ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – July 31, 2020

IN THE MATTER OF sections 121, 122, and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 212, 213, 226, 228, 289, 230, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF appeals filed by Jason King and Kingdom Properties Ltd., with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue Administrative Penalty No. PLA-19/08-AP-LAR-19/08 to Jason King and Kingdom Properties Ltd.

Cite as: *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 July 2020), Appeal Nos. 19-0005-0006-R (A.P.L.A.B.), 2020 ABPLAB 12.

WRITTEN HEARING BEFORE: Mr. Gordon McClure, Board Chair; Dr. Nick Tywoniuk, Panel Member; and Ms. Line Lacasse, Panel Member.

SUBMISSIONS BY:

Appellants: Mr. Jason King and Kingdom Properties 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

In 2013, Alberta Environment and Parks (AEP) issued two ten-year Miscellaneous Leases (the Leases) to Kingdom Properties Ltd. Mr. Jason King is the Director and majority shareholder of Kingdom Properties.* The Leases were for the operation of a commercial campground and a storage site for industrial equipment.

In 2014, Kingdom Properties Ltd. sublet the Leases to Kilometer 147 GP Ltd. AEP discovered the unauthorized subletting in 2017. After an investigation, AEP issued an Administrative Penalty to the Appellants for $734,500.00. AEP alleged the Appellants sublet the Leases and received money for access to public land without permission from AEP.

The Appellants appealed the decision to issue the Administrative Penalty to the Public Lands Appeal Board (the Board).

The Board held a hearing by written submissions on the following issues:

1. Was the Administrative Penalty properly issued?
    - Did the Director err in the determination of a material fact on the face of the Record?
    - Did the Director err in law?
    - Did the Director exceed his jurisdiction or legal authority?
2. Is the amount of the Administrative Penalty, including the proceeds assessment (economic benefit), reasonable?
    - Did the Director err in the determination of a material fact on the face of the Record?
    - Did the Director err in law?
    - Did the Director exceed his jurisdiction or legal authority?

After reviewing the Department's Records, the Board's file, other relevant evidence, and considering the written submissions from the Appellants and the Director, the Board determined the Administrative Penalty was not properly issued or assessed. The Board found the Director erred in the determination of a material fact on the face of the Department's Record, erred in law, and exceed his jurisdiction or legal authority by:

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* Kingdom Properties Ltd. and Jason King are collectively the Appellants.

(a) not calculating the net economic benefit in the assessment of the Administrative Penalty; and

(b) not considering the net economic benefit to the Appellants in the determination of the proceeds part of the Administrative Penalty.

The Board found the Director did not err in the other aspects of the Administrative Penalty.

The Board recommended that the Minister vary the Director's decision to issue the Administrative Penalty by reducing the proceeds to $390,597.56. Reducing the proceeds amount will decrease the total Administrative Penalty from $734,500.00 to $410,597.56. This reduction takes into account the amounts paid by the Appellants as rent for the lease and property taxes.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister of Environment and Parks (the "Minister"), regarding appeals filed by Mr. Jason King and Kingdom Properties Ltd. (collectively, the "Appellants"), of the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), to issue Administrative Penalty No. PLA-19/08-AP-LAR-19/08 (the "Administrative Penalty") in the amount of $734,500.00. The Director issued the Administrative Penalty to the Appellants for alleged contraventions (the "Contraventions") of sections 43(1) and 54.01(5) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act").[1] The provisions make it illegal to sublet a disposition and receive money for providing access to public lands without the appropriate permission.

II. BACKGROUND

[2] The Board notes that some of the following facts may be in dispute between the Appellants and the Director.

[3] On November 14, 2013, Environment and Sustainable Resource Development ("AEP"), as it was then known,[2] issued Department Miscellaneous Lease 130164 ("DML 164") and Department Miscellaneous Lease 30166 ("DML 166") (collectively the "Leases") to Kingdom Properties Ltd. ("Kingdom Properties"), for public lands located at W½ 22-74-08-W4M and NW 22-74-08-W4M (the "Lands"), near the Hamlet of Conklin, in Lac La Biche County. The Leases were for a term of ten years. The lease agreements stated the purpose of

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[1] Section 54.01(5) of the *Public Lands Act* provides:

"No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or use of public land unless

(a) the person receiving the money or other consideration is the holder of a disposition or authorization under section 20 and is entitled at law to receive money or other consideration for that purpose, and

(b) the access, passage or use is in respect of public land that is the subject of the disposition or authorization."

Section 43(1) of the *Public Lands Act* states: "The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director."

[2] The Department's name was changed to Alberta Environment and Parks on May 24, 2015. In 2013 it was known as Alberta Environment and Sustainable Resource Development.

DML 164 was for a commercial campsite, and DML 166 was for a storage site for industrial equipment.

[4] Kingdom Properties intended to use the Lands to operate a large commercial camp (the "Camp") offering accommodations, food, and other services to oil and gas and forestry employees. Kingdom Properties hired Kingdom Cats Ltd. ("Kingdom Cats") to prepare the Lands for construction of the Camp. Mr. King is the director and majority shareholder of both Kingdom Properties and Kingdom Cats.

[5] On November 20, 2014, Kingdom Properties sublet DML 164 to Kilometer 147 GP Ltd. ("Kilometer 147") for six months, and DML 166 for eight years and eleven months (collectively, the "Subleases"). Kingdom Properties did not have approval from AEP to sublet the Leases.

[6] Kilometer 147 built and operated the Camp under the name of "Monias Lodge," allegedly in a joint venture with Canada North Camps Inc. ("CNC") and 726 Modular Finance Canada, Ltd. ("726"). Kingdom Cats provided water and sewage hauling, dirt work, snow removal, and gravel services from November 2014 to April 2016.

[7] Mr. King stated in his affidavit filed for the purposed of the written hearing and signed May 15, 2020 (the "King Affidavit") that in 2014, 2015, and 2016, Lands Officers attended the Lands on behalf of AEP. Mr. King said he did not receive any follow-up correspondence or reports, and the Lands Officers raised no concerns. Mr. King stated he informed the Lands Officers that Kilometer 147 was operating the Camp.[3]

[8] Kilometer 147 and Kingdom Properties became involved in a dispute about rental payments, and on April 14, 2016, Kingdom Properties terminated the Subleases. In November 2016, Kilometer 147 entered onto the Lands and began operating the Camp without the consent or prior knowledge of Kingdom Properties. Kingdom Properties allowed Kilometer 147 to continue operating the Camp to accommodate the Camp's client.

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[3] In the Affidavit of Neil E. Brad, sworn May 27, 2020, at paragraph 10, the Director disputed whether AEP did a site visit, stating: "I have no notes, reports, e-mails or other records from a Public Lands officer that visited the site in 2016."

[9] On November 30, 2016, Kingdom Properties filed a Statement of Claim in the Court of Queen's Bench of Alberta against Kilometer 147, Kilometer 147 LP Ltd., CNC, and 726. In the Statement of Claim Kingdom Properties and Kingdom Cats sought, among other remedies, a judgment of arrears of rent and damages.

[10] On December 20, 2017, AEP was contacted by CNC, who informed AEP that Kingdom Properties was subleasing the Leases to CNC.

[11] On July 19, 2018, AEP sent the Appellants a Notice of Investigation, which informed the Appellants they were being investigated for alleged unauthorized subletting of the Leases.

[12] On July 26, 2019, the Director provided the Appellants with a Preliminary Assessment and invited the Appellants to provide any relevant documentation for the Director to consider in making his decision. On August 23 and August 26, 2019, the Appellants provided further information and documentation for the Director to consider but declined to meet with the Director.

[13] On August 29, 2019, the Director issued the Administrative Penalty under the Act, to Kingdom Properties and Mr. King for $734,500.00. The Director used the Base Penalty Table in section 171(3) of the *Public Lands Administration Regulation*, AR 187/2011 ("PLAR"), to assess the Administrative Penalty. Section 171(3) of PLAR provides:

> "Subject to subsections (4) and (5), the amount of an administrative penalty for each contravention that occurs or continues is the amount determined by the director, taking into account the seriousness of the contravention and the extent of any actual loss or damage that resulted or any potential loss or damage that may reasonably be expected to result from the contravention, in accordance with the following Base Penalty Table:

Extent of actual or potential loss or damage	Seriousness of contravention		
	Major	Moderate	Minor
Major	$5000	$3500	$2500
Moderate	3500	2500	1500
Minor	2500	1500	1000
None	1000	650	250"

[14] The Director assessed four counts against the Appellants as follows:

Count 1

- $5,000.00 penalty for unauthorized sublet of DML 166 contrary to section 43(1) of the *Public Lands Act*.
- Seriousness of the contravention: Major.
- Extent of actual or potential loss or damage: Major.

Count 2

- $5,000.00 penalty for unauthorized sublet of DML 164 contrary to section 43(1) of the *Public Lands Act*.
- Seriousness of the contravention: Major.
- Extent of actual or potential loss or damage: Major.

Count 3

- $5,000.00 penalty for receipt of money or other consideration for allowing access to DML 166 contrary to section 54.01(5) of the *Public Lands Act*.[4]
- Seriousness of the contravention: Major.
- Extent of actual or potential loss or damage: Major.

Count 4

- $5,000.00 penalty for receipt of money or other consideration for allowing access to DML 164 contrary to section 54.01(5) of the *Public Lands Act*.
- Seriousness of the contravention: Major.
- Extent of actual or potential loss or damage: Major.

[15] The Director stated he considered section 171(4) of PLAR in assessing the Administrative Penalty. Section 171(4) of PLAR states:

> "(4) The director may, in any particular case, increase or decrease the amount of the administrative penalty determined under subsection (3) if, after considering the following factors, the director considers it appropriate to do so:
>
> (a) the importance to the regulatory scheme of compliance with the provision that was contravened;

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4 Section 54.01(5) of the *Public Lands Act* provides:

"No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or use of public land unless

(a) the person receiving the money or other consideration is the holder of a disposition or authorization under section 20 and is entitled at law to receive money or other consideration for that purpose, and

(b) the access, passage or use is in respect of public land that is the subject of the disposition or authorization."

(b) the degree of wilfulness or negligence, if any, on the part of any person responsible for the contravention;

(c) any steps taken by a person responsible for the contravention to avoid or limit the extent of any actual loss or damage that resulted or any potential loss or damage that may reasonably be expected to result from the contravention;

(d) any steps taken by a person responsible for the contravention to prevent its recurrence;

(e) any previous contravention of a provision prescribed by subsection (2) by a person responsible for the contravention;

(f) whether a person responsible for the contravention derived or is likely to derive any economic benefit from the contravention;

(g) any other factor that, in the opinion of the director, is relevant."

[16] The Director said he applied sections 171(4)(a), (b), (c), (d) and (g) as follows:

"(a) Neutral - the importance of compliance is adequately reflected in the base penalty.

(b) + $1000.00 - Negligence on the Parties' behalf to review rules and regulations regarding the subletting of formal AEP dispositions.

(c) + $1000.00 - No mitigation. The Parties continued to sublet without authority for 1 year, 5 months.

(d) + $1,000.00 - The Parties stopped collecting money only after Kilometer 147 stopped further payments in May 2016.

(e) Neutral — No Enforcement history on file.

(f) Neutral —This factor has not been applied as the proceeds required to be paid under section 59.4(4) of the *Public Lands Act* are set out in Appendix 'A' below.

(g) + $2000 —Despite the express wording in the Sublease agreements that AEP's consent was needed, the Parties and the holder of both dispositions held out to Kilometer 147 that they had permission or by omission, never stated that they [did not] have consent of the Director to sublet. In either case, they carried on as if they were entitled at law to collect money for the use of public land.[5]

[17] The Director assessed the factors listed in section 171(4) at $5,000.00. The Director noted section 171(5) of PLAR allows the Director to assess a maximum penalty of

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[5] Administrative Penalty, pages 9 to 10, Department's Record, at tab 1.0.0.

$5,000.00 for each day or part of a day on which the Contravention occurred.[6] The Director stated in the Administrative Penalty: "it appears that the contraventions occurred or continued for roughly 512 days for each unauthorized sublet. This would total a maximum penalty of $5,120,000.00."[7] The Director determined the maximum penalty should not be levied, and instead decided the four assessed counts under section 171(3) were appropriate. The total of the four assessed counts was $20,000.00 (the "Penalty").[8]

[18] The Director assessed the proceeds under section 59.4(4)(b) and (c) of the *Public Lands Act* at $714,500.00 (the "Proceeds"). The Director determined the amount of the Administrative Penalty was $20,000.00 for the Penalty and $714,500.00 for the Proceeds. The total assessed amount of the Administrative Penalty was $734,500.00.

[19] On August 30, 2019, the Director served the Administrative Penalty on the Appellants' legal counsel. On September 16, 2019, the Board received a Notice of Appeal from each of the Appellants, appealing the Director's decision to issue the Administrative Penalty. The Appellants' Notices of Appeal alleged the Director, in issuing the Administrative Penalty, erred in the determination of a material fact on the face of the record, erred in law, and exceeded his jurisdiction or legal authority. The Notices of Appeal contained the request that the Administrative Penalty be set aside in its entirety.

[20] On September 20, 2019, the Board wrote to the Appellants and the Director (collectively the "Parties") acknowledging receipt of the Notices of Appeal, and requested the Director provide:

> "a copy of the Director's records (all documents and all electronic media) that were reviewed and that were available when making the decision, including policy documents, and an index. This includes all of the records within the compliance group relating to this appeal."[9]

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6 Section 171(5) of PLAR provides: "The maximum administrative penalty that may be imposed in respect of a contravention is $5000 for each day or part of a day on which the contravention occurs or continues, in addition to any amount required to be paid under section 59.4(4)(c) of the Act."

7 Administrative Penalty, page 8, Department's Record, at tab 1.0.0.

8 Although not clarified in the Administrative Penalty, it appears to the Board the Director decided each of the four assessed counts could be assessed at the maximum daily rate with one day for each contravention.

9 Board's letter, September 20, 2019.

The Department's Record was provided to the Board on November 20, 2019, and forwarded to the Appellants on November 24, 2019.

[21] On September 23, 2019, the Appellants requested the Board issue a stay of the Administrative Penalty. The Board's practice has been to issue a stay of an administrative penalty upon request. If the Director opposes the issuance of a stay, the Board may undertake a reconsideration of the stay decision. On September 27, 2019, the Director advised the Board he opposed the stay and requested the Board suspend the stay until the Director could respond.

[22] On October 25, 2019, the Board agreed to reconsider its decision to issue the stay but kept the stay in place pending the Board's decision. The Board set a schedule for the Parties to provide written submissions. The Board also provided for cross-examination questions to be submitted by the Director to Mr. King regarding his affidavit in support of the stay application. From January 17, 2020, until January 24, 2020, the Board received written submissions from the Parties regarding the stay application. On March 31, 2020, the Board released the reconsideration of its decision to grant the Appellants' stay application. The Board decided to grant a stay of the Administrative Penalty, which would remain until the Board lifted the stay or until the Minister made a decision regarding the appeals.[10]

[23] On January 10, 2020, the Appellants requested further disclosure of records from the Director. Specifically, the Appellants requested the following (the "Requested Disclosure"):

> "(a) Records of all site visits and inspections conducted by AEP, its employees and/or agents relating to DML 130164 and DML 130166 since the commencement of the dispositions (although some relevant records have already been disclosed, we are advised that site inspections and visits were conducted by AEP employees prior to June 2018);
>
> (b) Copies of all reports created from any site visits or inspections conducted by AEP, its employees and/or agents relating to DML 130164 and DML 130166 since the commencement of the dispositions, if not otherwise disclosed;
>
> (c) Copies of all aerial and site photographs for DML 130164 and DML 130166 since the commencement of the dispositions other than those already contained in the Director's record;

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[10] Reconsideration Decision: *King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (31 March 2020), Appeal Nos. 19-0005-0006-RD (A.P.L.A.B.), 2020 ABPLAB 3.

(d) Any records relating to follow-up communications or directives from AEP to the Appellants resulting from any site visit or inspection;

(e) All notes or other records prepared by any Environmental Protection Officers relating to DML 130164 and DML 130166 since the commencement of the dispositions, including but not limited to the following: D. Litzenberger, D. Cummins, S. Adams and F. Steil;

(f) All notes or other records prepared by any Public Lands Officers relating to DML 130164 and DML 130166 since the commencement of the dispositions, including but not limited to the following: K. McNutt, J. Bleach, M. Pasula and S. Pidwerbeski;

(g) All interview notes, records or correspondence received or created by AEP, its employees or agents relating to Paul McCracken or Shayne McCracken;

(h) Any records contained in the GLIMPS system in relation to DML 130164 and DML 130166 since the commencement of the dispositions; and

(i) All AEP internal emails, memoranda, meeting notes and other records in relation to DML 130164 and DML 130166 since the commencement of the dispositions."[11]

[24] On January 24, 2020, the Director provided a Supplemental Department's Record consisting of an Environmental Field Report along with site photographs. The Director stated that with a few exceptions, "the documents requested by the Appellants are not part of the Director's record… It is open to the Appellants to make a request to AEP for documents that are not part of the Director's Record under the *Freedom of Information and Protection of Privacy Act*."[12] The Supplemental Department's Record was subsequently provided to the Appellants.

[25] On February 7, 2020, the Board requested the Appellants advise the Board by February 12, 2020, if they would be making a document production motion.

[26] On March 2, 2020, the Appellants made a formal application for the Requested Disclosure from the Director for inclusion in the Department's Record. The Appellants apologized for being late and explained they thought the application had previously been sent to the Board. On March 3, 2020, the Director requested the Board dismiss the Appellants' application for being submitted after the deadline set by the Board.

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11 Appellants' letter, dated January 10, 2020.

12 Director's letter, dated January 24, 2020.

[27] On March 5, 2020, the Board refused to accept the Appellants' application for additional disclosure for being filed past the February 12, 2020 deadline. The Board stated:

> "If the Appellants believe that information is missing from the Director's Record, Ms. Hamelin [the Appellants' legal counsel] is free to make any motions she wishes, in the course of the hearing, as to how the Board should view the evidence that is before it."[13]

[28] A mediation meeting between the Parties was scheduled for March 25, 2020. However, based on the pre-mediation calls with the Parties, the Board decided to cancel the mediation and proceed to a hearing by written submissions.[14]

[29] On April 7, 2020, the Board scheduled a written submission process and provided the Parties with the opportunity to ask cross-examination questions based on the affidavits each party submitted.

[30] On April 20, 2020, the Board received the Department's Updated Record from the Director and provided it to the Appellants. The Board received written submissions from the Parties from May 15, 2020 to June 25, 2020. On July 6, 2020, the Board Panel met to determine its recommendations to the Minister.

III. ISSUES

[31] The Board set the following three issues for the written hearing:

1. Was the Administrative Penalty properly issued?
   - Did the Director err in the determination of a material fact on the face of the Record?
   - Did the Director err in law?
   - Did the Director exceed his jurisdiction or legal authority?
2. Is the amount of the Administrative Penalty, including the proceeds assessment (economic benefit), reasonable?
   - Did the Director err in the determination of a material fact on the face of the Record?

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13 Board's letter, dated March 5, 2020.

14 See: Board's letter, dated March 23, 2020. Following pre-mediation calls with the Parties the Board determined "...it would not be in the best interests of the parties or the Board to proceed with a mediation at this time."

- Did the Director err in law?
- Did the Director exceed his jurisdiction or legal authority?

IV. SUBMISSIONS

[32] The Board reviewed all the submissions from the Parties on the issues, which are summarized below.

A. Appellants

[33] The Appellants acknowledged they sublet the Leases to Kilometer 147 on November 20, 2014, without submitting a formal application to AEP for permission to sublet.

[34] The Appellants stated Kingdom Properties issued all invoices for services provided by Kingdom Cats to "Monias Lodge," the operating name of the Camp.

[35] The Appellants submitted that in 2015 and 2016, Lands Officers from AEP's Lac La Biche office conducted site visits on the Lands on behalf of AEP. The Appellants stated that during these site visits, the Lands Officers were informed by Mr. King, Mr. Craig Fingstead (an employee of Kingdom Properties Ltd.), and CNC employees that Kilometer 147 was operating the Camp.

[36] The Appellants said they terminated the Subleases with Kilometer 147 on April 14, 2016, due to arrears. The Appellants submitted Kilometer 147 owed $1,701,000.00 in unpaid fees for the Subleases between November 2014 and April 2016. The Appellants said Kilometer 147 made a $714,500.00 payment to Kingdom Properties and still owed $986,500.00 in unpaid fees. The Appellants stated that the operating expenses for the Camp came to $650,000.00 in 2015 and 2016. The Appellants said Kingdom Properties had to transfer that amount to Kingdom Cats to cover the cost of providing goods and services for the Camp (the "Transferred Funds"). The Appellants noted Kingdom Cats invoiced Kilometer 147 $3,564,976.40 for Camp services, of which Kilometer 147 paid $952,109.85. The Appellants said Kingdom Cats suffered a loss of $2,612,866.60.

[37] The Appellants said they did not learn until the end of November 2016, that earlier that month, Kilometer 147 returned to the Lands and continued to operate the Camp. The Appellants stated they sought a court order to take immediate possession of the Lands.

However, the Camp's client insisted Kilometer 147 continue to operate the Camp, and Mr. King reluctantly permitted Kilometer 147 to remain.

[38] The Appellants submitted the Director issued the Administrative Penalty after the expiry of the two years specified in section 56.1 of the *Public Lands Act*, which states:

> "A prosecution in respect of an offence under this Act or the regulations may not be commenced later than 2 years after
> (a) the date on which the offence was committed, or
> (b) the date on which evidence of the offence first came to the attention of the director,
> whichever is later."

[39] The Appellants noted the Director said he became aware of the subletting of the Leases on August 31, 2017. However, the Appellants stated the Lands Officers who conducted site visits in 2014, 2015, and 2016, were aware the Camp was being operated by Kilometer 147. The Appellants observed that the Incident Triage Form prepared by Lands Officer Mr. Jeff Bleach in May 2018, included the following:

> "The miscellaneous leases are actively disposed (DML 130164 and DML 130166 approved October 22, 2013) and otherwise in good standing. A search of GLIMPS indicates that no formal inspection of the leases has been completed. In summer of 2016 the Lands Officer for the area observed that some workers were attempting to remove topsoil from DML 130166. After a brief introduction and discussion the workers returned the material. Follow up the next week showed that no removal of the topsoil had occurred, no further actions were taken."[15]

[40] The Appellants submitted the latest the Director was aware the Appellants were not operating the Camp was July 2016, as the Lands Officers conducting the site visits to the Lands would have had that knowledge. The Appellants noted the Incident Triage Form did not specify the date of the Lands Officers' site visits. The Appellants stated the Board should draw an adverse inference that the visits occurred before July 2016.

[41] The Appellants said if the Lands Officers were aware that Kingdom Properties were not the party conducting commercial activities on the Lands before July 2016, then the Administrative Penalty was issued after the two-year limitation period set by section 56.1 of the *Public Lands Act*. The Appellants submitted that the Director exceeded his legal jurisdiction or

authority by issuing the Administrative Penalty after the expiry of the limitation period and, therefore, the Administrative Penalty must be set aside in its entirety.

[42] The Appellants stated that the Director's failure to provide the Requested Disclosure is a breach of procedural fairness. The Appellants noted the Supreme Court of Canada in *Cardinal* v. *Director of Kent Institution*, addressed the duty a person exercising statutory power has to ensure procedural fairness:

> "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual." [16]

The Appellants noted the Courts have held:

> "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. The duty of fairness is flexible, variable, and contextual in nature, and accordingly, the level of procedural fairness owed will vary depending, in part, on purpose and intent of the applicable legislation and the process for decision making outlined in the legislation."[17]

[43] The Appellants stated that enforcement of the Administrative Penalty would be potentially financially ruinous for them and may result in personal bankruptcy for Mr. King. The Appellants observed the Board has said the more important and impactful a decision is to an individual, the greater is the duty to disclose.[18]

[44] The Appellants said one of the principles of the duty to be fair is that a person must know the case against them and be provided with an opportunity to respond to the decision-maker. The Appellants stated that disclosure is an essential element of knowing the case to be made.

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15 Department's Record, at tab 7.0.1.

16 *Cardinal* v. *Director of Kent Institution*, [1985) 2 SCR 643 at paragraph 14.

17 Appellants' Initial Submission, May 15, 2020, at paragraph 74.

18 *Colette Benson and CRC Open Camp and Catering ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2019 ABPLAB 25.

[45] The Appellants said the Director would have needed to examine records existing before the date of the Notice of Investigation to determine the circumstances before issuing the Administrative Penalty, yet, virtually none of those records were disclosed in the Department's Record, Updated Department's Record, or Supplemental Department's Record. The Appellants submitted the question of what facts were known to the Director, and when he knew those facts is highly relevant to the appeals and necessary for the Appellants to make their case.

[46] The Appellants stated the Director failed to provide all the relevant and material records, even when specifically requested to do so by the Appellants. The Appellants submitted the investigation leading to the issuance of the Administrative Penalty was not transparent and fair. The Appellants alleged "... the Director was in possession of numerous relevant and material records" in relation to the Leases and activities conducted on the Lands, and "obtained hundreds of additional records during the course of the investigation, which he reviewed and specifically relied upon in determining the Administrative Penalty."[19] The Appellants stated that they were not provided with an opportunity to review and respond to the majority of the records before the Administrative Penalty was issued. The Appellants said:

> "There is a manifest imbalance in the parties' respective access to relevant records and information during the investigative process, and denying the Appellants access to the Requested Records simply compounds the disadvantage that the Appellants face in fully arguing their position on Appeal."[20]

[47] The Appellants said the Director's suggestion to request the Requested Disclosure through the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the "*FOIP A*ct"), is insufficient to discharge the Director's duty of fairness. The Appellants noted that the *FOIP Act* has timelines that are unrealistic for the appeal process and is outside of the Board's jurisdiction. The Appellants stated the Director could challenge any information received under a *FOIP Act* request on admissibility grounds.

[48] The Appellants submitted that to determine if the Director made an error of law, an error of fact, or exceeded his jurisdiction, and to respond to the Administrative Penalty, the Appellants must be able to review the information in the context of the full record. The

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19 Appellants' Initial Submission, May 15, 2020, at paragraph 83.

20 Appellants' Initial Submission, May 15, 2020, at paragraph 84.

Appellants said the Director's failure or refusal to provide the Requested Disclosure compromised the Appellants' ability to answer the case against them fully.

[49] If the Board upholds the Administrative Penalty, the Appellants stated the Proceeds portion should be set aside in its entirety or reduced substantially. The Appellants submitted the Subleases did not result in an economic benefit or advantage for Kingdom Properties. Alternatively, the Appellants alleged the Subleases did not result in an economic benefit or advantage in the amount assessed in the Administrative Penalty.

[50] The Appellants referred to Section 59.4(4) of the *Public Lands Act*, which states:

> "A notice of administrative penalty under this section may require one or more of the following:
>
> (a) payment of the penalty determined by the director under section 59.3;
>
> (b) any person who in the director's opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an accounting of the proceeds believed by the director to have been received by that person;
>
> (c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds."

[51] The Appellants said the *Public Lands Act* or PLAR did not define the term "proceeds," and there is no clarification as to whether it refers to gross or net proceeds. The Appellants noted the Board, in *Gionet et al.* v. *Director, Lower Athabasca Region, Alberta Environment and Parks*,[21] distinguished between the "penalty amount" and the "proceeds amount" of an administrative penalty. The Appellants stated the Board found the penalty amount is the "fine" assessed for contravention of the legislation, and the proceeds amount focused on eliminating the economic benefit derived from the contravention. The Appellants submitted the proceeds portion of the Administrative Penalty should be based on any net economic benefit the Appellants obtained from the Subleases.

[52] The Appellants stated that Kilometer 147's failure to comply with the Subleases' payment provisions caused Kingdom Properties substantial financial loss. The Appellants said

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[21] *Gionet et al* v. *Director, Lower Athabasca Region, Alberta Environment and Parks*, 2018 ABPLAB 27, at paragraph 32.

the only parties who received an economic benefit or advantage from the Subleases were Kilometer 147 and its partners. The Appellants noted Kingdom Properties had to pay the Transferred Funds to Kingdom Cats in 2015 and 2016, to ensure the continued operation of the Camp. The Appellants submitted Kingdom Properties was never repaid for the Transferred Funds. The Appellants also noted Kingdom Properties paid $6,337.20 in annual lease payments to the Crown for the Leases.

[53] The Appellants stated that due to an error, the documentation related to the Transferred Funds was not provided to the Director when the Administrative Penalty was being assessed. The Appellants submitted the Transferred Funds documentation should be considered by the Board. The Appellants stated the documentation was directly relevant to the issues in the appeals and rationally connected and provide context and clarification to the Department's Record. The Appellants said the Director knew before issuing the Administrative Penalty that the Appellants reserved the right to raise additional arguments and present further evidence. The Appellants noted the Board, in other appeals, had considered the admissibility of records which were not before the Director when a decision was made and was not in the Department's Record. The Appellants requested the Board admit the evidence relating to the Transferred Funds and weigh its relevancy in its deliberations on the appeals.

[54] The Appellants submitted the Transferred Funds should be deducted from the Proceeds portion of the Administrative Penalty to reflect Kingdom Properties' net economic advantage or benefit derived from the Subleases.

B. Director

[55] The Director submitted that between November 20, 2014 and March 12, 2017, the Appellants sublet the Leases without authorization in contravention of section 43(1) of the *Public Lands Act*. The Director stated the Appellants received $714,500.00 in revenue for the Subleases in contravention of section 54.01(5) of the *Public Lands Act*.

[56] The Director said he had authority as the designated Director under the *Public Lands Act* and PLAR to issue the Administrative Penalty. The Director stated that before issuing the Administrative Penalty, he considered all the information collected during an investigation

by AEP and the written representations of the Appellants. The Director submitted that the Administrative Penalty was properly issued and reasonable.

[57] The Director stated the Leases identified the purpose and contained the same condition: "the Lessee may not sublet nor assign the said lands and premises of any part thereof without the written consent of the Lessor."[22]

[58] The Director said CNC provided AEP with copies of the Limited Partnership Agreement (the "Partnership Agreement") between Kingdom Properties, CNC, and Kingdom Lodge LP Holding Ltd. The Director stated that the Partnership Agreement was replaced by two agreements to sublet the Leases. The Director noted that neither Kingdom Properties, Kilometer 147, nor any other party, approached AEP for authorization to construct and operate the Camp on the Lands or to sublet the Leases.

[59] The Director stated it is the responsibility of the regulated community to understand the legislation that regulates their occupation and use of public land in Alberta. The Director said AEP permits subletting of public land in limited circumstances to meet a short-term need. However, the primary purpose must not be to generate revenue for the disposition holder.

[60] The Director noted the Administrative Penalty has two components, the Penalty and the Proceeds, which have separate purposes:

(a) the Penalty is intended to act as a deterrent to the regulated community to prevent reoccurrence of a prohibited activity; and

(b) the Proceeds restores the economic status quo and returns the contravening party to the same economic position they were in before the non-compliance occurred.

[61] The Director submitted he had the authority to assess a one-time amount under section 59.4(4)(c) of the *Public Lands Act* where the Director is of the opinion the person has received proceeds derived directly or indirectly from any use of public land in contravention of the *Public Lands Act*. The Director said his assessment of the Proceeds considered the need to deter others from similar contraventions. The Director stated that failing to consider proceeds in

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22 Director's Initial Submission, May 15, 2020, at paragraph 13.

the administrative penalty process results in unfair treatment of compliant regulated parties, and conveys a message that promotes future non-compliant behaviour as a "cost of doing business."

[62] The Director said the Appellants' lack of evidence does not prevent the Director from exercising his authority to assess the Proceeds, as the Director may make a reasonable estimate of the total proceeds earned by the Appellants without regard for costs or expenses alleged but not proven by the Appellants.

[63] The Director stated the Proceeds were calculated based on documents and payment receipts, which indicated the total rent paid by Monias Lodge (Kilometer 147 LP) to the Appellants. The Director said he reduced the Proceeds from $1,552,109.80 to $734,500.00, based on representations made by the Appellants.

[64] The Director submitted the Administrative Penalty was properly issued, and the amount was reasonable, and the Appellants failed to prove their allegations that the Director erred.

C. Appellants' Response

[65] The Appellants noted the Minister might designate a person as a "director" under section 5(2) of the *Public Lands Act*.[23] The Appellants stated sections 59.3 and 59.4 of the *Public Lands Act*[24] require a "director" to exercise the specified administrative penalty powers.

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23 Section 5(2) of the *Public Lands Act* states: "Without limiting the generality of subsection (1), the Minister may by order designate any person as a director for the purposes of all or part of this Act and the regulations."

24 Section 59.4 of the *Public Lands Act* states:

"(1) If the director requires a person to pay an administrative penalty under this Act or the regulations, the director shall serve by personal service or registered mail a notice of administrative penalty demanding payment of the penalty.

(2) A notice of administrative penalty must state the grounds on which the penalty was assessed.

(3) An administrative penalty to which a notice under subsection (1) relates must be paid within 30 days of the date of service of the notice.

(4) A notice of administrative penalty under this section may require one or more of the following:

(a) payment of the penalty determined by the director under section 59.3;

(b) any person who in the director's opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an accounting of the proceeds believed by the director to have been received by that person;

The Appellants submitted there was no evidence of a Ministerial Order designating Mr. Neil Brad as the Director with authority to issue the Administrative Penalty.

[66] The Appellants said the Director acknowledged a July 2017 policy regarding subletting of dispositions did not exist in 2014 and is therefore irrelevant to these appeals.

[67] The Appellants submitted that the Affidavit of Neil Brad (the "Director's Affidavit") indicated AEP possessed virtually no records of any kind relating to the Leases or the Appellants before AEP started its investigation in August 2017. The Appellants said the Director's Affidavit stated there were no records created before August 2017 related to:

(a) aerial and site photographs;

(b) notes, reports and other records related to site visits or inspections;

(c) emails, phone records or records of other communications to or from AEP, the Appellants, and other parties; and

(d) entries in the Environmental Management System.

[68] The Appellants submitted the lack of documentation is inconsistent with AEP's normal practices. As an example, the Appellants noted the Incident Triage Form, disclosed in the Supplemental Department's Record, specifically referenced a site visit in 2016 by an unnamed Lands Officer. The Appellants said Incident Triage Form noted the Lands Officer conducted a follow-up visit the next week to address concerns about the removal of topsoil. The Appellants observed that the Director's Affidavit stated AEP has no notes reports or other records of any kind in its possession related to either of the site visits referred to in the Incident Triage Form.

[69] The Appellants stated that in contrast to the lack of documentation of the site visits mentioned in the Incident Triage Form, the Supplemental Department's Record discloses the detailed documentation created when AEP served the Administrative Penalty at the Appellants' legal counsel's offices on August 30, 2019. The Appellants noted the documentation included the date, time, method of service, description of the clothing worn by the officers serving the Administrative Penalty, the vehicle used, and the weather conditions.

(c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds."

The Appellants said this level of detail is consistent with other handwritten notes and records in the Supplemental Department's Record in relation to the investigation. The Appellants submitted the absence of records relating to the Leases and the Appellants before 2017 was "incomprehensible given the detailed record-keeping disclosed by the Director in relation to the investigation and Administrative Penalty."[25]

[70] The Appellants stated the Director's Affidavit was non-responsive and evasive to several of the questions the Appellants asked regarding the existence of the Requested Disclosure. The Appellants said questions to confirm if AEP had emails or other communications in relation to the Appellants which were not part of the Supplemental Director's Record, were frequently answered in the Director's Affidavit by stating "all emails and other communications related to the Administrative Penalty, the [DMLs] or the Appellants <u>that he considered when making his decision were included in the Director's Updated Record.</u>" [Emphasis by the Appellants.]

[71] The Appellants submitted:

> "… an adverse inference should be drawn as a result of the Director's failure to provide full disclosure of the relevant AEP records and information in relation to the [Leases], despite the Appellants' request for the same. This is particularly so in light of the Appellants' argument that the Director commenced the prosecution outside of the two-year limitation period set out in the *Public Lands Act*, and therefore lacked the requisite jurisdiction to issue the Administrative Penalty."[26]

[72] The Appellants referenced the Alberta Court of Queen's Bench decision in *Howard* v. *Sandau*, where the Court quoted the following statement from *Wigmore, Evidence in Trials at Common Law*:

> "The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstance, which

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25 Appellants' Response Submission, June 9, 2020, at paragraph 28.

26 Appellants' Response Submission, June 9, 2020, at paragraph 33.

> make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."[27]

[73] The Appellants stated the Director failed to disclose or provide the Appellants with almost any records created before August 2017, concerning the Leases, when such records should be in AEP's possession. The Appellants submitted the Board should infer the records likely exist, and those records would establish the circumstances leading to the issuance of the Administrative Penalty came to the Director's attention more than two years before the issuance of the Notice of Investigation in this matter.

D. Director's Response

[74] The Director stated that even though the Appellants allegedly delegated some responsibilities under the Leases to third parties and employees, the Appellants are responsible for the acts and omissions of those who acted on their behalf. The Director said Mr. King provided no evidence of conducting any due diligence to ensure his delegates understood the Lease's terms and conditions.

[75] The Director submitted the Appellants furthered their private commercial interests without regard to AEP's role as the regulator of the Lands or regard to AEP's regulatory obligations. The Director noted that Mr. King admitted in cross-examination that the Appellants did not notify AEP that Kilometer 147 was using and occupying the Lands without authority in November 2016. The Director said the Appellants' were required to report the trespass to AEP but failed to do so.

[76] The Director stated that had the Appellants complied with the requirements of the legislation, AEP could have responded in an appropriate and timely manner. Instead, the Director said that the Appellants turned to civil enforcement actions to enforce their rights under the Sublease agreement.

[77] The Director submitted the Appellants incorrectly relied on section 56.1 of the *Public Lands Act*[28] to determine the limitation date for the Administrative Penalty. The Director

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27 *Howard* v. *Sandau*, 2008 ABQB 34, at paragraph 41.

28 Section 56.1 of the *Public Lands Act* states:

noted section 56.1 is related to prosecutions under the *Public Lands Act*, and not to administrative penalties. The Director stated section 59.8 of the *Public Lands Act* provides that a notice of administrative penalty may not be issued more than two years after the date on which evidence of the contravention first came to the notice of the Director.[29] The Director said August 31, 2017, was chosen as the start of the limitation period, which was the earliest date referred to in the Incident Triage Form.

[78] The Director noted the Appellants alleged AEP Lands Officers visited the Lands in 2015 and 2016. The Director stated that Mr. King provided no evidence of discussions about subletting during the site visits and could not recall the Lands Officers' names. The Director said Mr. King's evidence was limited to the use of the Lands for a commercial campsite. The Director submitted:

> "A discussion in the field about the operation of a commercial camp sometime in 2015 or 2016, if such visits occurred, does not establish knowledge that any AEP staff or the Director knew that the Appellants were subletting the Lands in contravention of section 43(1) of the *Public Lands Act* at that time."[30]

[79] The Director stated the Lands Officers conducting the site visits would not likely have concerns regarding the activities occurring on the Lands. The Director noted the Leases' purposes were for a commercial campsite and a storage yard, which the Lands Officers would

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> "A prosecution in respect of an offence under this Act or the regulations may not be commenced later than 2 years after
>
> (a) the date on which the offence was committed, or
>
> (b) the date on which evidence of the offence first came to the attention of the director,
>
> whichever is later."

29 The Director cited Section 59.8 of the Act, however, the Board assumes this was a mistake and the Director mean to cite section 59.7. Section 59.8 provides:

> "(1) Subject to any right to appeal the notice of administrative penalty, the director may file a copy of the notice of administrative penalty with the clerk of the Court of Queen's Bench and, on filing, the notice may be enforced as a judgment of the Court.
>
> (2) On application by the director, the Court may make any order necessary to compel the person receiving a notice under section 59.4 to carry out the terms of the notice."

Section 59.7 of the *Public Lands Act* states:

> "A notice of administrative penalty may not be issued more than 2 years after
>
> (a) the date on which the contravention to which the notice relates occurred, or
>
> (b) the date on which evidence of the contravention first came to the notice of the director,
>
> whichever is later."

30 Director's Response Submission, June 9, 2020, at paragraph 57.

have observed at the site. The Director submitted knowledge that there was a commercial campsite on the Lands, does not prove AEP was aware the Leases were being sublet. The Director stated the limitation period is determined by the date evidence of the Contraventions first came to the Director's notice.

[80] The Director submitted the Director explained why the Department's Records did not include alleged records of inspections of the Lands before 2016 and, therefore, no adverse inference should be drawn. The Director noted that on cross-examination, he testified that:

(a) he had no record of any inspections conducted on the Lands before June 19, 2018;

(b) all notes, reports, emails, and other records created by Public Officer J. Bleach that were provided to Environmental Protection Officer Litzenberger were included in the Department's Records;

(c) he had no notes, reports, emails or other records from a Lands Officer that visited the site in 2016; and

(d) all emails and other communications related to the Administrative Penalty, the Leases, or the Appellants that he considered in making the decision were included in the Department's Records.

[81] The Director stated he did not have any documentary evidence relating to the alleged site visits to the Lands in 2014, 2015, and 2016, and was therefore unable to consider such evidence or include it in the Department's Records.

[82] The Director noted that the Supreme Court of Canada decision in *Baker* v. *Canada (Minister of Citizenship and Immigration)*[31] set out the factors to be considered when assessing the extent of the duty to be fair:

(a) the nature of the decision being made and the process followed in making it;

(b) the nature of the regulatory scheme and the terms of the statute under which the decision-maker operates;

(c) the importance of the decision to the individual(s) affected;

(d) the legitimate expectations of the person(s) challenging the decision;

(e) and the choice of procedure made by the administrative decision-maker itself.

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31 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraphs 21 to 28.

[83] The Director submitted the closer the decision-making process resembles a judicial process, the greater the requirement of procedural fairness. The Director stated that the issuance of the Administrative Penalty is an administrative decision to take enforcement action for the non-compliance of the Appellants, and not a quasi-judicial decision determining rights and privileges. The Director noted there is no requirement in the *Public Lands Act* to:

(a) provide a preliminary assessment to a regulated party;

(b) provide that party with an opportunity to meet face-to-face, explain its position in writing or provide information to the Director before the issuance of the administrative penalty;

(c) provide disclosure to a regulated party during the course of an investigation.

[84] The Director submitted the nature of the decision suggests that the Director has a less stringent duty of procedural fairness.

[85] The Director stated that the nature of the regulatory scheme provides for a right of appeal to the Board, which also suggests a less stringent duty of procedural fairness owed by the Director.

[86] The Director noted that the more important the decision is to the lives of those affected and the greater its impact, the more stringent the procedural protections required. The Director said the Administrative Penalty would result in an economic loss to the Appellants, but the decision would still attract a less stringent duty of procedural fairness.

[87] The Director noted the doctrine of legitimate expectation is based on the principle that it would be unfair for a decision-maker to depart from regular practices, or to act against representations as to procedure or substantive promises, without providing procedural rights. The Director stated that legitimate expectations could not lead to substantive rights.

[88] The Director said it was AEP's regular practice to deliver a preliminary assessment to the subject of an investigation and to invite the subject to a face-to-face "due process" meeting to discuss the investigation. The Director stated the due process meeting was an opportunity for the subject of an investigation to provide new information to the Director for consideration before making a decision.

[89] The Director said AEP does not generally provide disclosure during an ongoing investigation. The Director stated the investigation continues until the decision-maker decides on the enforcement measure to take based on the facts gathered in the investigation.

[90] The Director argued any legitimate expectation the Appellants may be entitled to was limited to a reasonable opportunity to provide information, explain its position in writing, and have a due process meeting with the Director. The Director stated the legitimate expectations of the Appellants suggested a less stringent duty of procedural fairness.

[91] The Director said disclosure is only required if a party appeals a decision to the Board. The Director stated that after filing the appeals, the Appellants had the legitimate expectation of receiving a copy of the Director's Record upon which the appeals are based. The Director argued the record provided to the Board on April 20, 2020, was complete because it contained all the material taken into consideration when deciding to issue the Administrative Penalty.

[92] The Director stated that the duty of procedural fairness should consider and respect the choices of procedure made by the administrative decision-maker and any institutional constraints.

[93] The Director submitted applying the factors in *Baker* v. *Canada* to the circumstances of the appeals indicated the extent of the Director's duty of procedural fairness as follows:

(a) before the issuance of the Administrative Penalty, was to provide the Appellants with a reasonable opportunity to a due process meeting; and

(b) during the appeals, was to provide a complete Director's Record.

[94] The Director stated that in deciding to issue the Administrative Penalty, he followed the AEP standard practices of issuing the Preliminary Assessment by inviting the Appellants to provide any additional information for consideration and meet with the Director in a due process meeting. The Director submitted he provided a complete "Director's Record."

[95] The Director stated section 59.4(4) of the *Public Lands Act* does not require that the receipt of proceeds result in an economic benefit or advantage. The Director said the section is clear that a person who received proceeds in contravention of the *Public Lands Act* is required to provide an account of the proceeds and pay those proceeds to AEP.

[96] The Director submitted he assessed the Proceeds at $714,500.00 for the revenue the Appellants received due to the Contraventions. The Director noted that Mr. King admitted he received the same amount from the operator of the Camp.

[97] The Director noted Kingdom Properties and Kingdom Cats are separate legal entities, and Kingdom Cats was not a party to the Administrative Penalty. The Director argued Kingdom Cat's alleged losses as a result of payments not made by Kilometer 147 was irrelevant to the determination of the Proceeds in the Administrative Penalty. The Director stated any payment made by Kingdom Properties to Kingdom Cats to cover those losses was also irrelevant.

[98] The Director noted it is a requirement in the terms and conditions of the Leases to make payments to the Crown. The Director said such payments are irrelevant to the Proceeds.

[99] The Director stated the Appellants had the opportunity to provide documents to the Director to consider before he made his decision to issue the Administrative Penalty. The Director submitted the Board should not admit evidence related to the Transferred Funds, which were irrelevant to the Proceeds. The Director said that if the evidence is admitted, it should be given no weight.

E. Appellants' Closing Comments

[100] The Appellants stated the two-year limitation period provided by section 59.7 of the *Public Lands Act* is triggered by the date when a contravention of the *Public Lands Act* occurred, or the date when a contravention first came to the director's attention, whichever is later. The Appellants noted the Director argued he is the director for the purpose of section 59.7, and the date another AEP employee may have been aware of the contravention is irrelevant to the determination of the limitation period. The Appellants submitted section 5 of the *Public Lands Act*[32] allows for the appointment of any person as a director for the purposes of all or part

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32 Section 5 of the *Public Lands Act* provides:

"(1) In accordance with the *Public Service Act*, there may be appointed an Assistant Deputy Minister, officers and any other employees necessary for the administration of this Act.

(2) Without limiting the generality of subsection (1), the Minister may by order designate any person as a director for the purposes of all or part of this Act and the regulations.

of the *Public Lands Act*. The Appellants said that at any given time, it would be possible for numerous AEP employees to hold the position of "director" for the purposes of the *Public Lands Act*.

[101] The Appellants stated if the Board finds that the limitation period only starts when a director who can issue an administrative penalty becomes aware of a contravention, it could result in a patently absurd situation where other AEP employees have knowledge of contravention for years without the limitation period being initiated because the director has yet to become aware of the contravention. The Appellants submitted the Legislature intended the limitation periods in the *Public Lands Act* to bring finality and certainty to enforcement proceedings, and the Director's interpretation of section 59.7 would be contrary to that objective.

[102] The Appellants noted that the Courts have generally followed the Supreme Court of Canada's decision in *Knight* v. *Indian Head School Division No. 19*, that a decision of a preliminary nature will not necessarily trigger the duty to act fairly. While in contrast, a final decision may have the duty to act fairly.[33] The Appellants quoted James Casey from *The Regulation of Professions in Canada*:

> "The traditional view of the duty of fairness in the investigatory stage has been as follows:
>
> > '... the maxim *audi alteram partum* does not apply to an administrative officer whose function is simply to collect information and make a report and who has no power either to impose liability or to give a decision affecting the rights or parties.'"[34]

[103] The Appellants submitted the Director acted as both the investigator and the decision-maker in the investigative stage leading to the issuance of the Administrative Penalty.

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(3) The Minister may, with respect to any director, and a director may, with respect to that director personally, designate any person as an acting director to act in the director's place in the event of the director's absence or inability to act.

(4) A designation under this section may direct that the authority conferred by the designation is to be exercised subject to any terms and conditions prescribed in the designation, including limitations on the scope of the designation.

(5) An officer in the performance of the officer's duties and in the exercise of the officer's powers under this Act or the regulations is a person employed for the preservation and maintenance of the public peace."

[33] *Knight* v. *Indian Head School Division No. 19*, 1990 CarswellSask 146, at paragraph 30.

The Appellants stated the Administrative Penalty was a final decision made by the Director, which imposed a substantial liability on the Appellants. The Appellants said it is difficult to conceive how such a situation would not be considered quasi-judicial.

[104] The Appellants stated that during the investigative stage, they were generally made aware of the allegations against them and given an opportunity to respond to the allegations, but they were not provided with the evidence in the Director's Records. The Appellants noted the Director said he based the decision to issue the Administrative Penalty on the evidence in the Director's Records.

[105] The Appellants noted that the investigation process outlined in the *Public Lands Act* does not permit an investigated party to provide a full answer and defence based on a complete record. The Appellants stated they had a legitimate expectation they would be made aware of the evidence compiled by the Director regarding the Contraventions so that they could respond to the evidence.

[106] The Appellants submitted the Director breached his duties of procedural fairness to the Appellants during the investigation, and the findings and penalties imposed should be set aside in their entirety.

F. Director's Closing Comments

[107] The Director noted Ministerial Order 28/2018 designated him as a director for the purpose of section 59.3 of the *Public Lands Act.*

[108] The Director submitted the question of when evidence of a possible contravention came to the attention of any AEP employee other than the Director is not relevant to the determination of the limitation period.

[109] The Director stated it was the responsibility of the Appellants to read and understand the public lands' regulatory regime that governs their use and occupation of the public lands, but they did not do so.

[110] The Director submitted he:

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[34] James T. Casey, *The Regulation of Professions in Canada* (Scarborough, ON: Carswell, 1994), at page 7-7.

> "… provided all materials he relied on when making his decision in the Director's Record. It is these materials that are 'relevant and material' to this appeal.
>
> Materials not in the possession of the Director, including those in the possession of AEP staff in other departments when he made his decision, are not properly part of the Director's Record."[35]

[111] The Director noted that during cross-examination, he stated that:

> "(a) he had no records of any inspections conducted on the [DMLs] prior to June 19, 2018;
>
> (b) all notes, reports, e-mail and other records created by Public Lands Officer J Bleach that were provided to EPO Litzenberger have been included in the Director's Record at Tabs 6.06, 6.02 and 7.01;
>
> (c) he had no notes, reports, e-mails or other records from a Public Lands officer that visited the site in 2016; and
>
> (d) all e-mails and other communications related to the Administrative Penalty, the [Leases] or the Appellants that he considered when making my decision were included in the Director's Record."[36]

[112] The Director stated he is not aware of any records other AEP staff possess that are "relevant and material." The Director reiterated his suggestion that the Appellants could make a request under the *FOIP Act*.

[113] The Director stated that as he provided an explanation for why the records requested by the Appellants were not included in the Director's Records, the Board should not draw an adverse inference against the Director. The Director quoted from *The Law of Evidence in Canada*:

> "In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application; or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case; or at least would not support it."[37]

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35 Director's Closing Comments, June 25, 2020, at paragraph 27 and 28.

36 Director's Closing Comments, June 25, 2020, at paragraph 29.

37 J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, 2d (Toronto: Butterworths 1999), at page 297.

[114] The Director stated that in issuing the Administrative Penalty for $734,500.00, the Director:

(a) did not err in the determination of a material fact on the face of the Record;

(b) made no errors in law;

(c) and was within his jurisdiction or legal authority.

The Director argued the Appellants have failed to meet the onus to prove their allegations that the Director made errors.

[115] The Director requested the Board find the Administrative Penalty was properly issued, and the amount was reasonable. The Director asked the Board to recommend to the Minister the appeals be dismissed.

V. STANDARD OF REVIEW

[116] When an administrative tribunal looks at a decision, it applies a "standard of review." The standard of review is the legal approach to analyzing the decision. The Supreme Court of Canada has determined two possible standards of review can be applied to a decision under consideration: "reasonableness" and "correctness."

[117] A reasonableness standard of review "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[38] The decision-maker's decision is given deference, meaning "the concept by which one sublimates one's own view to that of another. That is to say, even though one's conclusion differs from that of another, there is good reason to defer to the other's conclusion."[39] Deference does not mean "unquestioning acceptance,"[40] but it does mean that if the decision is "reasonable," the reviewing court (or tribunal) should not substitute its own decision for that of the decision-maker.

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[38] *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47.

[39] *X, Re* (2015), 2015 CarswellNat 2916, Immigration and Refugee Board of Canada (Refugee Appeal Division), at paragraph 39.

[118] A correctness standard of review requires no deference to the decision-maker. The Court has described the correctness standard of review as follows:

> "Under the correctness standard, a reviewing court shows no deference to the decision maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination. Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter. When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair."[41]

The correctness standard of review focuses on determining if the decision-maker made the right decision and did so fairly.

[119] In their submissions, the Parties provided comments on the standard of review the Board should apply to these appeals. Their arguments are summarized below.

A. Appellants

[120] The Appellants submitted the Board is required to determine the appropriate standard of review to apply in its review of the Director's decision to issue the Administrative Penalty. The Appellants noted the standard of review determines the intensity in which a reviewing body will review a decision and the level of deference provided to the decision-maker.[42]

[121] The Appellants noted the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick* ("*Dunsmuir*")[43] identified two standards of review, the standard of "correctness" and the standard of "reasonableness." The Appellants stated the standard of reasonableness applies unless legislation clearly states otherwise, or by the rule of law.[44]

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40 *McKenney* v. *Ontario (Labour Relations Board)*, [2012] O.L.R.B. Rep. 289, at paragraph 7.

41 *Leung* v. *Canada (Citizenship and Immigration)*, 2017 FC 636, at paragraph 19. See also: *Dunsmuir* v. *New Brunswick,* 2008 SCC 9, at paragraph 50.

42 *Hennig* v. *Institute of Chartered Accountants of Alberta*, 2008 ABCA 241, at paragraph 9.

43 *Dunsmuir* v. *New Brunswick,* 2008 SCC 9, at paragraph 34.

44 *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, at paragraph 10.

[122] The Appellants said the appeals are an internal review under the *Public Lands Act* of a decision of the Director. The Appellants stated that the standard of review applied by a higher internal decision-maker to a lower decision-maker in these circumstances is known as the "internal standard of review."[45]

[123] The Appellants referred to the Board's decision on the standard of review in *Inshore Developments Ltd.* v. *Director* ("*Inshore*").[46] The Appellants said the Board considered the Director's submission on the standard of review and determined the cases cited by the Director in support of a reasonableness standard could be distinguished as the cases did not involve a similar legislative framework under which the Director and the Board operated. The Appellants noted the Board stated: "The cases cited by the Director involved judicial reviews of tribunal decisions, not a tribunal's review of a decision of a designated statutory authority, where the reviewing tribunal must make a recommendation to the Minister."[47]

[124] The Appellants stated the *Public Lands Act* provided a statutory right of appeal of certain decisions made by the Director, with the Board established to hear those appeals. The Appellants noted the *Public Lands Act* requires the Board to provide recommendations to the Minister to confirm, reverse, or vary the Director's decision. The Appellants submitted the Board must be able to determine if the Director's decision is correct if it is to carry out this function.[48] The Appellants stated the Board in *Inshore* determined the overall context, and legislative purpose must be considered. The Appellants quoted from *Inshore*:

> "The Board is mainly influenced by the fact the Board must report to the Minister, who has the power to confirm, reverse, or vary, the Director's decision. The Board finds a standard of correctness must be applied, otherwise the Minister's powers would be fettered. While the Minister's decisions must be reasonable, this does not mean the Director's decisions are reviewed by the Minister on a standard

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45 *Sussman* v. *College of Alberta Psychologists*, 2010 ABCA 300, at paragraphs 41 to 42.

46 *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks*, 2018 ABPLAB 3.

47 *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks*, 2018 ABPLAB 3, at paragraph 111.

48 *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks*, 2018 ABPLAB 3, at paragraph 115.

> of reasonableness. This would suggest the Director could overrule the Minister."[49]

[125] The Appellants submitted that despite recent direction given by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov* ("*Vavilov*"),[50] the internal standard of review for this Board continues to be correctness. The Appellants stated clear legislative intention is sufficient to rebut the presumption of reasonableness as the standard of review. The Appellants noted the Supreme Court of Canada said in *Dunsmuir* that when applying a correctness standard, a reviewing court will not show deference to the decision-maker's reasoning, and will instead undertake its own analysis to decide whether it agrees with the determination of the decision-maker or will substitute its own correct answer.[51]

[126] The Appellants stated the Board's legislated role in relation to the Minister requires the Board to undertake its own assessment of the appeals to provide the Minister with the best possible information to decide if the Director's decision should be confirmed, reversed or varied. The Appellants said the Minister's exercise of his authority would be fettered if he were to give deference to the Director's decision.

[127] The Appellants submitted the standard of review in these appeals is correctness.

B. Director

[128] The Director submitted the *Vavilov* case does not apply to the Board's review of the Director's decision to issue the Administrative Penalty. The Director noted that in *Yee* v. *Chartered Professional Accountants of Alberta* ("*Yee*"), the Alberta Court of Appeal stated:

> "It relied on the decision in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9 [2008] 1 SCR 190, which has since been overruled by Vavilov. In any event, Dunsmuir was not the applicable authority, Dunsmuir dealt with the standard of review in external review of administrative action, that is, it dealt with the standard of review by a superior court of the decisions of an administrative tribunal.... Different, although overlapping considerations apply to review at various internal

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49 *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks*, 2018 ABPLAB 3, at paragraph 119.

50 *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, at paragraph 10.

51 *Dunsmuir* v. *New Brunswick,* 2008 SCC 9, at paragraph 50.

> levels within the administrative structure: *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paras 42-3…"[52]

[129] The Director also quoted the Alberta Transportation Safety Board in *Martin (Re)* as follows:

> "Like *Capilano*, *Vavilov* and *Trach* deal with the standard of review to be applied by a court in reviewing a decision of an administrative decision-maker, not the standard of review to be applied by one administrative decision-maker who is reviewing the decision of another administrative decision-maker. Therefore neither of these cases change the analysis set out above."[53]

[130] The Director referenced the Alberta Law Enforcement Review Board's decision in *DiGiuseppe* v. *Edmonton (Police Service)*, as follows: "The Board is not a 'court' and accordingly it is not clear that the new framework referencing the standard of review courts are to apply on appeal are applicable to appellate tribunals reviewing tribunal decisions of first instance."[54]

[131] The Director stated the Board based its decision to apply the standard of correctness in *Inshore* on three factors:

> "(a) The Board makes recommendations to the Minister. Without a correctness standard, the Minister's powers would be fettered, as a reasonableness standard would suggest the Director could overrule the Minister.
>
> (b) The Board, which has a more complete record than the Director, has more relative expertise.
>
> (c) The particular question in the appeal was a question of mixed law and fact. On this point alone, a reasonableness standard could apply. However, viewing the above factors together, this factor is less important."[55]

[132] The Director disagreed the Minister would be fettered if the Board reviewed a decision of the Director with deference. The Director submitted that if fettering was always the case, then every appeal board and appellate court would be fettered whenever deference is given to any aspect of a decision under appeal.

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52 *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98, at paragraph 32.

53 *Martin (Re)*, 2019 ABTSB 1706 (CanLII), at paragraph 44.

54 *DiGiuseppe* v. *Edmonton (Police Service)*, 2020 ABLERB 005, at paragraph 19.

55 Director's Response Submission, June 9, 2020, at paragraph 35.

[133] The Director submitted the *Inshore* decision did not consider several findings in *Newton* v. *Criminal Trial Lawyers' Association* ("*Newton*")[56] that were reiterated by the Court of Appeal in *Yee*:

> "(a) The fundamental purpose of an 'appeal' is to review a decision made by a lower decision-maker – the primary purpose of a record in an appeal is to enable an appeal board to review the particular decision for error;
>
> (b) 'Most appeal tribunals exist to review the decisions that come before them for fairness, accuracy or compliance with the acceptable range of outcomes having regard to the standard of review;'[57]
>
> (c) Granting a wide right of appeal does not signal an intention to permit a wholesale rehearing of the case or that an appeal tribunal should afford no deference whatsoever to the decision being appealed from.
>
> Such an approach 'would undermine the integrity of the first level of [decision-making], and make the proceedings before the [initial decision-maker] an ineffectual waystation along the path to a final decision.'"[58]

[134] The Director noted *Yee* was decided under the *Regulated Accounting Profession Act*, R.S.A. 2000, c. R-12 ("*RAPA*"),[59] which has similar wording to section 120 of the *Public Lands Act*.[60] The Director stated the similarities in the legislation are instructive to how the Board should approach the standard of review analysis in these appeals.

[135] The Director submitted the Board's recommendation to the Minister must be "with respect to the decision appealed from and not a substitute recommendation which sets aside the Director's decision."[61]

[136] The Director quoted the Court in *Yee* as follows:

> "When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal

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56 *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399.

57 *Newton* v. *Criminal Trial Lawyers' Association*, 2010 ABCA 399, at paragraph 60.

58 Director's Response Submission, June 9, 2020 at paragraph 38.

59 The Board notes the *Chartered Professional Accountants Act*, S.A. 2014, c.-10.2, replaced *RAPA* on June 13, 2015. The wording of the relevant sections quoted by the Director are identical.

60 Section 120 of the *Public Lands Act* states: "An appeal under this Act must be based on the decision and the record of the decision-maker."

61 Director's Response Submission, June 9, 2020 at paragraph 41.

holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation*, 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:

(a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;

(b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;

(c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well-positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;

(d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: *Newton* at [paragraph] 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;

(e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

(f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias."[62]

[137] With regards to the standard of review for issues of procedural fairness, the Director stated:

"The issue of whether the Director breached his duty of fairness is not subject to a traditional standard of review analysis.

Rather, the question is 'whether the proceedings met the level of fairness required by law.'[63]

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62 *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98, at paragraph 35.

63 *Institute of Charted Accountants of Alberta* v. *Barry*, 2016 ABCA 354, at paragraph 5.

No standard of review is required, as there is no decision of the Director for the Board to review."[64]

C. Standard of Review Analysis

[138] In reviewing the Decision, the Board must determine the proper standard of review to apply, reasonableness or correctness. A reasonableness standard of review requires greater deference to the Director's decision,[65] while a standard of correctness necessitates less deference. A standard of correctness requires the Board to determine whether the decision to issue the Administrative Penalty was correct and whether the procedural process followed in making the decision was fair.[66]

[139] The Board appreciated the Parties' efforts to assist the Board in determining the proper standard of review. The Board reviewed the cases and arguments the Parties provided. The Board especially considered the *Yee* case, recently decided by the Alberta Court of Appeal. The Director noted the Court in *Yee* considered the decision of an appeal tribunal under *RAPA*, which the Director said had similar legislation as the Board. The Director suggested this similar legislation could be instructive to the Board on its approach to the standard of review.

[140] The Board reviewed *RAPA*, and compared it to the *Public Lands Act* and PLAR, and found significant differences. *RAPA* sections 111 and 112 state the appeal is based on "the decision of the body from which the appeal is made [discipline tribunal]" and "the record of proceedings before that body."

[141] "Record of proceedings" and "record" is defined in section 1(xx) and (yy) of *RAPA*:

"(xx) 'record of proceedings' means
 (i) with respect to proceedings before a tribunal,
  (A) documents or things received as evidence at the proceedings, and
  (B) the transcript of the proceedings, if a transcript is created;

64 Director's Response Submission, June 9, 2020, at paragraphs 80 to 82.

65 *Eastern Irrigation District* v. *Irrigation Council Appeal Panel*, 2019 ABQB 809, at paragraph 36.

66 *Azizian* v. *Canada (Minister of Citizenship and Immigration)*, 2017 FC 379, at paragraph 18.

(ii) with respect to proceedings where a right of appeal exists under this Act or the bylaws, other than proceedings before a tribunal,

(A) information, documents or things considered by the decision-maker, and

(B) the transcript of the proceedings, if a transcript is created;

(yy) 'records' includes

(i) any financial or non-financial information that is or is capable of being represented or produced in written form, and

(ii) the result of the recording of details of electronic data processing systems and programs to illustrate what the systems and programs do and how they operate;"

[142] An appeal under the PLA is based on the decision of the decision-maker, which is similar to *RAPA*, but the "record of the proceedings" is very different from the "record of the decision-maker." Section 209(m) of PLAR states that record "means record as defined in the *Freedom of Information and Protection of Privacy Act*." Section 1(q) of *the FOIP Act* defines record as:

> "'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;"

[143] This expansive definition of "record" under PLAR impacts the scope of the appeals. A larger scope of the appeals suggests a legislative intent to allow the Board a more thorough and intensive review of the Director's decision, which would mean less deference should be given to the decision-maker.

[144] The other significant legislative difference is the Appeal Tribunal under *RAPA* makes the decision regarding the appeal. Under section 124 of the *Public Lands Act*, the Minister, not the Board, is the final decision-maker. This is the most substantial difference that distinguishes decisions such as *Newton* and *Yee* from appeals before the Board. The case law relied on by the Director does not address legislative frameworks similar to those under which the Director and the Board operate. None of the cases provided by the Director involved a

legislated responsibility requiring the reviewing tribunal to make a recommendation to a minister regarding a decision under review.[67]

[145] In *City Centre Equities Inc.* v. *Regina (City)*, the Saskatchewan Court of Appeal emphasized the importance of analyzing the legislation when determining the standard of review:

> "In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill."[68]

[146] In previous appeals, the Board undertook a detailed analysis of the standard of review for appeals under the *Public Lands Act* and PLAR. The Board's analysis determined the standard of correctness is appropriate for appeals before it.[69] The most important factor when considering the Board's role in the appeal process is that the Board does not make the final decision in appeals before it (other than on some procedural matters). The Board's role is to provide the Minister with the best possible advice. The Minister takes this advice into account in making his decision, which is the final decision on the appeal. The Minister's decision may reflect a broader range of factors than those considered by the Director.[70]

[147] The *Public Lands Act* provides a statutory right of appeal of certain decisions made by the Director. The Board was established to hear those appeals and provide

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

> "(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.
>
> (2) The report may recommend confirmation, reversal or variance of the decision appealed.
>
> (3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

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

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

recommendations to the Minister. In appeals of administrative penalties before the Board, there are three legislative purposes to consider:

(a) section 59.3 of the *Public Lands Act* authorizes the Director to issue an administrative penalty;

(b) section 211(h) of PLAR,[71] authorizes the Board to hear appeals of the Director's issuance of an administrative penalty under the *Public Lands Act*; and

(c) section 124 of the *Public Lands Act* states the Board must submit a report to the Minister, who confirms, reverses, or varies the administrative penalty. This section makes the Minister the final decision-maker on appealed decisions.[72]

[148] When the Board hears an appeal, it must recommend that the Minister confirm, reverse, or vary, a decision made by an AEP decision-maker. In doing so, it is essential that the Board determine if the decision is correct. The Board has a duty to provide the Minister with the best possible advice and recommendations. For these reasons, the Board has determined the standard of correctness is the appropriate standard of review to apply to the Director's decision to issue the Administrative Penalty.

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70 See: The Court of Queen's Bench of Alberta in *McColl-Frontenac Inc.* v. *Alberta (Minister of Environment)*, 2003 ABQB 303, at paragraph 19, where it quoted the Supreme Court of Canada in describing the powers of the Minister, stating: "[T]he exercise of ministerial discretion and decision-making generally involves polycentric considerations, that is they 'require the simultaneous consideration of numerous interests and the promulgation of solutions which concurrently balance the benefits and costs for many different parties,' .... *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, ..." 1998 SCR 778 at paragraph 36.

71 Section 211(h) of PLAR states: "The following decisions are prescribed as decisions from which an appeal is available: ... an enforcement order, a stop order or an administrative penalty ...."

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

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

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

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

VI. ANALYSIS

[149] Both the Appellants and the Director referred to the court proceedings involving the Appellants and other parties involved in the Leases. The court proceedings are beyond the scope of these appeals, and the Board did not consider any arguments related to them.

[150] The Board notes the Appellants did not organize their submissions according to the issues set by the Board. While the Board may set the issues, the parties to an appeal are free to structure their arguments in whatever manner they choose. The Board's written report and recommendations is generally organized according to the issues. However, in this report, the Board will address the issues of the duty of fairness (which includes disclosure, limitation date, and adverse inference) and the Proceeds portion of the Administrative Penalty. The Board will relate these issues to the issues the Board set for the hearing of the appeals.

A. Duty of Fairness

[151] The duty of fairness, often referred to as the duty to act fairly or procedural fairness,[73] is a basic principle of administrative law. The Supreme Court of Canada has stated that public authorities have a duty to act fairly:

> "This court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[74]

[152] AEP is a public body with legislated powers and must exercise those powers according to the principles of administrative law.[75] It is the Director's responsibility to ensure an appropriate level of procedural fairness exists within the decision-making process. The courts have held:

> "The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded

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[73] This report uses the terms "duty of fairness," "procedural fairness," and "duty to act fairly" interchangeably.

[74] *Cardinal* v. *Kent Institution*, [1985] 2 S.C.R. 643, at paragraph 14.

[75] *Knight* v. *Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 26.

> decision-maker would need to be informed in order to reach a rational conclusion."[76]

[153] The intent of the duty of fairness is not to create "procedural perfection" but to attain an appropriate balance between the need for fairness, efficiency, and predictability of the outcome.[77] If the balance is incorrect, the decision-maker has breached the duty to act fairly. If the breach is significant, the decision-maker's actions may be void. However, not every breach of the duty of fairness will render a decision void. Minor procedural technicalities or errors that are immaterial to a decision or did not affect the outcome will generally not be fatal to the decision.[78]

[154] A review of the duty of fairness is not a determination of whether the Director was reasonable or correct, but rather whether the Director met the level of fairness required by law.[79] The degree of procedural fairness owed by the Director to the Appellants "is to be decided in the specific context of each case."[80]

[155] In *Baker*, the Supreme Court of Canada listed factors to be considered when determining the duty of fairness required.[81] The list is not meant to be finite, as other factors may be relevant. Although the factors were given in the context of a judicial review, the Board considers them helpful:

(a) the nature of the decision being made and the process followed in making the decision;

(b) the nature of the statutory scheme and the terms of the statute under which the body operates;

(c) the importance of the decision to the individuals affected;

(d) the legitimate expectations of the person(s) affected by the decision; and

(e) the agency or administrator's choice of procedure.

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76 *Kindler* v. *Canada (Minister of Justice)*, [1987] 2 F.C. 145, at paragraph 18.

77 *Knight* v. *Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 53.

78 See: *Manyfingers* v. *Calgary (City) Police Service*, 2005 ABCA 183.

79 *Institute of Chartered Accountants of Alberta* v. *Barry*, 2016 ABCA 354, at paragraph 5.

80 *Knight* v. *Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at paragraph 50.

81 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraphs 21-28.

(i) Nature of the Decision

[156] The more a decision is judicial in nature, the more procedural fairness is required. A decision that is more legislative requires less procedural fairness. The decision to issue the Administrative Penalty is a mixture of judicial and legislative characteristics. The weighing of evidence, the opportunity for the Appellants to make representations, and the exercise of discretion by the Director, are hallmarks of a judicial process. The provisions in the *Public Lands Act* governing the issuance of an Administrative Penalty are detailed and extensive, which indicates a legislative nature to the decision. The nature of the decision is a mixture of judicial and legislative aspects.

(ii) Statutory Scheme

[157] Where no appeal of a decision is available, or if the decision is final, there is a greater degree of procedural fairness required. The *Public Lands Act* provides for an appeal to the Board, which lessens the degree of the duty of fairness owed by the Director to the Appellants. However, the decision of the Minister is final. The Board's role in providing a report and recommendations to the Minister requires a high level of procedural fairness. While the Director may owe a lesser duty of fairness at the decision-making level, the duty increases at the appeal level, particularly regarding the provision of the Department's Records.

(iii) Importance of the Interest to the Appellants

[158] The more important the decision is to the Appellants, the higher the duty of fairness is required. The Director's decision is significant to the Appellants as it may result in personal bankruptcy.

(iv) Legitimate Expectations

[159] The doctrine of legitimate expectations is based on the principle that procedural fairness must take into account the promises or regular practices of the delegate. It would be unfair for the Director or AEP to vary from their usual practice without good reason. The Board did not find any significant instances of legitimate expectations in the appeals.

(v) Procedural Choices

[160] The more statutory discretion the Director has to create his own procedure, the more procedural fairness is owed. In these appeals, the discretion of the Director or AEP to create their own procedure is limited by the *Public Lands Act* and PLAR. On the departmental

level, AEP can set its own policies and procedures as long as they do not conflict with the legislation. The Director has some discretion on procedural conduct but is limited by AEP policy and legislation.

[161] The Board's application of the factors listed in *Baker* suggests a duty of fairness in the mid-range of the spectrum between a low degree of fairness and the high standard applied to professional disciplinary procedures and immigration matters. The Board acknowledges this discretionary determination is not a precise measurement, and the standard may fluctuate depending on the facts and circumstances, as noted by the Court in *Baker*. The degree of the duty of fairness the Director owed to the Appellants was lower in the investigative stage leading up to the Administrative Penalty than after the Notices of Appeal were filed with the Board.[82]

[162] The duty to act fairly includes the principle of a*udi alteram partem*, which means "hear the other side." This principle refers to the right of a person to know the case being made against them and be allowed to respond to the decision-maker.[83] In an appeal under the *Public Lands Act*, the appellant has the right to review the decision-maker's record in order to know the case to be met.

[163] The Board considered the Supreme Court of Canada's decisions in *Charkaoui, Re* and *May v. Ferndale Institution*. In *Charkaoui, Re*, the Court ruled on an immigration matter. However, the Board finds there is an appropriate application from that case to these appeals. The Court stated:

> "Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case. This right is well established in immigration law. The question is whether the procedures 'provide an adequate opportunity for [an affected person] to state his case and know the case he has to meet.'"[84]

[164] In *May v. Ferndale Institution*, the Supreme Court of Canada considered the level of disclosure required in an administrative decision compared to a criminal matter. The Court

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82 See: *Tanaka* v. *Certified General Accountants' Association (Northwest Territories)*, [1996] N.W.T.R. 301.

83 David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Thompson Reuter Canada Limited, 2014) at page 259.

84 *Charkaoui, Re*, 2007 SCC 9, at paragraph 53.

referred to its previous decision in *R. v. Stinchcombe*,[85] where the Court found the Crown had the duty to disclose all its evidence to the defence so that the accused could mount a complete defence. The Court said:

> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context. 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."[86] [Emphasis is the Board's.]

[165] The Board interprets the decisions in *Charkaoui, Re* and *May v. Ferndale Institution* to mean that for the Director to satisfy the duty to act fairly, the Director must:

(a) provide an adequate opportunity for the Appellants to state their case;

(b) disclose sufficient information for the Appellants to know the case to meet.

If the Director fails to meet these requirements, the Director's decision may be void. The Board notes that the two requirements are closely linked: the Appellants cannot have an adequate opportunity to present their case without sufficient disclosure. The Board also notes there is a difference in the level of procedural fairness necessary at the investigative stage compared to the hearing stage.

[166] The Appellants submitted the Director acted unfairly by:

(a) not providing an opportunity to review the evidence before the Administrative Penalty was issued; and

(b) failing to provide a full record so the Appellants could know the case to be met.

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85 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

86 *May* v. *Ferndale Institution*, 2005 SCC 82, at paragraphs 91-92.

(a) Breach of Duty of Fairness: no opportunity to review the evidence before the Administrative Penalty was issued.

[167] The Appellants stated the Director breached the duty of fairness by not providing them with the evidence in the Department's Records before the Administrative Penalty was issued so they could respond effectively. The Director stated the Appellants were invited to a due process meeting, which was an opportunity to provide new information for the Director to consider before making the decision.

[168] The Board notes the Appellants declined to meet with the Director in a due process meeting and instead submitted documents for the Director's consideration. While the Appellants were completely within their rights to not attend the due process meeting, it would have been an opportunity to better explain their position to the Director.

[169] The Board's opinion is that it would have been preferable if the Director had provided all relevant documentation to the Appellants early in the process. The Board assumes the Director's goal in an investigation is to obtain the best information possible to make the correct decision regarding the Administrative Penalty. It is difficult to reach a correct decision without "hearing the other side." The Director provided an opportunity for the Appellants to be heard by inviting the Appellants to attend a due process meeting. The Appellants also provided documentation to the Director to consider before the Director made the decision. However, the Appellants were unable to present a full case to the Director without better access to the records upon which the Director relied.

[170] As already noted, the Board finds the degree of procedural fairness owed to an appellant in the investigative stage of an administrative penalty is relatively low. The availability of an appeal to the Board ameliorates the limited duty of fairness owed by the Director at the investigative stage. An appeal to the Board involves a more fulsome record, the cross-examination of witnesses, and the submission of written argument, all of which provide greater procedural fairness to the Appellants. The Board finds the Director met the duty of fairness owed to the Appellants during the period before the Administrative Penalty was issued.

(b) Breach of Duty of Fairness: failing to provide a full record so the Appellants could know the case to be met

[171] The Appellants alleged the Director acted unfairly by not providing the full Department's Records, even after the Appellants requested it specifically during the appeal process. The Director stated the records provided to the Board was complete as it contained all the documentation considered by the Director when deciding to issue the Administrative Penalty.

[172] The importance of the full Department's Record is found in the question of whether the Director issued the Administrative Penalty after the limitation period established in the legislation. The Appellants claimed the Requested Disclosure would prove AEP Lands Officers conducted site visits in 2014, 2015, and 2016, and were aware the Appellants were not operating the Camp. The Appellants argued the site visits are evidence the Director was aware of the unauthorized subletting of the Leases before August 31, 2017, which is the date the Director said he first became aware of the Contraventions. If the Appellants are correct, then the Director erred in material fact on the face of the record, erred in law, and exceeded his jurisdiction.

[173] The Board notes the Appellants initially relied on section 56.1 of the *Public Lands Act*,[87] and the Director repeatedly referred to section 59.8 of the *Public Lands Act*,[88] as the relevant sections establishing the limitation period for an administrative penalty. The correct section is 59.7, which states:

"A notice of administrative penalty may not be issued more than 2 years after

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[87] Section 56.1 of the *Public Lands Act* provides:

"A prosecution in respect of an offence under this Act or the regulations may not be commenced later than 2 years after

(a) the date on which the offence was committed, or

(b) the date on which evidence of the offence first came to the attention of the director,

whichever is later."

[88] Section 59.8 of the *Public Lands Act* states:

"(1) Subject to any right to appeal the notice of administrative penalty, the director may file a copy of the notice of administrative penalty with the clerk of the Court of Queen's Bench and, on filing, the notice may be enforced as a judgment of the Court.

(2) On application by the director, the Court may make any order necessary to compel the person receiving a notice under section 59.4 to carry out the terms of the notice."

(a) the date on which the contravention to which the notice relates occurred, or

(b) the date on which evidence of the contravention first came to the notice of the director,

whichever is later."

Section 56.1 refers to limitation periods for prosecutions, while section 59.8 refers to filing administrative penalties with the Court of Queen's Bench of Alberta. The Board assumes the references were the result of inadvertent mistakes.

[174] The Director stated the Contraventions first came to his attention on August 31, 2017, when an AEP Lands Officer discovered the Camp on the Lands was not being operated by Kingdom Properties. Further investigation revealed the Leases had been sublet without authorization. The Administrative Penalty was issued on August 29, 2019, within the two year limitation period as per section 59.7 of the *Public Lands Act*.

[175] The Appellants submitted AEP Lands Officers conducted site visits to the Lands in 2014, 2015, and 2016, and the Lands Officers witnessed a commercial camp operating. In his affidavit, Mr. King stated he advised the Lands Officers that Kilometer 147 was operating the Camp. The Appellants also noted an Incident Triage Form prepared by an AEP Lands Officer and included in the Department's Record referred to a site visit in 2016. In the Incident Triage Form, the Lands Officer stated:

> "In summer of 2016 the Lands Officer for the area observed that some workers were attempting to remove topsoil from DML 130166. After a brief introduction and discussion the workers returned the material. Follow up the next week showed that no removal of topsoil had occurred, no further actions were taken."[89]

The Appellants argued the site visits Mr. King testified of in his affidavit, along with the site visit in the Incident Triage Form, are evidence the Director, through the Lands Officers, knew of the Contraventions before July 2016.

[176] The Appellants stated the Director's failure to provide all the relevant and material records related to the Leases should lead the Board to make an adverse inference the

[89] Incident Triage Form, Department's Record, at tab 7.01.

records exist and establish the Director was aware of the Contraventions more than two years before the issuance of the Administrative Penalty.

[177] The Director responded that the Board should not make an adverse inference as the Director has said the Requested Disclosure does not exist, and if they did exist, they were not considered by the Director in making his decision.

[178] In a civil law setting, such as with appeals to the Board, the term "adverse inference" means a situation where a party to an appeal asks the Board to reach a conclusion on missing or silent evidence on an issue. The leading statement on adverse inference is from Wigmore's *Evidence in Trials at Common Law, 1979*:

> "The failure to bring before the tribunal some circumstances, documents or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanation by circumstance, which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."[90]

[179] Adverse inference is discretionary and dependent on the circumstances. Justice Veit of the Court of Queen's Bench of Alberta stated: "Adverse inferences should not always be drawn when an expected material witness does not testify: all pertinent circumstances must be examined to determine if an inference should be drawn."[91] The Court in *Howard* v. *Sandau* approved a list of circumstances it considered when determining if an adverse inference should be taken:

(a) Is there a legitimate explanation for the failure to produce the evidence?

(b) Is the evidence material to the outcome of the case?

(c) Is the evidence the only or best evidence on the matter available?

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90 John Henry Wigmore, Evidence in Trials at Common Law, Chadbourn Revision (1979), Vol 2, at page 192.

91 *Dabrowski* v. *Robertson*, [2007] A.J. No. 949 (Alta. Q.B.), at paragraph 64.

(d) Does the party that withheld the evidence have exclusive control of the evidence?[92]

[180] As the party seeking the adverse inference, the onus of proof is on the Appellants to convince the Board such an inference would be appropriate.

[181] The Board has considered the submissions from the Parties on whether an adverse inference should be drawn that AEP Lands Officers visited the Lands and were aware of the illegal subletting. The Board applied the test outlined in *Howard* v. *Sandau* as follows.

(i) Is there a legitimate explanation for the failure to produce the evidence?

[182] The Director stated he had no record of inspections conducted on the Lands before June 19, 2018, and if there are records held by other AEP staff that are relevant and material, he does not know of it. The Board notes the Incident Triage Form, included in the Department's Records at tab 7.01, clearly mentions two site visits conducted by an unnamed AEP Lands Officer. The Board finds it surprising that there would be no documentation regarding such visits. Department staff keep detailed notes of every visit, phone call and interaction with disposition holders, or at least are required to do so. The Lands Officer writing the Incident Triage Form would have relied on documentation to provide a fairly detailed description of the site visit. The Board does not understand how the indication of further documentation that could be relevant and material to the decision to issue the Administrative Penalty could be overlooked. There was no evidence to suggest the Director undertook a search for the documentation relating to the site visits. The Director appears to have relied only on the documents provided to him by AEP field staff.

[183] The Board finds no legitimate explanation for the Director's failure to produce the evidence.

(ii) Is the evidence material to the outcome of the case?

[184] The Appellants ask the Board to infer that the Director withheld records showing the Director, through the AEP Lands Officers that visited the site in 2014, 2015 and 2016, had knowledge of the illegal subletting of the Leases. For the Board to draw an adverse inference,

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92 *Howard* v. *Sandau*, 2008 ABQB 34, at paragraph 44.

there must be some evidence to lend credence to the claim. Mr. King stated in his affidavit that during the Lands Officers' visits in 2014 and 2015, "the nature of the Camp operations, and the operators of the Camp, were openly canvassed with the Lands Officers." The Board notes Mr. King did not claim the Lands Officers were aware the Leases were sublet to another party. The Board finds it improbable that when faced with a Lands Officer visiting the site, the parties involved would confess to subletting the Leases without authorization. Mr. King stated he presumed someone else had taken care of the required paperwork for the Leases' subletting. Mr. King would have no reason to discuss the Subleases with the Lands Officers if he thought the application for approval was completed. A Lands Officer would not be overly concerned upon learning a third party was operating the Camp as it was common practice to subcontract operations on a disposition. If a Lands Officer had knowledge of an unauthorized sublet, the officer would be duty-bound to raise the matter to the Director.

[185] The Board is concerned that the Director did not provide all the relevant documents related to the appeals, particularly regarding the visits of Lands Officers mentioned in the Incident Triage Form. However, the Appellants' own affidavit fails to provide evidence to support the claim the Lands Officers knew of Leases' unauthorized subletting. The Board finds on the balance of probabilities that if the Requested Disclosure were to be produced, the evidence would not demonstrate the Lands Officers knew of the unauthorized subletting of the Leases. The Board finds the evidence would most likely not be material to the outcome of the appeals.

[186] The Federal Court of Appeal made a similar finding in *Sheriff v. Canada (Attorney General)*. The Court held that a professional disciplinary hearing required a high level of procedural fairness and that the duty of fairness had been breached by the failure to provide appropriate disclosure. However, the Court found the undisclosed documents would not have affected the final outcome of the hearing or affected the appellant's right to make full answer and defence.[93] While the facts facing the Court were different from those considered by the Board in these appeals, the conclusion is the same.

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[93] *Sheriff* v. *Canada (Attorney General)*, 2006 FCA 139, at paragraph 47.

[187] In a judicial review of another professional disciplinary decision, the Nova Scotia Court of Appeal considered the complainant's allegation her hearing before the Barristers' Society (Nova Scotia) was unfair because the Society did not disclose certain documents the complainant sought. The Court stated:

> "Ms. Harris [the complainant] has not satisfied me that the Society breached its duty to disclose the material she sought to have disclosed. Accordingly, I am not prepared to order that it be disclosed or admitted as fresh evidence. I am satisfied this material either does not exist or is plainly irrelevant to the charges against Ms. Harris in the formal complaint and her reasonably possible defences.... On the basis of the record before us on this appeal, I am satisfied the existing material Ms. Harris sought to have disclosed would have had no effect on the Panel's decision or on the overall fairness of the hearing before the Panel."[94] [Emphasis is the Board's.]

[188] Having found the evidence in the Requested Disclosure would most likely not be material to the outcome of the appeals, the Board does not need to consider the remaining questions in the adverse inference test.

[189] The Appellants claimed the Requested Disclosure would reveal the Lands Officers knew of the unauthorized subletting of the Leases, but Mr. King's affidavit suggests otherwise. Had Mr. King conclusively stated under oath the Lands Officers were aware of the unauthorized subletting, the Board may have been able to make an adverse inference. Without sufficient supporting evidence, the Board is unable to make an adverse inference as requested by the Appellants.

[190] By determining an adverse inference is not appropriate in this situation, the Board must decide on the remaining evidence if the Director breached the limitation period. The Board finds there is no evidence to support the Appellants' claim the Director knew of the Contraventions before August 31, 2017.

[191] The Appellants noted section 59.7 of the *Public Lands Act* specifies that the limitation period only starts when the "director" becomes aware of a contravention of the *Public Lands Act*. The Appellants submitted the "director" must include AEP employees, or a limitation period could be stalled indefinitely because the "director" was unaware of the

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[94] *Harris* v. *Barristers' Society (Nova Scotia)*, 2004 NSCA 143, at paragraphs 6 and 98.

contravention. The Board agrees such a situation would be untenable. However, in these appeals, the scenario the Appellants suggest is not applicable. The Appellants did not provide sufficient evidence to convince the Board that AEP employees were aware of the Contraventions before August 31, 2017. The Board finds the Director did not issue the Administrative Penalty after the expiry of the limitation period in section 59.7 of the *Public Lands Act*.

[192] The Appellants also argued that the Director exceeded his jurisdiction by issuing the Administrative Penalty after the limitation date. The Board finds the Director issued the Administrative Penalty within the legislated limitation period and did not exceed his jurisdiction.

B. Proceeds

[193] The Appellants submitted the term "proceeds" in section 59.4 of the *Public Lands Act* refers to the economic benefit the person who contravened the legislation received. The Appellants stated they paid $6,337.20 in annual lease payments to the Crown for the Leases and transferred $650,000.00 to Kingdom Cats to cover the costs of running the Camp. The Appellants submitted these amounts should be deducted from the Administrative Penalty to determine the net economic benefit from the Subleases.

[194] The Director stated the Proceeds assessment considered the need for deterrence of other parties holding public lands dispositions so that an administrative penalty would not be viewed as a "cost of doing business." The Director said section 59.4(4) of the *Public Lands Act* requires the person who received proceeds in contravention of the legislation to pay those proceeds to AEP.

[195] *In JMB Crushing Systems ULC v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*,[95] the director and the appellant jointly requested the Board recommended the Minister approve a resolution reducing the proceeds part of an administrative penalty to zero. The parties agreed to the joint request after the appellant provided information showing its net profits as a result of the contravention was negligible. Firstly, this decision was the result of a mediated agreement between the parties. Secondly, the

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[95] *JMB Crushing Systems ULC* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, (30 August 2019), Appeal No. 18-0023-R (A.P.L.A.B.), 2019 APLAB 19.

Board is not bound by precedent.[96] However, the finding of an AEP director that proceeds were related to economic benefit is consistent with previous Board decisions.[97]

[196] The Appellant requested the Board accept its evidence regarding the Transferred Funds as relevant and rationally connected to the Department's Records. The Director argued the Transferred Funds were irrelevant to the calculation of the Proceeds, and the Board should reject the evidence or give it low weight.

[197] The Board considered the issue of evidence not part of the Department's Record in *1657492 Alberta et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks.* The Board stated:

> "In section 120, the "record" is the Director's Record. In an appeal on the record, the Board's decision must be based on the evidence found in the record provided by the Director. However, the Board's decision can also be based on other evidence that is rationally connected to evidence found in the Director's Record, meaning evidence that provides details, clarifies, or helps the Board understand the evidence found in the Director's Record."[98]

[198] In these appeals, the Board finds the evidence of the Transferred Funds is rationally connected to the evidence found in the Department's Records and assists in the Board's understanding of the facts and circumstances surrounding the appeals. The Board admitted the evidence submitted by the Appellants regarding the Transferred Funds, but the Board rejects the Appellants' submission the money transferred to Kingdom Cats by Kingdom Properties should be deducted from the Proceeds. Kingdom Cats and Kingdom Properties are both companies that are under the decision-making power of Mr. King. Allowing such an expense to be part of the determination of the Proceeds would be transferring Kingdom Cats' expenses to Kingdom Properties without transferring any of the benefits (revenues) received as a result of those expenses.

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[96] See: Sara Blake, *Administrative Law in Canada*, 2nd ed. (1997 Butterworths Canada Ltd.) at page 113:
"A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances in the field it governs. The principle of stare decisis does not apply to tribunals. A tribunal may consider previous decisions on point to assist it in deciding the appropriate order to make in the case at hand. If circumstances are similar, it may find an earlier decision persuasive. However, it should not treat the earlier decision as binding upon it."

[97] See: *Gionet et al.* v. *Director, Lower Athabasca Region, Alberta Environment and Parks* (4 September 2018), Appeal Nos. 17-0014-0016-D (A.P.L.A.B.).

[98] *1657492 Alberta et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks (14 August 2018)*, Appeal Nos. 17-0022, 0025-0027, and 0045-R (A.P.L.A.B.), at paragraph 147.

[199] In considering the amount of the Proceeds, the Board considered the evidence provided in the Department's Record.[99] The net economic benefit to the Appellants from the unauthorized subletting can be determined by reviewing the cash inflows (the rent paid to the Appellants for the Subleases) minus the cash outflows (property taxes and lease payments to the Crown).

[200] The Board finds the cash inflows are evidenced by the four cancelled cheques from Monias Lodge to Kingdom Properties on which the Director based the Proceeds portion of the Administrative Penalty. The total amount of the cancelled cheques is $714,500.00.[100]

[201] The cash outflow consists of property taxes and lease payments. The Appellants paid property taxes in 2016 and 2017 to the County of Lac La Biche in the amount of $320,425.01.[101] The Board found annual rental payments by the Appellants to the Province of Alberta for the Leases was a legitimate expense. The Appellants' rental payments to the Province of Alberta from October 21, 2014 to March 12, 2017, totalled $3,477.44.[102]

[202] The Board calculated the net economic benefit to the Appellants as follows:

Item	**Amount**
Cash Inflow	+ $714,500.00
Cash Outflow	
Property Taxes	- $320,425.01
Lease Payments	- $3,477.44
Total Net Economic Benefit to Kingdom Properties	**$390,597.56**

[203] Using the documentation in the Department's Records, the Board finds the net economic benefit to the Appellants is $390,597.56. This amount should replace the Proceeds amount calculated by the Director.

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99 See: Department's Record, at tab 8.2.4.

100 See: Department's Record, at tab 10.0.6.

101 The amount calculated for taxes paid does not include penalties for unpaid property taxes as Kingdom Properties has the legal obligation to pay taxes owing. Failure to pay taxes on a timely basis is not a consequence of the Subleases but a business decision made by Kingdom Properties to not exercise its available remedies under the Sublease agreement when Kilometre 147 did not meet tax payment obligations.

102 The Board calculated the 2017 lease payment on a proportional basis as the Appellants stopped lease payments 71 days into 2017.

[204] The Director assessed $20,000.00 for the Penalty amount of the Administrative Penalty, which the Board added to the Proceeds amount for a total Administrative Penalty amount of $410,597.56.

Proceeds	$390,597.56
Penalty	+ $20,000.00
Total	**$410,597.56**

VII. DECISION

[205] Section 124 of the *Public Lands Act* states:

> "(1) The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it.
>
> (2) The report may recommend confirmation, reversal or variance of the decision appealed.
>
> (3) On receiving the report of the appeal body, the Minister may, by order, confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could have made, and make any further order that the Minister considers necessary for the purpose of carrying out the decision."

[206] In making its Report and Recommendations to the Minister, the Board has reviewed the Board's file, the Department's Records, the Parties' submissions, the relevant legislation and case law. After careful consideration, the Board finds as follows:

1. As to whether the Administrative Penalty was properly issued, the Board finds the Director erred in the determination of a material fact on the face of the Record, erred in law, and exceeded his jurisdiction or legal authority, by not correctly determining the amount to be assessed as proceeds.

   Specifically, the Director made these errors by incorrectly calculating the Proceeds as being the gross amounts received by the Appellants. The Proceeds should have been calculated as the net economic benefit earned by the Appellants.

   In the other aspects of the issuance of the Administrative Penalty, the Board finds the Director did not err and made the correct decision.

2. As to whether the amount of the Administrative Penalty, including the Proceeds, was correctly assessed, the Board found the Director erred in the

determination of a material fact on the face of the Record, erred in law, and exceeded his jurisdiction or legal authority.

As stated, the Proceeds should have been calculated as the net economic benefit received by the Appellants. Specifically, the Director erred by not considering the property tax and lease payments incurred by the Appellants in the calculation of the Proceeds.

In the other aspects of the amount of the Administrative Penalty, the Board finds the Director did not err and made the correct decision.

VIII. RECOMMENDATION

[207] The Board recommends the Minister vary the Director's decision to issue Administrative Penalty No. PLA-19/08-AP-LAR-19/08 as follows:

1. Confirm the Base Penalty portion of the Administrative Penalty as $20,000.00; and
2. Reduce the Proceeds amount of the Administrative Penalty to $390,597.56.

[208] Reducing the Proceeds amount will decrease the total Administrative Penalty from $734,500.00 to $410,597.56.

[209] The Board notes that a stay of the Administrative Penalty was granted. Therefore, the Administrative Penalty is due sixty days after the date of the Minister's order in this matter. Further, no interest accrues on the Administrative Penalty until sixty days after the Minister's order in this matter.

[210] With respect to section 125(4) of the *Public Lands Act*, the Board recommends copies of the Report and Recommendations, and the decision of the Minister, be sent to the following persons:

(a) Ms. Tara Hamelin, Bishop McKenzie LLP, on behalf of the Appellants; and

(b) Ms. Vivienne Ball, Alberta Justice and Solicitor General, on behalf of the Director.

IX. ADDITIONAL COMMENTS

[211] The Board is concerned at the lack of documentation regarding site visits by AEP Lands Officers. From the Incident Triage Report, it is clear there were documents not considered by the Director that should have been on the file. There appears to have been no

effort to find the documents and provide them to the Appellants. Had Mr. King's Affidavit been more convincing, the Board may have made an adverse inference regarding the lack of documentation.

[212] The Board found the Director's comment that the Appellants could apply under the *FOIP Act* for the documents insincere, considering the Director and those who advise the Director, would have known the FOIP process is incompatible with the timelines in PLAR for appeals before the Board. Additionally, the definition of "record" under the *FOIP Act* is the exact same as the definition under PLAR. Therefore, the documents returned would have been identical. There was no benefit to either party by the Director's comment. The Board hopes AEP's approach to appellant's requests will be more helpful and less confrontational in the future.

Dated on July 31, 2020, at Edmonton, Alberta.

-original signed-................
Gordon McClure
Board Chair

-original signed-................
Nick Tywoniuk
Panel Member

-original signed-.................
Line Lacasse
Panel Member

ALBERTA
ENVIRONMENT AND PARKS

Office of the Minister
Government House Leader
MLA, Rimbey-Rocky Mountain House-Sundre

Ministerial Order
46/2020

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

and

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

Order Respecting Public Lands Appeal Board
Appeal Nos. 19-0005-0006

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal Nos. 19-0005-0006.

Dated at the City of Edmonton, Province of Alberta, this 26 day of Aug, 2020.

Jason Nixon
Minister

323 Legislature Building, 10800 97 Avenue, Edmonton, Alberta AB Canada Telephone 780-427-2391 Fax 780-422-6259

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Appendix

Order Respecting Public Lands Appeal Board Appeal Nos. 19-0005-0006

With respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), to issue Administrative Penalty No. PLA-19/08-AP-LAR-19/08 (the "Administrative Penalty") to Jason King and Kingdom Properties Ltd., in the amount of $734,500.00, pursuant to sections 59.3 and 59.4(4) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"), I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the Act, order that:

1. The decision of the Director to issue the Administrative Penalty is confirmed with respect to the base penalty amount being assessed at $20,000.00.
2. The decision of the Director to issue the Administrative Penalty is varied by changing the proceeds amount assessed under section 59.4(4) of the Act from $714,500.00 to $390,597.56.
3. The decision of the Director to issue the Administrative Penalty is varied by changing the total amount of the Administrative Penalty from $734,500.00 to $410,597.56.
4. The Administrative Penalty is due 60 days after the date of this Order.
5. No interest is payable on the Administrative Penalty until 60 days after the date of this Order.