
ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – December 4, 2023

IN THE MATTER OF sections 121, 122, 123, and 124, of the *Public Lands Act*, R.S.A. 2000, R.S.A. 2000, c. P-40, and sections 211, 228, and 235 of the *Public Lands Administration Regulation*, A.R. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Knelsen Sand and Gravel Ltd. of the decision by the Director, Lands Delivery and Coordination, Northwest, Forestry and Parks, to refuse an application for Surface Material Exploration SME 210063 from Knelsen Sand and Gravel Ltd.

Cite as: *Knelsen Sand and Gravel Ltd. v. Director, Lands Delivery and Coordination, Northwest, Forestry and Parks* (4 December 2023), Appeal No. 22-0019-R (A.P.L.A.B.), 2023 ABPLAB 15.

BEFORE:

Ms. Anjum Mullick, Panel Chair; Dr. Brenda Ballachey, Panel Member; and Dr. James Armstrong, Panel Member.

SUBMISSIONS BY:

Appellants: Mr. Joe Hustler, and Knelsen Sand & Gravel Ltd., represented by Mr. Robert Noce, Miller Thomson LLP.

Director: Ms. Camille Ducharme, Director, Lands Delivery and Coordination, Northwest, Alberta Forestry and Parks.

Intervenors: Mr. Tyler Wilson, Bridge Manager, Transportation and Economic Corridors.

Mr. John Krahn, Unity Sand & Gravel Ltd., represented by Elkan Environmental Engineering.

EXECUTIVE SUMMARY

On August 31, 2021, Knelsen Sand and Gravel Ltd. (the Appellant), applied to Alberta Forestry and Parks (the Department) for a Surface Material Exploration authorization (the SME) to explore the potential for surface materials on public lands (the Lands) located along the Peace River near Tompkins Landing at La Crete. The SME application was under the *Public Lands Act* and the *Public Lands Administration Regulation* (PLAR). On February 22, 2023, the Director, Lands Delivery and Coordination, Northwest, Alberta Forestry and Parks (Director), refused the SME application because Alberta Transportation and Economic Corridors (TEC) was considering the Lands for the construction of a bridge over the Peace River in the area and may require use of the surface materials on the Lands. The Director noted TEC would have priority to use surface materials on the Lands.

The Appellant appealed the Director's decision to the Public Lands Appeal Board, alleging the Director breached the duty of procedural fairness by:

- fettering the Director's discretion by rigidly applying the Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (2017) (the Allocation Directive) and not properly considering the application's individual circumstances; and
- failing to provide adequate reasons in the decision.

The Appellant submitted the alleged breaches of procedural fairness were errors in law and exceeded the Director's jurisdiction.

The Director identified TEC and Unity Sand and Gravel Ltd. (Unity), who had previously held an SME for the Lands, as parties that may be interested in the appeal. The Board added TEC as a party and accepted written submissions from Unity on the appeal's issues.

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

1. Whether the Director erred in law or jurisdiction by improperly fettering their discretion by rigidly relying on the Department's Allocation Directive's statement that "[t]he highest priority for aggregate allocation will be to support public works" to the exclusion of other valid, or relevant considerations?

2. Whether the Director erred in law or jurisdiction by providing inadequate written reasons? and
3. The weight, if any, to be given to the written submissions of Unity outlining their position regarding the appeal.

On November 6, 2023, the Board decided after reviewing the parties' written submissions, the legislation, and the relevant caselaw, that the Director did not breach procedural fairness by improperly fettering their discretion and did not breach procedural fairness by providing inadequate reasons in the Director's decision.

On the hearing issues, the Board found the Director, in refusing the Appellant's application for the SME:

1. did not err in law or jurisdiction by improperly fettering the Director's discretion by rigidly relying on the Allocation Directive's statement that "[t]he highest priority for aggregate allocation will be to support public works" to the exclusion of other valid, or relevant considerations;
2. did not err in law or jurisdiction by providing inadequate written reasons; and
3. no weight should be given to the written submissions of Unity outlining their position regarding the appeal.

The Board recommended the Minister confirm the Director's decision to not issue the SME to the Appellant.

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I. INTRODUCTION

[1] This is the Public Lands Appeal Board's (the "Board") Report and Recommendations to the Minister, Forestry and Parks (the "Minister"), regarding an appeal by Knelsen Sand & Gravel Ltd. ("Knelsen" or "Appellant") of the decision (the "Decision") by the Director, Lands Delivery and Coordination, Northwest, Alberta Forestry and Parks (the "Director"), to refuse the Appellant's application for Surface Material Lease SME 210063 (the "SME").

[2] The Board found the Director, in refusing Kelson's SME application, did not err in law, or exceed the Director's jurisdiction or legal authority. Under section 124(2) of the *Public Lands Act*, R.S.A. 2000, c. P-40,¹ the Board recommended the Minister confirm the Director's Decision.

II. BACKGROUND

[3] The SME is located at N ½ 16-104-19-W5M, SW 16-104-19-W5M, E ½ 17-104-19-W5M, and S ½ 21-104-19-W5M (the "Lands"), on the southeast bank of the Peace River, north of Tompkins Landing, near the hamlet of La Crete, in Mackenzie County.

[4] On August 31, 2021, Knelsen applied to Alberta Forestry and Parks (the "Department") for the SME. On February 22, 2023, the Director, as the statutory decision-maker for the application, refused to grant the SME. In the Director's letter advising the Appellant of the Decision, the Director stated:

"The department has rendered a decision of Refusal based on the following reasons:

Alberta Transportation and Economic Corridors (TEC) informed [the Department] that they had been recently directed to plan and look for options for the construction of a bridge over the Peace River to replace the current Tompkins Landing ferry and select a crossing location within proximity to the existing alignment of Highway 697.

Given the technically challenging ground conditions, temperamental nature of the river and issues encountered since then, this significant project is taking time to evaluate. TEC applied for a roadway

¹ Section 124 of the *Public Lands Act* states: "The report may recommend confirmation, reversal or variance of the decision appealed."

reservation RDS 210019 as well as a crown land reservation CLR 220001, of which both overlap SME 210063.

TEC indicated that they are not supportive of the approval of SME 210063 at this time for the following reasons.

- TEC is still in the design and estimating stage for the Tompkins Landing Bridge and Hwy 697 re-alignment project throughout this general area.
- The process to find a crossing location is currently ongoing and all potential alignments have not been identified, designed or estimated at this time.
- Depending on the crossing location, access to surface materials may be required for this provincial initiative.

Based on the reasons above, the department is not supportive of issuing a new exploration authorization at this time.

The scope of the public works project being considered is potentially significant in terms of land and resources required. In addition, the current Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use further states that aggregate for public works is the first priority.”²

[5] On March 3, 2023, Knelsen filed a Notice of Appeal with the Board appealing the Director’s Decision. The Appellant alleged the Director, in making the Decision, erred in the determination of a material fact on the face of the record, erred in law, exceeded the Director’s jurisdiction or legal authority, did not comply with a regional plan approved under the *Alberta Land Stewardship Act*,³ and that the Decision was expressly subject to appeal under section 15 of *Public Lands Administration Regulation*, A.R. 187/2011 (“PLAR”), or section 59.2 of the *Public Lands Act*.⁴

[6] The Board wrote to the Director and the Appellant acknowledging receipt of the Notice of Appeal and requesting the Director provide the Department’s Record, which the Board identified as including:

² Director’s Record, at Tab 3.2.

³ *Alberta Land Stewardship Act*, S.A. 2009, c. A-26.8.

⁴ Appellant’s Notice of Appeal, March 3, 2023.

- the Director’s Decision;
- the Director’s file as defined in section 209(f) of PLAR;⁵
- all related records in the Department’s possession as defined under section 209(m) of PLAR;⁶
- all related policy documents, guidelines, and directives available to the Director when the decision was made; and
- an index.

[7] On March 24, 2023, the Director advised the Board that TEC and Unity Sand and Gravel Ltd. (“Unity”) may be impacted by the appeal. The Director noted that Unity had previously held an SME for the same or similar Lands the Appellant was applying for. The Board wrote to TEC and Unity and informed them of the appeal and provided an opportunity to participate in the appeal process. On March 29 and March 31, 2023, Unity and TEC advised they wished to be involved in the appeal.

[8] On April 3, 2023, the Board asked the Director and the Appellant to comment on whether TEC and Unity were directly affected by the appeal and if it was appropriate for them to participate. After reviewing the Director and Appellant’s responses, the Board determined that TEC was “directly affected by the appeal as it is involved in the planning of a bridge near Tompkins Landing Crossing and any surface material from the proposed SME could be of value to the bridge project.”⁷ The Board found Unity did not have an official interest in the appeal as their SME had expired, however, the Board found it was appropriate to allow Unity to submit a written submission outlining their position concerning the appeal.

[9] On April 5, 2023, in response to the Board’s request for available dates for a mediation, the Director advised they would not participate in a mediation. On April 12, 2023, the Board acknowledged the Director’s refusal to mediate, and advised the Appellant and the Director it would proceed with a hearing by written submissions.

⁵ Section 209(f) of PLAR states: “‘director’s file’, in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision.”

⁶ Section 209(m) of PLAR states: “‘record’ means record as defined in the *Freedom of Information and Protection of Privacy Act*.”

⁷ Board’s Letter, April 20, 2023.

[10] The Board wrote the Appellant and the Director on April 20, 2023, and proposed the following issues for the hearing based on the Notice of Appeal:

1. Did the Director, who made the decision to refuse an application for SME 210063, err in the determination of a material fact on the face of the record?
2. Did the Director, who made the decision to refuse an application for SME 210063, err in law?
3. Did the Director, who made the decision to refuse an application for SME 210063, exceed the Director's or Officer's jurisdiction or legal authority?
4. Did the Director, who made the decision to refuse an application for SME 210063, not comply with a regional plan approved under the *Alberta Land Stewardship Act*?
5. This decision is expressly subject to appeal under Section 15 of PLAR, or Section 59.2(3) of the *Public Lands Act* (this is for appealing a deemed rejection because of the failure of a Director or Officer to approve or refuse an application for a disposition, authorization, or approval within a 30-day time limit unless an extension was approved).

The Board invited the Appellant and the Director to provide comments on the issues for the hearing.

[11] The Director provided the Director's file (the "Director's Record") on April 26, 2023.⁸ The Board distributed the Director's Record to the Appellant, the Director and TEC (the "Parties") and Unity on April 28, 2023.

[12] On May 8, 2023, the Appellant accepted the Board's proposed issues and provided two further issues for the hearing:

- the weight, if any, to be given to the written submissions of Unity Sand and Gravel outlining their position regarding the appeal; and
- such further and other reasons as may be presented at the hearing of this matter.

⁸ The Board did not receive the Department's Record, as requested. Instead, the Board received the Director's File, which did not contain all the records requested by the Board.

[13] On May 19, 2023, the Board confirmed the issues for the appeal and added the first issue proposed by the Appellant and advised that the second issue was already part of the Board's hearing process and subject to the *Public Lands Act*. The Board stated:

“Regarding the issue: ‘Such further and other reasons as may be presented at the hearing of this matter’, in its conduct of a hearing, the Board may determine whether it would be appropriate to consider any issues that may arise. The Board applies the relevant legislation, its Rules and Procedures, and the rules of procedural fairness in making such determinations. Please note that as an appeal under this Act must be based on the decision and the record of the decision-maker, the Board may only hear issues related to the Department's Record.”⁹

[14] On April 20, 2023, the Board advised that TEC was granted full intervenor status and may participate in the hearing as a party, and Unity would be permitted to submit a written submission outlining their position regarding the appeal. Unity did not have an interest in the appeal as their Surface Material Exploration authorization for the same or close to the same lands had expired. However, the Board found it appropriate for Unity to file a hearing submission outlining their position.

[15] On June 30, 2023, the Board advised the Parties and Unity of the procedures for the written hearing.

[16] On July 17, 2023, the Board wrote to the Parties and Unity, and noted the Director did not provide the policies, guidelines, and directives applicable to the Director's Decision. The Board requested the Director provide the missing information. The Board also provided the final schedule for the Parties and Unity to provide their written submissions for the hearing.

[17] On July 19, 2023, the Director requested an extension to September 25, 2023, to provide a written submission.

[18] The Board wrote to the Parties on July 20, 2023, and granted the extension. The Board also noted in Tab 3.1 of the Director's Record, the Director wrote: “This is not a

⁹ Board's Letter, May 19, 2023.

comprehensive listing of all the documents within the file that were reviewed; refer to the actual disposition file.”¹⁰ The Board stated:

“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.” The Board has found in past decisions that an incomplete record may result in an appellant being denied natural justice and procedural fairness.

As the Director has advised that the Director’s Record is incomplete, the Board requests the Director forward the full Department’s Record as requested by the Board in its March 9, 2023 letter. The Director may decide whether to submit the missing records as a supplement to the Director’s Record or withdraw the previous Director’s Record and submit the Department’s Record anew. Please provide the supplement or the Department’s Record by July 28, 2023.”¹¹

The Board informed the Parties it would reschedule the written hearing submissions for the parties once it received the supplemental record or Department’s Record from the Director.

[19] On August 3, 2023, the Director wrote to the Board regarding the statement in the Director’s Record, Tab 3.1, which stated: “This is not a comprehensive listing of all of the documents within the file that were reviewed. Refer to the actual disposition file.” The Director explained the statement was a reference to the electronic disposition file maintained by the Department and noted that public access to the electronic disposition file could be limited, and therefore attached documents from the electronic disposition file. The documents were:

- SME application plan;
- Alberta Transportation CLR22000;
- Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (2017) (the “Allocation Directive”);
- Alberta Aggregate Allocation Directive Questions and Answers;
- TEC Referral Response; and
- First Nation Consultation.

The Board distributed the documents to the Parties and Unity as the Director’s Addendum.

¹⁰ Director’s Record, at Tab 3.1.

¹¹ Board’s Letter, July 20, 2023.

[20] The Board set a new schedule for filing hearing submissions, and received written submissions from Unity, TEC, the Director, and the Appellant.

[21] The Board appointed a panel to provide the Board's Report and Recommendations to the Minister. On November 6, 2023, the panel met and considered the Parties' and Unity's written submissions, the relevant legislation, and the Director's Records.

III. ISSUES

[22] The issues set by the Board for the hearing by written submissions were:

1. Did the Director, who made the decision to refuse an application for SME 210063, err in the determination of a material fact on the face of the record?
2. Did the Director, who made the decision to refuse an application for SME 210063, err in law?
3. Did the Director, who made the decision to refuse an application for SME 210063, exceed the Director's or Officer's jurisdiction or legal authority?
4. Did the Director, who made the decision to refuse an application for SME 210063, not comply with a regional plan approved under the *Alberta Land Stewardship Act*?
5. This decision is expressly subject to appeal under Section 15 of the Public Lands Administration Regulation or Section 59.2(3) of the *Public Lands Act* (this is for appealing a deemed rejection because of the failure of a Director or Officer to approve or refuse an application for a disposition, authorization, or approval within a 30 day time limit unless an extension was approved).
6. What weight should the Board give to Unity's submissions?

[23] The Board notes the Appellant chose not to provide written submissions on issues 1 and 5, and reframed the remaining issues as follows:

- (a) Whether the Director erred in law or jurisdiction by improperly fettering their discretion by rigidly relying on the Allocation Directive's statement that "[t]he highest priority for aggregate allocation will be to support public works" to the exclusion of other valid, or relevant considerations?
- (b) Whether the Director erred in law or jurisdiction by providing inadequate written reasons? and

- (c) The weight, if any, to be given to the written submissions of Unity outlining their position regarding the appeal.”¹²

[24] The Board notes the other Parties did not object to the Appellant’s reframing of the issues. As the reframed issues are compatible with the issues the Board set, the Board accepts the Appellant’s proposed issues and will address those issues in this Report and Recommendations. The Board’s recommendation to the Minister will follow the issues set by the Board.

[25] There are two other matters the Board must determine before considering the issues for the appeal:

- A. the standard of review appropriate for the appeal; and
- B. the appropriate level of procedural fairness owed by the Director to the Appellant in relation to the SME application process.

IV. SUBMISSIONS AND ANALYSIS

A. Standard of Review

[26] In past appeals, the Board thoroughly examined the standard of review and has determined that due to the advisory role of the Board to the Minister of Forestry and Parks, the appropriate standard of review to apply to appeals is correctness. As there is a general consistency to the appeals before the Board, the Board’s determination of the standard of review typically will be the same. However, the Board reviews the facts of the appeal and the submissions of the Parties to determine if an assessment of the standard of review is warranted.

[27] The Board reviewed the facts of this appeal and the submissions of the Parties and determined there is nothing sufficiently unique about this appeal for the Board to change its

¹² Appellant’s Initial Submission, September 15, 2023, at paragraph 19.

standard of review. Therefore, the Board will review the appeal of the Director's Decision on the standard of correctness in its Report and Recommendations to the Minister.¹³

B. Appropriate Level of Procedural Fairness

[28] The Appellant argued “the Director erred in law or jurisdiction by failing to meet the appropriate level of procedural fairness owed in the circumstances.”¹⁴ The Appellant submitted that the Director breached the duty to act in a procedurally fair manner by fettering the Director's discretion and not providing sufficient reasons. The Appellant did not identify what level of procedural fairness was appropriate in this appeal, and none of the other Parties addressed procedural fairness.

[29] Procedural fairness, often referred to as the duty to act fairly, is a fundamental principle of administrative law which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision-maker. Procedural fairness is not concerned whether the outcome of the process was fair, but rather whether the process itself was fair.

[30] The purpose of procedural fairness is not to achieve procedural perfection, but to strike a suitable balance between the requirements of fairness, efficiency, and consistency in the outcome.¹⁵ A breach of procedural fairness occurs when the balance of those requirements is wrong. A substantial breach may render the decision-maker's actions void, but not every breach of procedural fairness results in a void decision. Minor procedural, technical, or immaterial errors that did not impact the outcome may not fatally undermine the decision.¹⁶

[31] The level of procedural fairness is determined on a sliding scale. Matters that impact individual liberty and significant property rights are at the higher end of the scale, while matters with a lesser impact on a person are at the lower end.

¹³ See: *Gordeyville and Area Community Members Group v. Director, Industrial Charges Unit, Public Land Disposition Management Section, Alberta Environment and Parks*, re: *Saddle Hills Target Sports Association* (16 December 2021), Appeal No. 20-0025-R (A.P.L.A.B.), 2021 ABPLAB 24, at paragraphs 21 to 58.

¹⁴ Appellant's Initial Submissions, September 15, 2023, at paragraph 3.

¹⁵ *Knight v. Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 53.

¹⁶ See: *Manyfingers v. Calgary (City) Police Service*, 2005 ABCA 183.

[32] In *Baker v. Canada (Minister of Citizenship and Immigration)* (“*Baker*”),¹⁷ the Supreme Court of Canada listed factors to be considered when determining the required level of procedural fairness.¹⁸ The list is not definitive, as various other factors may be important to consider. The Board notes the Court provided the factors in the context of a judicial review; however, the Board considers the factors to be helpful in determining the level of procedural fairness. Based on *Baker*, the factors the Board typically considers are:

- (a) the nature of the decision being made, and the process followed in making the decision;
- (b) the nature of the appeal system and the terms of the legislation the Director operates under;
- (c) the importance of the decision to the individuals affected;
- (d) the legitimate expectations of the individuals affected by the decision; and
- (e) the Director or Department’s choice of procedure.

(a) *Nature of the Decision*

[33] The more judicial a decision is in nature, the greater the level of procedural fairness required. For example, if a decision-maker has a significant amount of discretion, the decision is considered more judicial in nature. A decision that has a more legislative nature requires less procedural fairness because the legislation removes some of the discretion from the decision-maker. As with most decisions the Director is authorized to make, the decision to grant or refuse an SME is a mixture of judicial and legislative nature. The *Public Lands Act* and PLAR grant the Director a high level of discretion whether to issue an SME and what terms and conditions are applicable, which is characteristic of a judicial nature. However, the Director must act within the parameters set by the legislation, which is indicative of a non-judicial nature. These factors suggest a balance in the Director’s discretion, requiring a medium level of procedural fairness.

¹⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

¹⁸ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28.

(b) *Statutory Scheme*

[34] A greater level of procedural fairness is required where a decision is final with no appeal permitted. The *Public Lands Act* provides for an appeal to the Board of certain decisions prescribed in the *Public Lands Act* and PLAR. The Board's appeal process, as set by the legislation, allows an appellant to present thorough arguments, potentially engage the Director in mediation, and obtain the Department's Record related to the appeal. Through an appeal, the Board can remedy most breaches of procedural fairness that may have occurred in the initial decision-making stage and make recommendations to the Minister to mitigate other breaches. The Minister has the final decision-making authority and receives the Board's Report and Recommendations regarding the appeal. The *Public Lands Act's* appeal system lessens the degree of procedural fairness owed by the Director to the Appellant as the Appellant has the option of appealing the Director's Decision.

(c) *Importance of the Interest to the Appellant*

[35] A higher degree of procedural fairness is required where the decision is important to an appellant. The Board recognizes that the Director's Decision will have a negative impact on the Appellant, who has invested money into the SME application. However, the Board finds the rights associated with an SME are relatively minor, especially when compared to a Surface Material Lease ("SML"). An SME is only the right to enter onto public lands for the purpose of determining whether there is a surface material deposit of sufficient quantity and quality that it would be worth applying for an SML. The investment in exploring aggregate potential of public land is not insignificant but is far less in comparison to the investment required to develop an SML. It is important to note that the Department has no obligation to approve an SML application from the holder of an SME. An SME only guarantees that the SME holder will have the first opportunity to apply for an SML, provided the applicant has met all the requirements. As the rights connected to an SME are based in potential opportunity, the Board finds there is a lower degree of procedural fairness owed by the Director to the Appellant.

(d) *Legitimate Expectations*

[36] The doctrine of legitimate expectations is based on the principle that procedural fairness must consider the promises or regular practices of the Director. It would be unfair for the Director or the Department to vary from its usual practice without providing appropriate reasons in the notice. The Board did not find any significant instances of legitimate expectations in this appeal, particularly as there is no expectation of an SML being granted to the holder of the SME. The Appellant did not address legitimate expectations.

(e) *Procedural Choices*

[37] The Department has jurisdiction to set its own policies and procedures provided they do not conflict with relevant legislation. In *Baker*, the Supreme Court of Canada stated:

“... the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints.”¹⁹

[38] The Board identified two significant factors in its analysis of the Department’s procedural choices. The first was the Allocation Directive as an example of the Department establishing policy and procedures that are within the Director’s discretion to implement. The high level of discretion granted to the Director in the *Public Lands Act* and PLAR, indicates a higher level of procedural fairness. However, the Director’s discretion is constrained by the Department’s desire for the Allocation Directive to be applied to surface material extraction on public lands. The Allocation Directive is a significant factor the Appellant must consider when deciding to issue an SME, along with the individual facts of the application. The Department’s emphasis on the Allocation Directive is a moderating influence on the Director’s discretion.

[39] The second factor is the Department’s procedural choice in requiring an applicant for an SME to submit an application for Surface Dispositions form. An applicant must provide

¹⁹ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 27.

extensive information on the proposed SME, such as its size, legal land description, First Nations consultation, and information on the applicant. The form also includes a section titled “Remarks”, where an applicant may enter further information in support of the application. Additional documents, such as an application Plan, Applicant Supplement, the Landscape Analysis Tool Report, the Public Land Standing Report and a Statutory Declaration are also required. The Board finds the SME application process chosen by the Department provided a thorough opportunity for the Appellant to present its case on why the SME should be approved.

[40] The Department’s procedural choices of implementing the Allocation Directive and requiring the SME application process lessens the degree of procedural fairness owed by the Director to the Appellant by limiting the Director’s discretion and meeting the procedural fairness rights of the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision-maker.

Appropriate Level of Procedural Fairness

[41] In applying the *Baker* analysis to previous appeals, the Board has stated:

“Although the Board is unaware of any court-sanctioned procedural fairness spectrum, a review of the caselaw demonstrates that the highest standard of procedural fairness is reserved for decisions that affect personal liberty and livelihood, such as disciplinary procedures and immigration matters. The lowest level requires only the most minimal procedural fairness standards.

[42] In this appeal, after applying the factors outlined by the Court in *Baker* for determining the appropriate level of procedural fairness, the Board finds the Director owed a medium to low level of procedural fairness to the Appellant. A medium to low level of procedural fairness still requires the Director to act fairly, but it does not require the Director to provide the Appellant with procedures equivalent to those required in the assessment of penalties or matters restricting personal liberty.

C. Issue 1: Whether the Director erred in law or jurisdiction by improperly fettering their discretion by rigidly relying on the Allocation Directive’s statement that “[t]he highest priority for aggregate allocation will be to support public works” to the exclusion of other valid, or relevant considerations?

(i) *Submissions*

[43] The Board summarized the written submissions from the Appellant, the Director and TEC regarding Issue 1 below.

[44] The Appellant submitted the Director breached procedural fairness by fettering the Director’s discretion in refusing the SME without turning their mind to the specific circumstances of the SME application. The Appellant noted the Alberta Court of Appeal has held that one aspect of that duty is a decision-maker must not fetter their discretion by adopting inflexible policies or rules. The Appellant quoted from the Alberta Court of Appeal decision of *Lac La Biche (County) v. Lac La Biche (Subdivision and Development Appeal Board)*:

“Procedural fairness demands that administrative decision-makers do not fetter their discretion by adopting inflexible policies or rules, as the very existence of discretion implies that it can and should be exercised differently in different cases. A decision maker who always exercises its discretion in a particular way improperly limits the ambit of power.”²⁰

[45] The Appellant referred to the definition of fettering provided by the Alberta Court of Appeal in *Equs Rea Ltd. v. Alberta (Utilities Commission)*: “Discretion is fettered ‘when a statutory body and/or decision-maker treats non-legislative guidelines or policies as binding to the exclusion of other valid, or relevant reasons for the exercise of discretion.’”²¹

[46] The Appellant also cited the Federal Court of Canada decision in *Gordon v. Canada (Attorney General)* (“*Gordon*”). In *Gordon*, the appellant applied to waive the full amount of interest on money owed to the Canadian Revenue Agency (“CRA”). The Minister of Natural Revenue’s delegate (“Delegate”) denied the application, citing the CRA policy on interest relief which only allowed for a portion of the interest to be waived. The appellant filed for a judicial

²⁰ *Lac La Biche (County) v. Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305, at paragraph 11.

²¹ *Equs Rea Ltd. v. Alberta (Utilities Commission)*, 2019 ABCA 277, at paragraph 18, citing *Cidex Developments Ltd. v. Calgary (City)*, 2018 ABQB 519, at paragraph 30.

review of the decision. The Federal Court overturned the decision, finding the Delegate fettered their own discretion by:

- treating the policy as binding despite there being no statutory requirement prohibiting full interest relief; and
- not considering the appellant’s individual circumstances.²²

[47] The Appellant submitted the wording of section 20(2) and (7) of the *Public Lands Act* confers discretionary powers on the Director by using the word “may”. Section 20(2) and (7) state:

- “(2) The director or officer may grant an authorization under subsection (1) whether or not the public land to which the authorization relates is the subject of a disposition at the time the authorization is given...
- (7) The director or officer may impose any conditions the director or officer considers necessary on an authorization granted by the director or officer pursuant to this section.”

The Appellant stated: “There is no reference in Section 20 to any policy or guideline that the Director must follow or implement when making such decisions.”²³

[48] The Appellant noted section 11(4)(b) of PLAR²⁴ only requires a director to consider an authorization on its merits and does not require the Director to implement or apply any particular policy.

[49] The Appellant acknowledged the Allocation Directive affirms the priority for aggregate allocation is to support public works, however, the Appellant submitted the Allocation Directive is not binding on the Director. The Appellant argued the Director and TEC failed to follow the Allocation Directive’s requirement that aggregate needs for public works “must be identified through a comprehensive plan that anticipates and rationalizes the long-range need for

²² *Gordon v. Canada (Attorney General)*, 2016 FC 643.

²³ Appellant’s Initial Submission, September 15, 2023, at paragraph 33.

²⁴ Section 11(4)(b) of PLAR states:

“The director or officer...

(b) in any other case, must accept the application and proceed to consider it on its merits.”

aggregate supply.”²⁵ The Appellant noted the Allocation Directive also requires the comprehensive plan to be updated at least every five years. The Appellant stated the Director’s Record does not contain a comprehensive plan outlining TEC’s aggregate needs.

[50] The Appellant submitted the Director’s Record does not provide any evidence the Director gave consideration of whether there was sufficient aggregate to accommodate both TEC and the Appellant’s needs. Specifically, the Appellant submitted no consideration was given to the following:

- “(a) the fact that the Lands cover 291.64 acres and TEC’s CLR and RDS only cover approximately 163.64 acres of the Lands, leaving 128 acres in Section 21 and Section 22 without any conflicting reservations;
- (b) the possibility of approving the SME in Section 21 and Section 22, either by permitting [the Appellant] to revise its SME or by imposing terms and conditions on the SME;
- (c) whether the Tompkins Landing bridge and Hwy 697 re-alignment was likely to cross into Section 21 and Section 22 given that the width of Peace River expands towards the northeast [see Alberta Transportation CLR220001, Supplemental Director’s Record]; and that
- (d) should a Surface Material Lease ever be granted to [the Appellant] on any portion of the Lands, which can only be 80 acres in size within a 6-mile radius unless a ‘bonus bid’ is made, Section 115 of the PLAR permits the Minister to authorize TEC to enter any land under a Surface Material Lease and remove any surface material required for the construction or maintenance of public roads or other works.”²⁶

[51] The Appellant alleged the Director made the Decision without any additional information from TEC on estimated aggregate needs for the bridge project. The Appellant noted the Alberta Court of Appeal had previously found that a decision-maker will abuse its discretion if they make a decision based on insufficient information:

“In terms of the right to be heard, a tribunal must not abuse its discretion by basing its decision on insufficient or no evidence, or on irrelevant considerations. The decision-maker must consider relevant evidence, inform

²⁵ Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (2017), Director’s Addendum, August 3, 2023, at page 7.

²⁶ Appellant’s Initial Submissions, September 15, 2023, at paragraph 45.

the parties of that evidence, and allow the parties to comment on it and present argument on the whole of the case.”²⁷

The Appellant submitted the Director had an obligation not to base the Decision on insufficient evidence.

[52] The Director denied the Appellant’s allegation that the Director fettered their discretion in making the Decision. The Director submitted that decisions regarding public lands management involve extensive consultation and coordination between stakeholders. The Director stated:

“Management of public land requires careful coordination between a number of departments, agencies and diverse client groups. Decisions are based on inputs from multiple subject matter experts informing on land capability and suitability, compatibility with other land uses, environmental impact, policies and regulations, local and regional plans, stakeholder concerns, First Nation and Metis Settlement consultation and unique local and regional considerations.”²⁸

[53] The Director denied rigidly applying the Allocation Directive. The Director noted that regulatory reviews require the Director to consider process and policy, which can provide clarity and direction on which factors should be considered. The Director argued that similarities between the Decision and information provided though the referral process does not indicate the Director did not review and consider the information.

[54] The Director stated the following factors were considered in the review of the SME application:

- the merits of the SME application;
- Department policy, including the Allocation Directive;
- TEC’s mandate from the Government of Alberta to construct a bridge, connecting roads in a location with unstable slopes and impacts to stakeholders;
- the pressure on Government funded projects to minimize costs to the taxpayers;

²⁷ *Alberta (Workers’ Compensation Board) v. Appeals Commission*, 2005 ABCA 276, at paragraph 60.

²⁸ Director’s Response Submission, September 29, 2023, at page 1.

- TEC placed a reservation (CRL) on the land for a potential bridge location, but it needed to study other areas along the Peace River; and
- allowing new activities on public land adjacent to the potential bridge locations could result in compensation claims and land constraints if those authorizations and dispositions had to be cancelled once the bridge location was selected.

[55] TEC provided a submission on August 21, 2023, and did not provide a supplemental submission. TEC submitted it was “in the functional planning and preliminary design stage for a contemplated crossing of the Peace River within the river reach near Tompkins Landing Crossing...”²⁹ TEC stated it wanted to retain rights for the lands identified in its reservation application of April 19, 2021.

[56] TEC submitted that it could not support the SME application until the bridge alignment and supporting functions were confirmed. TEC stated:

“TEC remains steadfast in its position that until the alignment is finalized, approving this SME would potentially limit access to the required surface material (borrow, sand, rip-rap and gravels) and would prejudice the ability for TEC to deliver this project in a cost and schedule efficient manner.”³⁰

[57] In its rebuttal submission, the Appellant submitted that the Director’s concern about land constraints and potential compensation claims were speculative and not in keeping with the intent of the Allocation Directive. The Appellant stated:

“The intention of [Alberta Environment and Protected Areas] as evidenced by the Allocation Directive and Allocation Directive Q&A, is that public work resources needs ‘be identified through a comprehensive plan that anticipates and rationalizes the long-range need for aggregate supply’. In other words, when balancing the interests between public works and private works, the expectation presented by the Government of Alberta is that municipalities and ministries perform adequate due diligence when requesting that public lands be reserved for public works and that this due diligence be provided when making such a request.”³¹

²⁹ Transportation and Economic Corridors’ Response Submission, August 21, 2023.

³⁰ Transportation and Economic Corridors’ Response Submission, August 21, 2023.

³¹ Appellant’s Rebuttal Submission, October 13, 2023, at page 2.

[58] The Appellant also submitted that TEC's claim that the bridge project's potential alignments and locations had not been determined was contrary to the intent of the Allocation Directive. The Appellant stated the while the bridge project will be beneficial to the region, private aggregate exploration and extraction operations are also valuable to the public as aggregate will be used in provincial, municipal, commercial, and residential projects.

(ii) *Analysis*

[59] An SME fits within PLAR's definition of an authorization.³² When an application for an authorization, in this case, an SME, is received by the Department, a director or officer conducts a completeness review to determine if the application meets the Department's requirements. If the application meets the requirements, a director proceeds with a merit review of the application to determine whether to issue the authorization. A director has broad discretion, within the parameters of the relevant legislation, to make the decision. However, a director must ensure the decision-making process is not fettered.

[60] A decision-maker fetters their discretion when they apply an inflexible standard practice, guideline, or rule (policy), rather than consider the application on an individual basis. This does not mean a decision-maker cannot follow or be influenced by policy. Policy is an important part of governance, and "[r]ogue decision-makers may upset carefully considered agency policy. The regulated industry may be confused by inconsistent applications, or by ill-conceived or misapplied procedure or policy."³³ To avoid fettering discretion, the decision-maker must "put his or her mind to the specific circumstances of the case and not focus blindly on a particular policy to the exclusion of other relevant factors."³⁴

[61] As noted by the Appellant, the Alberta Court of Appeal stated that fettering occurs "when a statutory body and/or decision-maker treats non-legislative guidelines or policies as

³² Section 1(f) of PLAR states: "'authorization' means an instrument, other than a formal disposition or an approval, by which an authorization under section 20(1)(a), (b) or (e) of the Act is granted;"

³³ Lorne Sossin, Robert W. Macaulay, and James L. H. Sprague, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada Ltd., 2022) at § 9.10.

³⁴ *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, at paragraph 97.

binding to the exclusion of other valid, or relevant reasons for the exercise of discretion.”³⁵ Based on the Court’s description, the question before the Board is whether the Director treated the Allocation Directive as binding to the exclusion of other valid, or relevant reasons in making the Decision.

[62] The Appellant alleged the Director’s discretion was fettered when the Director failed to put the Director’s mind to the specific circumstances of the SME application and rigidly applied the Allocation Directive’s statement that the “highest priority for aggregate allocation will be to support public works.”³⁶

[63] The Appellant claimed the Director failed to consider that TEC’s reservations only covered a portion of the Lands, and the SME application could have been modified to accommodate both TEC’s and the Appellant’s needs by excluding the reserved Lands from the SME application and approving the SME for section 21 and section 22. The Board finds this allegation to be without merit. It is the responsibility of the applicant for a disposition to ensure their application is accurate and sufficient for their intent. It is not the Director’s responsibility to modify applications. The Appellant’s SME application did not include section 22 as part of the area for the SME. If the Appellant later decided to modify its application, it could have done so by amending it or withdrawing it and submitting a new application to cover the public lands it sought. It is unworkable to expect the Director to examine each application and make changes to enhance the chances of the application’s acceptability.

[64] The Appellant submitted the Director did not consider whether the potential bridge would cross into section 21 and section 22, particularly as the Peace River widens towards the northeast in that location. The Board finds it is not within the Director’s jurisdiction to make unilateral decisions regarding the suitability of potential locations for the bridge. Had the Appellant included sections 21 and 22 in its SME application, then the Director would have the

³⁵ *Equus Rea Ltd. v. Alberta (Utilities Commission)*, 2019 ABCA 277, at paragraph 18, citing *Cidex Developments Ltd. v. Calgary (City)*, 2018 ABQB 519, at paragraph 30.

³⁶ Alberta Aggregate (Sand and Gravel) Allocation Directive for Commercial Use on Public Land (2017), Director’s Addendum, August 3, 2023, at page 3.

responsibility to review whether the sections were suitable locations, but the Appellant did not include section 22 in its application.

[65] The Appellant claimed the Director did not consider section 115 of PLAR, which allows the Minister to authorize the withdrawal of surface material from public lands which are subject to a disposition. Section 115(a) and (b) states:

- “(1) The Minister may, by order, authorize the Minister of Infrastructure, the Minister of Transportation and Economic Corridors or any other person to enter the land under a lease and remove surface material required for the construction or maintenance of public roads or other public works.
- (2) Where an order under subsection (1) is made in respect of the Minister of Infrastructure or the Minister of Transportation and Economic Corridors, the operator is not entitled to compensation for any surface material removed under the authority of the order but the Minister of Infrastructure or the Minister of Transportation and Economic Corridors, as the case may be, may pay the operator any compensation that Minister considers appropriate.”

[66] The Board finds that, as part of the Director’s duties, the Director had to consider whether a potential situation could develop involving compensation owed to disposition holders. The Director determined it was inappropriate to put the Department in a situation where allowing new activities on the public lands adjacent to the potential bridge location could result in compensation claims if the Department had to cancel the disposition to allow for the bridge. Relying on section 115 of PLAR to justify approving the SME application would put the Minister in an even more untenable situation of potentially having to order the cancellation of the SME with a possibility of no compensation being paid to the Appellant. The Minister may consider section 115 on a surface material disposition that has already been granted, but the Director does not have the jurisdiction to bind the Minister by considering section 115 of PLAR as an option before the disposition is approved. The Minister’s powers in this regard are beyond the scope of this appeal.

[67] The Appellant submitted the Director made the Decision without sufficient information from TEC on its estimated aggregate needs. While there was an option for the Director to seek further information from TEC after the initial referral response, the Director

judged there was adequate information to refuse the SME application, given that TEC was still in the early stages of identifying the bridge location and indicated it wanted to enlarge the area reserved for its potential use. The Board finds that even if the Director had made further inquiries to TEC, it is unlikely TEC could have provided more specific information as the location of the bridge, which had not been determined, would affect the aggregate needs for the bridge.

[68] The Board found the Director appropriately considered TEC's concerns that issuing dispositions on public lands that are under consideration for significant public works could result in an increase in cost, compensation payments, and timelines. These are factors the Director should consider when making such a decision. The Director did not act out of unsupported speculation, but rather the Director prudently considered TEC's Referral Response and made the Decision based on the evidence provided.

[69] The Board finds the Appellant did not provide sufficient evidence to prove the Director:

1. breached the duty to act in a procedurally fair manner by fettering the Director's discretion; and
2. erred in law or jurisdiction by improperly fettering the Director's discretion by:
 - (a) rigidly relying on the Allocation Directive's statement that "[t]he highest priority for aggregate allocation will be to support public works" to the exclusion of other valid, or relevant considerations; and
 - (b) failing to consider relevant factors related to the SME application.

D. Issue 2: Whether the Director erred in law or jurisdiction by providing inadequate written reasons?

(i) Submissions

[70] The Board summarized the written submissions from the Appellant, the Director and TEC regarding issue 2 below.

[71] The Appellant noted the Supreme Court of Canada in *Baker* stated the duty of procedural fairness requires a decision-maker to provide written reasons in cases where there is a

statutory right of appeal.³⁷ The Appellant submitted the Director breached procedural fairness by failing to provide adequate reasons for the Decision.

[72] The Appellant stated that while a decision-maker isn't obliged to extensively justify each decision, certain standards must be met for the rationale to be considered adequate. The Appellant noted the Board had previously assessed the sufficiency of a director's reasons by examining how the reasons aligned with the relevant legislation, the director's record, and various other factors, including whether the reasons:

- (a) met legislative requirements;
- (b) enabled the appellant to understand the decision's basis;
- (c) logically connected back to the decision in a "chain of analysis";
- (d) was supported by evidence in the director's record; and
- (e) was justified given the legal and factual constraints confronting the Director.³⁸

[73] The Appellant submitted the failure of a decision-maker to engage meaningfully with crucial issues or central arguments may raise doubts about their awareness and sensitivity to the matter at hand.

[74] The Appellant referred to the Federal Court's finding that incorporating significant amounts of material from submissions or other sources into reasons may rebut the presumption of a decision-maker's impartiality and integrity if:

"... the copying is of such a character that a reasonable person apprised of the circumstances would conclude that the [decision-maker] did not put [their] mind to the evidence and the issues and did not render an impartial, independent decision."³⁹

[75] The Appellant argued the Decision extensively integrated what was stated in the Referral Response with minimal variation. Neither the merit decision nor the Director's Record

³⁷ *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, at paragraph 43.

³⁸ *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks, re: Stanley Jensen*, 2022 ABPLAB 10, at paragraph 96.

³⁹ *Csikja v. Canada (Minister of Citizenship and Immigration)*, 2017 FC 909, at paragraph 10, citing *Cojocaru (Guardian ad litem of) v. British Columbia Women's Hospital & Health Centre*, 2013 SCC 30 at paragraph 36.

indicated any thoughtful consideration regarding the opportunity to approve the SME operating in section 21 or 22, or in any other capacity. The Appellant submitted that rather than conducting an independent analysis, the Merit Rationale form and the Decision simply restated what was specified in TEC's Referral Response, almost word for word. The conclusion drawn in the Decision was that the Allocation Directive's statement emphasizing that the highest priority for aggregate allocation was to support public works, was deemed sufficient to reject the SME without additional consideration.

[76] The Appellant stated that the Decision and the Director's Record does not provide any evidence of additional inquiries made by the Director to TEC after receiving the Referral Response. There is no indication of efforts to determine whether TEC could offer any information or projected estimates regarding its aggregate needs for the bridge project. TEC's Referral Response did not provide a comprehensive plan that identified the long-range need for aggregate supply. The Appellant argued that such a plan would have "allowed the Director to fairly determine whether the entire SME needed to be refused or not."⁴⁰

[77] The Appellant submitted:

"... the Director breached the duty of procedural fairness failing to show a chain of analysis supported by adequate evidence in the Merit Decision and the Director's [File]. Further, it is respectfully submitted that the Director's substantial incorporation of the Referral Response into the Merit Decision suggests that the Director did not turn their mind to the evidence, or lack thereof, to render a fair, impartial decision."⁴¹

[78] The Director disagreed that the Decision did not contain adequate reasons. The Director submitted the reasons in the Decision "clearly set out a rational analysis that justifies the decision."⁴² The Director indicated that while some wording in the Decision may be similar to information provided by TEC and subject matter experts, this did not imply that such information was not reviewed or considered.

⁴⁰ Appellant's Initial Submissions, September 15, 2023, at paragraph 58.

⁴¹ Appellant's Initial Submissions, September 15, 2023, at paragraph 59.

⁴² Director's Response Submissions, September 29, 2023, at page 2.

[79] The Director stated:

“As noted in [*Cojocar v. (Guardian ad litem of) v. British Columbia Women’s Hospital & Health Centre* (*‘Cojocar’*)⁴³], which was included with the Appellants’ submission, there is a presumption that the Director will act with integrity and impartiality and that the onus is on the Appellant to rebut the presumption.”⁴⁴

The Director said that in *Cojocar*, the Court found extensive copying in a written decision was not sufficient grounds to overturn the decision. The Director stated that in this appeal, the Director agreed with the wording from the Merit Rationale and there was no need to revise the reasoning. The Director submitted the Appellant had not rebutted the presumption of integrity and impartiality as noted in *Cojocar*.

[80] In the Appellant’s rebuttal submission, the Appellant stated, referring to *Cojocar*:

“... the presumption of impartiality and integrity is rebutted if the incorporation of the material of others would lead a reasonable person apprised of all the relevant facts to conclude that the decision-maker did not put their mind to the issues and make an independent decision based on the evidence.”⁴⁵

[81] The Appellant submitted that in this appeal, the reasonable person standard is informed by the Allocation Directive and the Allocation Directive Q&A, which states public works resource requirements “must be identified through a comprehensive plan that anticipates and rationalizes the long-range need for aggregate supply” and that where there is sufficient aggregate for public works, commercial aggregate requests will be considered.⁴⁶

[82] The Appellant stated:

“A reasonable person in the context of a surface material authorization or disposition would expect that the decision-maker independently put their mind to whether a municipality or ministry has adequately rationalized its aggregate

⁴³ *Cojocar v. (Guardian ad litem of) v. British Columbia Women’s Hospital & Health Centre*, 2013 SCC 30, at paragraph 22.

⁴⁴ Director’s Response Submissions, September 29, 2023, at page 2.

⁴⁵ Appellant’s Rebuttal Submission, October 13, 2023, at page 3.

⁴⁶ Appellant’s Rebuttal Submission, October 13, 2023, at page 3.

needs and whether there is sufficient aggregate to accommodate both the municipality or ministry, as the case may be, and a particular applicant.”⁴⁷

The Appellant submitted that the Decision and the Director’s record did not disclose an independent analysis, and instead the Decision copied TEC’s Referral Response almost verbatim.

[83] The Appellant stated:

“It is submitted that by extensively copying the Referral Response without any indication that the Director turned her mind to the requirement under the Allocation Directive that public works resource needs be rationalized and that, where possible, commercial aggregate requests will be considered alongside public works resource requests, a reasonable person apprised of the relevant facts would conclude that the Director did not put their mind to those issues and instead made a partial decision based on incomplete information.”⁴⁸

[84] TEC did not make any specific submissions regarding the sufficiency of the Director’s reasons.

(ii) *Analysis*

[85] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada emphasized the importance of providing reasons when involved in decision-making. The Court stated:

“Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power.”⁴⁹

[86] Although reasons are an important part of decision-making, the decision-maker is not required to provide a detailed rationale for every reason in the decision. However, certain standards must be met for a decision-maker’s reasons to be considered sufficient. When the Board reviews the reasons for a decision, the Board considers the reasons in the context of the

⁴⁷ Appellant’s Rebuttal Submission, October 13, 2023, at page 3.

⁴⁸ Appellant’s Rebuttal Submission, October 13, 2023, at pages 3-4.

⁴⁹ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, at paragraph 79.

relevant legislation, the facts, and the Department's Record. The Board also considers other relevant factors, including whether the reasons:

- “(a) meet legislative requirements;
- (b) enable the appellant to know why the decision was made;
- (c) logically link back to the decision in a “chain of analysis”;
- (d) are supported by the evidence in the Department's Record; and
- (e) are justified considering the legal and factual constraints facing the decision-maker.”⁵⁰

[87] The Board applied the factors above to the reasons in the Decision, and the Board's findings are detailed below.

(a) *Did the reasons meet legislative requirements?*

[88] Section 10(5) and (6) of PLAR provide that if a formal disposition is refused and the applicant submits a written request to the director, written reasons must be provided within 12 days after the receipt of the request,⁵¹ but there is no requirement in the legislation for reasons to be provided upon the refusal of an authorization, which includes an SME. The Board finds the Director exceeded the legislative requirements by providing reasons for the Decision. Although the Director was not under any legislative requirement to provide reasons, the Board notes the Courts have held that reasons are essential to procedural fairness. The remainder of the Board's analysis will focus on court-mandated duty to provide reasons.

(b) *Did the reasons provided enable the appellant to know why the decision was made?*

[89] It is evident from the Appellant's detailed submissions that they knew and understood the Director's reasons for the Decision. The Director's Decision letter of February 22, 2023, provided the Appellant with the reasons for the Decision. The Decision stated the

⁵⁰ *Clifford v. Ontario (Attorney General)* 2009 ONCA 670, at paragraphs 28-31, and *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, at paragraphs 102, 103, and 105.

⁵¹ Section 10(5) and (6) of PLAR states:

- “(5) Where the director refuses to issue a formal disposition to an applicant, the applicant may submit a written request to the director requesting written reasons for the decision.
- (6) Written reasons requested under subsection (5) must be provided to the applicant within 12 days after receipt of the request.”

Department had refused the SME application based on five reasons which were provided in the letter. The Board finds the reasons in the Decision, although lacking in specific detail, were sufficient for the Appellant to know why the Decision was made. The Board finds the reasons also met the procedural fairness duty of *audi alteram partem*, which asserts that a party affected by a decision has the right to know the case against it and be provided a meaningful opportunity to address it.⁵² The reasons were sufficient for the Appellant to appeal to the Board, where the Appellant has had the opportunity for their views to be heard and considered by the decision-maker.⁵³

(c) *Did the reasons logically link back to the decision in a “chain of analysis”*

[90] In *Vavilov*, the Supreme Court of Canada held that the reasons given for a decision must be both rational and logical. The Court stated:

“... the reviewing court must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that ‘there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.’”⁵⁴

The Court stated that a reviewing court must be satisfied that the decision’s reasoning adds up.

[91] The Board found the Decision presented a logical chain of analysis. The Director’s reasons and analysis provided an evident link between TEC’s ongoing process and uncertainty regarding location and aggregate needed for the bridge, and the decision to refuse the SME application. The Appellant may disagree with the Decision, but the Board found the chain of analysis was clearly discernible in the reasons.

(d) *Are the reasons supported by the evidence in the Department’s Record?*

[92] The Board recognizes that the uncertainty regarding the bridge location and TEC’s inability to provide estimates of their future aggregate needs complicated the Appellant’s efforts to successfully apply for the SME. However, the Board finds the Director based the reasons on

⁵² *New Brunswick (Registrar of Motor Vehicles) v. Maxwell*, 2016 NBCA 37, at paragraph 46.

⁵³ Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2017), at 2.22.

⁵⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, at paragraph 102.

the information before the Director, which, although limited due to TEC's unresolved process, was sufficient for the Director to make the Decision. TEC provided evidence to the Director in the Referral Response that the potential aggregate needs for the bridge would possibly encompass the SME area. Considering the Referral Response and the Appellant's SME application, the Director determined the SME application should not be approved at this point in the bridge project. The Board finds the evidence in the Director's Record sufficient to support the reasons in the Decision.

(e) *Are the reasons justified considering the legal and factual constraints facing the decision-maker?*

[93] In *Vavilov*, the Supreme Court of Canada noted the diversity of administrative decision-making and that an important factor in reviewing a decision is "the constraints imposed by the legal and factual context of the particular decision under review."⁵⁵ When the Board considers the legal and factual constraints facing the Director, among the several factors reviewed is the governing statutory scheme of the *Public Lands Act* and PLAR.

[94] The *Public Lands Act* and PLAR give the Director significant discretion to decide whether to grant an authorization such as an SME. However, beyond this observation, the Parties did not address legal and factual constraints and the Board found little evidence in the Director's Record to make any conclusive finding on this factor.

[95] After reviewing the arguments regarding whether the Director provided adequate reasons for the Decision, the Board finds the Director's reasons to be limited, but sufficient to satisfy the Board that the reasons met the factors listed above. The Board finds the Director provided adequate written reasons, and therefore, did not err in law or jurisdiction, and did not breach the duty of procedural fairness.

⁵⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 SCR 653, at paragraph 90.

E. Issue 3: What weight should the Board give to Unity Sand and Gravel's submissions?

(i) Submissions

[96] The Board granted intervenor status to Unity as they were the previous holder of SME 200017 ("Unity SME") located approximately on the same public lands as the Appellant's SME.

[97] Unity submitted that as the previous holder of the SME they should have the first opportunity to apply for an SML on the Lands. Unity stated that in February 2021, they were preparing an SML application for the Lands, however, in April 2021, the Department advised them that a disposition application would not be accepted until a decision was made regarding the bridge location. Unity said the Department advised them that Unity would be contacted about an SML application when the bridge location decision was final.

[98] Unity stated they made numerous attempts to contact the Department and TEC regarding the SML but their inquires were not answered.

[99] Unity stated, "it is Unity's position that following a favorable decision on the bridge placement, Unity should have the first opportunity to apply for an SML given the considerable amount of time, effort, and financial resources invested by Unity to date."⁵⁶

[100] The Appellant noted the Allocation Directive states SME authorizations are issued for a maximum of 180 days with no extensions, and an SME holder wanting to proceed with an SML application has 10 days after the SME expires to file an application. After the 10 days, the SME holder no longer has exclusive rights and other parties may apply for an SME on the public lands.

[101] The Appellant submitted that Unity lost its exclusive rights to file an application for an SML and potentially extract aggregate from the Lands. The Appellant stated Unity's position that it should have first opportunity to apply for an SML is not within the Board's jurisdiction to grant. The Appellant submitted the Board should give no weight to Unity's submissions.

[102] The Director and TEC took no position on the weight to assign Unity's submissions.

⁵⁶ Unity Sand and Gravel's Written Submission, March 29, 2023, at page 2.

(ii) *Analysis*

[103] The Board appreciates Unity's involvement in the hearing and found its submissions to be helpful in providing background to the appeal. The Board finds that Unity's request that it be given first opportunity to apply for any SML after the bridge location is selected is beyond the scope of the Board's jurisdiction for this appeal. Unity's legal interest in the Lands, as far as this appeal is concerned, was extinguished at the end of the ten-day period after the expiry of Unity's SME. The Board can give no weight to Unity's submissions.

V. DECISION

[104] After reviewing the legislation, the Director's Record, the relevant case law, and the submissions of the Parties, the Board finds the Director did not breach procedural fairness by improperly fettering the Director's discretion and did not breach procedural fairness by providing inadequate reasons in the Decision.

[105] On the issues of the hearing, the Board found the Director, in refusing to issue the SME to the Appellant:

1. Did not err in law or jurisdiction by improperly fettering the Director's discretion by rigidly relying on the Allocation Directive's statement that "[t]he highest priority for aggregate allocation will be to support public works" to the exclusion of other valid, or relevant considerations;
2. Did not err in law or jurisdiction by providing inadequate written reasons; and
3. No weight should be given to the written submissions of Unity outlining their position regarding the appeal.

[106] The Board notes TEC indicated they were opposed to the SME application at that time. There is no reason the Appellant cannot apply for an SME for public lands in the area once the bridge's location has been determined along with TEC's aggregate needs for the bridge's construction.

VI. RECOMMENDATIONS

[107] When the Board provides its Report and Recommendations to the Minister, the Board must comply with section 124 of the *Public Lands Act*, which 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.”

[108] For the reasons stated in this Report and Recommendations, the Board recommends the Minister confirm the Director’s Decision to refuse Knelsen Sand and Gravel Ltd.’s application for SME 210063.

Dated on December 4, 2023, at Edmonton, Alberta.

“original signed by”
Anjum Mullick
Panel Chair

“original signed by”
Brenda Ballachey
Board Member

“original signed by”
James Armstrong
Board Member



ALBERTA

Forestry and Parks

*Office of the Minister
MLA, Central Peace - Notley*

Ministerial Order 67/2023

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

and

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

Order Respecting Public Lands Appeal Board Appeal No. 22-0019

I, Todd Loewen, Minister of Forestry and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal No. 22-0019.

Dated at the City of Edmonton, Province of Alberta, this 7th day of December, 2023.

A handwritten signature in black ink that reads "Todd Loewen".

Honourable Todd Loewen
Minister

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 22-0019

With respect to the February 22, 2023 decision of the Director, Lands Delivery and Coordination, Northwest, Forestry and Parks (the “Director”), to refuse an application from Knelsen Sand and Gravel Ltd. under the *Public Lands Act*, R.S.A. 2000, c. P-40, for Surface Material Exploration SME 210063, I, Todd Loewen, Minister of Forestry and Parks, in accordance with section 124(3) of the *Public Lands Act*, order that:

1. The decision of the Director to refuse the application for SME 210063 is confirmed.