

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – June 30, 2021

IN THE MATTER OF sections 121 and 123 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Smoking Diesel Contracting Ltd. and Trent Zelman of the decision by the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks, to issue Administrative Penalty PLA-20/11-AP-NR-20/10.

Cite as: *Smoking Diesel Contracting Ltd. and Trent Zelman v. Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024-ID1 (A.P.L.A.B.), 2021 ABPLAB 12.

BEFORE:

Mr. Gordon McClure, Board Chair and Appeals Coordinator.

Board Staff: Mr. Andrew Bachelder, Board Legal Counsel.

SUBMISSIONS BY:

Appellants: Smoking Diesel Contracting Ltd. and Mr. Trent Zelman, represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.

Director: Mr. Simon Tatlow, Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

In 2013, Alberta Environment and Parks (AEP) issued a Department Miscellaneous Lease (DML) to Smoking Diesel Contracting Ltd. (Smoking Diesel) for the construction and operation of a campsite and an industrial storage yard, in the Regional Municipality of Wood Buffalo. Mr. Trent Zelman is the sole shareholder of Smoking Diesel (collectively, the Appellants). The camp catered to oilfield workers.

In January 2021, the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks (the Director), issued a Notice of Administrative Penalty and Proceeds Assessment (the Administrative Penalty) to the Appellants in the amount of \$905,533.34 for allegedly subletting the DML without authorization. The Appellants filed a Notice of Appeal with the Board appealing the Administrative Penalty.

In May, 2021, the Director and the Appellants submitted preliminary motions to the Board requesting the Board admit additional evidence not contained in the Director's Record. The Director sought to include an affidavit from an Environmental Protection Officer (EPO) which contained evidence gathered after the Administrative Penalty was issued. The Appellants requested the admission of an affidavit from Mr. Zelman, photographs taken of the camp signage, and several proposed affidavits from former AEP employees attesting to the past practices of AEP with regards to subletting.

Appeals before the Board are based on the decision and record of the decision-maker, but there are situations where the Director's Record may be incomplete. In those instances, additional records may be introduced as evidence if the record being introduced is relevant, rationally connected to evidence in the Director's Record, provides details, clarification, and assistance to the Board in understanding the evidence contained in the Director's Record.

The Board considered written submissions from the Director and the Appellants on the admissibility of additional evidence and decided as follows:

The Director's Evidence

By seeking to admit evidence gathered after the Administrative Penalty was issued, the Director breached the Appellants' right to procedural fairness. The Board is able to remedy this breach

by striking paragraphs 5, 9, 20, 21, 22, 23 24, and 25 and Exhibit “A” from the EPO’s affidavit are not admissible as they refer to the evidence gathered after the Administrative Penalty was issued.

The Appellants’ Evidence

The affidavit of Mr. Zelman is admissible as Mr. Zelman is an appellant in the appeal. The photographs of the signage are admissible as they are rationally connected to the photographs in the Director’s Record, and provide details, clarification, and assistance to the Board in understanding the photographs in the Director’s Record. The proposed affidavits of the Appellants’ witnesses were not admissible as they were not rationally connected to the Director’s Record.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the “Board”) in PLAB 20-0024, on two preliminary motions made by Mr. Trent Zelman (“Mr. Zelman”) and Smoking Diesel Contracting Ltd. (“Smoking Diesel”) (collectively the “Appellants”) and the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks (the “Director”).

[2] The Director assessed a Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/11-AP-NR-20/10 (the “Administrative Penalty”) to the Appellants in the amount of \$905,533.34 for allegedly subletting Departmental Miscellaneous Lease DML 090115 (the “DML”) without authorization. The DML is held by Smoking Diesel. Mr. Zelman is the sole shareholder of Smoking Diesel and was named in the Administrative Penalty. The Appellants filed a Notice of Appeal with the Board appealing the Director’s decision to assess the Administrative Penalty.

[3] The Appellants and the Director (collectively the “Parties”) have both applied to the Board to admit evidence that is not contained within the Director’s Record in appeal PLAB 20-0024. The Director requested the Board admit the affidavit of Environmental Protection Officer, Dylan Cummins (the “EPO”), sworn May 20, 2021 (the “EPO Affidavit”), including Exhibit “A” to the affidavit, “Northgate Water/Sewer and Maintenance of Waddell Lodge Evidence” (the “Northgate Evidence”) (collectively, the “Director’s Evidence”). The Appellants requested the Board admit:

- (a) the Affidavit of Trent Zelman, sworn June 9, 2021 (the “Zelman Affidavit”);
- (b) photographs of signage related to the DML (the “Signage Photographs”);
and
- (c) the proposed Affidavits of David Lind, Evert Smith, Jon Warren, Angela Clarke, Andrew Bibo, Everett Normandeau, Victor Toutant, and Dennis Crowe (the “Witness Affidavits”).

The Board will refer to the Parties’ request to admit documents not on the Director’s Record as the “Additional Evidence.”

[4] The Board must decide whether to admit all, some, or none of the Additional Evidence.

II. DECISION

[5] After considering the legislation, relevant case law, and the written submissions of the Parties, the Board finds:

- (a) paragraphs 5, 9, 20, 21, 22, 23 24, and 25 of the EPO Affidavit are not admissible;
- (b) Exhibit “A” of the EPO Affidavit is not admissible;
- (c) the remainder of the EPO Affidavit is admissible, insofar as it does not relate to evidence gathered after the Administrative Penalty was issued;
- (d) the Zelman Affidavit is admissible;
- (e) the Signage Photographs are admissible;
- (f) the Witness Affidavits are not admissible;

[6] The Board will determine the appropriate weight to assign to the Additional Evidence after hearing the Parties’ submissions in a hearing and considering the Additional Evidence in the context of the entire appeal.

III. BACKGROUND

[7] On January 29, 2013, Alberta Environment and Parks granted the DML to Smoking Diesel for a campsite and industrial storage yard, on public lands¹ near what was then referred to as the City of Fort McMurray, in the Regional Municipality of Wood Buffalo.² Mr. Zelman is the sole shareholder of Smoking Diesel. A camp that catered to oilfield workers (the “Waddell Lodge”) was operated on the DML lands.

[8] On January 15, 2021, the Director issued the Administrative Penalty to the Appellants. The Director alleged the Appellants subleased the DML to Northgate Industries Ltd.

¹ The public lands are legally described as Section 34-78-09-W4M.

² The City of Fort McMurray is now referred to as the Urban Service Area of Fort McMurray.

(“Northgate”), contrary to section 54.01 of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the Act”), and contrary to the DML. The Director alleged Northgate operated the Waddell Lodge.

[9] The Appellants appealed the notice of appeal to the Board on January 27, 2021. The Appellants claimed Smoking Diesel and Northgate were involved in a joint venture.

[10] On May 17, 2021, the Appellants and the Director requested the Board admit the Additional Evidence. The Board notes that none of the Additional Evidence were included in the Director’s Record provided by the Director on April 1, 2021.

[11] The Board set a schedule for written submissions from the Parties regarding the admissibility of the Additional Evidence.

IV. ISSUES

[12] The Board has identified the following issues to be determined in deciding the preliminary motions:

- (a) what is the scope of the test to determine if the Additional Evidence can be admitted as evidence?
- (b) is the Affidavit of the EPO and the Northgate Evidence admissible?
- (c) are Affidavit of Mr. Zelman, the Signage Photographs, and the Witnesses’ Affidavits admissible?

V. ANALYSIS

(a) What is the scope of the test to determine if the Additional Evidence can be admitted as evidence?

(i) Submissions

[13] The Appellants submitted the Board has taken an expansive interpretation of Section 120 of the Act. The Appellants referred to the Board’s decision in *1657492 Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 August 2018) (“*Kalinski*”), where the Board stated: “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.”³

[14] The Appellants submitted the scope of evidence considered by the Board is broader than the Director's Record and includes records which clarify and respond to evidence in the Director's Record.

[15] The Director also referred to *Kalinski* and noted the party submitting the evidence has the onus to establish the new evidence meets the test in *Kalinski*.

(ii) Analysis

[16] Appeals before the Board are based on the record and the decision of the decision-maker.⁴ The record is provided by the Director and consists of all relevant information considered by the Director in making the decision that is being appealed.

[17] The Board has been given the responsibility under the Act to provide recommendations to the Minister of Environment and Parks (the “Minister”) on appeals before the Board.⁵ The Board has undertaken to provide the best possible advice to the Minister on appeals, which involves a careful consideration of the legislation, the submissions of the parties, and the evidence contained in the record.

[18] The Board, the Appellants, and the Minister, rely on the Director to ensure the Director's Record is complete when it is provided for an appeal. The Board has found that in some cases, there is evidence that is not in the record, but should be. When the Director's Record is incomplete, there are at least four possible outcomes:

³ *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.

⁴ Section 120 of the Act states: “An appeal under this Act must be based on the decision and the record of the decision-maker.”

⁵ Section 124(1) states: “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.”

- (a) the appellant may request that the Board ask the Director to provide further documents;
- (b) the appellant may request the Board make an adverse inference on the missing documentation;
- (c) the Board may find the record is incomplete and, as an appeal is based on the decision and record of the decision-maker, the Board may find the incomplete record resulted in an error of material fact on the face of the record, an error in law, or the decision-maker may have exceeded their jurisdiction; or
- (d) in some limited circumstances, the Board may admit documentation provided by the appellant.

[19] There are two situations where the Board will consider admitting records provided by an appellant. The first situation is where the records are rationally connected to the evidence found in the Director's Record. For a record to be rationally connected to the Director's Record, the record must have a connection to a specific record in the Director's Record. The stronger the connection, the more likelihood the record would be admissible. The record must provide detail or clarification of an existing record in the Director's Record that would assist the Board in understanding the Director's Record.⁶

[20] The second situation is where an appellant can provide records that should have been included in the Director's Record, but were not. For example, the Board may consider admitting a missing email or letter from an appellant to AEP if the Board determines it is relevant to the appeal and should have been a part of the Director's Record.

[21] The Board will examine the record that is requested to be admitted to determine its relevance. There are degrees of relevance. The more important the information is to the scope the appeal, the more likely the record should have been included in the Director's Record.

[22] In these preliminary motions, the Parties are seeking to admit records that were not in the Director's Record. The Board will consider the records being requested to be admitted and determine if the records:

⁶ See: *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.

- (a) are rationally connected to the Director's Record;
- (b) provide detail and clarification that assists the Board in understanding the Director's Record; and
- (c) are relevant to the scope of the appeal.

(b) Is the Affidavit of the EPO and the Northgate Evidence admissible?

[23] The Director seeks to admit the EPO Affidavit and the Northgate Evidence, which is attached to the affidavit as Exhibit "A". The Affidavit was sworn on May 20, 2021, and details his investigation of the Appellants after the Administrative Penalty was issued on January 15, 2021. The Northgate Evidence contains evidence the EPO gathered during the post-Administrative Penalty period.

(iii) Submissions

[24] The Director acknowledged an appeal is based on section 120 of the Act. The Director submitted the Director's Evidence is rationally connected to the Director's Record and satisfies the test in *Kalinski*. The Director stated the Director's Evidence provides detail, clarifies and helps the Board understand the evidence in the Director's Record regarding the financial arrangements between Smoking Diesel and Northgate related to the operation of the Waddell Lodge on DML lands, specifically the rent paid by Northgate to Smoking Diesel and the costs paid by Northgate for water/sewer and maintenance of the Waddell Lodge. The Director said the Director's Evidence was rationally connected to the following Tabs in the Director's Record: Tabs 7.19, 1.10, 8.7, 8.14, 7.22, and 8.63.

[25] The Director submitted the Director's Evidence disproves the Appellants' claim of a joint venture with Northgate.

[26] The Director stated the EPO learned from the Board's hearing in *CRC Open Camp et al. v. Director Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks* ("*CRC et al.*"),⁷ that two companies were providing services to

⁷ The hearing for PLAB 20-0003 was held May 3 to 4, 2021. See: *CRC Open Camp & Catering Ltd. et al. v.*

more than one camp operated by Northgate. After the hearing, the EPO contacted Northgate “to try to corroborate the evidence about maintenance costs, the supply of water to, and removal of sewage from Northgate’s Waddell Lodge camp given during the hearing.”⁸ The Director said that in response to the EPO’s request, Northgate provided the Northgate Evidence contained in Exhibit “A” of the EPO Affidavit.

[27] The Appellants submitted the Director’s Evidence is irrelevant and not rationally connected to materials found in the Director’s Record. The Appellants stated that the Director has not provided a reasonable explanation for why the Director’s Evidence was not included in the Director’s Record. The Appellants said:

“... no reason or explanation has been provided in relation to the Director's failure to obtain and include the Records as part of the Director's Record, despite the fact that he appears to have been well aware of those records during the investigation phase and prior to the Administrative Penalty being levied against the Appellants.”⁹

[28] The Appellants stated that they have never claimed that Smoking Diesel provided water and sewer services to Northgate as part of the joint venture arrangements. The Appellants said any arrangements between Northgate and other companies for provision of services is irrelevant to the determination of whether or not Smoking Diesel and Northgate had a joint venture agreement.

[29] The Appellants noted that the Director sought to introduce documents regarding Northgate’s joint venture arrangements with another company, CRC Open Camp & Catering Ltd. The Appellants stated:

“... whatever arrangements existed between CRC and Northgate with respect to an entirely different commercial camp are completely irrelevant to a determination of the arrangements between Smoking Diesel and Northgate in relation to the [Waddell Lodge].”¹⁰

Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks, (15 April 2021), Appeal No. 20-0003-R (A.P.L.A.B.), 2021 ABPLAB 3.

⁸ Director’s Rebuttal Submission, June 8, 2021, at page 2.

⁹ Appellants’ Response Submission, June 1, 2021, at page 1.

¹⁰ Appellants’ Response Submission, June 1, 2021, at page 3.

[30] The Appellants submitted that Smoking Diesel would likely suffer significant prejudice if the Board admits the Director's Evidence from an unrelated matter and party. The Appellants stated:

“Other than Northgate itself, there are no common parties or issues in the two separate appeal proceedings which would make the evidence from one appeal relevant to a determination of the issues in the other. The Director has not provided any compelling reason for the Board to consider the Records and CRC's relationship with Northgate as part of its assessment of the Appellants' arguments on appeal. The Appellants submit that the only evidence which should be considered by the appeal panel in relation to the joint venture argument is that evidence which pertains solely to the arrangements between Smoking Diesel and Northgate for the operation of the [Waddell Lodge].”¹¹

[31] The Appellants submitted that the Director's Evidence was not rationally connected to the Director's Record and requested the Board deny the Director's application to admit the Director's Evidence.

(iv) Analysis

[32] In administrative law, one of the most fundamental principles is *audi alteram partem*, which means, “listen to the other side,” or “let the other side be heard as well.” The Courts have stated:

“The minimum standard of procedural fairness in Canadian administrative law has long been held, and articulated as, *audi alteram partem*. The party affected by a decision has the right to know the case against it, and be provided a meaningful opportunity to address it.”¹²

[33] One of the Director's practices that contributes to satisfying the requirement for procedural fairness is the due process meeting where the Director invites the person who is being investigated to participate in before an administrative penalty is assessed. The Director provides an opportunity for the person to submit evidence and make representations to the Director regarding the matter. This practice allows the person to know the case against them and to be

¹¹ Appellants' Response Submission, at page 12.

¹² *New Brunswick (Registrar of Motor Vehicles) v. Maxwell*, 2016 NBCA 37, at paragraph 46.

able to provide a response to the Director before a decision is made whether to issue an administrative penalty. The person's submissions and representations to the Director become part of the Director's Record. As appeals before the Board are based on the Director's Record, this practice is extremely important to ensure procedural fairness and natural justice.

[34] The Director has submitted that the Director's Evidence was sought out through an investigation after the Administrative Penalty was issued. The administrative penalty was issued on January 15, 2021. At this point, the Director's investigation should have been completed and the evidence the Director based the Administrative Penalty on compiled in the Director's Record. Instead, the EPO continued the investigation and gathered the Director's Evidence after the EPO heard witness testimony in the hearing of *CRC et al.* which was held May 3 to 4, 2021.

[35] The act of conducting an investigation after the decision to issue the Administrative Penalty and attempting to introduce evidence into the Director's Record is a serious breach of procedural fairness. The breach deprives the Appellants of the opportunity to know and respond to the case against them, and for this information to be included in the Director's Record.

[36] The Director has not provided a reasonable explanation for why the evidence was not included in the Director's Record. Additions to the Director's Record are permitted when the Director learns of relevant, existing information in AEP's possession at the time of the decision that should have been included but was not. That is not the case in this situation. The Director's Evidence is new evidence and creates new considerations rather than provide detail, clarification, or help the Board understand the evidence found in the Director's Record.

[37] The Board finds the Director breached the Appellants' right to procedural fairness by continuing the investigation and gathering new evidence to be used against the Appellants after the Administrative Penalty was issued. The appropriate remedy for this breach is to restore the Director's Record to its state prior to the breach. The Board finds paragraphs 5, 9, 20, 21, 22, 23, 24, and 25 of the EPO Affidavit, and the Northgate Evidence to be in breach of the rules of

natural justice and procedural fairness and, therefore, those paragraphs and the Northgate Evidence are not admissible.

(c) Are the Zelman Affidavit, the Signage Photographs, and the Witness Affidavits admissible?

(i) Submissions

[38] The Appellants sought to introduce as evidence the Zelman Affidavit, the Signage Photographs, and the affidavits of the following persons:

David Lind;
Evert Smith;
Jon Warren;
Angela Clarke;
Andrew Bibo;
Everett Normandeau;
Victor Toutant; and
Dennis Crowe.

[39] The Appellants stated:

“The Appellants submit that the application to introduce the Additional Records on appeal is required to address and rebut the findings made by the Director in the Administrative Penalty, and to provide the Board with the necessary background and information in relation to AEP’s alternative arguments on appeal in relation to unauthorized subleasing. The Appellants will be arguing on appeal that AEP changed its historic policies and practices in relation to the subletting of Crown lands, to the detriment of the Appellants...”¹³

Further, the Appellants stated:

“It will be the Appellants’ submissions that AEP’s policies and practices during the entirety of Northgate’s presence on the [DML] were supportive of unauthorized subleasing, as they allowed AEP to balance its priorities of habitat and wildlife preservation with the significant demands of industry in the region.”¹⁴

¹³ Appellants’ Initial Submission, May 25, 2021, at page 2.

¹⁴ Appellants’ Initial Submission, May 25, 2021, at page 3.

[40] The Appellants submitted that they are not required to finalize all the evidence on which they intend to rely on before the provision of their initial submissions.

[41] The Appellants stated that key aspects of their arguments challenging and refuting the Director's findings may only be accomplished by introducing evidence from former AEP employees having knowledge of AEP's practices and policies in relation to unauthorized subleasing.

[42] The Appellants said the principles of natural justice require that the Witness Affidavits be admitted as evidence.

[43] The Appellants submitted the Signage Photographs are required to advance arguments that the Administrative Penalty was limitation-barred.

[44] The Director submitted the Appellants failed to meet the onus to show that the Witness Affidavits are rationally connected to the evidence in the Director's Record.

[45] The Director stated that before making the decision to issue the Administrative Penalty, the Appellants were sent the Preliminary Assessment and invited to provide any relevant documentation for the Director to consider. The Director said that the Appellants provided a response to a request for information from the EPO and information focused on the relationship between the Appellants and Northgate. The Director stated the Appellants could have provided any evidence they wanted, but instead chose to be silent on the issue of AEP's alleged historical subletting policies and practices. The Director submitted the Appellants cannot now complain that the Director failed to consider evidence he was not made aware of by the Appellants.

(ii) Analysis

[46] As noted earlier, an appeal before the Board is an appeal based on the record and the decision of the decision-maker. An appeal before the Board is not a hearing *de novo* that allows for a more fulsome defense and new evidence and argument. The test in *Kalinski* allows

for relevant evidence that provides detail, clarification, or assistance to the Board in understanding the evidence in the Director's Record, not to enable the Appellants to rebut evidence, as suggested by the Appellants in their submissions.

[47] The Board finds the Zelman Affidavit is a sworn statement by an appellant to the appeal, and is therefore relevant and admissible. An affidavit from an appellant is no different from an appellant providing testimony at a hearing, particularly as section 229 of the *Public Lands Administration Regulation*, AR 187/2011 ("PLAR"), allows oral questioning at a hearing and written questioning where the hearing is by written submissions.¹⁵ The Director, in a hearing, may present arguments or evidence to refute Mr. Zelman's statements, or to argue the Board should not consider those statements.

[48] The Board finds the Signage Photographs are relevant to the appeal, rationally connected to photographs found in the Director's Record, and clarify the Director's photos. The Board will permit the introduction of the Signage Photographs as evidence.

[49] The Appellants argued the Witness Affidavits would show AEP had a past practice of allowing subleasing of dispositions. The Board finds in reviewing the Director's Record there is no indication of any practice similar to the one alleged by the Appellants. To allow introduction of new evidence to rebut evidence in the Director's Record would be outside the legislative intent of the Board hearing a matter on the record. The Board finds the Witness Affidavits are not rationally connected to the Record and, therefore, the Board denies the Appellants' request to admit the Witness Affidavits as evidence.

VI. CONCLUSION

[50] After considering the Parties' written submissions, the Act and PLAR, and

¹⁵ Section 229 of PLAR states:

"A panel hearing an appeal

- (a) must give each party an opportunity to direct questions to other parties in attendance at an oral hearing, and
- (b) may give each party an opportunity to direct written questions to other parties where the appeal is heard on the basis of written submissions."

relevant case law, the Board has decided as follows:

- (a) paragraphs 5, 9, 20, 21, 22, 23 24, and 25 of the EPO Affidavit are not admissible;
- (b) Exhibit “A” of the EPO Affidavit, the Northgate Evidence, is not admissible;
- (c) the remainder of the EPO Affidavit is admissible, insofar as it does not relate to evidence gathered after the Administrative Penalty was issued;
- (d) the Zelman Affidavit is admissible;
- (e) the Signage Photographs are admissible; and
- (f) the Witness Affidavits are not admissible.

[51] The Board will determine the appropriate weight to assign to the Additional Evidence after hearing the Parties’ submissions in a hearing and considering the Additional Evidence in the context of the entire appeal.

Dated on June 30, 2021, at Edmonton, Alberta.

“original signed by”
Gordon McClure
Board Chair