ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision –December 20, 2019

IN THE MATTER OF sections 121, 123, and 125 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 212, 211, 213, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Colette Benson and CRC Open Camp and Catering Ltd. of a decision by the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue Administrative Penalty No. PLA-18/06-AP-LAR-18/10 to Colette Benson and CRC Open Camp and Catering Ltd.

Cite as: Reconsideration Decision: *Colette Benson and CRC Open Camp and Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (20 December 2019), Appeal No. 18-0015-RD (A.P.L.A.B.), 2019 ABPLAB 25

BEFORE:	Ms. Anjum Mullick, Panel Chair; Mr. Gordon McClure, Panel Member; and Mr. Tim Goos, Panel Member.

SUBMISSIONS BY:

Appellants:	Ms. Collette Benson, and CRC Open Camp and Catering Ltd., represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.
Director:	Mr. Neil Brad, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Ms. Collette Benson is the corporate director of CRC Open Camp and Catering Ltd. (CRC), which holds a Miscellaneous Lease (DML). The Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the Director) issued an Administrative Penalty for $1,415,572.50 to Ms. Benson and CRC (the Appellants) for allegedly subleasing the DML land without written consent from the Director. The Appellants appealed the Administrative Penalty to the Public Lands Appeal Board (the Board).

The Appellants requested the Board order the Director to release further disclosure of information not already provided in the Director's file. The Director, without a Board order, released some, but not all, of the requested information. The Board ordered the Director provide the remaining information requested by the Appellants.

The Director refused to comply with the Board's order and applied to the Board for a reconsideration of its decision to require the Director to provide the information requested by the Appellants. The Board agreed to reconsider its decision. The Board received submissions from the Appellants and the Director regarding the reconsideration request. Upon reconsidering its decision to require the Director to provide the information the Appellants' requested, the Board decided to uphold its original decision. The Board advised the parties it would release its reasons for its decision in due course.

This Decision by the Board are the reasons for its decision.

The Board found the situation the Appellants faced due to the Administrative Penalty required a high degree of procedural fairness. A high degree of procedural fairness included a fuller disclosure of information necessary for the Appellants to know the case against them. The Board found the legislation authorized the request for further disclosure.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") on the application by the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, (the "Director") for the Board to reconsider its decision to request the Director provide records as outlined in the Board's July 18, 2019 letter (the "Decision").[1]

II. BACKGROUND

[2] CRC Open Camp and Catering Ltd. ("CRC") is the leaseholder of Department Miscellaneous Lease No. 090101 (the "DML"), and Ms. Colette Benson is the director of CRC.[2]

[3] On December 19, 2019, the Director issued Administrative Penalty No. PLA-18/06-AP-LAR-18/10 (the "Administrative Penalty") under section 59.3(d) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"),[3] to the Appellants for $1,415,572.50. The Director alleged the Appellants:

(a) sublet the DML land without the written consent of the Director;

(b) received money or other consideration as monthly payments for allowing access to and use of the public lands without authority; and

(c) received money (proceeds) from the public auction sale of the DML or other consideration for gaining access to the public lands.

[4] On January 4, 2019, the Appellants filed a Notice of Appeal with the Board, appealing the Director's decision to issue the Administrative Penalty.

[5] On January 9, 2019, the Board requested the Director provide the Director's record, which the Board received on February 22, 2019, and provided to the Appellants on March 21, 2019.

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1 *Colette Benson and CRC Open Camp and Catering Ltd.* v. *Director Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (18 July 2019), Appeal No. 18-0015-DL2 (A.P.L.A.B.), 2019 APLAB 16.

2 CRC and Ms. Colette Benson are collectively the Appellants.

3 Section 59.3(d) of the Act states:

"The director may, in accordance with the regulations, require a person to pay an administrative penalty in an amount determined by the director if the person …

(d) contravenes a term or condition of a disposition or of an authorization under section 20…"

[6] On May 27, 2019, the Appellants advised the Board they would be requesting additional disclosure of information from the Director. The Appellants said some information had not been disclosed in the Director's record, including:

(a) inspection reports;

(b) internal and external email messages;

(c) meeting minutes and memoranda;

(d) other official correspondence from Alberta Environment and Parks ("AEP"); and

(e) other communications, reports, notes, photos and related records in AEP's files from the commencement of the DML with the Appellants.

The Appellants asked the Board if they should raise the disclosure issue in a preliminary application or address it at the mediation meeting the Board scheduled for May 29, 2019.

[7] The Board responded on May 27, 2019, stating if the mediation meeting did not result in a resolution of the appeal, the Board would consider an application by the Appellants for further disclosure. The mediation meeting was held with the Director and the Appellants (collectively, the "Parties") on May 29, 2019, and did not result in a resolution of the appeal.

[8] In response to the Appellants' request for further disclosure, the Director provided an amended Director's record on June 12, 2019, which included some of the records the Appellants were seeking.

[9] On June 21, 2019, the Appellants advised the Board they were applying for additional disclosure of information from the Director.

[10] On July 18, 2019, after receiving written submissions from the Appellants and the Director, the Board provided the Parties with its Decision, in which the Board requested the Director provide:

(a) any records relating to follow-up communications or directives from AEP to the Appellants resulting from the 2013 inspection;

(b) all additional notes or other records prepared by Mr. Paul Smith or other AEP employees relating to the DML since the commencement of the disposition;

(c) any records contained in the GLIMPS system relating to the DML, which were available to the Director at the time of the decision and not already provided; and

(d) all AEP internal emails, memoranda, meeting notes, and other records in relation to the DML.

[11] On July 29, 2019, the Director requested the Board reconsider its Decision.

[12] On August 26, 2019, the Board advised the Parties it would reconsider the Decision.[4] The Board determined it was appropriate to review its Decision to consider whether the Board had made a material error that could reasonably change the outcome of the Decision, as per Rule 26.5(c) of its Interim Appeals Procedure Rules for Complex Appeals (the "Rules").[5]

[13] The reconsideration was limited to the Board's Decision to order the production of additional disclosure with respect to:

- all additional notes or other records prepared by other AEP employees relating to the DML since the commencement of the disposition; and
- all AEP internal emails, memoranda, meeting notes, and other records in relation to the DML.

[14] A written submission schedule for the reconsideration was set on August 26, 2019, with submissions provided on August 29, 2019, for the Appellants' initial submission, September 3, 2019, for the Director's response submission, and September 5, 2019, for the Appellants' rebuttal submission.

[15] On September 5, 2019, the Board advised the Parties if the Board decided additional disclosure was appropriate, the Director would be required to provide the additional disclosure to the Appellants and the Board by 4:30 p.m. on September 10, 2019.

[16] On September 9, 2019, the Board issued its decision on the reconsideration application by the Director. The Board determined its decision to request the records was appropriate and within the Board's jurisdiction. The Board ordered the Director to provide the requested information by 4:30 p.m. on September 10, 2019. The Board advised it would provide reasons in due course.

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4 Letter of the Board, August 26, 2019.

5 Rule 26.5(e) states:

"26.5 The Board will not exercise its powers under section 125 of the Public Lands Act in the absence of the following:…

(a) Material errors that could reasonably change the outcome of the decision…"

[17] On September 9, 2019, the Director wrote the Board and refused to provide the documents as ordered by the Board. The Director stated, "the Director's record complies with the requirements of the *Public Lands Act* and the *Public Lands Administration Regulation* and is therefore complete." The Director further requested the Board's reasons "forthwith so that the Department can consider its available legal steps…."[6]

[18] On September 11, 2019, the Appellants requested the Board adjourn the hearing until the matters related to the disclosure of the additional records were resolved. The Appellants' legal counsel stated: "[i]n the circumstance, we cannot possibly advise the Appellant to proceed with the Appeal on the basis of what is, at this time, an incomplete record."[7]

[19] The Board requested comment from the Director on the adjournment request from the Appellants, and on September 12, 2019, the Director advised he opposed adjourning the hearing.

[20] On September 13, 2019, the Board informed the Parties the hearing was adjourned until after the Board provided its reasons for the reconsideration decision.

[21] On December 5, 2019, the Board received a letter from AEP's Assistant Deputy Minister, Regulatory Assurance Division, ("ADM"), which stated:

> "Alberta Environment and Parks has carefully considered your letter of September 9, 2019, in respect of additional records on this file being requested of the Director.
>
> In absence of reasons for providing documentation beyond the scope of the matter at hand, and the Board's admission that it has not determined the relevancy of the additional requested records, I recommend that PLAB advise the appellant to use the Freedom of Information and Protection of Privacy Act (FOIP) process to glean whatever information they are searching for. I am satisfied that the Director has exerted an exhaustive effort to provide a comprehensive record upon which he grounded his decision. This request for additional and extraordinary information warrants a different and more appropriate tool, such as the FOIP process."[8]

The letter was copied by the ADM to the Appellants and their legal counsel.

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6 Letter from Vivienne Ball, Legal Counsel to the Director, September 11, 2019.

7 Letter from Tara Hamelin, Legal Counsel to the Appellants, September 11, 2019.

8 Letter from John Conrad, Assistant Deputy Minister, Regulatory Assurance Division, Alberta Environment and Parks, December 5, 2019.

III. RECONSIDERATION PROCEDURE

[22] Section 125 of the Act contains the authority for the Board to reconsider any decision it makes.[9]

[23] Under the authority of section 123(9) of the Act,[10] the Board has included in its Rules procedures for dealing with reconsideration requests. The relevant Rules are 26.5 and 26.6.

[24] These Rules state:

> "26.5 The Board will not exercise its powers under section 125 of the Public Lands Act in the absence of the following:
>
> (a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
>
> (b) A procedural defect during the hearing which prejudiced one or both of the parties,
>
> (c) Material errors that could reasonably change the outcome of the decision, or
>
> (d) Any other circumstance the Board considers reasonable and substantive.
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> 26.6 The following are not sufficient grounds for a review:
>
> (a) disagreement with a decision;
>
> (b) failure to provide related case authority; or
>
> (c) present available evidence."

IV. SUBMISSIONS

A. Appellants

[25] The Appellants submitted the Director's interpretation of section 123(4) of the Act is too narrow. Section 123(4) of the Act states: "The appeal body may require the submission of additional information." The Appellants noted section 10 of the *Interpretation Act*, R.S.A. 2000,

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9 Section 125 of the Act states:
"The appeal body may reconsider, vary or revoke any report made by it."

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

c. I-8, requires legislation to be interpreted fairly and liberally.[11] The Appellants stated the Supreme Court of Canada, in *Bell Express Vu Limited* v. *Rex*, confirmed the proper approach to legislative interpretation is to take a large and liberal approach.[12]

[26] The Appellants said while neither the Act or the *Public Lands Administration Regulation*, AR 187/2011 ("PLAR") do not define the term "information," section 123(4) of the Act is not expressly limited to information concerning Notices of Appeals as suggested by the Director.

[27] The Appellants noted the Board could not achieve its objective of enabling the Minister to make informed decisions on public lands appeals if the Board's report to the Minister is based on an incomplete record.

[28] The Appellants submitted the Board, by ordering the additional disclosure from the Director, was interpreting section 123(4) of the Act in a fair and liberal fashion, to provide the fullest possible record to the Minister.

[29] The Appellants stated the Board correctly determined the impact and importance of the Administrative Penalty on the Appellants required the exercise of a higher duty of fairness that required the Director to disclose the requested information. The Appellants argued the Director, by limiting the record to only the information he chose to include in the record, has prevented the Appellants from raising all possible arguments in the appeal.

[30] The Appellants stated the historical interactions between the Appellants and AEP, and AEP's internal communications and discussions related to the DML, are relevant and material to the Appellants' case in the appeal. Therefore, the fullest possible disclosure of the requested information in the Director's file is required to meet the duty of fairness.

[31] The Appellants submitted the Board should deny the Director's reconsideration request.

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11 Section 10 of the *Interpretation Act* provides:

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

12 *Bell Express Vu Limited* v. *Rex*, 2002 SCC 42, at paragraphs 26 and 27.

B. Director

[32] The Director submitted the Board, in its Decision, made three substantial errors in law:

(a) the Board expanded the scope of the "Director's record" beyond the limits established by the legislation without the jurisdiction to do so, despite the express wording of the Act and PLAR, and inconsistent with its previous decisions;

(b) the Board misinterpreted its authority to require information in section 123(4) of the Act; and

(c) the Board conflated the law governing the "Director's record" with its approach to admitting rationally connected evidence at a hearing.

[33] The Director noted an appeal under the Act is based on "the record of the decision-maker…" meaning the Director.[13] The Director stated the Board does not hear the matter anew, but instead reviews the statutory decision being appealed.

[34] The Director submitted the Board does not have the authority to expand the scope of the Director's record beyond what is set out in the Act and PLAR. The Director referred to section 209(f) of PLAR, which reads: "In this Part… 'director's file', in respect of a prescribed decision made by the director, means records of the Department that <u>are considered by the director in making the decision</u>…." [Emphasis by the Director.]

[35] The Director stated section 209(f) of PLAR shows the Legislature provided express direction regarding the scope of the Director's record, limiting it to the materials considered by the Director when making the decision that is the subject of the appeal.

[36] The Director said the "Director's record" is complete and there are no other documents required by law that need to be included. The Director stated he provided an amended Director's record to the Appellants, despite not being required to do so by the legislation.

[37] The Director submitted the Board misinterpreted its authority to require information under section 123(4) of the Act. The Director stated section 123(4) grants the Board authority to request additional information as it relates to notices of appeal only. The Director said:

> "This limited authority is evident from a review of the following sections of the [Act]:

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[13] See section 120 of the Act.

> 1) a notice of appeal must contain the information and be submitted in a form and manner in accordance with the regulations (section 121 (2) under the Heading 'Notice of appeal');
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> 2) the Board may require the submission of additional information as it relates to the notice of appeal (section 123(4) under the heading 'Powers of the appeal body'); and
>
> 3) if the person who submitted the notice of appeal fails to provide further information required by the Board, the Board may dismiss a notice of appeal (section 123(5) under the heading 'Powers of the appeal body')."[14]

[38] The Director stated neither the Act nor PLAR uses the word "information" in relation to records or appeals, other than in procedural contexts.

[39] The Director noted the Board has held it can admit evidence during an oral hearing if the evidence is rationally connected to the evidence found in the Director's record. The Director submitted the Board's approach only applies to evidence at an oral hearing, not to the Director's record.

[40] The Director stated the Appellants failed to provide any particulars or any evidence that the Director's record is incomplete. The Director said the cost of wasted time and resources to search for materials described in paragraphs (b) and (d) on page 5 of the Decision outweighed any incremental or other benefit to the Appellants and the appeal process. The Director submitted it was contrary to the principles of fairness to request the Director use his time and resources to carry out the requested search without restrictions or limits that would bring them properly within the nature and scope of the Director's record as required by the Act and PLAR.

[41] The Director stated the Appellants' request for additional notes, records, internal emails, memoranda, meeting notes in relation to the DML is a "fishing expedition to obtain materials that are not relevant to its appeal of the administrative penalty issued by the Director."[15]

[42] The Director submitted the Appellants' request for additional records is similar to a request under the *Freedom of Information and Protection of Privacy Act* ("FOIP"),[16] and the Appellants are trying to circumvent the requirements of FOIP.

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14 Director's Letter dated July 29, 2019, at page 3.

15 Director's Letter dated July 29, 2019, at page 5.

16 *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

[43] The Director requested the Board apply the definition of the Director's record as provided in the Act and PLAR, and vary the Decision to exclude the records the Director objected to providing.

C. Appellants' Rebuttal

[44] The Appellants submitted the Board did not make any errors of law in its Decision. The Appellants stated section 120 of the Act[17] does not prevent the Board from ordering further disclosure of information for appeals. The Appellants said if the Legislature had intended to prohibit the Board from ordering further disclosure, it could have made that intention clear in section 120 by using words analogous to "only" or "solely."

[45] The Appellants stated the Director erred by using the terms "Director's record" and "Director's file" interchangeably in his submissions, and the Board also erred in previous decisions that interchanged those terms.

[46] The Appellants noted the term "Director's record" is not defined in the Act or PLAR, and the term "Director's file" is not referenced in section 120 of the Act. The Appellants submitted if the intention was to limit the documents considered by the Board in appeals to only those records the Director had considered in reaching his decision, the wording of section 120 would have included the term "Director's file."

[47] The Appellants noted section 209(m) of PLAR defines record as "record as defined in the Freedom of Information and Protection of Privacy Act." The Appellants referred to section 1(q) of FOIP, which states:

> "In this Act…
>
> (q) 'record' means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records…."

The Appellants submitted the Legislature granted the Board broad discretion to obtain disclosure beyond the records found in the Director's file.

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[17] Section 120 of the Act states:

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

[48] The Appellants submitted that Rule 14 of the Board's Rules [18] authorizes the Board to request a broad range of additional materials from either party to an appeal. The Appellants said if the Legislature had intended appeals before the Board were to be confined solely to the records in the Director's file, it would not have provided the Board with authority to order the disclosure of additional records and other materials.

[49] The Appellants argued the Board's decision in *165492 Alberta et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks ("Kalinski")*[19] is distinguishable from the Appellants' appeal. The Appellants stated the appellants in *Kalinski* were attempting to introduce new evidence, which was not before the Director when he made his decision, which is not the case in this appeal.

[50] The Appellants submitted to advance their appeal of the Administrative Penalty effectively, they require the disclosure of all materials in the Director's possession relating to the DML and AEP's investigation.

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[18] Rule 14 of the Rules states:

"14.1 If a party makes a request for an order for disclosure, the request must:

(a) Identify as precisely as possible the information or material required and the issue(s) to which it relates; and

(b) Provide details explaining how the disclosure requested may be relevant to the issue(s) to be considered by the panel.

14.2 The Board may grant an order for disclosure regarding:

(a) Material that has not been disclosed as required by these Rules, a preliminary hearing decision, or other legal requirement; or

(b) Material that is

(i) Within the control of another party,

(ii) Not readily available from another source,

(iii) *Prima facie* relevant to the proceedings before the Board, and

(iv) Reasonably necessary for the person requesting the information to make its own submissions.

14.3 A panel may, after first considering a request made under this Rule:

(a) Order disclosure within a specific time of all or some of the information or material requested by the other party, with or without conditions, including conditions to protect confidential information,

(b) Refuse to order disclosure of the information requested,

(c) Assess costs if, in the opinion of the panel, the disclosure was unreasonably withheld or unreasonably requested,

(d) Give any other direction it deems to be appropriate."

[19] *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.).

[51] The Appellants disagreed with the Director's submission that the costs of the additional disclosure outweigh the benefits and that the Appellants were engaged in a "fishing exhibition." The Appellants stated they provided parameters for their request for information and the records are already in the Director's possession.

[52] The Appellants disputed the Director's argument that the request for additional records is an attempt to circumvent the requirements of FOIP. The Appellants submitted the Board has statutory authority to require further disclosure, and the Appellants have used all the mechanisms available to them to challenge the Administrative Penalty fully.

[53] The Appellants requested the Board deny the Director's Reconsideration Request and confirm its Decision.

V. ANALYSIS

[54] Following a hearing on the merits of an appeal, section 124(1) of the Act requires the Board to submit a report and recommendation to the Minister of Environment and Parks, who then considers the Board's report and makes his decision respecting the appeal. In carrying out its duties for the Minister, the Board undertakes to provide the best possible information and advice in its report and recommendations. The Board strives to ensure the Minister has all the facts, arguments of the parties, and recommendations of the Board, when he make his decision. In making its report and recommendations to the Minister, the Board must keep in mind the principles of procedural fairness, and the requirements of the Act and PLAR.

[55] The Act and PLAR authorize the Board to make decisions regarding procedural matters. As with the report and recommendations it submits to the Minister, the Board strives to ensure it has all the facts and arguments of the parties when making a decision, and keeps in mind the principles of procedural fairness, and the requirements of the Act and PLAR.

A. Procedural Fairness

[56] Procedural fairness is a cornerstone of administrative law. The Alberta Court of Queen's Bench described procedural fairness as follows:

> "Procedural fairness ensures that administrative decisions are made using a fair, impartial, open, and transparent process that provides those affected by the decision

> an opportunity to know the case against them and to fully put forth their views and the evidence they wish the decision-making body to consider."[20]

[57] Administrative decision-makers, such as the Director and the Board, must reach decisions in a procedurally fair manner. In an appeal, the Board must extend procedural fairness to both the appellant and the director, which is a responsibility the Board takes very seriously.

[58] One of the most important principles in procedural fairness stems from the legal principle a*udi alteram partem*, which means, "hear the other side." The Courts have expanded a*udi alteram partem* to mean, "parties must be made aware of the case being made against them and given an opportunity to answer it…."[21] In the Supreme Court of Canada decision, *Consolidated Bathurst Packaging Ltd.* v. *International Woodworkers of America, Local 2-69 et al*., the Court stated:

> "Since its earliest development, the essence of the audi alteram partem rule has been to give the parties a 'fair opportunity of answering the case against [them]': *Judicial Review of Administrative Action* at 158. It is true that on factual matters the parties must be given a 'fair opportunity ... for correcting or contradicting any relevant statement prejudicial to their view': *Board of Education* v. *Rice*, [1911] A.C. 179 at 182…." [22]

[59] Reasonable access to relevant records and information is essential to providing appellants of a director's decision a "fair opportunity of answering the case against [them]." The Supreme Court of Canada said in *Ruby* v. *Canada (Solicitor General)*: "As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position."[23]

[60] If an appellant is to know the case to be met and present supporting evidence, it must receive the information and records relevant to the decision being appealed. The context of

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[20] *Buryn* v. *Alberta (Minister of Municipal Affairs)*, 2017 ABQB 613 (QB), at paragraph 31.

[21] *Canadian Cable Television Association* v. *American College Sports Collective of Canada Inc.*, [1991] 3 FC 626 (FCA), at paragraph 13.

[22] *Consolidated Bathurst Packaging Ltd.* v. *International Woodworkers of America, Local 2-69 et al*., [1990] 1 SCR 282, 1990 SCC 132, (S.C.C.), at paragraph 51.

[23] *Ruby* v. *Canada (Solicitor General)*, 2002 SCC 75, at paragraph 40.

the individual appeal and the governing legislation determines the amount of disclosure necessary to ensure procedural fairness.[24]

[61] In *May* v. *Ferndale Institution*, the Supreme Court of Canada examined the level of disclosure required in an administrative law context compared to a criminal law situation. The Court had previously set a high standard of disclosure for criminal matters in its decision in *R.* v. *Stinchcombe*.[25] The Court found the high standard of disclosure in *Stinchcombe* did not apply in the administrative context as there was not a criminal trial and innocence was not at stake. However, the Court said procedural fairness and statutory obligations could impose a higher than usual degree of disclosure in an administrative law situation. The Court stated:

> "In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision-maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction. As Arbour J. held in *Ruby*, at paragraph. 40:
>
> > As a general rule, a fair hearing must include an opportunity for the parties to know the opposing party's case so that they may address evidence prejudicial to their case and bring evidence to prove their position....
>
> Therefore, the fact that *Stinchcombe* does not apply does not mean that the respondents have met their disclosure obligations. As we have seen, in the administrative law context, statutory obligations and procedural fairness may impose an informational burden on the respondents."[26]

[62] The Board finds in this appeal the statutory and procedural fairness obligations place a high degree of responsibility on the Director to provide the information necessary for the Appellants to know the case to be met. For the Appellants to determine if the Director has made an error of fact, an error of law, or exceeded his jurisdiction, and to respond appropriately to the Administrative Penalty, they must be able to review the information in the context of the full record.

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[24] *Terry Lee May (Appellant)* v. *Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada (Respondents)*, 2005 SCC 82, at paragraph 90. ("May v. Ferndale Institution.")

[25] See: *R.* v. *Stinchcombe*, [1991] 3 SRC 326, 1991 SCC 45.

[26] *Terry Lee May (Appellant)* v. *Warden of Ferndale Institution, Warden of Mission Institution, Deputy Commissioner, Pacific Region, Correctional Service of Canada and Attorney General of Canada (Respondents)*, 2005 SCC 82, at paragraphs 92-93.

B. Legislation and Rules

[63] The statutory framework the Director and the Board operate under is a relevant factor the Board must consider when determining the degree of procedural fairness that is appropriate.

[64] The *Interpretation Act*, R.S.A. 2000, c. I-8, sets out how legislation in Alberta is to be interpreted. Sections 2 and 3 of the *Interpretation Act* provide for the scope of the legislation:

> "2 This Act applies to every enactment whether enacted before or after the commencement of this Act.
>
> 3(1) This Act applies to the interpretation of every enactment except to the extent that a contrary intention appears in this Act or the enactment.
>
> (2) The provisions of this Act apply to the interpretation of this Act except to the extent that a contrary intention appears in this Act.
>
> (3) Nothing in this Act excludes the application to an enactment of a rule of construction applicable to it and not inconsistent with this Act."

There is nothing in the Act or PLAR to suggest the *Interpretation Act* does not apply.

[65] Section 10 of the Interpretation *Act* requires legislation to be interpreted fairly and liberally. It reads: "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects." The Board, when interpreting the Act and PLAR, must view the legislation as being remedial, meaning legislation that promotes the public welfare and the public interest. The existence of the Board attests to the Legislature's intent to manage public lands in a way that recognizes its societal benefits and the importance of an appeal process to the effective and fair use of those lands.

[66] A recognized expert on statutory interpretation, Professor Ruth Sullivan, in discussing the concept of "liberal construction" of legislation, stated:

> "In liberal construction, the court takes a purposive and a benevolent approach. It does what it can to promote the social goals of the legislation and doubts about the meaning or scope of the legislation are resolved in favour of the person seeking its benefit. Liberal construction often leads the court to adopt an expansive interpretation of provisions defining benefits and entitlements, while procedural requirements and other formalities are minimized."[27]

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[27] Ruth Sullivan, *Statutory Interpretation* (Concord, ON: Irwin Law, 1997) at page 168.

[67] The Supreme Court has noted a "large and liberal" interpretation must also be plausible and logical.[28]

[68] When reviewing the Appellants' request for further disclosure, the Board has interpreted the Act and PLAR from a "fair, large and liberal construction and interpretation that best ensures the attainment of its objects," as required by section 10 of the *Interpretation Act*.

[69] The Board notes section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker." Only decisions of the Director prescribed in PLAR are appealable to the Board. The record of the Director is defined in section 209(m) of PLAR as: "'record' means record as defined in the *Freedom of Information and Protection of Privacy Act*…."

[70] Section 1(q) of FOIP, defines "record" as follows:

> "In this Act…
>
> 'record' means a record of information in any form and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records…."

[71] A review of the legislation confirms an appeal to the Board must be based on an appealable decision of the Director and the record of the Director, which includes an expansive list of items as defined in FOIP. It is important to note section 120 of the Act does not include words such as "limited" or some other restriction.

[72] PLAR includes a definition for "director's file" in section 209(f) as follows:

> "In this Part…
>
> (f) 'director's file', in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision;"

The Board notes the term "director's file" is not used anywhere in the Act or PLAR other than in this definition. "Director's file" appears to be an "orphan" clause.

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[28] *Godbout* v. *Pagé*, [2017] 1 S.C.R. 283, at paragraph 28.

[73] The Board has considered this "orphan" clause and whether it is the result of a gap in legislation or a drafting error. These are two concepts that the Court has discussed concerning "orphan" clauses. In this case, it is neither. A gap in the legislation is "a failure by the legislature to come up with a direction or plan that is appropriate for its purpose…." A drafting error "occurs when the language chosen by the drafter fails to express the rule that the legislature intended to enact."[29] The inclusion in PLAR of the definition for "director's file" without usage elsewhere does not create a gap in the legislation, and there is no evidence the drafter chose inappropriate language to express a legislative intent. The purpose of the phrase "director's file" can be determined from reviewing the legislation in the context of an appeal.

[74] In making a decision, a director considers the director's file, which consists of information the director gathered from the Department's record. It is clear there is a distinct difference between the record and the director's file. The record encompasses the director's file, and includes other documents and information not in the director's file. The director's file represents a subset of the record that the director considered. What is also clear is that the terms cannot be used interchangeably as the Director has suggested.

[75] In the Board's view, the director's file can be inadequate for the purposes of full disclosure to an appellant because it may not contain enough information for an appellant to make their case, or because there is insufficient information to show the director considered the decision in the context of the entire record. If the director is considering only a portion of the record, there may be important information that is not coming to the director's attention. In natural justice and procedural fairness terms, the director, by only considering a subset of the record, may make a reviewable error of law or error of fact by failing to take into account relevant information.

[76] An appellant may be aware of information missing from the director's file. In such situations, the appellant, the Board, and the director, need to review all relevant documents and information contained in the record. It is possible the missing information could influence the Board's recommendation to the Minister to confirm, reverse, or vary the director's decision.

[77] For example, in this case, the subject of the appeal is the alleged offence of illegal subleasing of the DML. Without pre-judging the matter in any way, the Board notes it could be

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[29] Ruth Sullivan, *Statutory Interpretation* (Concord, ON: Irwin Law, 1997) at pages 162-164.

possible the full Director's record may contain information important to the Appellants' case in this appeal. Such information may provide additional defences to the Appellants. In the Board's view, natural justice and procedural fairness mandate that the Appellants have the benefit of access to such information.[30]

[78] In this appeal, the Appellants requested records they claimed were missing or should have been included in the Director's file, specifically:

> "• Any records relating to follow-up communications or directives from AEP to the Applicants resulting from the 2013 inspection;
>
> • All additional notes or other records prepared by Paul Smith or other AEP employees relating to the Lands since the commencement of the disposition;
>
> • All records contained in the GLIMPS system relating to the Lands; and
>
> • All AEP internal emails, memoranda, meeting notes and other records in relation to the Lands."[31]

The Board notes the Director reviewed the Director's record and provided some additional records. The Board appreciates the Director's cooperative response in that particular instance.

[79] Although the Director provided some of the requested documents, there was still information and documents the Director did not release. The Board reviewed the documents filed by the Director and the correspondence from the Parties regarding the Appellants' request. The Board determined the Appellants' request for additional documents was reasonable and potentially necessary to enable the Appellants to make their case fully.

[80] The Director submitted that the Board's authority to require information under section 123(4) of the Act is limited to requesting additional information related to the Notice of Appeal. The Director noted the term "information" is not defined in the Act or PLAR, but the meaning could be determined from the way "information" is used in sections 121(2), 123(4), 123(5) of the Act.

[81] The Board does not agree with the Director's narrow and strict interpretation of the legislation. The Director has plucked the term "information" from three sections without any

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30 The Board wants to be clear that this is merely an example of what the Board is concerned about and should in no way suggest what the Board is expecting to find in the requested documents.

31 Appellants' letter, June 29, 2019, at page 3.

regard to overall context. The sections referred to by the Director are best considered using the contextual analysis rule, which requires interpretation of the legislation in its proper context. Professor Sullivan wrote:

> "The contextual analysis rule tells interpreters to read the legislation in context, including the rest of the Act, the legal context generally, and the external context in which the Act must operate. An interpretation that is consistent with the context is preferred over one that is not."[32]

The Board applied a contextual analysis to the legislation when considering the Director's argument regarding the meaning of the word "information."

[82] Section 121(2) appears under the heading "Notice of appeal." Not surprisingly, sections 121(1), (2), (3), and (4) refer to the Notice of appeal.[33] Section 121(2) refers to information required for a notice of appeal under PLAR. Section 121(2) of the Act is addressed by section 216(1) of PLAR, which lists the requirements necessary for a notice of appeal to be accepted by the Board.[34]

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[32] Ruth Sullivan, *Statutory Interpretation* (Concord, ON: Irwin Law, 1997) at page 28.

[33] Section 121 of the Act provides:

"(1) A notice of appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the regulations.

(2) A notice of appeal must contain the information, and be submitted, in a form and manner in accordance with the regulations.

(3) A notice of appeal submitted under subsection (2) initiates an appeal of the decision objected to.

(4) Submitting a notice of appeal does not operate to stay the decision objected to."

[34] Section 216(1) of PLAR reads:

(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.

[83] Section 123(4) of the Act states: "The appeal body may require the submission of additional information." The previous subsections, 123(1), (2), and (3), refer to a stay of a decision, and the authority of the Board to determine which matters will be heard at a hearing of the appeal. The subsections after section 123(4), subsections (5) to (11), refer to the dismissal of a notice of appeal, the authority of the Board to allow parties to make representations, the discontinuance of an appeal upon the withdrawal of a notice of appeal, the authority of the Board to establish its own rules and procedures, the non-application of the *Regulations Act*, and the awarding of costs.[35]

[84] When viewed as a whole and in context, section 123 outlines the powers of the Board to manage an appeal, and many of the subsections enable the Board to facilitate procedural fairness throughout the entire appeal process. Nowhere in section 123, or anywhere else in the

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[35] Section 123 of the Act states:

"(1) The appeal body may, on the application of a party to a proceeding before the appeal body, stay a decision in respect of which a notice of appeal has been submitted.

(2) Prior to conducting a hearing of an appeal, the appeal body may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal.

(3) Where the appeal body determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.

(4) The appeal body may require the submission of additional information.

(5) The appeal body may dismiss a notice of appeal if

(a) it considers the notice of appeal to be frivolous or vexatious or without merit,

(b) for any other reason the appeal body considers that the notice of appeal is not properly before it, or

(c) the person who submitted the notice of appeal fails to provide further information required by the appeal body.

(6) The appeal body shall dismiss a notice of appeal if a matter has been adequately dealt with through a hearing or review under any enactment.

(7) 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.

(8) The appeal body shall discontinue its proceedings in respect of a notice of appeal if the notice of appeal is withdrawn, once the appeal body is satisfied that all issues related to the appeal have been resolved.

(9) Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it.

(10) The *Regulations Act* does not apply to rules made under this section.

(11) The appeal body may award costs of and incidental to any proceedings before it on a final or interim basis and may, in accordance with the regulations, direct by whom and to whom any costs are to be paid."

Act or PLAR, is there any wording that reasonably suggests a restriction of the Board's authority to request further information.

[85] The Board notes that while the Act and PLAR do not define the word "information," FOIP, which uses the word "information" 379 times, also does not provide a definition. The Board suggests the reason "information" is not defined is because it is a word that is sufficiently common that it does not require defining by legislation. The Oxford Dictionary defines "information" as "facts or knowledge provided or learned as a result of research or study."[36] In the context of the Act and PLAR, the Oxford definition is appropriate.

[86] "Information" appears in the FOIP definition of "record", which, as pointed out earlier, is the definition used by PLAR in section 209(m).[37] Section 123(4) authorizes the Board to request further information, which means information contained in the records of the department. The Board exercised that authority in requesting the Director provide further information that would more fully complete the information before the Board.

[87] The Board also notes that section 166(1) of PLAR lists documents and information that must be disclosed to the public if in the possession of AEP.[38] Such disclosure is standard and

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[36] *The Concise Oxford Dictionary*, 10 ed. (Oxford, UK: Oxford University Press, 1999), at page 727.

[37] Section 209(m) of PLAR reads:

"'record' means record as defined in the *Freedom of Information and Protection of Privacy Act*;"

[38] Section 166(1) of PLAR states:

"Subject to this section,

(a) the following documents and information must, if in the control of the Department, be disclosed to the public in accordance with this Part:

  (i) documents registered in a book authorized by the Minister for the purposes of Part 5 of the Act, and any other documents to which they refer;

  (ii) plans, specifications and other documents and information provided to the Department as part of an application

    (A) by an applicant for a disposition, or

    (B) by the holder of a disposition to renew, suspend, cancel, amend, assign, transfer, sublet or mortgage it;

  (iii) written notices of appeal;

  (iv) documents and information provided to the Department in accordance with the Act, this Regulation or a term or condition of a disposition;

  (v) information contained in a registry established by the Department;

(b) the following documents that are created or issued to any person by the Department in the administration of the Act must be disclosed to the public in the form and manner provided for in this Part:

  (i) any forms established under the Act but not prescribed;

would be expected in the Director's file. The information the Appellants requested is in addition to the standard disclosure. The Legislature intended for appeals to include more than just the standard disclosure already required under PLAR.

[88] Further, section 123(9) provides the Board authority to set its own rules and procedures in relation to appeals, subject to PLAR.[39] The Board specifies in its Rules that the purpose of the Rules is to "ensure a fair, open and accessible process in accordance with the principles of natural justice."[40]

[89] The operating principles within the Rules are outlined as follows:

> "These rules recognize the following principles to the extent they are consistent with the legislated requirements governing the activities of the Board.
>
> - Parties to an appeal must have a fair opportunity to be heard and to understand and respond to the positions of the other parties involved.
> - Procedures should be accessible and straight forward enough to be understood and followed by most parties without compromising natural justice."[41]

[90] Rules 2.4(c) and (d) provide:

> "2.4 The Public Lands Appeal Board or a panel of the Board has all the powers necessary to conduct a fair, expeditious and impartial hearing of an appeal, including the following powers:
> …

(ii) dispositions;
(iii) interpretation letters or other instruments providing a record of the Department's interpretation of a provision of the Act or this Regulation;
(iv) warning letters;
(v) notices of intent to suspend;
(vi) notices of intent to cancel;
(vii) notices of amendment;
(viii) notices of suspension;
(ix) notices of cancellation;
(x) enforcement orders;
(xi) stop orders;
(xii) notices of administrative penalty."

39 Section 123(9) of PLAR provides:

"Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it."

40 *Interim Appeals Procedure Rules for Complex Appeals*, Public Lands Appeal Board, at page 3.

41 *Interim Appeals Procedure Rules for Complex Appeals*, Public Lands Appeal Board, at page 3.

(c) to rule on the admissibility and relevance of evidence,
(d) to seek disclosure of evidence when the ends of justice would be served."

[91] Rule 11 provides further direction regarding information to be submitted:

"A director whose decision has been appealed must provide the Board with the following upon receipt of a copy of the Notice of Appeal form:

(a) All information submitted with the original decision.

(b) The director's letter comprising the decision, together with:

(i) Recommendations and· reports to the director including comments.

(ii) Minutes of the meeting where the director considered the decision.

(iii) Any other reports considered by the director to make the decision.

(c) Time extension agreements, where applicable.

(d) Copies of all letters from referral agencies and area and adjacent landowners.

(e) List of adjacent disposition holders and/or landowners.

(f) Excerpts from the *Public Lands Act*, *Public Lands Administration Regulation*, ALSA, regional plan or any other statute, including all provisions relating to an appeal. Applicable excerpts include, but are not limited to, purpose provisions, discretionary and permitted uses, standards, and policies.

(g) Any applicable excerpts of plans under the *Alberta Land Stewardship Act* or other regional plans.

(h) An accurate area map or maps showing land uses, together with aerial and site photographs that give a detailed graphic explanation of the improvements and the physical conditions of the lands that are the subject of the appeal and surrounding lands including easements and rights-of-way registered on the property.

(i) If any transportation requirements are at issue, any relevant master plan or policy directive addressing:

(i) Access.

(ii) Road widening.

(iii) Service roads.

(iv) Road alignments.

(v) Any other relevant issue.

(j) If public reserves are at issue, any relevant policy documents concerning environmental, municipal, or other reserves.

(k) Any other information requested by a panel or a case manager that is necessary to expedite the appeal."

[92] As per Rule 11, the Board can request information beyond what might be included in the Director's file. The scope and scale of Rule 11 is consistent with the powers granted to the Board under the Act and PLAR.

[93] Section 228(e) of PLAR grants the Board the power to "order the parties to exchange documents and written submissions…"[42] The Courts and many administrative tribunals, including the Board, require the exchange of documents before a matter is heard. Of necessity, to preserve procedural fairness and allow the parties to see the case that is to be met, the exchange of documents must take place prior to a hearing. In the case of appeals before the Board, the exchange of documents occurs when the Director provides the record on which the appeal must be based.

[94] The Board notes section 228(e) uses the word "order." The power to "order" is a significant power granted by the legislation that, in this appeal, requires the Director to comply with the Board's order to produce the documents listed in the Board's Decision. The fact the Decision uses the word "request" at times instead of "order" is irrelevant. The Decision used both words. The Board tries at all times to treat participants in appeals with respect and uses the word "requests" in that context.

C. Precedent

[95] The Board notes in past decisions and correspondence the Board may have used the terms "Director's record" and "director's file" interchangeably. This is clearly an error by the Board. The Board was formed in 2011, and as the Board's body of appeals it has considered continues to increase, the Board's position on some matters of law and interpretation evolves. The movement from the Board's previous position is a result of a review of the Act and PLAR necessitated by the Appellants' request for further information, a request the Board had not been required to consider in this detail before.

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[42] Section 228(e) of PLAR states:

"A panel hearing an appeal may

(e) order the parties to exchange documents and written submissions…"

[96] As the Board must consider each appeal in its individual context, the Board's prior decisions and reports are not strictly binding on it.[43] As noted by respected administrative law experts, Mr. Robert W. Macaulay, Q.C., and Mr. James L.H. Sprague: "Agencies are not only at liberty not to treat their earlier decisions as precedent, they are positively obliged not to do so."[44]

[97] The Board cannot allow its previous decisions to fetter its ability to consider each appeal separately and within the factual context of the appeal.

D. ADM Letter

[98] The Board has reviewed the ADM's letter dated December 5, 2019. The Board considers the ADM's letter an inappropriate addition to its appeal process. The Board rejects the suggestion the Appellants use a FOIP request to "glean" information from the Director's record. The Board notes FOIP has timelines that are unrealistic for the Board's appeal procedures. Additionally, FOIP is outside the Board's jurisdiction, and any information the Appellants obtain from a FOIP request could be challenged by the Director on admissibility grounds. The ADM is not the Director, and is not a party to the appeal. Therefore, the Board will not take his letter into account.

VI. CONCLUSION

[99] Not every appeal before the Board will attract a higher standard of disclosure. In most appeals the information contained in the director's file is sufficient for the appellant to know the case to be met, and sufficient for the Board to provide the best possible recommendations to the Minister. The Board will order a fuller disclosure of the record beyond the director's file where circumstances warrant it.

[100] This appeal is an example of a situation where a fuller disclosure of the record is required for the Appellants to have the opportunity to know the case they must make. The appeal in this case is of an administrative penalty in the amount of $1,415,572.50. The Board rejects the Director's suggestion the Appellants' request for further information is a "fishing expedition." In

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[43] See: *Re: Maitland Capital Ltd.*, 2009 ABCA 186, Alberta Court of Appeal.

[44] Robert W. Macaulay, Q.C., and James L.H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters, 2018), at 6.3.

this situation, the Appellants requested further disclosure, provided sufficient reasons, and was able to narrow the scope of the records requested.

[101] The Board's mandate is to provide the best possible recommendations to the Minister to assist him in making his decision regarding appeals. To do so, the Board requires the parties to an appeal to be open in bringing forth information. As the holder of the Director's file and the record, the Director has a duty of fairness and a legislated duty to provide the information required for the appeal.

[102] The Director stated the additional cost in "wasted time and resources" to obtain the requested information "outweighed any incremental or other benefit to the Appellants and the appeal process." The Board believes the information requested by the Board should not be difficult to obtain providing the records have been properly managed.

[103] Although the Director may not see any benefit to the Appellants from the information requested, it is not the Director's role to make judgements on the value of evidence to the Appellants or the Board. The Legislature has clearly given the Board the responsibility to weigh evidence in an appeal. The Board will make its recommendations to the Minister after it has considered all the evidence in the context of a hearing.

[104] The Board has reconsidered its July 18, 2019 Decision, and reiterates its order for the Director to provide the following information:

> "(a) any records relating to follow-up communications or directives from AEP to the Appellants resulting from the 2013 inspection;
>
> (b) all additional notes or other records prepared by Mr. Paul Smith or other AEP employees relating to the DML since the commencement of the disposition;
>
> (c) any records contained in the GLIMPS system relating to the DML, which were available to the Director at the time of the decision and not already provided; and
>
> (d) all AEP internal emails, memoranda, meeting notes, and other records in relation to the DML."

Dated on December 20, 2019, at Edmonton, Alberta.

Anjum Mullick
Chair

Gordon McClure
Panel Member

Tim Goos
Panel Member