making a decision.

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[21] See: Tab 3 of the Director's Record.

[80] While the Board is sympathetic to the Appellant's claim of confusion created by AEP, the Board does not accept the contention the confusion was so great as to deny the Appellant the knowledge the MLP had expired nor that the Appellant could not undertake an appeal.

[81] The Director's Record discloses the Appellant was made aware on several occasions the MLP had expired and the Appellant was now an overholding tenant.[22] Further, the Appellant acknowledged this new status and knew that it did not have a current or long term disposition.

[82] For these reasons, the Board does not accept that facts here are similar to those in *Greene*. In that case, it was clear to the Board the unrepresented and illiterate disposition holders relied upon the advice and information provided to them by AEP and did so to their detriment. In this case, the Appellant was represented by counsel and did not demonstrate any impairment in its ability to deal with AEP on a commercial basis.

[83] As a result, the Board does not accept there is a factual basis in fairness or equity to cause the Board to assume jurisdiction other this appeal.

IV CONCLUSION

[84] The Board's view is the Director's letter of March 13, 2017, is a communication of the Director's decision to end the Appellant's overholding month-to-month tenancy. The letter provides a notice period after which the Appellant must vacate the land. The authority for the decision to terminate an overholding tenancy is found in the common law. This weaving together of the common law and legislation is confusing but permissible in law.

[85] Neither the Act nor PLAR provide for an appeal from a decision to terminate an overholding tenancy.

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22 See: For example Tab 4 and the email exchange at Tab 7 of the Director's Record.

[86] Having reviewed the Director's Record and the written submissions of the Parties as well as the Act and PLAR, the Board finds that it does not have jurisdiction to hear an appeal of the Director's decision to terminate the overholding tenancy. Therefore, the Board dismisses the Appellant's Notice of Appeal.

Dated on April 13, 2018, at Edmonton, Alberta.

Eric McAvity, Q.C.
Panel Chair

Marian Fluker
Acting Board Chair

Dave McGee
Board Member