ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – September 14, 2020

IN THE MATTER OF sections 121, 122, 123, and 124 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, 213, 228, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

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

Cite as: *Colette Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (14 September 2020), Appeal Nos. No. 18-0015-R (A.P.L.A.B.), 2020 ABPLAB 14.

HEARING BEFORE:	Ms. Anjum Mullick, Panel Chair; Mr. Nick Tywoniuk, Panel Member; and Mr. Tim Goos, Panel Member.
SUBMISSIONS BY:	
Appellants:	Colette Benson and CRC Open Camp and Catering Ltd., represented by Ms. Tara L. Hamelin and Josh F. Fortier, Bishop and McKenzie LLP.
Director:	Mr. Neil Brad, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

These are appeals relates to an Administrative Penalty issued to Ms. Collette Benson and CRC Open Camp and Catering Ltd. (collectively the Appellants) issued by the Director, Regional Compliance, Lower Athabasca Region, Operations Division, Alberta Environment and Parks (the Director), in the amount of $1,415,572.50. The Administrative Penalty relates to a Department Miscellaneous Lease (DML), which was held by CRC Open Camp and Catering Ltd. (CRC) and controlled by Ms. Benson. Ms. Benson is the sole director of CRC.

The Director alleges that the Appellants: (1) illegally sublet the DML without the written consent of the Director; (2) received money (rent) for the purpose of allowing access to and use of the DML without authority; and (3) received money (sale proceeds) from the a public auction sale of the DML for the purpose of gaining access to the DML. The Director assessed a base penalty amount of $47,000.00. In addition, the Director assessed proceeds amounts of $1,178,572.50 for the rent collected on the DML and $190,000.00 for the sale of the DML.

The Board held a hearing to address the following issues:

1. Did the Director who made the decision to issue the Administrative Penalty to Colette Benson and CRC Open Camp &Catering Ltd., err in the determination of a material fact on the face of the record?
2. Did the Director err in law?
3. Did the Director exceed the Director's or Officer's jurisdiction or legal authority?
4. Is the Board prohibited from hearing the appeal as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator? The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator.

The fourth issue was added because the appeals could not be processed within in the one year time period allowed for appeal such as this. The Appeals Coordinator exercised his authority under the legislation to extend the appeal period, but the Appellants argued that he did so improperly.

The Board held that it would not reconsider or alter the decision of the Appeals Coordinator, as the review of the Appeals Coordinator's decisions were not assigned to the Board by the legislation.

The Board held that the Director did not make a material error of fact on the face of the record. Specifically, the Board found the Appellants (1) illegally sublet the DML without the written consent of the AEP; (2) received money (rent) for the purpose of allowing access to and use of the DML without authority; and (3) received money (sale proceeds) from the a public auction sale of the DML for the purpose of gaining access to the DML.

Further, the Board held that the Director did make two errors of law. First, the Board held that the proceeds amount of the administrative penalty should be calculated based on net proceeds instead of gross proceeds, and as the evidence was unclear, the Board determined that it would be reasonable to deduct $144,615.32 to determine the net proceeds amount. The second error of law, was that the Director breached the principles of procedural fairness by refusing to comply with the Board's order to provide additional disclosure to the Appellants. The breach of procedural fairness was significant, and could not be remedied by the Board's hearing process. As a result of this breach of procedural fairness, as it interferes with the ability of the Appellants to adequately response to the Administrative Penalty. Therefore, based on this breach of the procedural fairness, the Board recommended that the Minister reverse the Administrative Penalty.

Finally, the Board held that the Director did not exceed his jurisdiction or legal authority. The Appellants argued the Ministerial Order designating the Director has having authority under the legislation did not designate the Director has having authority to assess the proceeds component of the Administrative Penalty. The Board concluded the Appellants interpretation was incorrect and that Director did have the legal authority to assess the penalty component.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister of Environment and Parks (the "Minister") regarding an appeal filed by Ms. Colette Benson and CRC Open Camp and Catering Ltd (collectively the "Appellants"). Ms. Colette Benson is a corporate director of CRC Open Camp and Catering Ltd. ("CRC").

[2] The Appellants appealed the decision by the Director, Regional Compliance, Lower Athabasca Region, Operations Division, Alberta Environment and Parks (the "Director") to issue Administrative Penalty No. PLA-18/06-AP-LAR-18/10 (the "Administrative Penalty") under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act") for the alleged contravention of Department Miscellaneous Lease DML 090101 (the "DML") between November 2013 and June 2018.[1] Specifically, the alleged contraventions are: subletting the DML without the written consent of the Director; receiving money or other consideration, as monthly payments for the purpose of allowing access for and use of public land without authority; and receiving money in the form of proceeds from the public auction sale of the DML or other consideration for the purpose of gaining access to public land.

[3] The Board is recommending to the Minister that the decision to issue the Administrative Penalty be reversed. In the course of processing the appeal, the Appellants made application to the Board for the additional disclosure of records from the Director. The Board granted this request as an order of the Board.[2] However, the Director refused to comply with the Board's order and did not provide the additional disclosure. The refusal by Director to provide the additional disclosure is an error in law. Specifically, refusal to provide the additional

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[1] For the purposes of this decision, the disposition will be referred to as a Department Miscellaneous Lease (DML). However, it should be noted that when it was issued, it was issued as Miscellaneous Lease (MLL). The name Miscellaneous Leases (MLL) was changed to Department Miscellaneous Lease (DML) in 2013.

[2] *Collette Benson and CRC Open Camp and Catering Ltd*. v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (18 July 2019), Appeal No. 18-0015-DL2 (A.P.L.A.B.), 2019 ABPLAB 16. Reconsideration Decision: *Colette Benson and CRC Open Camp and Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (20 December 2019), Appeal No. 18-0015-RD (A.P.L.A.B.), 2019 ABPLAB 25.

disclosure in the face of an order of the Board constitutes a breach of procedural fairness, which the Board was unable to remedy through its hearing process.

[4] While the Board could simply provide it reasons for the breach of procedural fairness caused by the Director's failure to provide the additional disclosure, the Board has decided that it will address all of the issues raised by the Director and the Appellants (collectively the "Parties") to provide future guidance regarding these matters.

II. BACKGROUND

[5] On April 18, 2012, the DML was issued by Alberta Environment and Parks ("AEP") to CRC for an Industrial Storage Site for a 10 year period.

[6] On May 28, 2013, AEP issued amendment to the DML to allow a fuel card lock as a permitted use by CRC. CRC subsequently applied to AEP to sublease the card lock to Plamondon Co-op Limited ("Plamondon"). The request to sublease the card lock to Plamondon was rejected by AEP.

[7] In the fall and winter of 2013, Premay Pipeline Inc. ("Premay") was working as a contractor on the Wood Buffalo Extension Project (the "Project") for Enbridge Pipelines (Athabasca) Ltd. ("Enbridge"). Premay was contracted to supply and install pipe for the pipeline. The Project was temporarily placed on hold by Enbridge, resulting in CRC and Premay entered into an agreement to store the pipe intended to be used for the Project. (CRC and Premay eventually entered into a series of seven agreements (the "Agreements").)

[8] In April 2014, AEP amended the DML to reduce the area from 15.41 acres to the current 11.44 acres. The 3.97 acre difference was re-surveyed into a new disposition with AEP issuing Department Miscellaneous Lease DML 14008 to Plamondon for the fuel card lock.[3]

[9] In 2014, Enbridge again put a hold on the Project. It was believed to be a temporary delay. The Agreement between CRC and Premay was extended several times over a

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[3] Director's Record, Tabs 3.4, 3.5, and 3.6.

period of four years, until it was officially confirmed that Enbridge would not be proceeding with the Project.

[10] In 2018, the Bensons decided to retire and retained Ritchie Brothers Auctioneers (Canada) Ltd. ("Ritchie Bros.") to sell the assets of CRC.

[11] On May 23, 2018, AEP received a phone call from a member of the public who advised that on Tuesday May 8, 2018, he had seen an advertisement in the Lac La Biche Post, a local newspaper, for the public auction the DML by Ritchie Bros.[4]

[12] On May 25, 2018, AEP obtained a copy of the auction advertisement from the Ritchie Bros. website, which listed the particulars of an unreserved real estate auction.[5]

[13] On May 29, 2018, the AEP Lands Approval Team Lead sent a letter to the Appellants advising that subletting the DML was not permitted and detailing the requirements for the transfer the DML through the assignment process.[6]

[14] On May 31, 2018, AEP staff attended at the DML and observed a Ritchie Bros. auction notice posted on the DML.[7]

[15] On May 31 2018, AEP inspected the DML, finding that the DML was being used for pipeline pipe storage.[8]

[16] After the May 31, 2018 inspection, AEP learned that the manufacturer of the pipe located on the DML had sold and delivered the pipe to Enbridge in Conklin, Alberta.[9]

[17] On June 5, 2018, AEP contacted Enbridge, who provided documentation showing that they had a financial arrangement in the form of a "Work Order" with Premay to store the pipe on the DML.[10]

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4 Director's Record, Tabs 1.6, and 6.1.

5 Director's Record, Tabs 6.1, 6.2, and 6.3.

6 Director's Record, Tab 1.3.

7 Director's Record, Tab 3.7.

8 Director's Record, Tabs 3.7, 4.1, 4.2, 4.3, and 4.4.

9 Director's Record, Tabs 6 and 12.

[18] On June 6, 2018, the Appellants' consultant Summit Land and Environmental Inc. ("Summit") acknowledged that there was a "private agreement between the parties to provide access to [the DML]."[11]

[19] On June 11, 2018, a copy of a "Joint Venture Agreement" between CRC and Premay was provided to AEP.[12]

[20] On June 13, 2018, the DML was sold at the public auction conducted by Richie Bros. for a bid of $190,000.00 from Plamondon.[13]

[21] Immediately following the auction, Premay advised AEP that it was approached by Plamondon to renegotiate a sublease of the DML.[14]

[22] On June 14, 2018, Premay provided AEP with a complete set of seven "Agreements" with CRC, and associated invoices, covering November 2013 to June 2018.[15]

[23] On June 15, 2018, a General Assignment of Disposition form was signed and sealed by the Appellants and Plamondon.

[24] September 24, 2018, AEP received an application for approval for the assignment of the DML from CRC to Plamondon from Summit.[16]

[25] On September 28, 2018, the Director sent the Preliminary Assessment of Administrative Penalty (the "Preliminary Assessment") in the amount of $1,433,572.50 to the Appellants.[17]

[26] On November 12, 2018, the Appellants provided written representations to the Director in response to the Preliminary Assessment.

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10 Director's Record, Tabs 6.11 and 6.13.

11 Director's Record, Tabs 2.1, 6.16, and 10.2.

12 Director's Record, Tabs 2.1, 6.16, and 10.2.

13 Director's Record, Tabs 6.4, 6.5, 6.6, 6.7, and 6.8.

14 Director's Record, Tab 10.1.

15 Director's Record, Tab 2.1.

16 Director's Record, Tab 3.9.

[27] On November 14, 2018, the Director met with the Appellants as part of the administrative penalty process.[18]

[28] On November 19, 2018, an email from the Appellants to AEP confirmed that the proceeds from the auction of the DML by Ritchie Bros had been transferred from Plamondon to CRC.[19]

[29] On November 21, 2018, Ritchie Bros. provided AEP with a "Contract to Auction" signed by the Appellants on February 28, 2018.[20]

[30] On December 19, 2018, the Director issued the Administrative Penalty to the Appellants in the amount of $1,415,572.50. The Administrative Penalty was made up of two components: the penalty component in the amount of $47,000.00, and the proceeds component of $1,368,572.50.[21]

[31] On January 4, 2019, the Appellants filed a Notice of Appeal, dated December 20, 2018, with the Board.

[32] On January 9, 2019, the Board acknowledged receipt of the Notice of Appeal. The Board's letter requested the Director advise by January 16, 2019, as to when the Director's record (the "Director's Record") would be provided.

[33] On January 15, 2019, the Director advised the Board that the Director's Record would be provided to the Board by Friday 22, 2019.

[34] On January 18, 2019, the Board requested that the Parties provide dates for a mediation and a hearing by January 25, 2019.

[35] On January 21, 2019, the Director advised the Board of their dates for a mediation and a hearing.

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17 Director's Record, Tab 1.1.

18 Director's Record, Tabs 5.2 and 5.4.

19 Director's Record, Tab 2.5.

20 Director's Record, Tab 2.3.

[36] On January 22, 2019, the Appellants advised the Board of their dates for a mediation and a hearing. There were no common dates as between the Director and the Appellants.

[37] On February 4, 2019, the Board wrote the Parties seeking additional dates for a mediation and a hearing.

[38] On February 6, 2019, the Director provided additional dates for a mediation and a hearing.

[39] On February 12, 2019, the Appellants provided additional dates for a mediation and a hearing. There were still no common dates as between the Director and the Appellants.

[40] On February 14, 2019, acknowledged receipt of the letters providing available dates for a mediation meeting and a hearing, and requested the Appellants revisit their schedule and advise the Board if they were available for mediation dates in March 2019.

[41] On February 19, 2019, the Appellants wrote the Board indicating their schedules had no availability to provide further dates for mediation.

[42] On February 21, 2019, the Director advised the Board he was no longer available on a number of dates he had provided.

[43] On February 22, 2019, the Board acknowledged receipt of correspondence from the Parties dated February 14, 19, and 21, 2019, respectively.

[44] On February 22, 2019, the Director provided an indexed copy of the Director's Record, "exclusive of any documents that may exist which are protected by solicitor-client or other legal privilege."

[45] On February 26, 2019, the Board received a stay application dated February 25, 2019, in which the Appellants made an application to the Board for a stay of enforcement of the Administrative Penalty pending resolution of the appeal. As well, the Appellants requested a stay

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[21] Director's Record, Tab 1.2.

of the enforcement of a decision issued by AEP cancelling the DML. The cancellation of the DML is not a matter that is appealable to the Board.

[46] On March 21, 2019, the Board acknowledged the February 22 and 25 correspondence, and requested the Parties hold dates for a mediation and a hearing.

[47] On April 2, 2019, the Board issued a Decision Letter regarding the request by the Appellants for a stay of Administrative Penalty. The Board stayed the Administrative Penalty until the Board has heard the appeal and the Minister make a decision.[22]

[48] On April 2, 2019, the Board wrote the Parties advising that the Board had scheduled a mediation meeting for May 29, 2019 and a hearing for June 20, 2019. The Board request that the Parties advise the Board of any concerns by April 9, 2019.

[49] On May 16, 2019, the wrote to the Parties providing a hearing schedule and confirmed the issues set for the hearing as:

1. Did the Director who made the decision to issue the Administrative Penalty to Colette Benson and CRC Open Camp &Catering Ltd. err in the determination of a material fact on the face of the record?
2. Did the Director err in law?
3. Did the Director exceed the Director's or Officer's jurisdiction or legal authority?

[50] On May 21, 2019, the Appellants raised a preliminary issue in advance of the mediation.

[51] On May 22, 2019, the Board wrote the Parties addressing the preliminary issue.

[52] On May 27, 2019, the Appellants wrote the Board indicating they would be proceeding with mediation and advising the Board they would be seeking additional disclosure from AEP as it appeared there were records that had not been disclosed. These included the following records pertaining to the DML at issue:

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[22] *Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (1 April 2019), Appeal No. 18-0015-DL1 (A.P.L.A.B.), 2019 ABPLAB 5.

- inspection reports;
- internal and external email messages;
- meeting minutes and memoranda;
- other official correspondence from AEP; and
- all other communications, reports, notes, photos and related records in AEP's files from the commencement of the DML with CRC.

[53] On May 27, 2019, the Board responded to the Appellants request regarding disclosure indicating the Appellants could raise disclosure as an issue at mediation and if the mediation was unsuccessful in resolving the appeals, the Appellants could then make application to the Board for further disclosure.

[54] On June 3, 2019, based on the results of the mediation, the Board wrote to the Parties confirming its understanding that they wished to proceed to a hearing of the appeals. The Board also granted the Appellants adjournment request with respect to the hearing and acknowledging the motion respecting additional disclosure.

[55] On June 12, 2019, the Board acknowledged of letters from the Parties providing available dates for a hearing and requested the parties hold September 18, 2019 for the hearing.

[56] On June 12, 2019, the Director provided additional documents he relied upon when making the decision that is the subject of the appeals.

[57] On June 14, 2019, the Board acknowledged the Director's provision of documents and confirmed that the Appellants had a deadline of June 21, 2019 to file any motions for additional disclosure.

[58] June 20, 2019, the Board wrote the parties establishing the hearing date as September 18, 2019, and setting the schedule for written submissions for the hearing and detailed the hearing procedures.

[59] On June 21, 2019, the Appellants wrote the Board making an application for additional disclosure from the Director. According the Appellants, the disclosure was required to complete the Director's Record.

[60] On June 28, 2019, the Director wrote the Board that in response to the Appellants' application of June 21, 2019, the Director repeated and relied on his letter of June 12, 2020.

[61] On July 5, 2019, the Board acknowledged the Appellants' June 21, 2019 letter and the Director's June 28, 2019 letter, regarding the disclosure. The Board confirmed it would review the submissions and provide a decision on the additional disclosure application.

[62] On July 12, 2019, the Appellants submitted documents they intended to rely upon at the hearing. The Board acknowledged the letter on July 15, 2019.

[63] July 18, 2019, the Board issued its decision with respect to the Appellants application for additional disclosure from the Director.[23] The Board ordered that those records that are rationally connected to the DML and the Administrative Penalty be disclosed. The Board noted that some of the documents requested by the Appellants were already provided in the June 12, 2019 supplement to the Director's Record. Specifically, the Board requested the Director review the his file, and any other relevant files, for the following:

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

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

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

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

[64] On July 29, 2019, the Director requested a reconsideration of the Board's July 18, 2019 decision regarding disclosure of additional records.

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

[65] On July 31, 2019, the Board wrote the parties establishing a submission process for the reconsideration of the Board's July 18, 2019 decision. On July 31, 2019, the Appellants sought an extension to the submission schedule due to holidays. The Board wrote the parties on August 1, 2019 establishing new submission dates.

[66] On August 9, 2019, the Board issued a Decision Letter with respect to the admissibility of seven documents filed by the Appellants.[24] The Board admitted the seven documents filed by the Appellants, and stated it would determined the appropriate weight, if any, be given to each of the documents, in its deliberations after the hearing concluded. The Board allowed parties the opportunity for further submissions on the admissibility of the additional documents, in the written submissions filed in preparation for the hearing or in their oral submissions at the hearing.

[67] On August 19, 2019, the Board received the Appellants submission regarding the Director's reconsideration request. On August 21, 2019 the Director's submission was received. On August 23, 2019 the Appellants rebuttal submission was received.

[68] The Board wrote the parties on August 26, 2019 granting the reconsideration of the decision and requesting submissions from the Parties on the merits of the reconsideration. On August 26, 2019, the Appellants wrote the Board advising that they could not meet the submission dates due to prior commitments. On August 27, 2019, the Board set new submission dates in a letter to the Parties. Submissions were received from the Appellant on August 29, 2019. A response submission was received from the Director on September 3, 2019. The Appellants response submission was received on September 5, 2019. On September 9, 2019, the Board provided its decision on the reconsideration. The Board confirmed its original decision and ordered the disclosure of the required documents by September 10, 2019. The Board noted reasons for its decision would be provided in due course.

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[24] *Collette Benson and CRC Open Camp and Catering Ltd*. v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (9 August 2019), Appeal No. 18-0015-DL3 (A.P.L.A.B.), 2019 AEPLAB 17.

[69] On September 11, 2019, the Appellants informed the Board by letter that the Director had not provided the additional records by the Board's deadline. The Board acknowledged the letter the same day.

[70] On September 11, 2019, the Director wrote the Board indicating he will not provide the documents requested by the Board and requesting the Board's reasons so the AEP could consider "legal steps" in relation to the September 9, 2019 letter.

[71] On September 11, 2019, the Appellants wrote the Board requesting an adjournment in light of the Director's refusal to comply with the direction of the Board until such a time that matters related to the disclosure of the additional records have been completed.

[72] On September 12, 2019, the Board acknowledged the September 11, 2019 letters from the Appellants and the Director and requested a comment from the Director on the adjournment request. The Director submitted that the hearing should proceed and opposed the Appellants adjournment request.

[73] The Board wrote the parties adjourning the hearing on September 13, 2019.

[74] September 27, 2019, the Board acknowledged the Director's September 25, 2019, letter requesting reasons for the September 9, 2019 reconsideration decision.

[75] December 3, 2019, the Assistant Deputy Minister, Regulatory Assurance Division wrote the Board recommending the Board "advise the [A]ppellant[s] to use the *Freedom of Information and Protection of Privacy Act* (FOIP) process to glean whatever information they are searching for."[25]

[76] On December 6, 2019, the Appellants responded to the Assistant Deputy Minister's letter noting the Board had determined the request for the records was appropriate and within the Board's jurisdiction and the Director's position regarding FOIP for further records production are moot.

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[25] See: *Freedom of Information and Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP").

[77] On December 20, 2019, issued its reason for its reconsideration decision.[26] The Board repeated it's ordered to the Director that he should to provide the documents by January 3, 2020, noting that FOIP is not part of the Board's process.

[78] On January 3, 2020, the Appeals Coordinator wrote the Parties noting the legislated one-year mark would expire on January 5, 2020, and the requirement of section 236 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR") for the Appeals Coordinator to consider the effect of delay in regards to the appeal. The Appeals Coordinator, after considering the facts and potential affects, decided the appeal should proceed as if the applicable time period had not expired as per section 236(1)(b) of the PLAR.[27] Available dates for a hearing were requested from the Parties by January 3, 2020. The Appeals Coordinator recused himself from the panel that would hear the matter to avoid any concerns about bias.

[79] On January 7, 2020, the Board wrote the Parties having not received a response by January 3, 2020. The Board again requested available dates for hearing from the Parties by January 14, 2020, and again ordered the additional disclosure be provided by the Director by January 14, 2020.

[80] On January 14, 2020, the Director responded providing dates of availability for a hearing and submitting the Director had provided all documents required by law. The Appellants responded they would be seeking judicial review of the Appeals Coordinator's decision regarding section 236 of PLAR and would not provide potential hearing dates. The letters were acknowledged by the Board on January 15, 2020.

[81] On January 28, 2020, the Appellants served the Board with an Originating Application for Judicial Review returnable February 27, 2020 and a Notice to Obtain Record of Proceedings.

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

[27] Appeals Coordinator's Letter, dated January 3, 2020.

[82] On January 29, 2020, the Board acknowledged the Originating Application and Notice to Obtain Record of Proceedings with respect to the appeal requesting all further correspondence in relation to the Originating Application be forwarded directly the Board's outside counsel.

[83] On February 5, 2020, the Board wrote the Parties regarding the Board's decision to proceed with scheduling the appeal and advising that due to the Director decision not to comply with the Board's order for further disclosure, the Board would consider drawing an adverse influence in appropriate circumstances. The Parties were requested to provide available dates for a hearing in by February 14, 2020.

[84] On February 18, 2020, the Board acknowledged receipt of letters dated February 13 and 14, 2020 from the Director and the Appellants, respectively, regarding the hearing. The Board set the hearing for May 28, 2020.

[85] On February 21, 2020, a letter was sent by the Board confirming the issues to be heard. The letter also set the schedule for the filing of written submission and detailed the hearing procedures for the May 28, 2020 hearing scheduled for the Board offices.

[86] On April 16, 2020, the Board wrote the parties informing them that due to the COVID-19 Pandemic, an in-person hearing on May 28, 2020 was not possible. The Board requested the parties advise by April 23, 2020, whether they would they like to return to mediation (via telephone conference or video conference), proceed to a hearing via written submissions only, or wait and decide at a later point in time if an in person hearing is possible.

[87] The Director responded on April 12, 2020, requesting the appeals proceed via written submissions only. The Appellants responded on April 21, 2020, indicating a preference to reschedule the appeal to when an in person hearing was possible.

[88] On May 1, 2020, the Board wrote the parties acknowledging the April 12 and 21 letters and providing a schedule to receive written submissions for a hearing to be held on August 14, 2020. The Board requested the Parties advise the Board of any concerns by May 8, 2020.

[89] The Board wrote the Parties on May 21, 2020, confirming the hearing schedule and procedures, and issues to be heard for the hearing being conducted by written submissions with closing comments by video conference on August 14, 2020.

[90] On June 24, 2020, the Board wrote the Parties providing video conference instructions and confirming the hearing schedule, procedures and issues for the August 14, 2020 hearing.

[91] On July 3, 2020, the Director submitted his Initial Written Submission (the "Director's Initial Submission").

[92] On July 3, 2020, the Appellants submitted their Initial Written Submission (the "Appellants' Initial Submission"). The Appellants' Initial Submission included an affidavit from Ms. Colette Benson, signed on July 3, 2020 (the "Benson Affidavit") and an affidavit from Mr. David Lind, signed on July 2, 2020 (the "Lind Affidavit").

[93] The Appellants' Initial Submission also included a request to add an additional issue to be considered in the hearing of the appeal. The additional issue proposed by the Appellants was: "Is the Public Lands Appeals Board … prohibited from hearing the [appeals] as a result of a loss of jurisdiction?" The Appellant alleged that the decision of the Appeals Coordinator under section 236 of PLAR was flawed, such that the Board had lost the jurisdiction to hear the appeals.

[94] On July 6, 2020, the Board acknowledged: the Director's Initial Submission and the Appellants' Initial Submission. The Board noted the addition of the fourth issue to the hearing of the appeal by the Appellants and requested comments from the Director by noon on Friday, July 10, 2020.

[95] On July 10, 2020, the Director provided Cross-Examination Questions for the Appellants on the Benson Affidavit and Lind Affidavit. On July 10, 2020, the Appellants provided Cross-Examination Questions for the Director on the Director's Record. The correspondence was acknowledged by the Board on July 13, 2020.

[96] On July 13, 2020, the Director wrote the Board regarding not being able to meet the Board's deadline of July 10, 2020, to provide comments to the Appellants July 3, 2020 letter. The Director wished to know if comments were still required. The Board responded on July 13, 2020, to the Director indicating that comments were still required.

[97] On July 15, 2020, the Appellants wrote the Board noting they had not received the Director's response to the Board's July 6, 2020, request for comments regarding the question of the Board's jurisdiction. The Board acknowledged the letter the same day.

[98] The Director's comments regarding the question of the Board's jurisdiction to hear the appeal were received on July 16, 2020. The Board acknowledged receipt of the letter on the same day.

[99] On July 16, 2020, the Appellants wrote the Board reiterating their request that the Board consider the issue of its jurisdiction as part of the appeal process.

[100] On July 16, 2020, the Board wrote to the Parties indicating it would include the additional issue of jurisdiction in the hearing of the appeals. Specifically, the Board set the additional issue as: "Is the Board prohibited from hearing the appeal[s] as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator? The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator."[28]

[101] On July 17, 2020, the Director submitted the affidavit of Neil Brad sworn July 17, 2020 (the "Brad Affidavit") in Answer to the Cross-Examination Questions on the Director's Record from the Appellants. Further, on July 17, 2020 the Appellants submitted the Answers to the Cross Examination Questions on the Benson Affidavit and the Lind Affidavit. The Board acknowledged the submissions on July 20, 2020.

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[28] See: *Collette Benson and CRC Open Camp and Catering Ltd*. v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (16 July 2020), Appeal No. 18-0015-DL4 (A.P.L.A.B.), 2020 ABPLAB 10. (Note: Citation corrected.) See: Board's Letter, dated July 20, 2020, restating the issue.

[102] On July 24, 2020, the Appellants submitted their Response Written Submission (the "Appellant's Response Submission") and the full Affidavit of Ms. Colette Benson (the "Benson Response Affidavit"), and the Director submitted his Response Written Submission (the "Director's Response Submission") and the Affidavit of Mr. Wayne Holland sworn on July 24, 2020 (the "Holland Affidavit"). The Board acknowledge receipt on the same day.

[103] July 31, 2020, the Appellants submitted Cross-Examination Questions with respect to the Holland Affidavit.

[104] On August 4, 2020, the Board wrote the parties acknowledging the Appellants July 31, 2020, letter.

[105] On August 10, 2020, the Director submitted the signed but unsworn affidavit of Wayne Holland in Response to the Appellant's Questions on his affidavit sworn July 24, 2020 (the "Holland Response Affidavit"). The Board acknowledged the submission on August 11, 2020.

[106] On August 14, 2020, the closing comments of the appeal were heard orally by video conference. The panel convened to decide the appeal after the close of the hearing.[29]

III. ISSUES

[107] The Board set the following issues to be heard in the hearing:

5. Did the Director who made the decision to issue the Administrative Penalty to Colette Benson and CRC Open Camp &Catering Ltd., err in the determination of a material fact on the face of the record?
6. Did the Director err in law?
7. Did the Director exceed the Director's or Officer's jurisdiction or legal authority?
8. Is the Board prohibited from hearing the appeal as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator? The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator.

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[29] See: Board's letter, dated May 1, 2020, detail the procedure followed for the hearing of the appeals.

IV. SUBMISSIONS

A. Appellants' Initial Submission

1. Introduction

[108] The Appellants stated Colette Benson is a corporate director of CRC, an Alberta-owned and operated business, together with her husband Albert Benson.[30] The Bensons are also the directors of NEC Contractors Ltd. ("NEC") and have always considered that the both companies to function together as one entity.[31]

[109] On April 18, 2012, the DML was issued to CRC for an Industrial Storage Site.[32] The Appellants stated, "CRC incurred expenses of more than $230,000 to acquire, clear and prepare the DML for use as an industrial storage site…."[33] The Appellants referred to this work as the improvements (the "Improvements").

[110] The DML was used for storage of CRC and NEC heavy equipment and industrial materials between projects and once the construction season was over. However, there were many times throughout the year, when there was no CRC or NEC equipment or materials on the DML at all.[34]

[111] In early 2013, CRC submitted an application to AEP for an amendment to the permitted use of the DML, and on May 28, 2013, AEP issued an amendment to allow a fuel card lock as a permitted use.[35] CRC subsequently submitted an application to AEP to sublease the proposed card lock site to Plamondon. AEP rejected CRC's application. Subsequently, a portion of the DML as subdivided out as a separate parcel of land and a new Departmental Miscellaneous Lease was issued to Plamondon for the card lock site.[36]

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30 Benson Affidavit, at paragraph 2. See: Director's Record, at Tab 7.1.

31 Benson Affidavit, at paragraph 3.

32 Benson Affidavit, at paragraphs 6 and 10. See: Director's Record, at Tab 3.1.

33 Benson Affidavit, at paragraphs 11 to 12 and Exhibit "A".

34 Benson Affidavit, at paragraphs 8 to 9 and 13 to 14.

35 Benson Affidavit, at paragraphs 15 to 17. See: Director's Record, at Tab 3.2.

36 Benson Affidavit, at paragraphs 15 to 18. See: Director's Record, at Tabs 3.2 and 3.6.

[112] The Appellants submitted that AEP, in its letter rejecting the sublease application, advised CRC that a sublease was permitted only for a purpose consistent with the leaseholder's original stated use. The Appellants stated they "understood from this letter that as long as a proposed sublease was consistent with the original approved use of the DML, AEP's consent to sublease was not required."[37] Moreover, the Appellants stated they were aware of other disposition holders who had informally partnered with other businesses on their leases and had profited from such arrangements. Therefore, the Appellants stated they presumed that subleasing without consent was permitted by AEP.[38]

[113] The Appellants submitted in September 2013, NEC was working as a contractor on the Project for Enbridge, along with Premay.[39] As a result of unseasonably warm conditions in the fall and winter of 2013, the Project could not proceed and was temporarily placed on hold by Enbridge. Premay had an urgent need to store their supply of pipe until the Project resumed.[40] Premay made inquiries with AEP regarding short-term storage options, but AEP had no options available for Premay in the timeframe required.[41] According to the Appellants, CRC and Premay entered into a joint venture arrangement to store the pipe for the short-term on the DML. The initial term of the Agreement was only five months.[42] However, as a result of the collapse of the oilfield industry in 2014, Enbridge ended the Project and never actually used Premay's stored pipe.[43]

[114] The Appellants submitted CRC considered its arrangement with Premay to be a joint venture, further they believed that such an arrangement was permitted by AEP as a use which was consistent with the terms of the DML.[44] During the entirety of the term of the

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37 Benson Affidavit, at paragraphs 18 and 20. See: Director's Record, at 3.3.

38 Benson Affidavit, at paragraph 21.

39 Benson Affidavit, at paragraphs 22 to 23.

40 Benson Affidavit, at paragraphs 24 to 26.

41 Benson Affidavit, at paragraph 27.

42 Benson Affidavit, at paragraphs 29 to 31.

43 Benson Affidavit, at paragraphs 37 to 38.

44 Benson Affidavit, at paragraphs 32 to 35.

Agreement, CRC continued to use the DML for its own purposes and never delegating any of its responsibilities under the DML.[45] The Appellants stated that CRC incurred operating and maintenance expenses of approximately $140,630.00 in relation to the DML between 2013 and 2018.[46]

[115] The Appellants said Ritchie Bros. was retained to sell all remaining assets of CRC and NEC in 2018, when the Bensons decided to retire.[47] The Appellants stated that "despite the Bensons' clear instructions to Ritchie Bros. that their only interest was in selling the Improvements, and that they were not actually permitted to auction the DML itself, the DML was included in the advertising materials prepared by Ritchie Bros."[48]

[116] The Appellants argued that Plamondon purchased the Improvements through the auction for $190,000 (the "Sale Proceeds"). Payment of the Sale Proceeds to CRC was contingent upon the assignment or transfer of the DML to Plamondon. On September 24, 2018, CRC submitted a request for a General Assignment of Disposition to AEP (the "Assignment") in consideration of the receipt of $1.00.[49]

[117] The Appellants submitted AEP cancelled the DML prior rendering a decision on the Assignment, and AEP has not returned CRC's security deposit of $18,708.00 despite completion of all reclamation requirements.[50]

[118] AEP approved Plamondon's application to lease the DML on the same terms granted to CRC.

2. Position of the Appellants

[119] With respect to the issue of jurisdiction, the Appellants stated the appeals were "… served on the Board by the Appellants on January 4, 2019. The [appeals were] not heard

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45 Benson Affidavit, at paragraph 36.

46 Benson Affidavit, at paragraphs 39 to 41.

47 Benson Affidavit, at paragraph 42.

48 Benson Affidavit, at paragraphs 43 to 46.

49 Benson Affidavit, at paragraphs 47 to 48.

prior to January 4, 2020, and the order of the Minister under Section 124 of the Act has not been issued to date."[51]

[120] The Appellants stated their position that "the Board is prohibited from hearing the [appeals] as a result of a loss of jurisdiction, and that the Administrative Penalty must be referred back to the Director in accordance with [PLAR] who must then grant the relief requested in the [appeals]."

[121] The Appellants submitted that the issue of the Board's jurisdiction must be determined prior to consideration of the remaining grounds of appeals.

[122] The Appellants submitted that should the Board determine it retains jurisdiction to hear the appeal, then the Administrative Penalty must be set aside entirely or in part as the Director erred in fact or in law, or exceeded his jurisdiction. The Appellants stated:

- "The Director failed to consider and/or apply AEP's historical internal policies or practices with respect to unauthorized subleases when assessing the Administrative Penalty;
- The Director breached his duties of procedural fairness as a result of his failure to comply with an Order of the Board and his refusal to provide disclosure of requested relevant and material records to CRC;
- The Director's assessment of the 'proceeds' portion of the Administrative Penalty did not reflect the actual economic benefit or advantage received by CRC as a result of the Subleases; and
- The Director erred in including the proceeds of the sale of the Improvements as part of the Administrative Penalty."

3. Jurisdiction

[123] The Appellants submitted section 236 of PLAR prohibits the Board from hearing the appeals. According to the Appellant, in the case of a complex appeal pursuant to section 236(1)(b) of PLAR, an order under section 124 of the Act (the Minister's decision on the appeal)

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50 Benson Affidavit, at paragraphs 49 to 50.

51 Appeals Coordinator's letter, dated January 3, 2020.

must be made in respect of an appeal within one year after the day the notice of appeal is served on the Appeals Coordinator ("the Appeal Period").

[124] The Appellants submitted that the Appeal Period in section 236(1)(b) is a mandatory time limit and "must" is to be construed as imperative.[52]

[125] The Appellants quoted section 236(3) of PLAR submitting, that PLAR dictates

> "… that the Appeals Coordinator must not act pursuant to [s]ection 236(2)(a) if, in the opinion of the Appeals Coordinator, the decision, variation or rescission sought in the appeal is unlawful, absurd or likely to cause unreasonable loss or damage to public land or is likely to have a significant adverse effect on the interests of any person."

[126] The Appellants submitted the Appeals Coordinator's January 3, 2020 letter advised the appeals would proceed as if the Appeal Period had not expired notwithstanding section 236(2)(a). The Appellants stated the reasons were because:

a) land use in the region is so constrained that granting the relief sought in the appeals could result in potentially unreasonable loss or damage to public land;

b) the relief sought in the appeals could adversely impact the interests of persons seeking to utilize public lands; and

c) that deciding the appeals without a full hearing and reasoned decision could cause unreasonable loss or damage to public lands and have a significant adverse effect on the interests of any person seeking to utilize lands within the Lower Athabasca Regional Plan.

[127] The Appellants submitted the grounds the Appeals Coordinator relied upon are irrelevant considerations to section 236(3) extension of the Appeal Period and the Decision is delegating decision-making authority to the Board, which is not allowed.

[128] The Appellants submitted the definition of "loss or damage" as defined in section 1(1.1) (ii) of the Act, stating that "granting the relief requested in the [appeals] - specifically,

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[52] *Interpretation Act*, RSA 2000, c I-8, at section 28(2)(d).

rescinding the financial penalties in the Administrative Penalty - would not satisfy the definition of 'loss or damage' to public land in the Act."

[129] The Appellants submitted that rescission of the Administrative Penalty would not affect the DML in question or on land use in the region of the DML. The Appellants submitted there is no basis that rescission of the Administrative Penalty would have an adverse impact on the interests of persons seeking to utilize public lands.

[130] The Appellants submitted it appears that neither section 236(3) nor the term "adversely impact" have been previously considered by the Board.

[131] The Appellants submitted that an analogy can be drawn to decisions, which have considering the term "adversely affected" in section 212 of PLAR in relation to assessing an individual's standing to appeal. The Appellant quoted *Rothwell* v. *Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, re: *Scenic Sands Community Association* ("*Rothwell*") that:

> "To determine whether an appellant is 'adversely affected,' the Board must find the director's decision could potentially have a negative impact on the appellant, and there must be a reasonable possibility it will occur. When claiming to be directly and adversely affected, the onus is on the appellant to demonstrate to the Board there is a reasonable possibility he or she will be directly and adversely affected by the decision of the director. It is not enough for an appellant to show he or she is possibly affected, it must also be shown the possibility is reasonable. For the Board to find an appellant is directly and adversely affected, the effect cannot be too remote or speculative. Both the reasonableness and the possibility of the effect must be shown."[53]

[132] The Appellants submitted that a consideration of the potential interests of hypothetical individuals is insufficient to satisfy the test for adverse impact. The test outlined by the Board in *Rothwell*, requires consideration of whether granting the relief requested would

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[53] Stay Decision: *Rothwell* v. *Director, Operations Division, Red Deer-North Saskatchewan Region, Alberta Environment and Parks,* re*: Scenic Sands Community Association* (15 February 2019), Appeal No. 18-0014-D (A.P.L.A.B.), 2019 ABPLAB 3 at paragraph 32.

adversely impact the interests of specific individuals seeking to utilize identified pieces of public land.

[133] The Appellants submitted that the Appeals Coordinator was required, at the very least, to turn his mind to whether granting the relief sought by the Appellants had reasonable possibility of affecting the interests of identified users of particular pieces of public lands. However, there is no such discussion of this factor in the Appeals Coordinator's January 3, 2020 letter, and no indication that the Appeals Coordinator turned his mind to this factor.

[134] The Appellants stated while section 236(3) has the potential to extend the one-year limitation where justified "in the opinion of the Appeals Coordinator," it is submitted that any such decision must be based on a reasonably informed review of the enumerated factors, rather than mere supposition or belief. As noted in the decision of *Prince Edward Island Public Service Assn.* v. *Holland College*[54]:

> "Much stress was laid in argument on the implications of the words 'in the opinion of the College.' Those words, 'in the opinion of ...' have been judicially interpreted in *R. ex. rel. Wilson* v. *Holmes*, [1931] 3 D.L.R. 218, Sask.C.A. and, more recently, by the trial court of this Province in *Matheson MacMillan* v. *Minister of Finance*, unreported, No. GDC-6304, wherein it is said:
>
> > 'An 'opinion' is the product of an informed mind, and is to be distinguished from a mere 'belief,' the formation of which does not require an informed mind. To form an opinion necessarily requires something in the nature of an evidentiary basis, which the formation of a belief does not.'"

[135] Appellants stated that the Appeals Coordinator's conclusions in this respect are insufficient to meet the test for "in the opinion of" as discussed in the case law, submitting the Appeals Coordinator's Decision appears to be unsupported speculation and is not reflected in evidence.

[136] The Appellants further submitted that section 236(3) requires the Appeals Coordinator, to determine if the factors have been satisfied, in order to justify extending the time

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54 *Prince Edward Island Public Service Assn*. v. *Holland College*, 1986 PESCAD 179.

limits in section 236(1)(b). The Appeals Coordinator improperly delegated his decision-making authority to a panel of the Board by concluding that a full hearing was required to decide whether the factors in section 236(3) were satisfied or not.

[137] The Appellants stated as noted by the Court of Appeal in *Goodrich* v. *Flagstaff (County of) Subdivision and Development Appeal Board*, in the context of a decision to be made by the SDAB:[55]

> "It is clear that an administrative tribunal, such as the SDAB, may not delegate its statutory authority: *Murray v. Rockyview* (1980), 1980 ABCA 242 (Canlii), 27 A.R. 80 at para. 5 (C.A.) citing *Figol v. Edmonton City Council* (1969), 1969 Canlii 734 (ABCA), 71 W.W.R. 321 (Alta. C.A.); *Labour Relations Board of Saskatchewan v. Speers*, 1947 Canlii 199 (SKCA), [1947] 2 W.W.R. 927 (Sask. C.A.); *Vine v. National Dock Labour Board*, [1957] A.C. 488 (H.L.).That is, a SDAB may not transfer to another party its own authority to make the ultimate decision."

[138] The Appellants submitted this principle applies to a delegation of the Appeals Coordinator's decision-making authority.

[139] The Appellants submitted the Legislature clearly signaled its intention in resolving matters before the Board in a timely fashion by enacting section 236(1)(b) and 236(2)(a) of the Regulation. If it is accepted that a full appeal is required to determine if the factors in section 236(3) are to occur, it would make section 236(1)(b) and 236(2)(a) of no value. As a result, according to the Appellant, the Board has lost jurisdiction to hear the appeals. The Administrative Penalty must be referred back to the Director to grant the relief requested.

4. Standard of Review

[140] The Appellants submitted the Board in its review of the Administrative Penalty must first determine the proper standard of review to apply, as the standard of review speaks to

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[55] *Goodrich* v. *Flagstaff (County of) Subdivision and Development Appeal Board*, 2002 ABCA 293, at paragraph 18.

the level of deference that the reviewing body will give to the decision of a decision-maker of first instance.[56]

[141] The Appellants submitted the appeals are an internal review of a decision of the Director. The standard of review applied by a higher internal decision-maker to a lower decision-maker is known as the "internal standard of review".[57] In considering the appropriate internal standard of review in *Inshore Developments Ltd.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* ("*Inshore*"),[58] the Board's analysis held that the cases cited by the Director in support of a "reasonableness" standard could be distinguished from the framework under which the Board operated, stating: "The cases cited by the Director involved judicial reviews of tribunal decisions, not a tribunal's review of a decision of a designated statutory authority, where the reviewing tribunal must make a recommendation to the Minister."[59]

[142] The Appellants submitted the Board was established to hear appeal of certain decisions made by the Director, and provide recommendations to the Minister to confirm, reverse, or vary, the Director's decision.[60] The Appellants stated, although the Board determined that certain factors in its analysis, if looked at in isolation, could require a reasonableness standard of review, the overall context and legislative purpose must be considered:

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

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

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

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

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

60 *Inshore*, at paragraph 115.

> of reasonableness. This would suggest the Director could overrule the Minister."[61]

[143] The Appellants submitted *Yee* v. *Chartered Professional Accountants of Alberta* ("*Yee*"),[62] recently considered the standard of review for internal appeals which referenced the Courts earlier decision in *Newton* v *Criminal Trial Lawyers' Association* ("*Newton*"), noting the Board specifically turned its mind to the factors outlined in *Newton* in *Inshore.* The conclusion the Board reach was that the correct standard of review for appeals before it was correctness. Of primary influence was the Board's role in making recommendations to the Minister, and the Minster's role under the Act as the ultimate decision-maker on appeals.[63]

[144] The Appellants submitted there is a fundamental difference between the role of the Board on appeals under the Act and those of internal appeal bodies, stating, as noted by the Court in *Yee*, of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute.

[145] The Appellants submitted that both on a statutory and procedural basis *Yee* and *Newton* are entirely distinguishable, from an appeal under the Act, stating:

> "[I]t is clear that the overall statutory role of other appeal bodies is fundamentally different to that of the Board. The role of an appellate body reviewing a decision which has been made with the benefit of fulsome evidence provided by both sides is substantially different than the appeal process contemplated by the Act."

Further, the *Chartered Professional Accountants Act,* SA 2014, c C-10.2 ("CPAA"), the *RAPA* and the *Police Act*, R.S.A. 2000, c. P-1 7 ("PA") all provide for appeal of decisions to the Court of Appeal.[64] By contrast, the Act specifically prohibits review of the decision of the Minister by a court.

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61 *Inshore*, at paragraph 119.

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

63 *Inshore*, at paragraphs 112 to 114

64 CPAA, section 122. RAPA, section 117. PA, section 18.

[146] The Appellants submitted it is not appropriate to apply the same standard of review applicable to appeal bodies under other internal appeal processes to appeals before the Board, stating "as summarized in *Dunsmuir v. New Brunswick*, 2008 SCC 9 *("Dunsmuir")* (in relation to the court's review of a decision of an administrative decision-maker), when applying the correctness standard, a reviewing court will not show deference to the decision-maker's reasoning process - it will rather undertake its own analysis of the question. The analysis will require the court to decide whether it agrees with the determination of the decision-maker. If not, the court will substitute its own view and provide the correct answer."[65]

[147] The Appellants submitted the Board's role requires the Board to undertake its own assessment of the matters before the Director and to provide the Minister with the best possible information. The Minister must be unfettered in exercising their legislative authority to decide if the Director's decision must be confirmed, reversed, or varied. The internal standard of review under the Act continues to be "correctness," requiring a less deference by the Board to the decision of the Director.

5. AEP's Practice Regarding Subleasing

[148] The Appellants stated, "the [appeals] must be allowed as the Director breached his duties of fairness by failing to provide any explanation or reason for AEP's deviation from long-standing past practices regarding informal subleasing of DMLs when imposing the Administrative Penalty."

[149] The Appellants submitted up to the early 2010 oilfield resource extraction and forestry industries in the Conklin region was, booming and there was a demand for both short and long-term land use options in relation to significant projects taking place in the region.[66] AEP was focused on managing public lands in a way that balanced business demands with

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65 *Dunsmuir*, at paragraph 50.

66 Lind Affidavit, at paragraphs 16 to 17.

environmental, cultural and community concerns, to ensure that any land use decisions did not result in a fractured landscape.[67]

[150] The Appellants stated, "[t]he Appellants' witness, David Lind, in his position as the sole Land Management Planner in the Lac La Biche office until 2013, was unable to recollect a single instance during his employment where AEP penalized a disposition holder solely for subleasing their [DML] without obtaining AEP's prior authorization."[68] The Appellants submitted "informal subleases were considered to be an allowable deviation from the strict terms of the Act and the [DML] which reasonably balanced land management priorities with the pressing demands of industry in the region."[69] The Appellants witness stated:

> "AEP was aware of and allowed many informal subleases on [Department Miscellaneous Leases] in the region to continue despite the fact that no permission to sublease had been sought in advance by the disposition holders, unless the department believed that environmental damage would result."[70]

[151] The Appellants stated "During this period, it was extremely uncommon for AEP to investigate when they became aware of an unauthorized sublease. The Appellants' witness, David Lind, in his position as the sole Land Management Planner in the Lac La Biche office until 2013, was unable to recollect a single instance during his employment where AEP penalized a disposition holder solely for subleasing their [DML] without obtaining AEP's prior authorization."[71]

[152] The Appellants submitted that at the time there was limited communications to disposition holders relating to penalties for breaches of the Act and [DMLs] or that AEP's internal policies relating to informal subleasing had changed.[72]

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67 Lind Affidavit, at paragraphs 3 to 9.

68 Lind Affidavit, at paragraph 18.

69 Lind Affidavit, at paragraphs 17 and 20.

70 Lind Affidavit, at paragraph 13.

71 Lind Affidavit, at paragraph 18.

72 Lind Affidavit, at paragraph 19.

[153] The Appellants submitted the Appellants had relied and conducted themselves according to AEP's long-standing internal policies and practices in relation to the DML and the process implemented in assessing the Administrative Penalty constituted a substantial departure from long-standing internal policies and practices.

[154] The Appellants submitted the Federal Court of Appeal recently considered a decision-maker's ability to depart from past practices in *Canada (Attorney General) v. Honey Fashions Ltd.,* 2020 FCA 64 *("Honey Fashions").*[73] Relying on the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 *("Vavilov"),* the Court assessed the governing statutory scheme, the evidence before the decision maker, past practices and past decisions, and the impact of the decision on the affected party in order to determine if the Canadian Board Security Agency ("CBSA" decision was reasonable.[74]

[155] The Appellants submitted the evidence before the court established that past decisions amounted to past practices for both parties.[75] The Appellants stated "Federal Court of Appeal determined that it was not sufficient for the CBSA to claim that the decisions made complied with the statutory scheme under which they were made. Ultimately, the CBSA Decision was determined to be unreasonable because the CBSA had failed to provide Honey Fashions with an explanation as to why the CBSA's past practices were not followed, and that as a result, the decision lacked justification, transparency and intelligibility."[76] The Appellants noted the court stated at paragraph 46:

> "In light of all the foregoing, I am of the view that the Federal Court did not err in finding that the decision by the CBSA not to accept the name change requests was unreasonable. If anything, that conclusion is bolstered by the recent decision of the Supreme Court in *Vavilov,* with its insistence on the need for a reasonable decision to be justified in light of the legal and factual constraints that bear on that decision. A decision maker cannot deviate from earlier decisions or from a longstanding past practice, especially when it is too late for those affected by

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73 *Canada (Attorney General)* v. *Honey Fashions Ltd*., 2020 FCA 64 ("*Honey Fashions*").

74 *Honey Fashions*, at paragraph 30.

75 *Honey Fashions*, at paragraph 38.

76 *Honey Fashions*, at paragraph 40.

> these decisions to adjust their behaviour accordingly, without providing a reasonable explanation for that departure."

[156] The Appellants submitted that the Director erred in law in failing to consider AEP's past practices and internal policies in relation to unauthorized subleasing prior to issuing the Administrative Penalty. The evidence suggests that AEP was not only aware that unauthorized subleases were occurring, but also that these informal subleases were tacitly encouraged.

[157] The Appellants' submitted the evidence is that they were aware of and relied on these past practices to their detriment. The Appellants further submitted they were also aware that subleases of Department Miscellaneous Leases for profit were extremely common in the Conklin area at that time, and that they were unaware of any of these arrangements triggering an investigation or penalty by AEP.[77]

[158] The Appellants submitted they were denied procedural fairness in the course of the investigation, as AEP's long-standing past practices in relation to unauthorized subleases appear not to have been considered by the Director prior to the imposition of the Administrative Penalty. The Appellants stated that based upon the court's direction in *Honey Fashions,*

> "The Director's failure to provide reasons in the Administrative Penalty for his departure from AEP's past practices and policies regarding unauthorized subleasing of [Department Miscellaneous Leases] was unreasonable, and in so doing, he breached his duties of procedural fairness to the Appellants. As such, the [appeals] must be allowed and the Administrative Penalty set aside in its entirety."

6. Board's Disclosure Order

[159] The Appellants submitted that as a result of the Director's failure or refusal to comply with an order of the Board, as well as the related breach of procedural fairness in failing to disclose all relevant and material records as part of the Director's Record in this proceeding the appeals must be allowed. The Appellants provided a chronology that stated:

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[77] Benson Affidavit at paragraphs 33 to 35.

> "On June 21, 2019, the Appellants brought an application to the Board for the disclosure of additional records from the Director.
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> On July 18, 2019, after receiving written submissions from the parties, the Board granted the Appellants' request and requested the Director to provide:
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> a) Any records relating to follow-up communications or directives from AEP resulting from the 2013 inspection;
>
> b) All additional notes or other records prepared by Mr. Paul Smith or other AEP employees relating to the DML since the commencement of the disposition;
>
> c) Any records contained in the GLIMPS system relating to the DML, which were available to the Director at the time of the decision and not already provided; and
>
> d) All AEP internal emails, memoranda, meeting notes, and other records in relation to the DML.
>
> (the 'Additional Disclosure').
>
> On July 29, 2019, the Director requested that the Board reconsider its decision, and on August 26, 2019, the Board agreed to do so. After receiving additional written submissions from the parties, the Board determined that its decision to request the Additional Disclosure was appropriate and within the Board's jurisdiction, and ordered the Director to provide the Additional Disclosure to the Appellants by September 10, 2019 (the 'Order').
>
> Notwithstanding the Order, the Director advised the Board on September 10 that it refused to provide the Additional Disclosure to the Appellants.
>
> On December 5, 2019, the Board received a letter from the Assistant Deputy Minister, Regulatory Assurance Division, which once again confirmed that the Director would not provide the Additional Disclosure to the Appellants as required by the Order, and suggested that the Appellants should instead access the process under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 [('FOIP')]. This suggestion was rejected by the Board."[78]

[160] The Appellants submitted the Director has yet to comply with the Order, and the Appellants have yet to receive any of the Additional Disclosure.

[161] The Appellants stated

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[78] *Colette Benson and CRC Open Camp and Catering Ltd*. v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2019 ABPLAB 25.

> "… pursuant to the *Interim Appeals Procedure Rules for Complex Appeals* (the 'Rules'), the Board has all powers necessary to conduct a fair, expeditious and impartial hearing of an appeal, including the power to seek full disclosure of evidence when the ends of justice would be served, and where sanctioned by law, to impose appropriate sanctions against any party who fails to obey a Board order."[79]

[162] The Appellants submitted, the Rules provide that if a party fails to comply with an order of the Board, the panel may:

a) Limit or bar the presentation of evidence where a party has disregarded a Rule or Board decision concerning the exchange of evidence;

b) Order the non-complying party to pay all or part of the costs of another party resulting from the non-compliance; or

c) Take any other appropriate action.[80]

[163] The Appellants submitted Section 232(3) of the Regulations, bars them from receiving a costs award as a result of the Director's refusal to comply with the Order, and the only realistic course of action for the Board is to sanction the Director for a willful and repeated refusal to obey the Order by either setting aside the Administrative Penalty in its entirety, or alternatively to barring the presentation of any evidence by the Director in the appeals, including the Director's Record. Further, the Appellants submitted the Director breached procedural fairness by refusing to comply with the Order and the refusal to provide the Appellants with the Additional Disclosure entitles the Appellants to a remedy.

[164] The Appellants submitted the duty of procedural fairness on a person exercising statutory power quoting the Supreme Court of Canada in *Cardinal v Director of Kent Institution,* [1985] 2 SCR 643, 1985 SCC 23 at paragraph 14:[81]

> "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative

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79 Rules, section 2.4(d) and (i).

80 Rules, section 3.1.

81 *Supreme Court of Canada in Cardinal* v *Director of Kent Institution,* [1985] 2 SCR 643, 1985 SCC 23 at paragraph 14.

> decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."

[165] The Appellants noted *Buryn* v. *Alberta (Minister of Municipal Affairs)*, 2017 ABQB 613 ("*Buryn*") which stated

> *"*[p]rocedural fairness ensures that administrative decisions are made using a fair, impartial, open, and transparent process that provides those affected by the decision an opportunity to know the case against them and to fully put forth their views and the evidence they wish the decision-making body to consider. The duty of fairness is flexible, variable, and contextual in nature, and accordingly, the level of procedural fairness owed will vary depending, in part, on purpose and intent of the applicable legislation and the process for decision making outlined in the legislation."[82]

[166] The Appellants submitted and Ms. Benson has previously provided evidence in these proceedings that if the Administrative Penalty is fully enforced the impact would be extremely serious and potentially financially ruinous.[83] The Appellants noted "[d]isclosure is an essential element of knowing the case to be made,"[84] stating: "the facts known to the Director regarding the use of the DML, and when those facts were known, are highly relevant considerations in this proceeding and are required by the Appellants to fully explore and forward their arguments in [these appeals]." However, the Director has not only failed to provide all relevant and material records as part of the Director's Record, he has refused to provide these records in the face of an order of the Board directing him to do so.

[167] The Appellants submitted they are entitled to relief contemplated under the Rules due to the Director's breach of procedural fairness. The consequences are more than trivial, the Appellants have been deprived of their ability to fully present their case to the Board by the Director denying Appellants the ability to fully examine the Director's case against them, and to be able to prepare their response in light of that examination.

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82 *Buryn* v. *Alberta (Minister of Municipal Affairs)*, 2017 ABQB 613 ("*Buryn*") at paragraph 31.

83 Appellants' letter, dated February 25, 2019 and Affidavit of Colette Benson sworn February 20, 2019.

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

[168] The Appellants stated that, this situation is exacerbated by the fact that the investigation leading to the issuance of the Administrative Penalty does not fully meet the standard of a transparent and fair process. The Director was in possession of numerous relevant and material records in relation to the DML and the activities conducted on it, and obtained additional records during the course of the investigation, which he reviewed and specifically relied on in determining the Administrative Penalty. However, the Appellants were given no opportunity to review and respond to the vast majority of these records prior to receiving the Administrative Penalty, and were required to pursue these appeals in order to obtain even partial disclosure through the Director's Record. There is a manifest imbalance in the parties' respective access to relevant records and information during the investigative process, and denying the Appellants access to the Additional Disclosure simply compounds the disadvantage that the Appellants face in fully arguing their position on the appeals.

[169] The Appellants submitted that an adverse inference should be drawn by the Board as a result of the Director's failure to provide the Additional Disclosure, despite the Order directing him to do so. The Appellants stated, "This is particularly relevant in light of the Appellants' argument that the Director failed to provide reasons in the Administrative Penalty for his departure from AEP's past practices and policies regarding unauthorized subleases of [Department Miscellaneous Leases]."

[170] The Appellants noted that a number of cases have adopted the following statement from *Wigmore, Evidence in Trials at Common Law, 1979* as the "leading statement" on adverse inference (at paragraph 41):

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

> make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such an inference in general is not doubted."[85]

[171] The Appellants submitted that the Director's failure to disclose in accordance with the terms of the Order, when such records should clearly be in AEP's possession, should lead the Board to infer that there are likely records in existence. The Appellants submitted this would support the Appellants' argument that AEP was aware of and accepted unauthorized subleases of Department Miscellaneous Leases in the Lac La Biche region at the time that the Appellants entered into the Agreement.

[172] The Appellants stated, "[t]he Director's failure or refusal to abide by the Order and to provide the Additional Disclosure has compromised the Appellants' ability to fully answer the case against them and to effectively advance their position on [the appeals]." The Appellants submitted the Director breached his duties of procedural fairness to the Appellants in this matter, and the breach of procedural fairness cannot be cured,[86] submitting that the appropriate remedy is for the Board to allow the appeals and set aside the Administrative Penalty in its entirety.

7. Proceeds

[173] The Appellants submitted the Proceeds portion of the Administrative Penalty should be reduced as the Subleases did not result in an economic benefit or advantage for CRC in the amount assessed. In regards to section 59.4 of the Act, the Appellants noted the term "proceeds" has not been defined in the Act or the Regulations. The legislation provides no clarification whether it refers to gross or net proceeds received. The Appellants noted the matter has recently been the subject of commentary in the decision of *Gionet et al v Director, Lower Athabasca Region, Alberta Environment and Parks* ("*Gionet*").[87] The Board discussed the administrative penalties facing the appellants distinguishing between the two separate amounts

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85 *Howard* v. *Sandau*, 2008 ABQB 34.

86 *Yee* v *Chartered Professional Accountants of Alberta*, 2020 ABCA 98, at paragraph 14

87 *Gionet et al*. v *Director, Lower Athabasca Region, Alberta Environment and Parks*, 2018 ABPLAB 27.

which make up the administrative penalty imposed on the appellants: the "penalty amount" (the prescribed statutory penalty of up to $5000 per offence) and the " proceeds" .The Board stated that the penalty amount is the monetary "fine" assessed for contravening the legislation. The proceeds amount, is focused on eliminating the "economic benefit the person who contravened the legislation received" [88] In other words, the proceeds amount is meant to bring the offending party back to zero, erasing any financial gains as a result of the offence, preventing the offender from profiting financially from its contravention of the legislation.

[174] The Appellants submitted this principle is further bolstered by guidance from the Alberta Energy Regulator (AER) in its compliance and enforcement manual published in November 2019 (the "Manual")[89]. The guidance provided in the Manual is consistent with the Board's commentary in *Gionet.* The Manual states that a proceeds order under the Act is meant to address "economic advantage[s] [gained] from a noncompliance."

[175] The Appellants submitted the proceeds portion of the administrative penalty should be based on the net proceeds obtained, stating: between 2013 and 2018, CRC incurred out of pocket costs in relation to the preparation, maintenance and operation of the DML in the amount of approximately $140,630.00. In addition, CRC incurred further expenses in the amount of $3,985.32 in relation to the annual lease payments to the Crown for the DML. The Appellants submitted that the Administrative Penalty should be reduced by the amount of $144,615.32.

[176] The Appellants submitted that the Director erred in including the Improvements Proceeds as part of the proceeds portion of the Administrative Penalty, rejecting the Appellants' evidence that the $190,000 paid to CRC by Plamondon following the auction related solely to the sale of the Improvements.

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88 *Gionet,* at paragraph 32.

89 Alberta Energy Regulator (AER) in its Compliance and Enforcement Manual, published in November 2019.

[177] The Director's "estimates" obtained from other contractors, totaled only $55,000 for the value of the work done on the DML by CRC.[90] Based on the Director's estimates and Improvements Proceeds amount, the Director concluded that $190,000 was not an accurate reflection of the value of CRC's DML improvements[91].

[178] The Appellants submitted the Director concluded that the Appellants had assigned the DML to Plamondon without the Director's consent, and the Improvements Proceeds reflected the proceeds of sale of the DML to Plamondon[92]. However, the evidence supplied by the Appellants shows that CRC expended more than $230,000 in relation to the acquisition and preparation of the DML. The Appellants submitted that CRC's own records of the actual costs incurred are the most accurate information in relation to the costs incurred and represent a reasonable value for the Improvements made in regards to the Proceeds Improvements amount. The Appellants submitted Director's estimates were based on general parameters and were prepared by individuals with no personal knowledge of the DML or the scope of the work completed.

[179] The Appellants stated,

> "It is difficult to understand the Director's conclusion that the Improvements Proceeds were, in reality, the proceeds of CRC's sale of the DML to Plamondon. It seems contradictory to conclude that the Appellants assigned the DML without the consent of the Director, when it is also acknowledged in the Administrative Penalty that CRC applied to AEP to assign the DML to Plamondon and that any payment for the Improvements was contingent upon the Director's approval of the Assignment request."

The Appellants submitted the sum of $190,000 must be from the Administrative Penalty, as the Director erred in finding the proceeds received were in breach of the Act, being derived from the sale of lands.

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90 Director's Record, Tabs 1.2 (page 6), and 9.2 to 9.4

91 Director's Record, Tabs 1.2 (page 6), and 9.2 to 9.4

92 Director's Record, Tabs 1.2 (page 6), and 9.2 to 9.4

8. Relief Requested

[180] The Appellants stated in their requested relief that:

- the Board is prohibited from proceeding with the appeals as a result of a loss of jurisdiction, and as such the appeals must be allowed and the Administrative Penalty returned to the Director who must grant the relief requested in the appeals;
- in the alternative, the appeals must be allowed as the Director erred in law in failing to consider and apply AEP's historical internal policies or practices with respect to unauthorized subleases when assessing the Administrative Penalty;
- in the alternative, the appeals must be allowed as the Director's willful refusal to comply with an Order of the Board resulted in a breach of procedural fairness;
- the amount of the Administrative Penalty, if enforced, must be reduced by the sum of $144,615.31 as the Subleases did not result in an economic benefit or advantage for the Appellants in the amount assessed; and
- the amount of the Administrative Penalty, if enforced, must also be reduced by the amount of $190,000 as the Director improperly included the proceeds from the sale of the Improvements in the proceeds assessment.

B. Director's Initial Submission

1. Introduction

[181] The Director filed the Director's Initial Written Submission on July 3, 2020 (the "Director's Initial Submission"). In the Director's Initial Submission, he stated the Appellants are holders of the DML. The Appellants sublet the DML to Premay between December 1, 2013 and June 19, 2018 and sold the Lands by auction receiving proceeds of $1,178,572.50 in rent and $190,000.00 from the sale by auction. The Director stated:

> "Section 43(1) of the [Act] prohibits the holder of a disposition from subletting public lands contained in a disposition without the written consent of AEP.
>
> Section 54.01 of the [Act] prohibits a person from receiving money for the purpose of gaining or allowing access to or use of public land unless the person:
>
> i. is a disposition holder; and

ii. is entitled at law to receive money for the purpose of gaining or allowing access to the public lands that are subject to their disposition."

[182] The Director submitted he considered all of the information collected during the Department's investigation and from representations made by the Appellants in response to the Preliminary Assessment before deciding to issue the Administrative Penalty to the Appellants in the amount of $1,415,572.50 on December 19, 2018.

[183] According to the Director, the Administrative Penalty was made up of two components:

(a) the penalty component of $47,000 for contraventions of section 43(1) and section 54.01(5) of the [Act]; and

(b) the proceeds component of $1,368,572.50 comprised of:

1. $1,178,572.50 for rent received by the Appellants from Premay, and

2. $190,000.00 from the sale by auction of [DML] held by the Appellants.

[184] The Director submitted the Administrative Penalty amount is reasonable and properly issued.

2. Summary of Facts and Evidence

[185] Colette Benson and her spouse Albert Benson own 99 percent of the voting shares of CRC Open Camp &Catering Ltd., an Alberta Company in which Colette Benson is the sole corporate director.[93]

[186] Ms. Benson is the primary decision maker for CRC[94] and has full signing authority related to the operations of CRC.[95]

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93 Director's Record, Tab 7.1.

94 Director's Record, Tab 2.1.

95 Director's Record, Tab 7.1.

[187] The Director submitted AEP issued the DML for a 15.41 acre parcel of public land for use as an "Industrial Storage Site" with 13 conditions, on April 18, 2012.

[188] The Director stated "pursuant to section 2 of [PLAR], a disposition holder only has the estate, interest, rights and privileges expressly provided in the disposition", submitting there were two conditions within the DML of note and relevance being conditions 3 and 9 which state:

> **Condition 3**
>
> The said lands shall be used by the lessee solely for the purpose of an Industrial Storage Site and may not be used for any other purpose without the written consent of the Lessor.
>
> **Condition 9**
>
> The Lessee may not sublet nor assign the said lands and premises of any part thereof without the written consent of the Lessor.

Subleasing

[189] The Director submitted AEP inspected the Lands on May 31 2018. AEP found no evidence of use of the Lands by the Appellants.[96] The entirety of the Lands were being used for pipeline pipe storage.[97]

[190] AEP learned that Enbridge in Conklin, Alberta had the bought the pipe and had it delivered to the Lands[98], who when contacted by AEP on June 5, 2018 provided a "Work Order" showing that they had a financial arrangement with Premay to store the pipe on the Lands.

[191] The Director submitted the Appellants' consultant Summit acknowledged that there was a "private agreement between the parties to provide access to [the DML]" In an email to AEP dated June 6, 2018. However, he denied it was a sublet.[99] A copy of the "Joint Venture

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96 Director's Record, Tabs 3.7, 4.1, 4.2, 4.3, and 4.4.

97 Director's Record, Tabs 3.7, 4.1, 4.2, 4.3, and 4.4.

98 Director's Record, Tabs 6 and 12.

99 Director's Record, Tabs 2.1, 6.16, and 10.2.

Agreement" between CRC and Premay was provided to AEP was provided on June 11, 2018, in an email from Summit.[100]

[192] The Director submitted Premay provided AEP on June 14, 2018, with a complete set of seven "Agreements" and associated invoices covering a period of 56 months (November 2013 —June 2018) establishing that Premay paid CRC $21,045.94 per month, and in total amount of $1,178,572.50 for the use of DML 090101.[101]

[193] The Director submitted the word, "Agreement" appears at the top of the first sublet agreement between CRC and Premay and indicates that the term was for five months from "Nov 1, 2013 to Mar 31 /14". There are five invoices for "Rental for ..." in the amount of $21, 000 per month from CRC to Premay for the months from November 2013 to March 2014.[102]

[194] The Director submitted the words, "JV Agreement" or "JV Agreement Extension" appears at the top of the agreements that covers the term April 1, 2014 to March 31, 2015 and the term July 1, 2017 to June 30, 2018 with an invoice from CRC to Premay to covering the term of each agreement. The unit price was $21,000 per month over the term, the same amount charged by CRC to Premay of each agreement.[103].

[195] The Director submitted there are no substantive differences in the terms and conditions of these seven sublet agreements, except for frequency of payments, GST and access for CRC, which are all obligations of Premay. Under each of the seven sublet agreements CRC collected rent in exchange for allowing Premay to use the Lands.

[196] The Director submitted "from November 2013 to June 30, 2018, the Appellants generated $1,178,572.50 in revenue from subletting the Lands to Premay stating "[i]n each of the seven sublet agreements:

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100 Director's Record, Tabs 2.1, 6.16, and 10.2.

101 Director's Record, Tab 2.1.

102 Director's Record, Tab 2.1.

103 Director's Record, Tab 2.1.

- CRC's obligation was to "Allow for Premay the use of 7 acres of land" for pipe storage over the term of the agreement;
- Premay's obligation was to "pay 3,000/acre for storage of pipes (21,000/month)"."

Previous Request to Sublease

[197] The Director submitted on October 1, 2009 CRC submitted a site plan with their application that detailed the use of the Lands as an "Industrial Storage Yard".[104]

[198] Subsequently, on June 21, 2013, CRC submitted an application to AEP for consent to sublet to Plamondon Co-op Ltd. ("Plamondon") 4 acres of the lands subject to the disposition. On October 8, 2013 AEP refused consent of the sublease.[105]

[199] The Director stated that in refusing to provide consent, the statutory decision-maker provided the following reasons in the decision letter:

- Important provisions of the proposed sublease (the 4 acre premises and definition of "head lease") would create uncertainty of key terms of this DML, which authorizes 3.2 acres for a fuel card lock;
- A proposed sublease is not the correct way to seek to increase the area authorized for the fuel card lock;
- A sublease is not appropriate for an intensive commercial land use, in this context AEP should directly regulate the land user as an DML holder;
- When the DML was issued, it appears CRC's strategy was to sublet or transfer a portion of it to others, it is not appropriate to procure public land solely or mainly for the purpose of sublet or transfer; and
- Subleases are allowed only for a purpose consistent with the DML holder's use. Subleases should not be used to authorize a purpose different

104 Director's Record, Tab 3.1.

105 Director's Record, Tab 3.3.

> from the rest of the DML. In those cases an amendment and application for a new DML would be appropriate.[106]

[200] The Director submitted AEP amended the DML reducing the area from 15.41 acres to the current 11.44 acres in April 2014, when a new disposition was created as DML 14008 and issued to Plamondon. This DML is not part of this appeal.[107]

Investigation

[201] The Director submitted that AEP received a phone call from a member of the public on May 23 2018, who had seen an advertisement for the public auction of DML 090101 by Ritchie Bros, in the Lac La Biche Post, a local newspaper.[108] The auction advertisement flyer obtained from the Ritchie Bros. website listed the particulars of the unreserved real estate auction that included "Current additional revenue of $252,000/annually."

[202] The Director stated that on May 29, 2018, the AEP Lands Approval Team Lead sent a letter to the Appellants advising that:

a) "the Lessee may not sublet nor assign the said lands and premises or any part thereof without the written consent of the lessor";
b) "if it is your intention to dispose of your lease, be aware that the department must approve any transfer of the DML through assignment"; and
c) "there are also applications, eligibility and other requirements for both the assignor and assignee that must be met prior to an assignment and that the final decision whether or not to approve an assignment rests with AEP".[109]

[203] On May 31, 2018, AEP observed a Ritchie Bros. auction notice posted at the Lands.[110]

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106 Director's Record, Tab 3.3.
107 Director's Record, Tabs 3.4, 3.5, and 3.6.
108 Director's Record, Tabs 1.6 and 6.1
109 Director's Record, Tab 1.3.

[204] On June 13, 2018 in Edmonton, a public auction conducted by Richie Bros. the DML was sold for $190,000.00 to Plamondon.[111]

[205] The Director stated:

> "Immediately following the auction, Premay advised AEP that it was approached by Plamondon to re-negotiate a sublease of the DML. Premay advised AEP that they had not re-negotiated any lease arrangement with Plamondon at that time and was awaiting further direction from AEP."[112]

[206] On November 21, 2018, Ritchie Bros. provided AEP with a "Contract to Auction" that identified DML 090101 as "PARCEL #3" and "leased land" that is "currently leased to Premay Pipeline Hauling LP for a pipe storage yard..."[113]under Item #3 in Schedule A of the contract signed by the Appellants on February 28, 2018.

[207] On November 19, 2018, Counsel for the Appellants confirmed the proceeds from the auction had transferred from Plamondon to CRC with a contractual obligation to return the proceeds to Plamondon if the request for assignment of the DML was denied by AEP. [114]

[208] The Director submitted following AEP's refusal to consent to assign the DML, no evidence was provided by the Appellants that the proceeds were returned to Plamondon.

[209] The Director said an application for approval for the assignment of the DML from CRC to Plamondon with a completed General Assignment of Disposition [GAD] form signed by the Appellants and Plamondon signed and sealed by the parties on June 15, 2018, two days after the Ritchie Bros. auction, was received by AEP on September 24, 2018.[115]

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110 Director's Record, Tab 3.7.

111 Director's Record, Tabs 6.4, 6.5, 6.6, 6.7, and 6.8.

112 Director's Record, Tab 10.1.

113 Director's Record, Tab 2.3.

114 Director's Record, Tab 2.5.

115 Director's Record, Tab 3.9.

[210] Though the sale of the DML through Richie Bros. auction for was $190,000.00, the consideration for the assignment was $1.[116]

[211] The Director submitted Colette Benson in her personal capacity and to CRC were sent the Preliminary Assessment composed of the assessed penalty component of $47,000 and the proceeds component of $1,368,572.50, totalling $1,433,572.50, on September 28, 2018.[117]

Administrative Penalty

[212] The Director submitted before making his decision, the Director invited the Appellants to meet in person to review the facts on which the Preliminary Assessment was based and to provide any relevant documentation for his consideration.[118]

[213] The Director submitted the Appellants provided written representations for the Director's review on November 12, 2018 and the Director met with the Appellants and their representatives on November 14, 2018. At the beginning of the meeting, the Director described the purpose of the meeting in the administrative penalty process.[119]

[214] The Director submitted that the meeting included discussion of the Ritchie Bros. auction in which the Appellants' claimed that the sale was not for the DML, but for the "improvements" such as survey, leveling, grubbing, clearing, stripping and preparations made to the Lands and the time associated with this work.[120]

[215] The Director asked the Appellants if they had any documents they wished to provide about the auction. Despite the Director's request, the Appellants provided no evidence to support their claims that they sold only improvements" before the Director made his decision.

[216] The Director submitted he considered Colette Benson's oral evidence that the Ritchie Bros. auction was not to sell the DML but to sell the "improvements" given during the

116 Director's Record, Tab 6.14.

117 Director's Record, Tab 1.1.

118 Director's Record, Tab 1.1.

119 Director's Record, Tabs 5.2 and 5.4.

120 Director's Record, Tabs 5.2 and 5.4.

November 14, 2018 meeting and concluded the Appellants did not sell "improvements" at the June 13, 2018 Richie Bros. auction. The Appellants sold access to public land and sold the financial liability for the reclaiming Lands.

[217] On December 19, 2018, after considering all of the information collected during AEP's investigation, the written and oral representations and documents submitted by the Appellants, the Director made his decision, to issue the Administrative Penalty. The Administrative Penalty is made up of two components: the penalty component amount of $47,000.00 and the proceeds component of $1,368,572.50 for contraventions of the Act.[121]

3. Director's Submissions

[218] The Director submitted the Administrative Penalty in the amount of $1,415,572.50, was properly issued and the amount of the penalty was reasonable, and the Director:

a) made no errors in the determination of a material fact on the face of the Record;
b) made no errors in law;
c) was within his jurisdiction or legal authority.

[219] The Director submitted, as Regional Compliance Manager, Mr. Brad is designated as a Director under the Act pursuant to section 5(2) and Ministerial Order 28/2018, which was in effect on December 19, 2018 as a director for the purpose of section 59.3 the Act.

[220] The Director stated he "had the authority to issue administrative penalties under section 59.3 of the Public Lands Act." Noting contraventions of section 43(1) and of section 54.01(5) of the Public Lands Act are offences under section 56(1) of the Act and pursuant to section 171(2) of PLAR, section 56(1) of the Act is a provision prescribed for the purpose of section 59.3(a) of the Act.

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121 Director's Record, Tab 1.2.

[221] The Director submitted the Appellants sublet the Lands to Premay without written consent from AEP in contravention their dispositions and section 43(1) of the Act, which reads: "The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director."

[222] The Director submitted it is "the responsibility of the regulated community to read and understand the public lands regulatory regime legislation that regulates their occupation of public land in Alberta."

[223] The Director submitted that though AEP issues policies on the interpretation and intent of the public lands regulatory regime[122] it does not relieve the obligation to become informed and to comply with the Act and the regulations, and the terms and conditions of its disposition.

[224] The Director stated "[i]n July of 2017, AEP released a policy "Subleasing Miscellaneous Leases, Pipeline Installations Leases and Surface material Leases using section 146(4) of the [PLAR]."[123]

[225] The Director submitted that AEP policy will only permit subletting of public land by a disposition holder in limited circumstances to meet a short-term need for effective resource utilization when the disposition holder is unable to utilize their lease, sating "[t]he sublet must not have the primary purpose or outcome of revenue generation for the disposition holder[124]. [emphasis added by the Director]

[226] The Director submitted a definition of "sublet" is defined by the Merriam-Webster dictionary as: "A lease by a tenant or lessee of part or all of leased premises to another person but with the original tenant retaining some right or interest under the original lease." [125]

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122 Director's Record, Tabs 8.3.

123 Director's Record, Tabs 8.1, 8.2, and 8.3.

124 Director's Record, Tab 8.3.

125 Director's Record, Tab 1.2 and 2.7.

[227] The Director submitted AEP did not receive a request to sublet the Lands and the have not provided evidence of written consent of AEP to sublet the Lands before entering into the seven sublet agreements with Premay.

[228] The Appellants are in contravention of the Act. By entering into the seven sublet agreements with Premay without the consent of AEP, the Appellants contravened section 43(1) of the *Act*. Further, as the primary purpose of the seven sublet agreements is to generate revenue, the agreements are contrary to AEP policy.

[229] The Director submitted the Appellants are not entitled at law to sublet of the Lands for the primary purpose of generating revenue and have provided no evidence to establish any entitlement.

[230] The Director stated

> "section 54.01(5) of the [Act] prohibits a disposition holder from receiving money for the purpose of gaining or allowing access to public land unless a disposition holder has an entitlement at law to receive money. Section 54.01(5) reads:
>
> No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or use of public land unless
>
> (a) the person receiving the money or other consideration is the holder of a disposition or authorization under section 20 and is entitled at law to receive money or other consideration for that purpose, and
>
> (b) the access, passage or use is in respect of public land that is the subject of the disposition or authorization."

[231] The Director stated "[t]he Appellants received monies for the purpose of allowing access to public land in contravention of section 54.01(5) of the [Act]."

[232] The Director submitted he was within his authority to issue the administrative penalty to Colette Benson pursuant to section 59.91 of the *Act*, which reads:

> "If a corporation commits an offence or is subject to an administrative penalty as a result of a contravention of this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence or contravention is guilty of the offence or responsible for the contravention and is liable to the punishment

provided for the offence or the administrative penalty, whether or not the corporation has been prosecuted for or convicted of the offence or has been given notice of the administrative penalty."

[233] The Director stated evidence gathered during the investigation established that Colette Benson directed, authorized, assented to, acquiesced or participated in the unauthorized subletting of the Lands. The Director relied on the following facts to issue the Administrative Penalty to Colette Benson in her personal capacity:

a) Ms. Benson is the sole director of CRC;

b) Ms. Benson has full signing authority for CRC;

c) at all material times, Ms. Benson was primary decision maker for CRC;

d) during the November 14, 2018 in person meeting Ms. Benson:

   i. referred to herself and CRC interchangeably and did not distinguish her personal responsibilities and actions from those of CRC;

   ii. "Well if they would have had entire use of the property I would assume that would be considered a sublease. If I made them responsible for all the environmental issues on the property while they were there and while they were off of there I would assume that would be a sublease. I did neither of those things. I still used the property for what I needed it for my business, and I'm still one-hundred percent responsible for the environmental obligations.[126]

   iii. admitted she was responsible for the actions and management of CRC as they relate to the Lands and the rental of the Lands to Premay: "I am still wholly responsible for the land as according to the [DML]. I didn't pass off any environmental responsibilities to Premay or to anybody else, and we had a business arrangement, and I didn't allow them total access to the entirety of my property. I totally understand what my responsibilities are in the [DML].[127]

e) with the exception of one agreement that AEP obtained that was not signed, Ms. Benson signed each of the other six sublet agreements;[128]

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[126] Director's Record, Tab 5.2 (2018-11-14 - Audio Recording - Procedural Due Process Meeting - Time 25:28 to 26:02).

[127] Director's Record, Tab 5.2 (2018-11-14 - Audio Recording - Procedural Due Process Meeting - Time 16:07 to 16:31).

[128] Director's Record, Tab 1.2.

f) Ms. Benson signed the "Contract to Auction" with Ritchie Bros.[129]

[234] The Director submitted an administrative penalty has two components, the penalty component and the proceeds component.

[235] The administrative penalty of $47,000.00 calculated the penalty portion under section 171 of PLAR[130] is meant to be a deterrent to prevent a reoccurrence of the prohibited activity.

[236] The Director submitted where the Director is of the opinion that the person is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of the Act, the Director has the authority to assess a one-time administrative penalty under section 59.4(4)(c) of the Act. Section 59.4(4) provides:

> "(4) A notice of administrative penalty under this section may require one or more of the following:
>
> a) payment of the penalty determined by the Director under section 59.3;
>
> b) any person who in the Director's opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an accounting of the proceeds believed by the Director to have been received by that person;
>
> c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds."

[237] The Director stated "when assessing proceeds, the Director must consider the implications for deterrence and whether fair and equitable treatment of other compliant regulated parties will occur as an outcome of the decision."

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129 Director's Record, Tab 3.2.

130 Director's Record, Tab 1.2.

[238] The Director submitted the objective of assessing proceeds is to return the contravening party to the same economic position as they were in, prior to the non-compliance occurring, leveling the economic "playing field" for the regulated community.[131]

[239] Failing to consider proceeds in the administrative penalty process would convey a message that promotes noncompliant behaviour as a "cost of doing business" that would be unfair to compliant regulated parties.

[240] The Director may make a reasonable estimate of the total revenues or proceeds earned by the Appellants without regard for unproven or alleged costs or expenses.

[241] The proceeds component in the amount of $1,368,572.50 was calculated from the total rent monies paid by Premay and collected by CRC as a result of unauthorized subletting and the total proceeds for the sale at public auction.[132]

[242] The Director submitted the Administrative Penalty was properly issued and was reasonable; stating he did not err in law, nor did he make any material errors of fact on the face of the record.

[243] The Director submitted the Appellants have failed to prove he made any errors.

4. Relief Requested

[244] The Director respectfully requested that the Board:

- find that the Administrative Penalty was properly issued and the amount was reasonable; and
- recommend to the Minister of AEP that this appeal be dismissed.

[245] The Director made no submission with respect to costs.

C. Appellants' Response Submission

[246] The Appellants submitted a Response Written Submission, dated July 24, 2020 (the "Appellants' Response Submission"). The Appellants responded to the Director Initial

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131 Director's Record, Tabs 1.1 and 1.2.

Submissions, dated July 3, 2020, and the Affidavit of Neil E. Brad sworn on July 17, 2020 in relation to the Appellants' questions on the Director's Record ("the Brad Affidavit").

1. Director's Statutory Authority

[247] The Appellants submitted the Administrative Penalty must be set aside in its entirety as Neil Brad, Regional Compliance Manager, did not have the requisite authority under the Act to issue the proceeds order against the Appellants in relation to the DML.

[248] The Appellants submitted the Director stated that for the purpose of Section 59.3 of the Act, pursuant to Ministerial Order 28/2018 (" the Ministerial Order "), Neil Brad, Regional Compliance Manager, was designated as a director.

[249] The Appellants stated, "[p]ursuant to Section 5(2) of the Act, the Minister may by order designate any person as a director for the purposes of all or part of the Act and the Regulations. The enforcement powers under Sections 59.3 and 59.4 of the Act are to be exercised by 'the director'."

[250] The Appellants submitted section 59.3 of the Act states in part that:

> The director may, in accordance with the regulations, require a person to pay an administrative penalty in an amount determined by the director if the person
>
> a) contravenes a provision of an ALSA regional plan, this Act or the regulations that is prescribed in the regulations for the purposes of this section,
>
> b) without legal authority makes use of public land,
>
> c) as a holder of a disposition or of an authorization under section 20, without the consent of the director , or a person authorized by the Minister to provide consent , makes use of the public land that is the subject of the disposition or authorization for any purpose other than the purpose for which the disposition authorization is granted,
>
> d) contravenes a term or condition of a disposition or of an authorization under section 20.

[251] The Appellants submitted section 59.4 of the Act states in part that:

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132 Director's Record, Tabs 1.1 and 1.2.

> (4) A notice of administrative penalty under this section may require one or more of the following:
>
> (a) payment of the penalty determined by the director under section 59.3;
>
> (b) any person who in the director's opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an accounting of the proceeds believed by the director to have been received by that person;
>
> (c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds.

[252] The Appellants submitted, section 171 of the Regulations outlines the range of administrative penalties the director can impose for contraventions under Section 59.3 of the Act.

[253] The Appellants stated "[w]hen Sections 59.3 and 59.4 of the Act and Section 171 the Regulations are considered together, it is clear that an administrative penalty and a proceeds order are two separate and distinct measures which can be imposed by the director in relation to contraventions of the Act." The Appellants submitted "), the director acknowledged that the administrative penalty and the proceeds assessment arose from two separate sections of the Act.

[254] The Appellants submitted the director's power to impose a proceeds order against any person arises solely from the authority granted to him in Section 59.4 of the Act. The Appellants submitted the director acknowledged that the administrative penalty and the proceeds assessment arose from two separate sections of the Act. The Appellants noted the Administrative Penalty Assessment Form states "[i]n addition to the amounts identified in the Total Preliminary Assessment, section 59.4(4)(c) of the Act provides the authority for the Director to include in a notice of administrative penalty a requirement for payment of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations, or an amount equivalent to the value of those proceeds."[133]

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133 Director's Record, Tab 1.1 (page 22).

[255] The Appellants submitted Neil Brad, as a Regional Compliance Manager and an employee of AEP, only has the authority granted to him under Section 5(2) of the Act and pursuant to the Ministerial Order. The Ministerial Order authorizes a Regional Compliance Manager to exercise the authority of a director under Section 59.3 of the Act. The Ministerial Order has not granted authority in relation to Section 59.4.

[256] The Appellants stated the Ministerial Order contains the following provisions:

- Pursuant to Section 5(2) of the Act , the Deputy Minister of Environment and Parks designates the persons holding the positions or classifications listed in the attached Appendix "A" as directors under the Act;
- These designations are subject to the limitations and restrictions that are set out in Appendix "A"; and
- An employee holding the position or classification listed at the top of a particular column is designated as a director with respect to the sections of the Act and regulations marked by an "X" in the corresponding row referring to that section.

[257] The Appellants submitted Appendix "A" of the Ministerial Order grants a Regional Compliance Manager the authority under Section 59.3 of the Act, but has not done so in relation to Section 59.4 which is associated with proceeds.

[258] The Appellants stated, "in relation to the proceeds assessment, the Director acted without statutory authority and therefore lacked the requisite jurisdiction to impose that portion of the Administrative Penalty against the Appellants. As such, the proceeds assessment is null and void as against the Appellants and must be set aside in its entirety."

2. Sublease vs. Joint Venture

[259] The Appellants submitted that the arrangement with Premay did not constitute a contravention of the Act as joint ventures are not arrangements which require prior permission from AEP and that the Administrative Penalty was improperly assessed. The Appellants submitted the contractual relationship between CRC and Premay was not a sublet, but a joint venture. The resulting proceeds received by the Appellant from this business arrangement did not contravene the Act.

[260] The Appellants submitted that there is no single accepted definition of a joint venture in case law. Instead, a collection of factors that speak to the nature of the parties' relationship is what makes a joint venture.

[261] The Appellant stated a joint venture has been defined in various ways, including:

- A special combination of two or more persons where, in some specific adventure, a profit is jointly sought without any actual partnership or corporate designation.[134]
- An association of two or more persons based on contract who combine their money, property, knowledge, skills, experience, time or other resources in the furtherance of a particular project or undertaking, usually agreeing to share the profits and the losses and each having some degree of control over the venture.[135]
- A joint venture is almost always confined to a specific defined business undertaking. Such undertaking should be defined via a term of length, or a specific termination date. Further, it should allow each party to continue to carry on their own business outside of the joint venture.[136]
- The relationship that subsists between persons who carry on, in common and with a view to profit, a business venture established by contract for a discrete project or undertaking or for a series of discrete business projects or undertakings.[137]

[262] The Appellants submitted the definitions are supplemented by commentary on joint ventures from *Williston on Contracts,* 3rd edition. The commentary is as follows:

> "Besides the requirement that a joint venture must have a contractual basis ... the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset t o a common undertaking;
>
> (b) A joint property interest in the subject matter of the venture;
>
> (c) A right of mutual control or management of the enterprise;

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134 Black's Law Dictionary, Revised 4th ed. (1968)

135 *Carleton Condominium Corp. No. 1* v. *Shenkman Corp*., 1985 ONHC 713, at paragraph 34.

136 Government of Canada, Distinguishing Between a Joint Venture and Partnership, February 1999, online: https://www.canada.ca/en/revenue-agency/services/forms-publications.

137 Alberta Law Reform Institute - Joint Ventures Final Report, 2012 Canlii Docs 332.

> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise."

[263] The Appellants submitted, it appears that many courts make this assessment based upon the specific facts, guided by the principles out lined in *Williston on Contracts* courts to determine whether a business relationship is or is not a joint venture.

[264] The Appellants said, initially contemplated to be a short-term arrangement to store pipe on the DML on behalf of Enbridge, CRC and Premay entered into an arrangement whereby Enbridge provided compensation to Premay and these proceeds were shared with CRC in the form of monthly payments[138].

[265] The Appellants submitted that the DML was in constant use for the short and long-term storage of CRC and NEC equipment and materials throughout their joint venture relationship with Premay. During peak construction season, there would be numerous times when there was no equipment or materials on the DML at all, and further, at the time of AEP's inspection in May, 2018 the Bensons' auctioned all of the CRC and NEC business equipment and materials through Ritchie Bros.[139]

[266] The Appellants stated,

> "CRC's contribution to the joint venture was the provision of 7 acres of the DML for storage of the pipe, and Premay contributed its contractual relationship with Enbridge for the pipe storage. The proceeds of the joint venture, in the form of payments made by Enbridge, were divided between Premay and CRC."[140]

[267] The Appellants submitted, parties must have some expectation or arrangement to share in the profits, noting the split is dependent on the context of the agreement, and an uneven

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138 Director's Record, Tabs 2.1 (pages 53 to 80) and 6.13 (pages 315 to 320).

139 Benson Affidavit, at paragraphs 13 to 14.

140 Appellants' Response Written Submission, July 24, 2020, at paragraph 25.

split does not appear to preclude the existence of a joint venture. The Appellants stated, "In *SG Levy and Sons Ltd v Dover Financial Corp* ., 147 NSR (2d) 186 ('*SG Levy*'), the Court affirmed a lower court's finding that a joint venture was legitimate despite the fact that the parties intended to make profits from 'separate domains.' Specifically, one party intended to make profit from rent and the sale of the project, while the other looked to profit from 'fees and financing arrangements.' In affirming the lower court, the Court also explicitly stated that the parties' arrangement to take separate profits was sufficient to satisfy the factors set out in the Williston commentary."[141]

3. Sale of Public Lands

[268] In response to the Director's submission that the Appellants sold the DML to Plamondon at the Auction, the Appellants submitted, the only thing sold to Premay as a result of the auction was the value of the Improvements on the DML.

[269] The Appellants submitted the term "improvement" in the Act remains largely undefined and there is limited guidance on interpretation of the term, stating,

> "[i]n relation to 'improvements' under the *Builders' Lien Act*, the Court of Appeal has held that the Act uses that term because it is of the essence that the workman 'improves' or enhances the value of the land. As such, the court held that the term should be interpreted with this idea of added value in mind, which imbues the term with the breadth of its more common definition."[142]

[270] The Appellants noted, the court has referenced the broad definition of the term "improvement" outlined in Black's Law Dictionary that stated it is "a valuable addition made to property... amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value and utility or to adapt it to new or further purposes" .[143] The Appellants submitted that an improvement can be nearly anything so long as it gives value to the

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141 *SG Levy*, at paragraphs 59 to 60.

142 *Wyo-Ben Inc.* v *Wilson Mud Canada Ltd.*, 1985 ABCA 310 at paragraph 12.

143 *Fairley* v *Frost*, 1998 ABQB 635 at paragraph 31.

land or property and the cleared trees, leveled ground, trucked in gravel and creation of an access road on the DML are all "improvements" to the DML benefiting a subsequent disposition holder.

[271] The Appellants submitted neither of the Director's allegations are that the Appellants sold access to public lands and the avoidance of any financial liability for reclaiming the DML at the Auction is supportable. The Appellants stated "[t]he Director's evidence is that AEP became aware of the Auction on May 23, 2018." Subsequently, the AEP Lands Approvals Team Lead a sent a letter to CRC advising of the restrictions placed on the assignment of public lands, and the steps that had to be taken before any assignment would be approved by AEP.[144] The Appellants submitted, "[t]here is no evidence that AEP advised the Appellants of its position in relation to selling access to public lands or the avoidance of reclamation costs at any time prior to the Auction."

[272] The Appellants submitted CRC submitted a General Assignment of Disposition request to AEP through its agent complying with all of the requirements outlined in the letter regarding an assignment of the DML.[145] All required reclamation work was completed to the satisfaction of, the Director at CRC's expense prior to AEP's grant of the DML to Plamondon.[146] The only thing sold at the Auction to Plamondon was the value of the Improvements, which were comprised of the valuable additions made to the DML by CRC to enhance its utility and accessibility. The sale of the cost of improvements made to public lands is not prohibited by the Act, and the appeals must be allowed.

4. Board's Disclosure Order

[273] The Appellants submitted the Director's Affidavit supports for their position the Director failed to disclose all relevant and material records to the Appellants breaching his duty of procedural fairness. The Appellants stated,

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144 Director's Response Written Submissions at paragraph 46.

145 Director's Record, Tab 3.9.

146 Benson Affidavit, at paragraphs 49 to 50. Answers to Questions on Affidavit of Collette Benson at paragraph 21.

> "[s]everal of the answers in the Brad Affidavit were entirely non-responsive to the questions which were asked, and did not confirm or deny the existence of the requested records. For example, in relation to the Director's Record as a whole, the Questions sought to confirm whether AEP had any other records of any kind in its possession in relation to the Appellants and the DML which did not already form part of the Director's Record. … However, the Director's answer to this question was that he had no personal knowledge about documents that other AEP employees may or may not have in their possession, and could only speak to the records provided to him in the course of his investigation."[147]

The Appellants submitted the answer failed to respond to the question asked, stating

> "[a]s a Regional Compliance Manager, Mr. Brad would have been as aware as any other employee about the documents and records which are held in AEP's central records system and which are accessible by any AEP employee. Failing to acknowledge that AEP is the party responsible for records creation and retention is somewhat baffling, and flies in the face of the Director's earlier position that the Appellants should utilize the access mechanisms under [FOIP] to obtain these records."[148]

The Appellants submitted this is also not a reasonable response when the Director has a duty to inform himself in order to respond appropriately.

[274] The Appellants stated,

> "[t]he responses provided in the Brad Affidavit are, seemingly, consistent with the Director's refusal throughout this matter to disclose any records or information to the Appellants that the Director does not voluntarily choose to disclose. Even in the face of an order of the Board directing him to do so, the Director has refused to provide the Appellants with the additional records and information required to fully advance their appeal."[149]

The Appellants further stated,

> "[t]his lack of responsiveness by the Director or simply compounds the lack of procedural fairness which the Appellants have encountered throughout this matter. As acknowledged several times in the Brad Affidavit, appellants are not provided with disclosure during the course of an investigation, and receive

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147 Brad Affidavit, at paragraph 3.

148 Appellants' Response Written Submission, at paragraph 46.

149 Appellants' Response Written Submission, at paragraph 48.

> disclosure of those documents which the Director chooses to disclose as part of his record only if they actually file an appeal of that decision."[150]

[275] The Appellants submitted for the reasons raised in the Appellants' Submissions, the appeals must be allowed and the Administrative Penalty set aside in its entirety.

D. Director's Response Submission

[276] The Director submitted a Response Written Submission dated July 24, 2020 (the "Director's Response Submission"). The Director responded to the Appellants' Initial Written Submission dated July 3, 2020, which included the unsworn affidavit of Colette Benson signed on July 2, 2020 and the unsworn affidavit of David Lind signed on July 2, 2020 and their respective unsworn answers to the Director's cross examination questions.

1. Subletting of Public Land

[277] The Director submitted in response to a public complaint AEP investigated the unauthorized subletting of the Lands by the Appellants.[151]

[278] The Director submitted that section 43(1) of the Act and Condition 9 of the DML prohibit subletting of lands contained in a disposition without the consent of the director.

[279] In response to the Appellants' initial submission, the Director submitted AEP cancelled the Appellants' disposition on February 29, 2019 based on the opinion of the statutory decision maker that "an unauthorized sublease had taken place and that CRC was non-compliant with the [Act], [PLAR], and term and condition 9 of DML…."[152]

[280] The Director submitted the Appellants attempt to justify their contravention of the disposition and the Act by relying on the "but everybody else is breaking the law" defence.

[281] The Director submitted is a disposition is a statutory authorization to occupy public lands. The holders of formal dispositions have a number of statutory duties related to the

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150 Brad Affidavit, at paragraphs 10, 11, 13 and 14.

151 Director's Record, Tab 1.3.

152 Cancellation Letter from AEP dated February 25, 2019.

disposition including positive obligations to: (a) comply with the Act and the PLAR*;* and (b) comply with the terms and conditions of the disposition.[153]

[282] The Director stated, "[o]n December 19, 2018, when the Administrative Penalty was issued, the Appellants were disposition holders and therefore regulated parties who were subject to:

a) the [Act];
b) the [PLAR]; and
c) the terms and conditions of their disposition."

[283] The Director submitted the Appellants as a disposition holder have a responsibility "to read and understand the public lands regulatory regime that governs their occupation and use of public lands."

2. AEP's Practice Regarding Subleasing

[284] The Director submitted in response to the Appellants' initial submission of what they "understood" from the October 8, 2013 letter refusing their application to sublet that a plain reading of the letter did not support their submission. The Director stated, "[w]hile the Appellants admit that 'the sublease application was rejected for several reason'" they either chose to ignore or intentionally disregarded the clear direction about restrictions on subletting provided by the statutory decision maker on behalf of AEP." The Director further submitted the Appellant failed to take steps to confirm their understanding of the October 8, 2013 letter.

[285] The Director submitted the Appellants demonstrated an intentional disregard for the public lands regulatory regime and the terms and conditions of their disposition. The Director stated, "[w]hen asked in cross examination if there was any other communication from AEP on which the Appellants' understanding was based, Ms. Benson confirmed that the October 8, 2013 letter was the only communication on which she relied."

[286] The Director stated,

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153 PLAR, section 21(1)

> "…[a]s discussed in paragraph 42 of the Director's initial submission, the statutory decision maker provided the following reasons for refusing the Appellants' application to sublet in the October 8, 2013 letter:
>
> a) Important provisions of the proposed sublease (the 4 acre premises and definition of ''head lease") would create uncertainty of key terms of this [DML], which authorizes 3.2 acres for a fuel card lock;
>
> b) A proposed sublease is not the correct way to seek to increase the area authorized for the fuel card lock;
>
> c) A sublease is not appropriate for an intensive commercial land use, in this context [AEP] should directly regulate the land user as an [DML] holder;
>
> d) When the [DML] was issued, it appears CRC's strategy was to sublet or transfer a portion of it to others, it is not appropriate to procure public land solely or mainly for the purpose of sublet or transfer; and
>
> e) Subleases are allowed only for a purpose consistent with the [DML] holder's use. Subleases should not be used to authorize a purpose different from the rest of the [DML]. In those cases an amendment and application for a new [DML] would be appropriate."

[287] In response to the Appellants' initial submission, the director submitted the personal opinions and speculations of David Lind, a former staff-level employee of AEP are not evidence of AEP's policy or positions on any subject matter. The Director stated, "Mr. Lind also confirmed in cross examination that he had no authority to make decisions about policy direction for AEP and his role was to provide "input, guidance and advice" to other persons who did have the authority and responsibility to make policy decisions. His level of involvement in policy development or decision making was limited to a 'planner' or 'member' and only 'assisted' or 'participated.'"

[288] Further, the Director stated, "Mr. Lind was unable to provide any documentary evidence to substantiate his statements. For example, Mr. Lind was unable to provide any documents to support his claim that "the view and internal policy of AEP" that "strict enforcement of the sublet clause would have very serious consequences for the area in the long term ".

[289] The Director submitted Mr. Lind was unable to recall any "specific involvement" he had with Act disposition applications and had retired when the Appellants submitted their application to sublet the Lands on June 21, 2013.

[290] The Director said the allegations of infrequent AEP investigations within the Appellants' Initial Submissions have no evidentiary foundation. The Director submitted, Mr. Lind admitted on cross-examination that he could not recall any specific investigations he was involved, stating, "carrying out inspections is consistent with AEP staff who are officers under the [Act] that do not have training in investigative techniques or investigative responsibilities."

[291] The Director stated, that Wayne Holland, Mr. Lind's manager and supervisor confirmed that as a Land Management Planner, Mr. Lind's primary role would not have been compliance assurance or enforcement. Those responsibilities were the primary rote of AEP's Compliance Assurance Officers.[154] The Director further stated, contrary to the evidence of Mr. Lind, AEP has investigated unauthorized subletting of public land near Fort McMurray. In 2015, AEP commenced an investigation of unauthorized subletting that took place from 2009 to 2017. In 2017, AEP issued an administrative penalty to over $2 million dollars to Gionet Holdings Corporation and others.[155]

[292] The Director submitted in response to the Appellants' initial submissions there is no foundation to the assertion that AEP's past policy and practice was to allow and encourage unauthorized subletting in the Conklin area. The Appellant's assertion ignores and disregards:

a) the prohibition in section 43(1) of the Act*;*
b) the terms and conditions in the DML; and
c) the October 8, 2013 AEP letter noting restrictions on subletting.

[293] The Director submitted in 2012 to 2013 there was a lot of development and activity on public lands in the Conklin area.[156] AEP's objective were to balance the land use and

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154 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 14.
155 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 16.
156 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 5.

development needs of the oil and gas industry with responsible and sustainable land use practices.[157] AEP suspected commercial agreements (e.g. subcontracting and joint ventures) between and among industry partners to use public lands and became concerned that some agreements were leading to long-term subletting for profit.[158] In response to its concerns, AEP put conditions prohibiting subletting without AEP's consent in land dispositions, such as the Appellants' DML[159].

[294] The Director submitted there was no written subletting policy document prior to 2017, when AEP published its subletting policy. The policy restated the law and was consistent with direction given the Appellants in the October 8, 2013 letter.[160] The Director stated,"[i]n referring to the October 8, 2013 letter, Mr. Holland's evidence confirms this:

> "Particularly important to AEP's position about subletting is her statement in her reasons that AEP would not approve of [DML] holder adopting a primary role as intermediary, sub-landlord for commercial leases and that AEP's expectation is and was that the [DML] holder be the active user and land steward of the public land contained in the disposition"[161]

[295] The Director submitted the Appellants were required to obtain the consent of AEP prior to subletting their disposition regardless of their understating of the October 8, 2013 letter.

[296] The Director submitted in response to the Appellants' initial submissions that despite Ms. Benson's admission that she was aware of the law as stated in the conditions of the DML, she entered into seven sublet agreements in contravention of the *Public Land Act* and the DML and they relied on not getting caught.

[297] The Director noted the Appellants relied on *Honey Fashions v President Canada Border Services Agency and the Attorney General of Canada ("Honey Fashions")*[162] decision to

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157 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 6.

158 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 6.

159 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 8.

160 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 11.

161 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 10.

162 *Canada (Attorney General)* v. *Honey Fashions Ltd*., 2020 FCA 64.

assert that they "were denied procedural fairness" in the course of AEP's investigation. The Director stated *Honey Fashions "*has no applicability to the facts that are at issue in this appeal", stating, "The Court in *Honey Fashions* found that the long stating administrative practices of the CBSA lead to a legitimate expectation on behalf of Honey Fashion and that the refusal to refund duties following the change in administrative process was unfair."

[298] The Director noted

> "*Honey Fashion* does not stand for the proposition that a Director who is investigating a regulated party such as the Appellants who carried out unlawful activities on the Lands for a number of years in contravention of the [Act] has a duty of procedural fairness to provide reasons why he is taking enforcement action pursuant to his authority under the [Act]*."*

[299] The Director submitted no duty of procedural fairness exists that precludes the Director from taking any enforcement action once evidence of those contraventions comes to his notice without providing reasons.

[300] The Director submitted AEP provided a " Notice of Investigation to Ms. Benson On June 13, 2018[163], and pursuant to its authority under the Act, AEP investigated, and based on the evidence gathered the Director issued the Administrative Penalty.

[301] In response to the Appellants' initial submission, the Director stated, "the Appellants have provided no evidence to substantiate their claims that the agreements with Premay from November 1, 2013 to June 30, 2018 were a 'joint venture'." The Director submitted that in cross examination Ms. Benson was unable to provide details about the portion of funds alleged to be shared with Premay. The Director's evidence shows Premay paid $21,000 to CRC each month to rent a portion of the Lands to store pipe; there was no profit sharing between Premay and CRC.

[302] The Director stated,

> "… in each of the seven sublet agreements:

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163 Director's Record, Tab 1.4

a) CRC's obligation was to "Allow for Premay the use of 7 acres of land" for pipe storage over the term of the agreement; and

b) Premay's obligation was to "pay 3,000/acre for storage of pipes (21,000/month)"."

[303] The Director submitted in response to the Appellants 'initial submission Ms. Benson was unable to identify the portion or portions of the DML Lands which CRC used from November 1, 2013 to when the Appellants vacated the Lands. The Director's evidence is that all of the Lands were used for pipeline storage and there was no concurrent use.

[304] The Director submitted AEP provided written direction about the restrictions on subletting the DML on October 8, 2013. Despite receiving clear direction from AEP, Ms. Benson signed agreements to rent the Lands to Premay on:

a) November 14, 2013 for the term November 1, 2013 to March 31, 2014;

b) February 24, 2014 for the term April 1, 2014 to March 31, 2015;

c) March 3, 2015 for the term April 1 to September 30, 2015;

d) around September 22, 2015 for the term October 1, 2015 to September 30, 2016;

e) March 23, 2016 for the term October 1 to December 1, 2016;

f) December 4, 2016 for the term January 1 to June 30, 2017; and

g) June 13, 2017 for the term July 1, 2017 to June 30, 2018.

All in contravention of the terms and conditions of the DML and the Act.

3. Sale of Public Land

[305] In response to the Appellants' initial submissions, the Director submitted Counsel for the Appellants confirmed that the $190,000 was paid by Plamondon to CRC as a result of the June 13, 2018 Richie Bros. auction, though CRC was contractually obligated to return the funds to Plamondon if AEP didn't approve the assignment.[164]

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[164] Director's Record, Tab 2.3.

[306] The Director submitted in response to the Appellants' initial submissions that Ms. Benson's affidavit she states that her intention was not to sell the DML but to recoup the expenses incurred in developing the DML and sell the improvements. However, the Director stated "on cross examination, Ms. Benson admitted that all "moveable personal property, such as trailers or vehicles owned by CRC had already been sold in April 2018."

[307] The Director submitted Ms. Benson affidavit claims that the following "improvements" were what was sold to Plamondon. Those being:

- Logging;
- Stripping;
- Grubbing;
- Levelling;
- Gravel; and
- Administration and management fees.

These items neither are improvements nor are they moveable property. Further,

> "Condition 5 of the DML states that the disposition holder 'may not clear the land of any trees, disturb the surface of the land.' Separate and apart from this prohibition, the disposition holder am also prohibited from constructing 'any improvements' on the Lands without the written consent of AEP."[165]

[308] The Director submitted the activities of logging, stripping, grubbing, leveling and gravel are not improvements and cannot be severed from the Lands and sold to Plamondon. The benefit of which can only be enjoyed by entering on and occupying the Lands, which Ms. Benson claims was not sold at auction.

[309] The Director submitted the DML is subject to reclamation and is to be reclaimed to its natural state, or to an equivalent land capability as defined in the PLAR, section 21(1)(f) of the regulation. The Director stated "[t]he Appellants' site development strategy described the actions the Appellants would take once they no longer required the disposition:

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165 Director's Record, Tab 3.1.

> "Once this disposition in no longer required, the site will be reclaimed to match existing terrain and meet previous land use. The constructed storage yard pad will be contoured to match existing offsite terrain. The stock piled subsoil and topsoil will be redistributed over the disturbed area in respective order. The remaining mulch onsite will be redistributed over the topsoil""

[310] The Director submitted the Appellants only cleaned up the surface of the Lands and there is no evidence CRC reclaimed the Lands to equivalent land capability as required by the PLAR. Therefore, Plamondon purchased the reclamation liability for $190,000, which to consider as a saleable improvement is also nonsensical.

[311] The Director submitted administration and management fees are not an improvement, are of no benefit to Plamondon, and are incapable of being "sold."

[312] The Director submitted in response to the Appellants' initial submissions.

[313] The Director submitted in response to the Appellants' initial submissions AEP's policy direction for the assessment of proceeds was stated in the Director's initial submission which noted the objective of proceeds is to restore the economic status quo, consider implications for deterrence, and include appropriate educational messaging.

4. Proceeds

[314] In response to the Appellants' initial submissions the Director stated,

> "[t]he wording of section 59.4(4) of the [Act] is clear on its face. A person who is in receipt of proceeds from the use of public land in contravention of the Act such as the Appellants are required to:
>
> a) provide an accounting of the proceeds received; and
>
> b) pay those proceeds to AEP."

[315] The Director submitted the following dictionary definitions of "proceeds":

> a) "Money or other property received as the result of a sale or other transaction especially involving collateral."[166]

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166 Merriam-Webster Dictionary.

b) "… money obtained by the sale of property; the sum, amount, or value of property sold or converted into money or into other property."[167]

[316] The Director submitted the calculation of proceeds of $1,368,572.50 is based on the financial transaction evidence gathered in the investigation of the seven unauthorized sublet agreements between the Appellants and Premay and the sale of the DML at auction in contravention of section 43(1) and 54.01(5) of the Act.

[317] The Director in response to the Appellants' initial submissions submitted, the costs the Appellants allege were for improvements are the costs that the Appellants would have incurred had they used the DML and were not incurred to facilitate the unauthorized sublet. Moreover, payments to the Crown in the amount of $3,985.32 are a term and condition of the disposition.

[318] The Director stated in response to the Appellants' initial submissions, "the Appellants have conflated the civil disclosure standard of "relevant and material" with the disclosure requirement under section 120 of the PLAR, which is 'the decision and record of the decision-maker"."

5. Board's Disclosure Order

[319] The Director submitted he provided the record to the Board on February 22, 2019 and an amended index and additional records on June 12, 2019 comply with the disclosure requirement of the *Public Lands Act.* The Director alleged the Director's Record was complete.

[320] The Director stated," Section 120 of the *Public Lands Act* dearly states that "An appeal under this Act must be based on the decision and the record of the decision maker."

[321] The Director submitted he provided the Director's Record, which complies with the requirements of the *Act* and the *PLAR.*

[322] The Director submitted that the Board requested on September 9, 2019 that the Director provide documents not contained in the Director's Record in the possession of AEP by

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167 Black's Law Dictionary.

September 10, 2019. The Board stated, by "requesting these documents be produced, the Board has not determined that they are relevant," but reasons were not provided.

[323] The Director stated

> "[o]n September 11, 2019, the Director advised that it would not provide documents in the possession of AEP that are not part of the Director's Record. The Director re-iterated that as indicated on June 12, June 28, July 29 and September 3 2019, that the Director's record compiled with the requirement of the [Act] and the [PLAR] and was therefore complete."

[324] The Director stated

> "[o]n December 3, 2.019, the Assistant Deputy Minister (ADM) of AEP wrote to the Board and advised that because the Board had not yet provided its reasons and that the Board requested documents in the possession of AEP not contained in the Director's Record without first considering their relevancy, he suggested that the Appellants use the *Freedom of information and Protection of Privacy Act* to obtain whatever information they were searching for."

The Director submitted the Appellants had sufficient time to make such a request to obtain whatever documents not included in the Director's Record and failed to do so some 18 months after first submitting their notice of appeal on January 4, 2019. The Director stated, "[t]he ADM of AEP confirmed to the Board that he was satisfied that that the Director had "exerted an exhaustive effort to provide a comprehensive record upon which he grounded his decision."".

[325] The Director stated, "[o]n January 14, 2020, in response to the Board's request for documents not contained in the Director's Record, the Director advised the Board that he "will not provide the documents as requested by the Board." The Director submitted he provided two reasons for his response. First, the Director's Record was complete by law, and second, he had satisfied the Board's request.

[326] The Director submitted that it was not until the Appellants provided their initial submissions was the nature of the documents sought provided.

[327] The Director submitted the Appellants asked the Director in cross examination about AEP's possession of any other records regarding the DML or the Appellants not included

the Director's Record provided, to which the Director indicated he only had personal knowledge of records provided to him and all those are included.

[328] The Director stated, it appears that the Appellants speculate that there are

> "… records in existence which would support the Appellants' argument that AEP was aware of and accepted unauthorized subleases of [Department Miscellaneous Leases] in the Lac La Biche region at the time the Appellants entered into the Agreement … Other than these records, the Appellants have given no indication that there are documents missing from the Director's Record to challenge any other facts relevant to the Administrative Penalty."

[329] The Director submitted it would have assisted the Director had the Appellants asked for what they were looking for.

[330] The Director submitted AEP in 2013 had no written policy document about subletting[168]and the Appellants' witness was unable to provide any evidence of such.

[331] The Director in response to the Appellants' initial submissions stated,

> "[t]he regular practice of AEP's compliance decision makers such as the Director is to deliver a Preliminary Assessment and then invite the person who is the subject of the Preliminary Assessment to a face-to-face "due process'' meeting to discuss the facts as known by the Director and to provide any new information to the Director for consideration before making the· final decision."

[332] The Director stated,

> "[t]he investigation of a regulated party is ongoing up until the time at which a compliance decision maker decides on the appropriate enforcement response based on the particular facts gathered in the investigation. In this case, the Director's enforcement response was to issue an administrative penalty on December 19, 2018."

[333] The Director submitted it is not the regular practice of AEP to provide disclosure during an ongoing investigation.

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168 Affidavit of Wayne Holland, sworn July 24, 2020, at paragraph 11

[334] The Director stated "[t]he only requirement to provide disclosure to a regulated party is if that party appeals the administrative decision to the Board As a result , the appeal is based on the decision and the record of the decision maker."[169]

[335] In response to the Appellants initial submissions the Director provided a quote from J. Sopinka, S.N. Lederman and A.W. Bryant, The Law of Evidence in Canada, 2d (Toronto: Butterworths 1999) at 297, noting it has been cited extensively in the Courts and by administrative tribunals:

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

[336] The Director submitted, no adverse inference should be draw against the Director because, the Director provided an explanation in cross-examination explaining why any such records, if they exist, were not included in the Director's Record. The Director testified that only documents provided to him informed his decision.

6. Standard of Review

[337] The Director in response to the Appellants' initial submissions submitted the Appellants misstated the internal standard of review required.

[338] The Director submitted *Newton* governs the standard of review applicable appeals before the Board[170] and *Vavilov* does not apply to the Board's review of the Director who is a statutory decision maker, noting it has previously been confirmed that *Vavilov* does not change the standard of review analysis that applies in internal appeals.

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169 *Public Lands Act*, section 120

170 *Canada (Minister of Citizenship and Immigration)* v *Vavilov* , 2019 SCC 65.

[339] The Director noted *Yee* an appeal of a decision of the Appeal Tribunal of the Chartered Professional Accountants of Alberta, quoting "Justice Slatter in *Yee* v *Chartered Professional Accountants of Alberta* distinguished an external review governed by *Dunsmuir* from *Newton* that governs internal review. Justice Slatter discussed the distinction:

> "It relied on the decision in *Dunsmuir* v *New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, which since been overruled by *Vavilov*. In any event, *Dunsmuir* was not the applicable authority, *Dunsmuir* dealt with the standard of review in external review of administrative action, that is, it dealt with the standard of review by a superior court of the decisions of an administrative tribunal. Different, although overlapping considerations apply to review at various internal levels within the administrative structure: *Newton* v *Criminal Trial Lawyers' Association*, 2010 ABCA 399 at paras 42-3 …[171][172]

[340] The Director submitted in *Martin (Re)* an appeal to the Alberta Transportation Safety Board of the Registrar 's decision to issue an Administrative Penalty against the appellant stated that:

> "Like *Capilano*, *Vavilov* and *Trach* deal with the standard of review to be applied by a court *in* reviewing a decision of an administrative decision-maker, not the standard of review to be applied by one administrative decision-maker who is reviewing the decision of another administrative decision-maker. Therefore neither of these cases change the analysis set out above."[173]

[341] Similarly in *DiGiuseppe* v *Edmonton (Police Service)*, an appeal to the Alberta Law Enforcement Review Board of the Police Chiefs decision to dismiss several allegations against a number of officers, the Alberta Law Enforcement Review Board stated: "The Board is not a 'court'' and accordingly it is not clear that the new framework referencing the standard of review courts are to apply on appeal are applicable to appellate tribunals reviewing tribunal decisions of first instance."[174]

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171 *Newton* v *Criminal Trial Lawyers' Association*, 2010 ABCA 399, at paragraph 42-43.

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

173 2019 ABTSB 1706, at paragraph 45.

174 2020 ABLERB 005, at paragraph 19.

[342] The Director submitted that the standards of review is dependent on the question asked in an internal appeal.

[343] The Director noted the Appellants cite *Inshore Developments Ltd.* v *Director. Provincial Approvals Section, Alberta Environment and Parks,* (''Inshore") in their submission that the internal standard of review under the Act is correctness.[175]

[344] The Director stated the Board in *Inshore* based this proposition on three factors:

a) The Board makes recommendations to the Minister. Without a correctness standard, the Minister's powers would be fettered, as a reasonableness standard would suggest the Director could overrule the Minister.[176]

b) The Director lacks relative expertise in comparison with the Board, as the Board has the benefit of a more complete record.[177]

c) The particular question in the appeal was a question of mixed law and fact. On this point alone, a reasonableness standard could apply. However, viewing the above factors together, this factor is less important.[178]

[345] The Director stated,

> "… [e]ven though the Board correctly identified the role of the Board as set out by the [Act] as the most important factor in determining the standard of review as the Court of Appeal did in *Yee,*[179] it does not logically follow that the Minister is "fettered" if the Board accords deference to a decision of the Director. If this "fettering" were always the case, every appeal board and every appellate court would be "fettered" whenever deference is given to any aspect of a decision appealed from."

[346] The Director submitted, the Board in *Inshore* failed to consider several of the findings in *Newton* reiterated by the Court in *Yee* that stated*:*

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175 2018 ABPLAB 3.

176 *Inshore,* at paragraph 119.

177 *Inshore,* at paragraph 116.

178 *Inshore,* at paragraph 118.

179 Paragraph 33.

a) The fundamental purpose of an "appeal" is to review a decision made by a lower decision-maker - the primary purpose of a record in an appeal is to enable an appeal board to review the particular decision for error";[180]

b) "Most appeal tribunals exist to review the decisions that come before them for fairness, accuracy or compliance with the acceptable range of outcomes having regard to the standard of review";[181]

c) Granting a wide right of appeal does not signal an intention to permit a wholesale rehearing of the case or that an appeal tribunal should afford no deference whatsoever to the decision being appealed from.[182][183]

Such an approach "would undermine the integrity of the first level of [decision-making], and make the proceedings before the [initial decision-maker] an ineffectual waystation along the path to a final decision.[184]

[347] The Director stated, "Yee was decided under the *Regulated Accounting Profession Act* that provides:

111(1) Unless the parties to the appeal otherwise agree, an appeal must be based on

(a) the decision of the body from which the appeal is made.

(b) the record of proceedings before that body, and

(c) any further evidence that the appeal tribunal agrees to receive.

The *Act* similarly provides:

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

[348] The Director submitted though the Board makes a recommendation to the Minister does not change the Board's fundamental role as an appellate body. The recommendation must be made with respect to the decision appealed from.

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180 *Newton,* at paragraph 64.

181 *Newton,* at paragraph 60.

182 *Newton,* at paragraph 54.

183 *Yee,* at paragraph 33.

185 Paragraph 35.

[349] The Director stated, "[i]n light of the substantial similarities between the *Act* and the legislation considered in *Yee*, the Court of Appeal's comments [185] are instructive in how the Board should approach the standard of review analysis in this appeal:

> "When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused/ on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review: *Halifax (Regional Municipality) v Anglican Diocesan Centre Corporation* 2010 NSCA 38 at para. 23, 290 NSR (2d) 361. The following guidelines may be helpful:
>
> (a) findings of fact made by the discipline tribunal , particular ty findings based on credibility of witnesses, should be afforded significant deference;
>
> (b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;
>
> (c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and *to* ensure that proper professional standards are maintained;
>
> (d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: Newton at paragraph 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis tor intervening, it is entitled to do so;
>
> (e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession;

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185 Paragraph 35.

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

7. Jurisdiction

[350] The Director in response to the Appellants initial submissions submitted the Board is not prohibited from hearing the appeal.

[351] The Director submitted in regards to the Board's January 3, 2020 decision, the Appellants advised the Board on January 14, 2020 that they would be filing their application for judicial review. The Board wrote the Appellants on February 5, 2020 providing reasons to support its position to proceed to schedule the hearing.

[352] The Director submitted there have been no change of circumstances to warrant a change in the Board's position.

[353] The Director submitted, the Appellants actions amount to an abuse of process.

[354] The Director submitted the Appellants have commenced two legal proceedings for a determination of the Board's jurisdiction to hear this appeal based on the substantially same facts, issues and underlying relief sought before the Board and the Court.

[355] The Director submitted the Appellants are entitled to challenge the Board's jurisdiction in the forum of its choice.

[356] The Director stated, "[d]espite its election to proceed with a Court application, on July 3, 2020, the Appellants then unilaterally demanded that the Board's jurisdiction to hear this appeal be added as a fourth issue in this appeal."

[357] The Director stated,

> "[o]n July 16, 2020, the Director advised the Board that the Appellants' actions were an abuse of process and requested that the Board dismiss the Appellants' attempts to add a fourth issue to the hearing because the Appellants had already elected to proceed via an application in the Courts. The Director requested that the Board proceed with the written submission schedule based only on the three issues set by the Board on February 21, 2020."

[358] The Director submitted the Board agreed to the Appellant's demand with the addition of the fourth issue in this appeal.

[359] The Director submitted the Appellants allows them to hedge their bets by obtaining a pre-determination of the issues in its judicial review and should they not be successful in their appeal the Appellants can use the decision to challenge the Board's jurisdiction in the judicial review.

[360] The Director stated

> "[i]t is improper for the Appellants to demand that that the Board adjudicate the very issue for which it is a respondent in the Appellant's judicial review before the Court. Further stating, it is improper for the Appellants and the Board to require the Director to make substantive arguments on the jurisdictional issue in this appeal at the 11th hour … when those arguments are properly made by the Board before a Court in the Appellants' judicial review."

[361] The Director submitted, the Board is not prohibited from hearing the appeal.

[362] The Director submitted the Appellants advised the Board that they would seek a stay of the appeal in a January 14**,** 2020 letter and on April 21, 2020. The Appellant failed to do so.

[363] The Director stated "[o]n June 3, 2020, Appellants' counsel advised Counsel for AEP in the judicial review that the Appellants would "not be proceeding with the stay application, and will deal with the remainder of the judicial review application when and if required" and "[o]n July 13, 2020, the Appellants served their application for a stay on the Director."

[364] The Director stated, on July 16, 2020, the Appellants told the Board that it would proceed with its stay application unless the Board was willing to consider the issue of the Board's jurisdiction in this appeal. The Appellants failed to obtain a stay.

8. Conclusion

[365] The Director concluded submitting, the Administrative Penalty was properly issued, the amount was reasonable and in issuing the Administrative Penalty in the amount of $1,415,57 2.50, the Director:

a) made no errors in the determination of a material fact on the face of the Record;

b) made no errors in law; and

c) was within his jurisdiction or legal authority.

The Director submitted the Appellants have failed to prove their allegations that the Director made errors.

[366] The Director requested that the Board:

a) find that the Administrative Penalty was properly issued and the amount was reasonable; and

b) recommend to the Minister of AEP that this appeal be dismissed.

V. JURISDICTION

[367] The Appellants argue the Board has lost the jurisdiction to hear these appeals. As discussed by the Parties, the Appellants base this argument on section 236 of PLAR,[186] and the fact that more than one year has passed in the processing of this appeal.

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[186] The relevant portions of section 236 of PLAR provide:

"(1) An order under section 124 of the Act must be made in respect of an appeal … (b) within one year after the day the notice of appeal is served on the appeals co-ordinator, in the case of a complex appeal ….

(2) If the hearing is not completed before the expiry of the applicable period under subsection (1)(a), (b) or (c), then, unless subsection (3) applies, the appeals co-ordinator must (a) in the case of an appeal from a decision, refer the decision back to the director or officer who made it, who must then rescind or vary the decision to the extent necessary to grant the relief requested in the notice of appeal of the decision ….

(3) The appeals co-ordinator must not act under subsection (2)(a) or (b) if, in the opinion of the appeals co-ordinator, the decision, variation or rescission sought in the appeal is unlawful, absurd or likely to cause unreasonable loss or damage to public land or is likely to have a significant adverse effect on the interests of any person.

(4) Despite sections 221(1)(a) and (b) and 233(3), an appeal to which subsection (3) applies

[368] At the request of the Appellants, the Board added the issue of the Board's jurisdiction to the hearing of these appeals.[187] Specifically, the Board agreed to consider the question: "Is the Board prohibited from hearing the appeal as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator? The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator."

[369] The Appeal Coordinator's January 3, 2020 decision provides:

> "As Appeal Coordinator, I am required by section 236 of [PLAR] to consider the effect of delay in regards to [these appeals]. Having considered the effect of delay, I am of the opinion that to decide this matter in the absence of full consideration of the parities' arguments, the record, and the facts of the matter, would be contrary to the intent of the [Act] and the [PLAR].
>
> As Appeals Coordinator, I am of the opinion that available public land in the area where the events underlying [these appeals] took place, is significantly limited. This is especially true given the requirements of the Lower Athabasca Regional Plan. Land use is constrained to such a degree that the decision, variation or rescission sought in [these appeals] may have significant and potentially adverse effects on public land that could result in potentially unreasonable loss or damage to public land. Further, the decision, variation or rescission sought in this appeal could adversely impact the interests of persons seeking to utilize public land. As such, all arguments associated with this case must be known, the facts considered, and a reasoned report with recommendations provided to the Minister at the conclusion of the appeal for the Minister's decision. I am of the opinion that to decide this appeal without a full hearing and a reasoned decision could cause unreasonable loss or damage to public land and could have a significant adverse effect on the interests of any person seeking to utilize lands within the Lower Athabasca Regional Plan. Therefore, this appeal will proceed as if the applicable time period had not expired as per section 236(1)(b) of PLAR."

[370] The Appellants are arguing that there are two reasons the Board has lost jurisdiction as a result of the Appeal Coordinator's January 3, 2020 decision. The first argument is that the Appeals Coordinator deferred his decision whether to grant the extension of the appeal

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> must proceed or be continued under this Part as if the applicable time period under subsection (1)(a), (b) or (c) had not expired."

[187] See: Collette Benson and CRC Open Camp and Catering Ltd. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (16 July 2020), Appeal No. 18-0015-DL4 (A.P.L.A.B.), 2020 ABPLAB 10. (Note: Citation corrected.) See: Board's Letter, dated July 20, 2020, restating the issue.

period under section 236(3) to the Board as part of the hearing. The second argument is that Appeals Coordinator has not properly applied the test prescribed in section 236(3). The Appellants argue that the "opinion" formed by the Appeals Coordinator as to whether there is likely to be "unreasonable loss or damage to public land" or "a significant adverse effect on the interests of any person" is not proper. It should be noted that the Board does not accept the characterization of the Appellants that the Appeals Coordinator deferred his decision to the Board, or that the opinion that he formed is not reasonable.

[371] However, what the Appellants are asking the Board to do in the hearing of the appeals is review the decision of the Appeals Coordinator. While the Appeal Coordinator is also the Chair and a member of the Board, the function of the Appeal Coordinator is separate and apart from the Board. In carrying out his functions under section 236, the Appeal Coordinator is a separate statutory decision-maker.

[372] Looking at the functions assigned to the Board it does not include the authority to review the decision of the Appeals Coordinator. Administrative tribunals, like the Board, only have the authority to decide those matters assigned to them by their enabling statute.[188] The Board is authorized to hear appeals of the decision of director and officers of the AEP listed in section 211 of PLAR. This list of appealable decisions does not include section 236 of PLAR. As a result, the Board in the hearing of the appeals does not have the jurisdiction to review the decision of the Appeal Coordinator. The correct course of action is to file a judicial review.

[373] The Appellants implicitly recognized this when, in response to the Appeal Coordinator's January 3, 2020 decision, they filed their January 28, 2020 judicial review. The Appellants did not file an application with the Board to have the Board review the decision of the Appeal Coordinator. It was only after the submission process for the hearing had started did the

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188 "An administrative tribunal is created by statute and has only those powers conferred on it by statute. It has no inherent power to undertake proceedings or to make an order that affects a person's substantive rights or obligations without express authority." Sara Blake, Administrative Law in Canada, 6th ed. (Toronto: LexisNexis Canada, 2017), at page 129.

Appellants raise the argument that the Board should review the decision of the Appeal Coordinator.

[374] In answer to the question "Is the Board prohibited from hearing the appeal as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator?" The Board's answer in "no." On the face of the Appeal Coordinator's January 3, 2020 letter, the Appeal Coordinator has extended the Appeal Period, and pursuant to section 236(4) of the Act, the appeal can proceed as if the Appeal Period has not lapsed.

[375] In answer to the question "The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator." The Board's answer is also "no." The Board does not have the jurisdiction to review the Appeals Coordinator. To do so, would be to usurp the role of the Court of Queen's Bench on judicial review.

VI. STANDARD OF REVIEW

[376] In undertaking the hearing of an appeal, the Board must determine the proper standard of review to apply, reasonableness or correctness. In this case, the Appellants are advocating a correctness standard, while the Director is advocating a reasonableness standard. A reasonableness standard of review requires greater deference to the Director's decision, while a standard of correctness necessitates less deference.[189] A standard of correctness requires the Board to determine whether the decision to issue the Administrative Penalty was correct and whether the procedural process followed in making the decision was fair.[190]

[377] The Board recent considered the standard of review in the cases of *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region,*

189 *Henning* v. *Institute of Chartered Accountants of Alberta*, 2008 ABCA 241, at paragraph 9.

190 *Buryn* v. *Alberta (Minister of Municipal Affairs*) 2017 ABQB 613, at paragraph 31.

Alberta Environment and Parks[191] and *Heigh et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks.*[192] The Board relies on these cases.

[378] The Board reviewed the cases and arguments the Parties provided. The Board especially considered *Yee* v. *Chartered Professional Accountants of Alberta* ("*Yee*"),[193] recently decided by the Alberta Court of Appeal. The *Yee* case extensively referenced the *Newton* v. *Criminal Trial Lawyers' Association* ("*Newton*"),[194] which the Board has previously considered.

[379] The Court in *Yee* considered the decision of an appeal tribunal under *Regulated Accounting Profession Act*, R.S.A. 2000, c. R-12 (the "RAPA"). The Board reviewed the RAPA, compared it to the Act and PLAR and found significant differences. Sections 111 and 112 of the RAPA state the appeal is based on "the decision of the body from which the appeal is made [being the discipline tribunal]" and "the record of proceedings before that body." The "record of proceedings" and "record" are in RAPA in section 1(xx) and (yy):

> "(xx) 'record of proceedings' means
>
> (i) with respect to proceedings before a tribunal,
>
> (A) documents or things received as evidence at the proceedings, and
>
> (B) the transcript of the proceedings, if a transcript is created;
>
> (ii) with respect to proceedings where a right of appeal exists under this Act or the bylaws, other than proceedings before a tribunal,
>
> (A) information, documents or things considered by the decision-maker, and
>
> (B) the transcript of the proceedings, if a transcript is created;
>
> (yy) 'records' includes

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

192 *Heigh et al.* v. *Director, Provincial Approvals Section, Alberta Environment and Parks* (20 August 2020), Appeal Nos. 19-0009-0011 and 19-0014-0244-R (A.P.L.A.B.), 2020 ABPLAB 13.

193 *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98.

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

> (i) any financial or non-financial information that is or is capable of being represented or produced in written form, and
>
> (ii) the result of the recording of details of electronic data processing systems and programs to illustrate what the systems and programs do and how they operate;…."

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

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

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

[382] The other significant legislative difference is the Appeal Tribunal under the RAPA makes the decision regarding the appeal. Under section 124 of the Act, the Minister, not the Board, is the final decision-maker. This is the most substantial difference that distinguishes decisions such as *Newton* and *Yee* from appeals before the Board.

[383] The decision of *City Centre Equities Inc*. v. *Regina (City)*[195] from the Saskatchewan Court of Appeal also supports the Board's approach. In *City Centre Equities* the Court undertook an extensive review of cases addressing the internal standard or review, and emphasized the importance of analyzing the legislation when determining the standard of review:

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195 *City Centre Equities Inc*. v *Regina (City)*, 2018 SKCA 43.

> "In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill."[196]

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

[385] The Act provides a statutory right of appeal of certain decisions made by the Director. The Board was established to hear those appeals and provide recommendations to the Minister. In appeals of administrative penalties before the Board, there are three legislative purposes to consider:

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

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

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

[386] When the Board hears an appeal, it must recommend that the Minister confirm, reverse, or vary, a decision made by an AEP decision-maker. In doing so, it is essential that the Board determine if the decision is correct. The Board has a duty to provide the Minister with the best possible advice and recommendations. For these reasons, the Board has determined the

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

standard of correctness is the appropriate standard of review to apply to the Director's decision to issue the Administrative Penalty.

VII. ANALYSIS

A. Sublease vs. Joint Venture

[387] The Director alleges that the Appellants have illegally subleased the DML to Premay, and in exchange for the use of the DML received $1,178,572.50 in rent. Specifically, the Administrative Penalty was issued for the contravention of sections 43(1) and 54.01(5) of the Act.[197] According to the Director, "[s]ection 43(1) of the [Act] prohibits the holder of a disposition from subletting public lands contained in a disposition without the written consent of AEP." Further, according to the Director,

> "[s]ection 54.01 of the [Act] prohibits a person from receiving money for the purpose of gaining or allowing access to or use of public land unless the person:
>
> iii. is a disposition holder; and
>
> iv. is entitled at law to receive money for the purpose of gaining or allowing access to the public lands that are subject to their disposition."

The Director also submitted there were two conditions in the DML that prohibit subleasing. These conditions are:

> Condition 3: The said lands shall be used by the lessee solely for the purpose of an Industrial Storage Site and may not be used for any other purpose without the written consent of the Lessor.
>
> Condition 9: The Lessee may not sublet nor assign the said lands and premises of any part thereof without the written consent of the Lessor.

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

Section 54.01(5) of the Act provides:

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

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

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

[388] The Appellants argue that the DML was not subleased to Premay, but instead the Appellant was in a joint venture with the Premay. The Board rejects this view. Notwithstanding the attempt by the Appellants to characterize their business relationship with Premay as a joint venture, the Board believes it was a sublease within the meaning of the Act, and therefore in contravention of section 43(1) and 54.01. It is also in contravention of conditions 3 and 9 of the DML.

[389] In the Appellants' Response Submissions, the Appellant stated that a joint venture has been defined in various ways,[198] including: "A special combination of two or more persons where, in some specific adventure, a profit is jointly sought without any actual partnership or corporate designation."[199] Further, the Appellants submitted these definitions are supplemented by the commentary on joint ventures found in Williston on Contracts, 3rd edition. According to the Appellants, this commentary is as follows:

> "Besides the requirement that a joint venture must have a contractual basis ... the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
>
> (b) A joint property interest in the subject matter of the venture;
>
> (c) A right of mutual control or management of the enterprise;
>
> (d) Expectation of profit, or the presence of "adventure," as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise."[200]

The Appellants stated that the courts make the assessment whether something is a joint venture based upon the specific facts.

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198 Appellants' Response Submission, paragraph 19.

199 Black's Law Dictionary, revised 4th ed. (1968).

200 Appellants' Response Submission, at paragraph 20.

[390] In the Director's Decision on the Administrative Penalty, dated December 19, 2020, the Director compared the concept of a joint venture with that of a sublease. The Director cited the Merrian-Webster Dictionary defining a joint venture as: "A cooperative business relationship or partnership between two or more parties that is usually limited to a single enterprise and that involves that sharing of resources, control, profits and losses." The Director also cited the Merrian-Webster Dictionary defining sublet as: "A lease by a tenant or lessee of part or all of a leased premises to another person but with the original tenant retaining some right or interest in the original lease."

[391] The Board has reviewed all seven of the agreements.[201] The first agreement is not titled as a joint venture. It has a total of seven terms. The first three terms are obligations of CRC: it allocates seven acres of the DML to the use Premay; it prescribes a term of five months; and it identified the land location. The remaining four terms are obligations of Premay: Premay agrees to pay $3000 per acre for the storage of pipe for a total of $21,000 per month; Premay is to use the land at its own risk and not hold CRC liable; CRC is to be a named insured on Premay's insurance, and the payments are to be made monthly in advance. The remaining six agreement are fundamentally the same, but add the title "JV", which the Board understands to mean "Joint Venture".

[392] The fundamental problem with these agreements and the business relationship between CRC and Premay with respect to being a joint venture, is that there is no joint adventure – there is no common business activity aimed at jointly generating profit and no risk of the CRC experiencing a loss.[202] The agreement, regardless of what they are titled, are solely for Premay renting a place to store its pipe from CRC and CRC getting paid rent as a result. The business relationship is therefore one of a sublease – a sublease which is illegal under the Act and the conditions included in the DML.

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201 See: Director's Record, Tab 2.1.

202 The Appellants argue their joint venture was the work on the Project for Enbridge. In the Board's view, this is too remote. Further, there is no mention of this "joint work" in the agreement and, as noted, the project came to an end, but the subleasing continued.

B. AEP's Practices Regarding Subleases

[393] The Appellants have argued that AEP has a past practice of allowing subleases, without the consent contemplated by the Act. In support of this position, they point to their own experience requesting to sublease the DML for the purpose of a card lock. They also point to the evidence presented by Mr. David Lind, in his affidavit (the Lind Affidavit). Further, the Appellants argue that the Director breached the principles of procedural fairness by failing to provide reasons in the Administrative Penalty for deviating from this past practice. Specifically, in support of this proposition they cite the recent case of the Federal Court of Appeal in *Canada (Attorney General)* v. *Honey Fashions Ltd.*[203], 2020 FCA 64.

[394] The Board does not accept the existence of this past practice. While the Board is prepared to accept that this the past there may have been lax enforcement of the prohibition against subleasing, this does not equate to there being a practice of expressly or tacitly allowing subleasing, even where the sublease was for the same purpose as the original lease. In fact, in the circumstances of this case, the Appellants were expressly advised that subleasing of the DML without consent was prohibited.

[395] As discussed above, shortly after acquiring the DML, the Appellants' made an application to AEP to sublease part of the DML to Plamondon for a card lock. This application was rejected. The evidence of Ms. Benson in her affidavit (the Benson Affidavit) was that she interpreted the rejection as being based on a different purpose, and as a result, that if the sublease was for the same purpose it consent would have been required. The Board does not believe Ms. Benson's interpretation of AEP's decision is reasonable as it is not consistent with the law that a sublease is only permitted where AEP grants consent. There is no suggestion in the law that consent is only required where a different use is involved. Rather, the Board is of the view that this decision makes it clear that consent was required, and clearly demonstrates that the Appellants were aware of this requirement.

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[203] *Canada (Attorney General)* v. *Honey Fashions Ltd.*, 2020 FCA 64.

[396] The further evidence the Appellants present is that of David Lind, a former employee of AEP. Mr. Lind testified in his affidavit that he believed there was a practice of allowing subleasing without consent except in circumstances were damage to the land would occur. For example, he stated:

> "The view and internal policy of AEP at the time that we were managing and granting applications for DMLs in the Conklin region was that the strict enforcement of the sublet clause would have very serious consequences for the area in the long term. As such, many subleases were permitted to continue despite the fact that no prior consent had been obtained by the disposition holder. The only exceptions to this informal policy were situations where we felt that the sublease would result in environmental damage to the lands."[204]

Mr. Lind was not able to point to any formal document or policy statement. Rather, is statements were based on pure observation. Respectfully, the Board does not believe to Mr. Lind was in a position to make the observation that there was past practice regarding allowing subleasing without consent. As discussed in the Director's Response Submission, Mr. Lind role with the AEP was that of a planner – he was not part of the compliance group that dealt with this issue.

[397] The Board notes that Mr. Lind evidence is expressly contradicted by the evidence of Mr. Wayne Holland, in his affidavit. As discussed in the Holland Affidavit, in "… 2015, AEP commenced an investigation of authorized subletting that took place from 2009 to 2017. In 2017, AEP issued an administrative penalty to over [$2,000,000] to Gionet Holding Corporation and others."[205]

[398] As there is no past practice of allowing subletting without consent, there is no obligation on the part of the Director to give reasons as to why he was departing from a past practice, and the *Honey Fashions* case is not applicable.

C. Board's Disclosure Order

[399] The Appellants argue the Director has failed to provide the procedural fairness that is require to maintain the Administrative Penalty because of his refusal to comply with the

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204 Lind Affidavit, at paragraph 13.

Board's order for additional disclosure. The Appellants argue that this is not an error in procedural fairness that the Board can correct through its hearing procedure. The Board agrees.

[400] In the Board's view, the failure of the Director to provide the additional disclosure violates a fundamental principle of procedural fairness, such that the Appellants do not have the full opportunity to respond to the Administrative Penalty. As such, the Board is recommending to the Minister that the Administrative Penalty be reversed.

[401] As discussed, the Appellants filed a motion with the Board for additional disclosure, and the Board granted the request.[206] The Director requested reconsideration of the Board's decision. The Board undertook the reconsideration and confirmed its original decision.[207] In its reconsideration decision, the Board reiterated

> "… its order for the Director to provide the following information:
>
> '(a) any records relating to follow-up communications or directives from AEP to the Appellants resulting from the 2013 inspection;
>
> (b) all additional notes or other records prepared by Mr. Paul Smith or other AEP employees relating to the DML since the commencement of the disposition;
>
> (c) any records contained in the GLIMPS system relating to the DML, which were available to the Director at the time of the decision and not already provided; and
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> (d) all AEP internal emails, memoranda, meeting notes, and other records in relation to the DML.'"[208]

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205 Director's Response Submission, at paragraph 33. See: Holland Affidavit, paragraph 16.

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

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

208 Reconsideration Decision: *Colette Benson and CRC Open Camp and Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (20 December 2019), Appeal No. 18-0015-RD (A.P.L.A.B.), 2019 ABPLAB 25, at paragraph 104.

The Board notes the requested documents are all focused on the subject matter of the Administrative Penalty, the DML.

[402] In response, the Director wrote the Board indicating he will not provide the documents requested by the Board and requesting the Board's reasons so the AEP could consider "legal steps."[209] Notwithstanding the Board's decisions on this question, the Director has continued to insist that he had disclosed all that he is required to under the Act. His position was further confirmed in letter received by the Board from the Assistant Deputy Minister, Regulatory Assurance Division, wherein he stated:

> "… I recommend that PLAB advise the appellant to use the Freedom of Information and Protection of Privacy Act (FOIP) process to glean whatever information they are searching for. I am satisfied that the Director has exerted an exhaustive effort to provide a comprehensive record upon which he grounded his decision. This request for additional and extraordinary information warrants a different and more appropriate tool, such as the FOIP process."[210]

In response to the arguments by the Appellants that the Director breached the rules of procedural fairness by failing to comply with the Board's order, the Director has simply related the Director's view that the Director's Record complies with the Act.[211]

[403] In response, the Appellants argue that

> "… the only realistic avenue for the Board to sanction a willful and repeated refusal to obey the [Board's order] is either to allow the [appeals] and set aside the Administrative Penalty in its entirety, or alternatively to bar the presentation of any evidence by the Director in the [appeals], including the Director's Record."[212]

[404] In determination how to proceed, the Appellants argue that

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209 Director's letter, dated September 11, 2019.

210 Assistant Deputy Minister's letter, dated December 3, 2019. The Board takes exception to the suggestion that the appropriate mechanism for obtaining proper disclosure for the Director in an appeal proceeding it to apply through FOIP. In the Board's view, the FOIP process is not compatible with the appeal process.

211 Director's Response Submission, at paragraphs 115 to 118.

212 Appellants' Initial Submission, at paragraph 93.

> "… procedural fairness ensures that administrative decisions are made using a fair, impartial, open, and transparent process that provides those affected by the decision an opportunity to know the case against them and to fully put forth their views and the evidence they wish the decision-making body to consider. The duty of fairness is flexible, variable, and contextual in nature, and accordingly, the level of procedural fairness owed will vary depending, in part, on purpose and intent of the applicable legislation and the process for decision making outlined in the legislation."[213]

[405] The requirement for procedural fairness, sometime referred to as the duty of fairness or the duty to act fairly, applies to all statutory decision-makers. The Supreme Court of Canada has stated that public authorities have a duty to act fairly:

> "This court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[214]

[406] AEP is a public body with legislated powers and must exercise those powers according to the principles of administrative law.[215] The Board and the Director, together, have the responsibility to ensure an appropriate level of procedural fairness exists within the decision-making process. The courts have held:

> "The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded decision-maker would need to be informed in order to reach a rational conclusion."[216]

Meeting this obligation for fairness is the reason the Board issued the order for the additional disclosure.

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213 Appellants Initial Submission, at paragraph 96. *Buryn* v. *Alberta (Minister of Municipal Affairs)*, 2017 ABQB 613, at paragraph 31. These are fundamental principles of administrative law dated back to at least 1911 in *Board of Education* v. *Rice*, [1911] AC 179 at page 182.

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

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

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

[407] The Board notes, the intent of the duty of fairness is not to create "procedural perfection" but to attain an appropriate balance between the need for fairness, efficiency, and predictability of the outcome.[217] If the balance is incorrect, the decision-maker has breached the duty to act fairly. If the breach is significant, the decision-maker's actions may be void. However, not every breach of the duty of fairness will render a decision void. Minor procedural technicalities or errors that are immaterial to a decision or did not affect the outcome will generally not be fatal to the decision.[218]

[408] In this case, a review of the duty of fairness is not a determination of whether the Director was reasonable or correct, but rather whether the Director met the level of fairness required by law.[219] The degree of procedural fairness owed by the Director to the Appellants "is to be decided in the specific context of each case."[220] In this the context is that the Board has made an order for additional disclosure and the Director has refused to comply with that request.

[409] In *Baker*, the Supreme Court of Canada listed factors to be considered when determining the duty of fairness required.[221] The list is not meant to be finite, as other factors may be relevant. Although the factors were given in the context of a judicial review, the Board considers them helpful:

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

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

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

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

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

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

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

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

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

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

Nature of the Decision

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

Statutory Scheme

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

Importance of the Interest to the Appellants

[412] The more important the decision is to the Appellants, the higher the duty of fairness is required. In the case before the Board the penalty amount is $1,415,572.50 and is assessed against CRC, but also against Ms. Benson personally. In the Board's view, the Director's decision is significant to the Appellants as it may result in personal bankruptcy. According to the Appellants, the Administrative Penalty is "extremely serious and potentially financially ruinous."[222]

Legitimate Expectations

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[222] Appellants' Initial Submission, at paragraph 98.

[413] The doctrine of legitimate expectations is based on the principle that procedural fairness must take into account the promises or regular practices of the decision-maker. In the case before the Board, the Appellants have the legitimate expectation that upon being ordered by the Board to produce additional disclosure, the Director would act in good faith and copy with the discloser request.

Procedural Choices

[414] The more statutory discretion the Director has to create his own procedure, the more procedural fairness is owed. In these appeals, the discretion of the Director or AEP to create their own procedure is limited by the Act and PLAR. On the departmental level, AEP can set its own policies and procedures as long as they do not conflict with the legislation. The Director has some discretion on procedural conduct but is limited by AEP policy and legislation.

[415] The Board's application of the factors listed in *Baker* suggests a duty of fairness in the higher-range of the spectrum between a low degree of fairness and the high standard applied to professional disciplinary procedures and immigration matters. The Board acknowledges this discretionary determination is not a precise measurement, and the standard may fluctuate depending on the facts and circumstances, as noted by the Court in *Baker*. The degree of the duty of fairness the Director owed to the Appellants was lower in the investigative stage leading up to the Administrative Penalty than after the Notices of Appeal were filed with the Board.[223] In this case, we are dealing with the decision of the Director to refuse to provide additional disclosure in the context of the hearing of the appeal and in the face of the Board ordering the disclosure.

[416] The duty to act fairly includes the principle of a*udi alteram partem*, which means "hear the other side." This principle refers to the right of a person to know the case being made against them and be allowed to respond to the decision-maker.[224] In an appeal under the *Act*, the appellant has the right to review the Department's Record in order to know the case to be met

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

224 David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto:

and to use the information in those records to respond to the Administrative Penalty. In the Board's view, these records are material if the Director had it before him at the time he made the decision to issue the Administrative Penalty and the records are material if they were available to him and relate to the subject matter of the Administrative Penalty, which is the DML. This is the case with the Board's order for additional disclosure.

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

> "Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case. This right is well established in immigration law. The question is whether the procedures 'provide an adequate opportunity for [an affected person] to state his case and know the case he has to meet.'" [225]

[418] In *May v. Ferndale Institution,* the Supreme Court of Canada considered the level of disclosure required in an administrative decision compared to a criminal matter. The Court referred to its previous decision in *R. v. Stinchcombe,*[226] where the Court found the Crown had the duty to disclose all its evidence to the defence so that the accused could mount a complete defence. The Court said:

> "It is important to bear in mind that the *Stinchcombe* principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The *Stinchcombe* principles do not apply in the administrative context. <u>In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or</u>

Thompson Reuter Canada Limited, 2014) at page 259.

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

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

she has to meet. If the decision maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction."[227] [Emphasis is the Board's.]

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

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

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

If the Director fails to meet these requirements, the Director's decision may be void. The Board notes that the two requirements are closely linked: the Appellants cannot have an adequate opportunity to present their case without sufficient disclosure. The Board also notes there is a difference in the level of procedural fairness necessary at the investigative stage compared to the hearing stage. Having regard to all of this, the Board is of the view that by refusing to comply with the Board's order for additional disclosure, the Director has breached the principles of procedural fairness in a significant way. In the Board's view, this breach of procedural fairness interferes with the Appellants ability to fully state their case. Therefore, the Board is recommending to the Minister that the Administrative Penalty be reversed.

D. Director Statutory Authority

[420] The Appellants argue that the Director does not have the authority to assess an administrative penalty for the "proceeds" component. Specifically, the Appellants point to Ministerial Order 28/2018, which assigns authorities under the Act and PLAR. Section 5(2) of the Act allows the Minister (and pursuant to the *Interpretation Act*,[228] the Deputy Minister) to authorize Director to act under specific portions of the Act. In the Ministerial Order, the Director is identified as a Regional Compliance Manager and is authorized to make decisions under section 59.3 of the Act, but is not, on its face assigned, to make decision under section 59.4 Act.

[421] Sections 59.3 and 59.4 of the Act provide:

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

228 *Interpretation Act*, R.S.A. 2000, c. I-8, section 21(1)(b).

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

(a) contravenes a provision of an ALSA regional plan, this Act or the regulations that is prescribed in the regulations for the purposes of this section,

(b) without legal authority makes use of public land,

(c) as a holder of a disposition or of an authorization under section 20, without the consent of the director, or a person authorized by the Minister to provide consent, makes use of the public land that is the subject of the disposition or authorization for any purpose other than the purpose for which the disposition or authorization is granted,

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

(e) contravenes a decision or order made under regulations made under section 9(b.1) or (b.2),

(f) contravenes section 62.1 or a regulation made under that section, or

(g) fails to notify the Minister of a transfer, redemption or allotment of shares to which section 114.1(4) applies.

59.4(1) If the director requires a person to pay an administrative penalty under this Act or the regulations, the director shall serve by personal service or registered mail a notice of administrative penalty demanding payment of the penalty.

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

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

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

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

(b) any person who in the director's opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this Act or the regulations to provide an

> accounting of the proceeds believed by the director to have been received by that person;
>
> (c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds."

[422] The Appellants argument is that the authority to level an administrative penalty for the proceed component is found in sections 59.4(4)(b) and (c). This interpretation is incorrect. The authority to assess an administrative penalty is found in section 59.3. Section 59.4(4) describes that the administrative penalty issue under section 59.3 can included both the base penalty amount (section 59.4(4)(a)) and the proceeds amount (sections 59.4(4)(b) and (c)). There is no separate decision making power under section 59.4; the decision-making power is found in section 59.3.

[423] As a result, the delegation to the Director (the Regional Compliance Manager) of the decision-making authority under section 59.3 is sufficient. It is not necessary to delegate section 59.4. When the decision-making authority is delegated under section 59.3, the authority under section 59.4 comes with it.

E. Proceeds

[424] The Appellants argue that in the event the Board upholds the administrative penalty, including the proceeds amount, then the proceeds should be reduced by the expensed incurred by Appellants. This is to say, the amount of the proceeds should be the net proceeds instead of the gross proceeds as claimed by the Director.

[425] The basis for this argument is that the intent of penalizing the party for the proceeds is to "bring the offending party back to zero, erasing whatever finance gains they may [have] experienced as a result of the offense."[229] If the proceed assessed in the penalty is the gross amount of the proceeds this would unduly penalize the offender, they would end up paying more than they actually realized from the undertaking.

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229 Appellants' Initial Submission, at paragraph 217.

[426] The Board agrees with the Appellants that neither the Act nor PLAR provide much guidance on this question. However, this issue has been addressed by the Environmental Appeals Board (the "EAB") in *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* ("Alberta Reclaim").[230] In Alberta Reclaim, the EAB discussed that there are four possible circumstances in which proceed could be considered.[231] For the purposes of this discussion only the first two – gross proceeds and net proceeds are relevant.

[427] In Alberta Reclaim, the EAB discussed that penalizing an offender for the gross proceeds was appropriate where the offense was something that could never been made legal. In the Alberta Reclaim case, this was the illegal importation of beverage containers – something that could never have been made legal. In the alternative, for something that was illegal but could have been made legal with the appropriate authorization, the appropriate approach if for the proceeds to be assess as net proceeds.

[428] In this case, the illegal subletting is something that could have been made legal by obtaining the consent of AEP. As a result, in accordance with the analysis in Alberta Reclaim, the appropriate approach is to penalize the offender for the net proceed. In reviewing the Appellants' Response Submission, the expenses claimed are somewhat unclear. According to the written submission,

> "… CRC incurred out of pocket costs in relation to the preparation, maintenance and operations of the DML in the amount of approximately $140,630.00. In addition, CRC incurred further expenses in the amount of $3985.32, in relation to the annual lease payments to the Crown for the DML. … As a result, the Appellants submitted that the Administrative Penalty must be reduced by the amount of $144,615.32."[232]

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230 *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (18 August 2016), Appeal Nos. 14-025-027-D (A.E.A.B.).

231 *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (18 August 2016), Appeal Nos. 14-025-027-D (A.E.A.B.), at paragraphs 96 and 97.

232 Appellants' Response Submission, at paragraphs 123 and 124.

However, in the Benson Affidavit, Ms. Benson states that "…CRC incurred more than $230,000 in acquisition expenses and Preparation Costs for the DML."[233] The Board notes that these "Preparation Costs" include "administration and management fees."[234] The Board does not consider these proper "out-of-pocket" expenses in that these costs were returned to CRC. In the Board's view, these type of expenses should not be deducted from the proceeds as part of the net proceeds calculation.

[429] The Board notes that the Director acknowledged there were out of pocket expense at least in the amount of $55,000.[235]

[430] Therefore, if the Board were recommending that the Administrative Penalty be upheld, it would recommend that the penalty be varied to reduce the Administrative Penalty by $144,615.32. Given the information before it, the Board the is prepared to accept this amount as the appropriate deduction to ensure that only the net proceeds are included in the Administrative Penalty.

F. Sale of Public Lands

[431] The Director argues that the Appellants sold the DML, without the consent of AEP, in contravention the Act. The sale is said to have occurred by auction for $190,000.00, and was based on the Appellants agreeing to assign the DML to the successful bidder. The Director argues the Appellants contravened section 43(1) of the Act, which provides: "The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director." Further, the Director argued the Appellants have contravened section 54.01(5), which provides:

> "No person shall provide or receive money or other consideration for the purpose of gaining or allowing access to, passage on or over or use of public land unless
>
> (a) the person receiving the money or other consideration is the holder of a disposition or authorization under section 20 and is entitled at

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233 Benson Affidavit, at paragraph 12.

234 Benson Affidavit, at paragraph 12.

235 Director's Initial Submission, at paragraph 72.

law to receive money or other consideration for that purpose, and

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

[432] The Appellants argue they did not sell the DML, that instead what they sold were the Improvements. Specifically, the Appellants stated that they sold the logging, stripping, grubbing, leveling, gravel, and administration and management fees.[236] The Director argues these are not improvements within the meaning of the DML, nor are these movables that can be removed from the land. The Act and DML require the written consent of AEP prior to constructing any improvements. No evidence was presented that any improvements were authorized by AEP. Further, the Board notes that in the advertisement for the auction there is no mention of Improvements, the notice posted by Ritchie Bros. was clearly for the DML itself.[237] The same is true of the contract with Ritchie Bros. The contract identified the DML, and specifically noted there was a lease with Premay for a pipe storage yard.[238]

[433] The Board does not accept the argument that the Appellants sold Improvements, certainly not any Improvements that had been authorized by AEP. In the view of the Board, what the Appellants sold was the right to access the land, and the Appellants rights under the illegal subleasing agreement. This is express contravention of sections 43(1) and 54.01(5) of the Act.

[434] The Board's understanding is that CRC purported to "sell" the DML to Plamondon, with the transaction was contingent on AEP assigning the DML to Plamondon. The Board understands that AEP did not assign the DML to Plamondon, but instead cancelled the DML issued to CRC and issued a new DML – for the same land – to Plamondon. The last information the Board has is that the sales proceeds ($190,000.00) were transferred and remain with CRC. No evidence was provided to the contrary. As such, this money is properly part of the proceeds that should be included in the Administrative Penalty.

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236 Benson Affidavit, at paragraph 11.

237 Director's Record, Tab 6.1.

238 Director's Record, Tab 2.3.

VIII. DECISION

Did the Director who made the decision to issue the Administrative Penalty to Colette Benson and CRC Open Camp &Catering Ltd., err in the determination of a material fact on the face of the record?

[435] The Director did not make any errors in determination of a material fact on the face of the record with respect to the proceeds of the sale of the DML. The Board found the Appellants (1) illegally sublet the DML without the written consent of the AEP; (2) received money (rent) for the purpose of allowing access to and use of the DML without authority; and (3) received money (sale proceeds) from the a public auction sale of the DML for the purpose of gaining access to the DML.

Did the Director err in law?

[436] The Director made an error in law with respect to the calculation of the proceeds. Specifically, in the Board's view, the intent of the legislation in this case – where the contravention could have been made legal – the appropriate calculation of the proceeds should be net profit. While the evidence before is unclear, the Board is prepared to accept the submissions of the Appellants that the costs incurred with respect to the DML was $144,615.32, and this amount should be deducted from the Administrative Penalty.

[437] The Director made a significant error of law with respect to his refusal to comply with the Board's order to provide the Appellant with additional disclosure. In the Board's view, this constitute a breach of rule of procedural fairness that the Board is unable to remedy through its hearing process. As a result, the Board is recommending that the decision to issue the Administrative Penalty be reversed.

Did the Director exceed the Director's or Officer's jurisdiction or legal authority?

[438] The Director did not exceed his jurisdiction or legal authority. The Appellant argued that that Ministerial Order designating the Director (as Regional Compliance Manager) did not properly authorize the Director to issue the proceeds component of the Administrative Penalty. In the Board's view, the Appellants' interpretation of the Ministerial Order is in error. The Ministerial Order designated the Director for the purpose of section 59.3 of the Act. This is

the section of the Act that, in combination with section 59.4 of the Act, authorizes the Director is issue both the base amount of the Administrative Penalty and the proceeds amount of the Administrative Penalty. There is no need to designate the Director for the purposes of section 59.4.

Is the Board prohibited from hearing the appeal as a result of loss of jurisdiction based on the January 3, 2020 decision of the Appeals Coordinator? The issue includes can and should the hearing panel reconsider or alter the decision of the Appeals Coordinator.

[439] The Board – more specifically the hearing panel – does not have the jurisdiction to review the Appeals Coordinator's January 3, 2020 decision. This is not an authority assigned to the Board, it is the jurisdiction of the Court of Queen's Bench on judicial review. On its face, the Board has valid decision of the Appeals Coordinator to extend the Appeal Period in accordance with section 237 of PLAR. Therefore, the Board is not prohibited from hearing the appeal.

IX. RECOMMENDATION

[440] The Board recommends that the decision to issue the Administrative be reversed. The Director has committed an error of law by failing to comply with the Board's order to provide the Appellants with additional disclosure. The Director's decision to refuse to provide the Appellants with additional disclosure breaches of procedural fairness, and the Board is unable to remedy this breach of procedural fairness through it hearing process.

Dated on September 14, 2020, at Edmonton, Alberta.

"*original signed by*"
Anjum Mullick
Panel Chair

"*original signed by*"
Dr. Nick Tywoniuk
Board Member

"*original signed by*"
Tim Goos
Board Member

ALBERTA
ENVIRONMENT AND PARKS

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

MINISTERIAL ORDER
61/2020

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

and

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

ORDER RESPECTING PUBLIC LANDS APPEAL BOARD APPEAL NO. 18-0015

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being the Order Respecting Public Lands Appeal Board Appeal No. 18-0015.

Dated at the City of Edmonton, in the Province of Alberta, this 16 day of NOV 2020.

Jason Nixon
Minister

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

APPENDIX

Order Respecting Public Lands Appeal Board
Appeal No. 18-0015

With respect to the December 18, 2018, decision of the Director, Regional Compliance, Lower Athabasca Region, Operations Division, Alberta Environment and Parks (the "Director"), to issue Administrative Penalty No. PLA-18/06-AP-LAR-18/10 (the "Administrative Penalty") under the *Public Lands Act*, R.S.A. 2000, c. P-40, to Colette Benson and CRC Open Camp & Catering Ltd. I, Jason Nixon, Minister of Environment and Parks, order that the Director's decision to issue the Administrative Penalty is reversed.