

ALBERTA PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – August 20, 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 Robert Heigh and Sharon Heigh, and the Shelter Bay Campers, with respect to the decision of the Director, Provincial Approvals Section, Alberta Environment and Parks, to refuse to issue Department Miscellaneous Lease 160081, Department License of Occupation 160190, and Department License of Occupation 160191.

Cite as: *Heigh et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (20 August 2020), Appeal Nos. No. 19-0009-0011 and 19-0014-0244-R (A.P.L.A.B.), 2020 ABPLAB 13.

HEARING BEFORE:

Mr. Gordon McClure, Board Chair; Ms. Meg Barker, Panel Member; and Mr. Chris Powter, Panel Member.

SUBMISSIONS BY:

Appellants: Robert Heigh and Sharon Heigh, and the Shelter Bay Campers, represented by Mr. Michael Theroux, Bennett Jones LLP.

Director: Ms. Corrine Kristensen, Director, Provincial Approvals Section, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

Intervenors:

Mr. Findlay MacDermid, Dene Ni Nene Manager, Lands and Resources Department, Cold Lake First Nation.

Ms. Caroline Palmer, General Manager of Planning & Community Services, Municipal District of Bonnyville, No. 87

EXECUTIVE SUMMARY

On November 14, 2016, Robert Heigh and Sharon Heigh (the Heighs), the owners and operators of Shelter Bay Resort, applied to the Director, Provincial Approvals Section, Alberta Environment and Parks (the Director), for three formal dispositions: Department Miscellaneous Lease 160081; Department Licence of Occupation 160190; and Department Licence of Occupation 160191 (the Dispositions). The purpose of the Dispositions was to replace expired and cancelled dispositions for a recreational campground, which the Heighs have operated for over 30 years (the Shelter Bay Campground). On October 7, 2019, the Director refused to issue the Dispositions for the following reasons:

- (a) non-compliance with the Public Lands Act;
- (b) the proposed campground would benefit only a small number of Albertans;
and
- (c) a historical pattern of non-compliance with the lease and acting without authorization from Alberta Environment and Parks (AEP).

On October 25, 2019, the Board received a Notice of Appeal from the Heighs appealing the Director's decision. On November 5, 2019, the Board received Notices of Appeal from 231 individuals who use the Shelter Bay Campground (the Shelter Bay Campers).

The Board held a mediation meeting, which did not result in an agreement.

The Board allowed requests from the Cold Lake First Nations and the Municipal District of Bonnyville to participate, and received written submissions from these parties as intervenors.

The Board scheduled a hearing by written submissions with final arguments by video conference. The issues were set as follows:

Did the Director in refusing to issue the Dispositions:

1. err in the determination of a material fact on the face of the record;
2. err in law; or
3. exceed her jurisdiction or legal authority?

After reviewing the file, written submissions, and hearing final arguments from the Appellants' and the Director, the Board considered the Director's reasons for refusing to issue the Dispositions. The Board found the Director was correct to base her decision to refuse to issue

the Disposition on the non-compliance of the Heighs with AEP's requirements, the pattern of historical non-compliance, and that the proposal for the campsite would benefit only a small number of Albertans.

The Board found the Director in refusing to issue the Dispositions:

1. did not err in the determination of a material fact on the face of the record;
2. did not err in law; and
3. did not exceed her jurisdiction or legal authority.

Therefore, the Board recommended to the Minister of Environment and Parks that the Director's decision not to issue the Dispositions be confirmed.

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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 Mr. Robert Heigh and Ms. Sharon Heigh (the “Heighs”), the owners and operators of Shelter Bay Resort, and the individuals who use the Shelter Bay Campground (the “Shelter Bay Campers”). The Heighs and the Shelter Bay Campers (collectively the “Appellants”) appealed the decision by the Director, Provincial Approvals Section, Alberta Environment and Parks (the “Director”), to refuse to issue dispositions for Department Miscellaneous Lease 160081, Department Licence of Occupation 160190, and Department Licence of Occupation 160191 (collectively, the “Dispositions”).

II. BACKGROUND

[2] On August 13, 1987, Alberta Environment and Parks (“AEP”) issued Miscellaneous Lease 870094 (the “MLL”), to the Heighs for the operation of a campground on public lands located on the eastern shore of Marie Lake in the Municipal District of Bonnyville, No. 87 (the “Lands”).¹ Along with the MLL, AEP also issued Licence of Occupation LOC 870573 for a pier site and Licence of Occupation LOC 870644 for an access road to the Lands (the MLL, LOC 870573, and LOC 870644 are collectively the “Leases”).²

[3] On February 10, 1999, AEP renewed the Leases for a further ten-year term, effective August 13, 1997. The Leases expired on August 13, 2007. AEP conducted a lease renewal inspection on June 22, 2007 and found several deficiencies the Heighs needed to address. On January 10, 2011, AEP found the management of the Leases was satisfactory, and recommended the Leases be renewed for another ten-year term.³ As part of the renewal process, AEP explained to the Heighs that a survey plan for the Leases was required. AEP did not

¹ Miscellaneous Lease 870094 is located on NW 21-65-2-W4M, SW 28-65-2-W4M, and E 29-65-2-W4M.

² In 2013, AEP changed the names of the dispositions it issued. A Miscellaneous Lease (MLL) became a Department Miscellaneous Lease (DML) and a License of Occupation (LOC) became a Department license of Occupation (DLO).

³ Letter to Robert Allan Heigh and Sharon Anne Heigh, dated January 10, 2011, Department’s Record, at tab 3.23.

receive the survey plan, and on June 6, 2011, and again on May 27, 2014, AEP requested the Heighs provide the required survey plan. On September 25, 2015, AEP sent a letter to the Heighs providing notice that AEP would cancel the Leases if the Heighs did not provide the required survey plan within 30 days. AEP did not receive the survey plan within the 30-day deadline. On November 25, 2015, AEP advised the Heighs it had cancelled the Leases, as the Heighs had not responded to the September 25, 2015 letter.

[4] On December 7, 2015, the Heighs requested a renewal of the Leases. On December 16, 2015, AEP wrote to the Heighs and advised the Heighs that they had until May 24, 2016 to submit the survey plan, failing which they would have to apply for new dispositions.

[5] On February 8, 2016, an AEP Lands Officer, accompanied by the Heighs, conducted an inspection of the Lands. The inspection identified several incidents of unauthorized clearing of the Lands. AEP issued a Temporary Ministerial Stop Order to the Heighs to prevent further clearing.

[6] Between January 15, 2016 and May 24, 2016, the Heighs and AEP communicated in a series of emails regarding the survey plan. On June 1, 2016, AEP wrote to the Heighs and informed them it was granting an extension to June 30, 2016, for submission of the survey plan. The letter stated if the Heighs did not meet the deadline, they would have to reapply for new dispositions. AEP did not receive the survey plan by the June 30, 2016 due date.

[7] On July 12, 2016, AEP conducted another inspection of the Lands. The inspection found:

- two unauthorized boat launches;
- an outhouse within the 30 metre buffer of the lakeshore;
- excessive garbage including abandoned boats, vehicles, and campers;
- improper brush disposal; and
- unauthorized gravel extraction.

[8] On November 14, 2016, the Heighs applied to AEP the Dispositions (the “Applications”). The intent of the Applications for the Dispositions was to replace the Leases.

[9] On January 25, 2017, AEP advised the Heighs that the Applications had several deficiencies that needed to be resolved before the Applications could be considered on their

merits, including the requirement for a survey plan. AEP granted the Heighs 30 days to provide a survey plan that was acceptable to AEP.

[10] On February 6, 2017, AEP received an amendment to the Applications from the Heighs. On March 7, 2017, AEP received a second amendment to the Applications from the Heighs.

[11] On June 6, 2017, AEP received a public complaint from Donald Heigh, the Heighs' son. On June 22, 2017, AEP conducted an inspection of the Lands. The inspection found:

- the campground was being operated on public land without authorization from AEP;
- excess debris (wood, metal, equipment, vehicles) at the Heighs residence and shop areas;
- evidence of hydrocarbon releases on the ground;
- unauthorized gravel removal;
- storage of materials and improvements within the 30-metre buffer required around the lake shore;
- unauthorized trench construction and culvert replacement within a watercourse;
- camp stall expansion with debris pushed into the tree line; and
- several unauthorized structures, and storage of pallets and docks.

[12] After the June 22, 2017 inspection, AEP and the Heighs communicated regarding AEP's concerns. On November 17, 2017, AEP wrote a letter to the Heighs advising of three deadlines:

- December 15, 2017, to submit to AEP a written proposal for increasing the number of publicly available short-term sites, and how personal property will be removed from the campground before March 31, 2018;
- January 31, 2018, to submit to AEP an updated business plan; and
- March 31, 2018 to remove the lifts and docks.

The letter advised the Heighs that failure to meet one or more of the deadlines might result in enforcement action against them.

[13] On December 14, 2017, the Heighs submitted a proposal identifying ten short-term occupancy sites and two group sites, which would be available to the public.

[14] On January 17, 2018, AEP advised the Heighs they had received the survey plan and it met the content requirements.

[15] On January 30, 2018, the Heighs submitted an updated Business Development Plan to AEP.

[16] On March 15, 2018, AEP provided a Supplemental Information Request 1 (“SIR 1”) to the Heighs that listed multiple concerns. The SIR 1 required amendments to the Business Development Plan to address those concerns. The Heighs provided a revised Business Development Plan on May 1, 2018.

[17] On March 31, 2018, the Heighs advised AEP they completed the cleanup of the 30-metre buffer zone by removing boat launches and docks.

[18] On June 6, 2018, AEP wrote to the Heighs (the “June 2018 Letter”) and noted the revised Business Development Plan submitted on May 1, 2018, did not address several concerns detailed in the SIR 1. AEP stated in the June 2018 letter:

“AEP will proceed with reviewing your application on June 25, 2018 with the information provided to date and then make a decision about the [applications]. Please provide any additional information, including the information requested below, that you wish AEP to consider in relation to [the Application] no later than June 22, 2018.”⁴

[19] On June 20, 2018, the Heighs provided another revised Business Development Plan outlining changes intended to address AEP’s concerns.

[20] On July 5, 2018, AEP conducted an inspection of the Lands. On July 6, 2018, the AEP Lands Approvals Team Lead (“Approvals Lead”), in an internal AEP email, acknowledged there had been some “great improvements” at the Lands. However, there remained multiple concerns the Heighs had not remedied.

[21] On July 30, 2018, in an internal AEP email, the Approvals Lead discussed the public complaint from Donald Heigh, which indicated sewage was running from the Heighs’ residence into a slough and flowing into Marie Lake. The Approvals Lead stated, “It is for this

⁴ Letter from James Laird, Lands Approvals Team Lead, dated June 6, 2018, Department’s Record, at tab 2.51.

reason that I suspect there might be something unlawful going on, that we unfortunately didn't discover during our initial investigation at the site.”⁵ The Approvals Lead noted an aerial photograph showed a plume near the residence entering into the lake at the bed and shore, and evidence of a cutline through the vegetation to the residence. The Approvals Lead recommended a follow-up inspection to determine if septic effluent from the residence was entering the lake.

[22] On September 5, 2018, AEP and staff from the Municipal District of Bonnyville, No. 87 (the “MD of Bonnyville”) conducted a site visit on the Lands. On September 5, 2018, AEP advised the Heighs the inspection found “what appears to be septic containers under the back step [of the Heighs’ residence] with a pump out from one of the containers into the environment (bush).”⁶ AEP noted the residence did not have a development permit from the MD of Bonnyville for private sewage.

[23] On September 25, 2018, a Merit Rationale form was prepared by the AEP Regional Office, which stated:

“Taking into consideration the long standing non-compliance history and issues at the Shelter Bay site, along with the deficiencies noted in the most current revision of the Business Development Plan, as well as the fact that the Heighs have failed to bring the site to a suitable standard within clearly articulated time lines as determined during the July and September 2018 field inspections, it is the Regions recommendation that the Department refuse the application.”⁷

[24] On January 15, 2019, Husky Energy LTD. advised AEP the Heighs were collecting compensation from Husky Energy for use of the access road (the “Road DLO”) to the Campground.

[25] On May 27, 2019, AEP conducted another inspection on the Lands (the “May 2019 Inspection”). The inspection found “numerous outstanding non-compliance issues as documented in the July 5, 2018 inspection report.”⁸ The inspection documented the following:

- 240 campsites and five cabins located on site;

⁵ Email from James Laird, Lands Approvals Team Lead, dated July 30, 2018, Department’s Record, at tab 2.57.

⁶ Letter from Dean Litzenberger, AEP Environmental Protection Officer to the Heighs, dated September 18, 2018, Department’s Record, at tab 2.61.

⁷ Merit Rationale, September 25, 2018, Department’s Record, at tab 2.63.

⁸ Inspection Form, May 27, 2019, Department’s Record, at tab 2.65.

- 35 unauthorized structures built throughout the campground;
- 42 decks;
- 59 sheds or structures;
- 13 waste water discharges into the environment;
- 12 piles of debris;
- 30 boat lifts or docks located in the lake or in the treeline adjacent to the lake; and
- 13 unregistered vehicles or camping units throughout site.

[26] On October 7, 2019, the Director prepared a Final Review of the Applications and issued the merit decision to refuse to issue the Dispositions (the “Decision”). The Director stated the reasons for the Decision were:

- (a) non-compliance with the Public Lands Act (the “Act”);
- (b) the proposed campground would benefit only a small number of Albertans; and
- (c) a historical pattern of non-compliance with the lease and acting without authorization from AEP.

[27] The Decision advised the Heighs they had no right to the Lands, and because of the Director’s Decision, the removal of all chattels owned or improvements erected or created by the Heighs and the Shelter Bay Campers, was required. The Director stated failure to remove the chattels and improvements might result in forfeiture to the Crown under section 62(4) of the Act,⁹ and that the Director had referred the matter to the Regional Compliance Section, Lower Athabasca Region, Alberta Environment and Parks (“Regional Compliance”).¹⁰

[28] On October 25, 2019, the Board received a Notice of Appeal from the Heighs appealing the Director’s Decision.

⁹ Section 62(4) of the Act states:

“Any chattel, building or other improvement on public land is forfeited to the Crown in right of Alberta

- (a) when the one-month period referred to in subsection (2) and any extension of it prescribed by the Assistant Deputy Minister has expired, or
- (b) when a disposition is cancelled or expires if the holder at the time of the cancellation or expiry of the disposition is indebted to the Crown or to the director.”

¹⁰ Regional Compliance is the part of AEP responsible for the enforcement of the legislation administered by AEP in the area of the Province where the Lands are located.

[29] On November 5, 2019, the Board received a Notice of Appeal from the Shelter Bay Campers (231 campers), also appealing the Decision.

[30] The Board accepted the Notices of Appeal (the “Appeals”) and requested the Director provide the Department’s record related to the Decision (“Department’s Record”), which the Director sent to the Board on January 27, 2020.¹¹ The Board sent the Department’s Record to the Appellants on January 31, 2020. The Board also requested that the Director advise of any potentially interested persons.

[31] On November 26, 2019, the Board sent a letter to thirteen parties and individuals who may be potentially interested or impacted by the Appeals, requesting that they contact the Board by December 9, 2019, if they wish to be involved in any aspect of the Appeals. Cold Lake First Nations (“CLFN”) and the MD of Bonnyville indicated their interest in being a third party to the Appeals. The Board requested and received comments from the Appellants and the Director (collectively, the “Parties”) regarding the participation of the CLFN and the MD of Bonnyville. On December 23, 2019, the Appellants wrote the Board and supported the involvement of the CLFN as directly affected, but argued the MD of Bonnyville was not directly affected by the Appeals. The Director wrote to the Board on January 3, 2020 and advised the Director took no position on the involvement of the CLFN and the MD of Bonnyville.

[32] On January 14, 2020, the Board decided to allow limited participation of the CLFN and the MD of Bonnyville as intervenors in a hearing by written submission only.

¹¹ Section 120 of the Act states “[a]n appeal under this Act must be based on the decision and the record of the decision-maker.” To determine what the decision and the record of the decision-maker is, the Board looks to the definitions in the Public Lands Administration Regulation, Alta. Reg. 187/2011 (“PLAR”). Section 209(f) of PLAR defines “director’s file” as “in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision...”

Section 209(m) of PLAR defines “record” as follows: “means record as defined in the Freedom of Information and Protection of Privacy Act...” Section 1(q) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, states:

“‘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...”

Based on these definitions, the Board considers the “Department’s Record” to be the director’s file, along with records of the Department, which is any of the information as defined in section 1(q) of the *Freedom of Information and Protection of Privacy Act*.

[33] On March 18, 2020, the Appellants applied to the Board for a stay of the Decision. After hearing from the Director and the Appellants, the Board granted a stay of the Decision on May 11, 2020. The stay was to remain in effect until the Board lifted the stay or until the Minister issued an order regarding the Appeals.¹²

[34] On May 6, 2020, the Board held a mediation meeting by video conference due to the COVID 19 pandemic. The Parties were unable to reach an agreement.

[35] The Board determined it would be appropriate to hold a hearing with written submissions and oral presentations by video conference. The Board set the issues for the hearing, dates for cross-examination by written questions and answers, and written submissions from the Parties. The Board held the video conference portion of hearing on July 21, 2020.

III. ISSUES

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

Did the Director in refusing to issue formal dispositions DML 160081, DLO 160190, and DLO 160191:

1. err in the determination of a material fact on the face of the record?
2. err in law?
3. exceed her jurisdiction or legal authority?

IV. SUBMISSIONS

A. Appellants' Initial Submission

[37] The Appellants stated the Heighs have operated the Shelter Bay Resort as a campground and recreation area on the northeast shore of Marie Lake in MD of Bonnyville since 1987. The Appellants stated the Shelter Bay Resort has grown to over 240 campsites. The Appellants said the Heighs live at the Shelter Bay Resort, which has been their home for more than 33 years.

[38] The Appellants argued the Decision was wrong, fundamentally unfair, and based on speculative evidence.

¹² See: Stay Decision: *Heigh et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (11 May 2020), Appeal Nos. No. 19-0009-0011 and 19-0014-0244-ID1 (A.P.L.A.B.), 2020 ABPLAB 5.

[39] The Appellants stated the Director erred in fact and law by concluding the Heighs were trespassers with no right to use and enjoy the Lands. The Appellants submitted the Heighs have maintained a continuous right to occupy and operate the Shelter Bay Resort on the Lands by paying annual rent, including in 2019 for the 2020 camping season, which AEP accepted from the expiry of the lease in 2007 until present.

[40] The Appellants noted the Director characterized the annual rent payments made after the expiry of the Leases as payments made under Section 170(1)(a) of the PLAR.¹³ The Appellants said the Department's Record contained no evidence that AEP accepted the Heighs' annual rental payments for any other reason than as rental payments. The Appellants referred to AEP internal emails from 2017 included in the Department's Record that show AEP knew the Heighs were making annual rental payments for the Lands but did nothing to prevent them. The Appellants submitted the Director erred in fact and law by concluding the Heighs received money for the use of public lands without authorization. The Appellants stated AEP has known for many years the Heighs charge some of their public campers annual or daily rent for use of the Lands and have never raised this as a problem. The Appellants said payment of the annual rent continuously since the expiry of the Leases preserves the Heighs' right to occupy and operate the Shelter Bay Resort on the Lands, which includes the right to receive monies for their campers' use of the Lands. The Appellants submitted the Director's use of this ground as a rationale to deny the Dispositions is unfair and unreasonable, as AEP did not raise the issue with the Heighs, and they did not have an opportunity to respond.

[41] The Appellants stated the Director erred in fact and law by relying on internal AEP email correspondence to allege the Heighs were demanding compensation from Husky Energy Ltd. for use of the Road DLO. The Appellants said the only evidence in the Department's Record is an email between two AEP employees discussing a phone call with a

¹³ Section 170(1) of PLAR states:

“The director may require

- (a) a person that makes use of public land without authority, or
 - (b) a disposition holder that makes use of the public land under the disposition or authorization for any purpose other than that for which it was granted
- to pay a sum of money in an amount determined by the director, in addition to any other rent, fee,

Husky Energy Ltd. employee. The Appellants said the Heighs have paid annual rent, which gives them the right to use and occupy the Road DLO.

[42] The Appellants submitted AEP's May 2019 Inspection was not a *bona fide* assessment of the Heighs' management of the Leases, but a pretext to deny the Dispositions. The Appellants noted the Heighs did not learn of the allegations of non-compliance listed in the May 2019 Inspection Report until they had reviewed the Department's Record provided by the Board. The Appellants stated the Director should have provided the May 2019 Inspection to the Heighs to give them an opportunity to respond to it before the Director made her Decision.

[43] The Appellants submitted procedural fairness is a cornerstone of administrative law and decision-makers must reach decisions in a procedurally fair manner. The Appellants referenced the Court of Queen's Bench of Alberta decision in *Buryn v. Alberta (Minister of Municipal Affairs)*, which described procedural fairness as follows:

“Procedural fairness ensures that administrative decisions are made using a fair, impartial, open, and transparent process that provides those affected by the decision an opportunity to know the case against them and to fully put forth their views and the evidence they wish the decision-making body to consider. 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.”¹⁴

[44] The Appellants quoted the Supreme Court of Canada's from *Baker v. Canada (Minister of Citizenship and Immigration)*, where the Court said “[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.”¹⁵

[45] The Appellants submitted that the Director owed the Heighs a high degree of procedural fairness, as the Decision directly impacts the Heighs' economic and property rights in significant ways. The Appellants noted the Decision in this case was different from most of the decisions about whether to issue dispositions to applicants under the Act. The Appellants stated:

cost or other amount prescribed under section 9.1 of the Act for the use.”

¹⁴ *Buryn v. Alberta (Minister of Municipal Affairs)*, 2017 ABQB 613, at paragraph 31.

¹⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 25.

“... the laws of natural justice and procedural fairness required the Director to turn her mind to the fact that she was effectively deciding whether it was appropriate to evict the Heighs from their home, strip them of their sole source of income, and shut down a campground, and community that has been important to the Lakeland region for over 30 years.”

The Appellants submitted the Director did not properly turn her mind to the seriousness of the consequences the Decision would have on the Heighs.

[46] The Appellants stated the principle of *audi alteram partem*, which means “hear the other side,” is one of the most important principles in procedural fairness. The Appellants noted the Federal Court of Appeal has stated *audi alteram partem* requires that “parties must be made aware of the case being made against them and given an opportunity to answer it...”¹⁶

[47] The Appellants observed that the Supreme Court of Canada, in *Consolidated Bathurst Packaging Ltd v. International Woodworkers of America.*, stated:

“Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a ‘fair opportunity of answering the case against [them].’ It is true that on factual matters the parties must be given a ‘fair opportunity... for correcting or contradicting any relevant statement prejudicial to their view.’”¹⁷

[48] The Appellants submitted that the Director was obligated to share the May 2019 Inspection Report with the Heighs and failed or refused to do so. The Appellants said by not allowing the Heighs a chance to respond to the May 2019 Inspection Report before relying on it in the Decision, the Director violated the *audi alteram partem* principle. The Appellants stated that the Heighs were unable to know the case against them and exercise their right to correct or contradict factual errors in the May 2019 Inspection Report on which the Director based the Decision. The Appellants submitted the Director withheld evidence and failed to disclose aspects of the case against the Heighs, which had a direct effect on the Heighs’ rights and led to an outcome inconsistent with the principles of natural justice and fairness.

[49] The Appellants stated the Director erred in law by improperly sub-delegating her decision-making authority to the AEP inspectors responsible for the May 2019 Inspection

¹⁶ *Canadian Cable Televisions Association v. American College Sports Collective Canada Inc.*, [1991] 3 FC 626 (FCA), at paragraph 13.

¹⁷ *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America*, [1990] 1 SCR 182 at paragraph 13.

Report, which caused the Director to make errors of fact. The Appellants quoted the Board in *Inshore Developments v. Alberta Environment and Parks* (“*Inshore*”):

“[w]hile the Director can rely upon the AEP field staff for recommendations, the Director cannot claim the Decision was [hers] when [s]he simply accepted the [field staff’s recommendations] without taking any steps to ensure the information [s]he was provided with was correct and reliable... [b]y improperly sub-delegating [her] decision-making authority ... the Director violated the principles of natural justice and created an unfair situation for the Appellant.”¹⁸

[50] The Appellants said the Director erred by adopting the AEP inspectors’ speculative conclusions in the May 2019 Inspection Report without scrutiny. The Appellants submitted the May 2019 Inspection Report contained the following factual errors or misunderstandings that could have been resolved through discussions with the Heighs:

- a) debris piles – the Appellants noted the May 2019 Inspection occurred one week after the May long weekend when the Shelter Bay Campers and the Heighs were engaged in spring cleanup;
- b) unauthorized activity under the *Water Act*, R.S.A. 2000, c. W-3 – the Heighs denied knowingly initiating any activity without the required authorization under the *Water Act*;
- c) unauthorized structures, including 30 boat lifts/docks – the Appellants stated the structures were detailed in the Business Development Plan;
- d) unregistered motor vehicles and camping units – the Heighs stated they do not have an obligation to verify that all motor vehicles and camper units that the Shelter Bay Campers bring to the campground are properly registered; and
- e) wastewater discharge to the environment – the Appellants said the photos showed allowable groundwater drainage infrastructure and wastewater disposal equipment which was disconnected at the time of the inspection.

[51] The Appellants noted the Decision relied on a penalty assessment issued to the Heighs on March 5, 2012, as evidence of a pattern of non-compliance with the regulatory regime. The Appellants stated the Director failed to consider that the Heighs applied for approval before commencing the work, that they did not intentionally contravene the rules, and upon finding out they had done so, tried to remedy the situation in accordance with AEP’s requirements. The Appellants submitted the Director erred in fact and law by giving undue weight to an isolated incident of non-compliance.

¹⁸ *Inshore Developments Ltd. v. Alberta Environment and Parks*, 2018 PLAB 37, at paragraphs 129 and 130.

[52] The Appellants stated the Department's Record demonstrates a history of the Heighs working with AEP to resolve regulatory issues to ensure the Shelter Bay Resort operated in an environmentally responsible manner.

[53] The Appellants said that in 2017, AEP asked the Heighs to prepare a new business plan. The Appellants stated the Heighs sent AEP three drafts of the Business Development Plan, and received no comments back from AEP. The Appellants said that when AEP accepted the fourth draft without comment, the Heighs reasonably believed the Business Development Plan was acceptable and AEP would approve the Applications.

[54] The Appellants submitted the Director erred in fact and law by concluding that the continued operation of the Shelter Bay Resort would benefit only a small number of Albertans. The Appellants stated the Director failed to consider that the Business Development Plan included an increase in short stay campsites, and a plan for advertising. The Appellants also said the Shelter Bay Resort is the only affordable campsite for hundreds of campers each year and brings economic benefits to the City of Cold Lake and the Town of Bonnyville. The Appellants noted the Shelter Bay Resort is a rustic camping experience, and weekend campers are more likely to prefer other nearby camping destinations.

[55] The Appellants stated AEP's internal correspondence shows that AEP has prejudicially sought out evidence to build a case in favour of denying the Dispositions. The Appellants referred to a July 30, 2018 email in which the AEP Lands Approvals Team Lead refers to a complaint filed by the Heighs' son, Donald Heigh, and that the Lands Approvals Team Lead suspected there might be something unlawful occurring that "we unfortunately didn't discover during our initial investigation at the site."¹⁹ The Appellants stated they were troubled that AEP would find it "unfortunate" that no evidence of unlawful conduct was discovered at the Shelter Bay Resort. The Appellants submitted AEP's apparent disappointment in not finding corroboration for the complaint suggested that AEP's motivation for some time was to find a pretense for denying the Dispositions, rather than fulfilling AEP's core mandate.

¹⁹ Email from James Laird, Lands Approvals Team Lead, dated July 30, 2018, Department's Record, at tab 2.57.

B. Director's Initial Submission

[56] The Director stated AEP cancelled the Leases when the Heighs did not provide the required survey plan as part of the renewal process. The Director said the Heighs had the opportunity to have the Leases reinstated after they were cancelled, but did not send in the survey plans by the deadline set by AEP. The Director noted the Heighs did not challenge the decision to cancel the Leases on November 25, 2015 and did not challenge the decision to not reinstate the Leases after the cancellation. The Director submitted the Heighs were now out of time to challenge either decision.

[57] The Director stated the Applications went through AEP's review process for administrative completeness and were approved for administrative completeness after the Heighs fixed some deficiencies. The Director said the Applications were then sent to one of the regional offices for merit review. The Director said the regional office provided the Merit Rationale to the Director that recommended the Director refuse to issue the Dispositions because of:

- (a) continuing compliance issues at the Lands; and
- (b) deficiencies in the Business Development Plan despite several versions and AEP assistance.²⁰

[58] The Director stated that in making the Decision, she reviewed AEP's files for the Leases, the May 2019 Inspection Report, and noted the on-going compliance issues.

[59] The Director noted the Decision provided three reasons for the refusal to issue the Dispositions:

- “(a) the Heighs’ non-compliance with the *Public Lands Administration Regulation* and the *Public Lands Act* from the submission of their application for new dispositions on November 14, 2016 through the Department’s review of application to the Director’s decision on October 7, 2019;
- (b) the Heighs’ pattern of non-compliance over the years from April 21, 1988 to July 12, 2016; and
- (c) the Heighs’ proposal only benefited a small number of Albertans contrary to the public policies applicable to the Lands.”²¹

²⁰ Director's Record tab 2.63 PLAB 19-0009; tab 2. 10 PLAB 19-0010; tab 2.10 PLAB 19-0011.

²¹ Director's Initial Submission, June 5, 2020, at paragraph 11.

[60] The Director said AEP discovered evidence of the Heighs' non-compliance with the legislation during an inspection resulting from a public complaint made on June 6, 2017. The Director stated AEP's inspection occurred on June 6, 2017, and found:

- “(a) the campground was being operated without an approval or authorization from the Department;
- (b) excess accumulation of woody and metal debris, equipment, and vehicles at the residence and shop area;
- (c) evidence of hydrocarbon releases to the ground;
- (d) trespass and unauthorized aggregate removal;
- (e) encroachment into and storage of materials and improvements within the 30 metre lake buffer;
- (f) unauthorized trenching work and culvert replacement within a watercourse;
- (g) recent camp expansion and woody debris pushed into the adjacent treeline, including unauthorized cutting of Crown timber;
- (h) several unauthorized structures and storage of pallets and docks; and
- (i) unauthorized installation of a culvert and trenching in a watercourse, which required authorization under the *Water Act*.”²²

[61] The Director said AEP offered to conduct a joint site visit with the Heighs in March 2018, and again in May 2018, but received no response. The Director stated AEP proceeded with a site visit on July 5, 2018. The Director noted there was improvement from the 2017 inspection, however, the following non-compliant issues were observed:

- “(a) items remained in the 30 metre buffer (fire pits, scrap woody debris);
- (b) items to be addressed at the boat launch (boat lifts and old docks, old camper trailer and 5th wheel, scattered metal and wood debris in the bush adjacent to the parking lot);
- (c) recent clearing of a site with debris pushed into the trees;
- (d) garbage and general untidiness;
- (e) recent expansion of a camp stall without authorization;
- (f) discharge of waste;
- (g) unauthorized access points through the 30 metre buffer from lake side camp stalls;
- (h) unauthorized structures;
- (i) RVs that are not road worthy or plated;

²² Director's Initial Submission, June 5, 2020, at paragraph 74.

- (j) drainage issues causing impediments of flow;
- (k) unauthorized harvesting of trees; and
- (j) remaining structures that should have been removed.”²³

[62] The Director stated a joint inspection with the MD of Bonnyville, conducted on September 5, 2018, found what appeared to be septic containers under the back step of the Heighs’ residence, with a pump out from one of the containers into the bush.

[63] The Director said that before making the Decision, she had AEP staff conduct a site visit to the Lands to assess the current situation and determine whether any more outstanding compliance issues remained. The Director requested AEP staff who were not familiar with the file conduct the inspection. The May 2019 Inspection Report found:

- “(a) 35 unauthorized structures;
- (b) 13 waste water discharges to the environment;
- (c) 12 debris piles;
- (d) 30 boat lifts or docks (some located in the lake, and some in the treeline);
- (e) waste accumulation; and
- (f) vehicles in various states of disrepair throughout the Lands.”²⁴

[64] The Director noted the MD of Bonnyville had concerns relating to the Lands regarding permits, safety, and the environment.

[65] The Director stated the second reason the Director refused to issue the Dispositions was the Heighs’ pattern of non-compliance from April 21, 1988 to July 12, 2016. The Director listed examples of non-compliance from AEP’s files for the Leases, which are summarized below:

- (a) clutter from equipment, picnic tables, tarp buildings, etc. needed to be cleaned up;
- (b) general cleanliness needed to be addressed;
- (c) the shop area required cleaning;
- (d) storage of construction and maintenance material needed to be corrected;
- (e) items and machinery not being used in maintenance or construction needed to be moved to a maintenance storage yard;
- (f) culverts were being stored outside of the Lands;

²³ Director’s Initial Submission, June 5, 2020, at paragraph 76.

²⁴ Director’s Initial Submission, June 5, 2020, at paragraph 85.

- (g) vehicles were being parked on the lakeshore;
- (h) the 30 metre buffer was not being maintained;
- (i) the area around the generator needed to be cleared of vegetation;
- (j) development of a central storage yard was necessary;
- (k) a Fire Control Plan was required to be submitted to AEP;
- (l) fire pits need to be installed in mineral soil and surrounded with a cleared area of no less than six feet;
- (m) refuse and derelict vehicles were accumulating;
- (n) unauthorized extraction of surface material along the road beyond the Lands;
- (o) multiple violations of the 30 metre buffer zone;
- (p) disposal of liquid waste was not being controlled;
- (q) campsites and trails were developed without authority;
- (r) an outhouse was located within the 30 metre buffer zone;
- (s) excessive garbage, including abandoned boats, vehicles and campers were found throughout the Lands;
- (t) an old trappers' cabin was converted into a year-round residence without authorization; and
- (u) erosion control, the establishment of vegetation, brush and waste disposal were needed.²⁵

[66] The Director stated the third reason for the Decision was that the Business Development Plan only benefited a small number of Albertans. The Director noted the Lower Athabasca Regional Plan ("LARP") highlighted the growing demand for lake-based recreation. The Director said the Business Development Plan was inconsistent with LARP and the definition of recreational camping as defined in PLAR. The Director submitted ensuring public access is an important principle of recreation management of public lands.

[67] The Director noted the final Business Development Plan submitted by the Heighs stated, "[m]anagement will submit short term site use and vacancies to Alberta Environment and Parks by September 30, 2018."²⁶ The Director said AEP did not receive any further information.

²⁵ Director's Initial Submission, June 5, 2020, at paragraph 94.

²⁶ Department's Record, at tab 2.53.

[68] The Director submitted AEP worked with the Heighs for many years without success to explain the regulatory requirements and educate them about the non-compliance issues. The Director stated:

“Despite the Department’s best efforts to educate the Applicants about their regulatory responsibilities under the public lands regulatory regime and other environmental legislation such as the *Environmental Enhancement and Protection Act*, the Heighs have failed to come into compliance.”²⁷

[69] The Director submitted the Minister manages all public land in Alberta, except for public lands specified in other legislation or by an order of the Lieutenant Governor in Council. The Director stated there are no common law rights to enter on, use or occupy public lands that are subject to the public lands regulatory regime, which includes the Lands in these Appeals.

[70] The Director said the Act prohibits persons from entering and occupying public land without authorization from AEP, and AEP provides the authorization by issuing authorizations, approvals, and dispositions under the Act. The Director noted a disposition is a statutory authorization to occupy public lands issued by AEP on terms and conditions set out in the disposition. The Director submitted dispositions are not agreements. The Director stated disposition holders have statutory duties, which include prohibitions against unauthorized loss or damage on the land, accumulation of garbage or debris, and using a structure or building as a dwelling place. The Director submitted a disposition holder only has the estate, interests, rights, and privileges expressly provided in the disposition.

[71] The Director stated a director may refuse to issue a disposition if an applicant is in non-compliance with the Act or PLAR. The Director said she refused to issue the Dispositions because the Heighs were in non-compliance with the legislation and have a historical pattern of non-compliance.

[72] The Director stated AEP can cancel a disposition by following the procedure outlined in the Act. The Director said the effect of a cancellation is the disposition holder has no rights to occupy the lands, and may remove any chattels owned by the holder, including buildings or improvements erected or created by the former disposition holder. The Director

²⁷ Director’s Initial Submission, June 5, 2020, at paragraph 112.

submitted the effect of the cancellation of the Dispositions is that the Heighs were unlawfully occupying the Lands.

[73] The Director said only in narrow circumstances can a former disposition holder be deemed an overholding tenant on a month-to-month basis on the lands. The Director referred to section 20(3) of PLAR²⁸ and noted a former disposition holder can be deemed an overholding tenant only on the expiry of a disposition and where the former holder does not vacate the land. The Director stated overholding tenants are required to comply with the terms and conditions of the expired disposition and the public lands regulatory regime. The Director submitted the Heighs are not overholding tenants on the Lands.

[74] The Director requested the Board find the Director did not err in the determination of a material fact on the face of the record, did not err in law when she made the decision to refuse to issue the Dispositions to the Heighs.

C. Appellants' Response Submission

[75] The Appellants noted the Director only referred to the May 2019 Inspection Report in the Decision, but referenced other inspections in the Director's Initial Submission.²⁹ The Appellants also observed that the Director raised new policy considerations under the LARP that were not in the Decision. The Appellants submitted it was improper for the Director to rely on new evidence and arguments not within the Decision.

²⁸ Section 20(3) of PLAR provides:

“Where a disposition expires without being renewed and the former holder of the disposition does not vacate the subject land, the former holder is deemed to be an overholding tenant on a month-to-month basis in respect of the subject land, and the director may do one or more of the following as the director considers appropriate in the circumstances:

- (a) take one or more enforcement actions in respect of the subject land or any activity on it;
- (b) issue a formal disposition to the holder of the expired disposition in place of the expired disposition, whether or not an application has been made for the formal disposition;
- (c) issue an authorization to the holder of the expired disposition to carry out any work on the subject land that the director considers necessary, whether or not an application has been made for the authorization;
- (d) dispose of chattels and improvements in accordance with section 62 of the Act;
- (e) direct that any interest of the holder in the subject land be offered for sale by public tender or auction.

²⁹ Director's Initial Submission, June 5, 2020 (the “Director's Initial Submission”).

[76] The Appellants said the Director's Initial Submission mischaracterize the Department's Record by alleging it shows the Heighs have a long history of non-compliance with AEP standards. The Appellants stated the Department's Record demonstrate the Heighs have worked to meet AEP's standards and have made significant improvements to the Shelter Bay Resort operations. The Appellants denied the allegation made by their "disgruntled son" that a septic system was running into the lake, and noted that AEP found no evidence of such contravention when an inspection occurred. The Appellants submitted recent inspections by AEP have raised minor allegations of non-compliance, with some of the allegations being completely unfounded.

[77] The Appellants stated the Director's Initial Submission provided a misleading account of the Heighs' efforts to renew the Dispositions, and the Appellants responded as follows:

- (a) the Director failed to acknowledge the Dispositions would have been renewed had the Heighs not had such difficulty with the AEP's changing resurveying requirements;
- (b) AEP's January 10, 2011 letter to the Heighs indicated the "... disposition is being managed satisfactorily and the department is prepared to renew your disposition..."
- (c) the Director's Initial Submission and the Department's Record ignore the diligence with which the Heighs tried to meet the resurveying requirements, despite their unfamiliarity with the process; and
- (d) the Department's record shows that AEP did not assist the Heighs despite the Heighs' requests, and scheduled unrealistic joint inspections despite snow and ice still on the campsite.³⁰

[78] The Appellants stated the Director based the Decision on several concerns identified in the Merit Rationale. The Appellants said AEP did not discuss many of those concerns with the Heighs.

[79] The Appellants noted the Director's Initial Submission expressed concern over the Heighs' decision to circulate a letter to the Shelter Bay Campers without the exact messaging AEP desired. The Appellants stated they presented AEP with an amended letter in response to AEP's concerns and, therefore the matter should be moot.

[80] The Appellants referred to the June 2018 Letter that advised AEP would review the Applications on June 25, 2018, “with the information provided to date and then make a decision about the application.”³¹ The Appellants stated that instead, the Director had AEP staff conduct additional inspections at the Shelter Bay Resort on July 5, 2018, September 5, 2018, and May 27, 2019. The Appellants noted the July 5, 2018 inspection report indicated improvements from the June 22, 2017 inspection. The Appellants submitted the Director was seeking to delay making a decision and seeking evidence to support rejecting the Applications and, therefore required AEP staff to conduct two more inspections.

[81] The Appellants stated the Board should not consider the September 5, 2018 inspection, which was conducted with the MD of Bonnyville, as it was not a ground for the Director’s Decision.

[82] The Appellants submitted the Board should only consider the May 2019 Inspection Report referred to by the Director in the Decision, and not consider the inspections the Director relied on in the Director’s Initial Submission.

[83] The Appellants noted the Director has said the Heighs are not overholding tenants, as the Leases were cancelled. The Appellants stated the Department’s Record shows that the Heighs’ lease expired in August 2007, and that it is not possible to cancel an expired lease. In support of their argument the Appellants quoted section 20(3) of *PLAR* which provides: “where a disposition expires without being renewed and the former holder of the disposition does not vacate the subject land, the former holder is deemed to be an overholding tenant on a month-to-month basis in respect of the subject land....” (Emphasis by the Appellants)

D. Director’s Response Submission

[84] The Director submitted exhibits 2, 3, 7, 12, 22, and 23 of the Appellants’ Initial Submission³² (the “Exhibits”) are not admissible as they are not part of the Department’s Record. The Director stated the Appellants needed to bring a preliminary motion to request the Board

³⁰ Appellant’s Response Submission, June 25, 2020, at paragraphs 20 to 25

³¹ Department’s Record, at tab 2.49.

³² Appellants’ Initial Submission, June 5, 2020 (the “Appellants’ Initial Submission”).

admit the Exhibits, but failed to do so. The Director said the Board acted unfairly by declining to address the admissibility of the Exhibits and not permitting the Director additional time to cross-examine on the Exhibits.

[85] The Director stated if the Board admits the evidence listed in exhibits 22 and 23, the Director requests the Board also admit the Director's new evidence provided with the submissions. The Director said the Appellants' evidence included:

- (a) the Order to Vacate (the "Order") issued by AEP in December 2019;
- (b) the Appellants' originating application for judicial review of the Order, which included an application for a stay of the Order; and
- (c) the affidavit of Sharon Heigh, sworn May 26, 2020, in support of the stay application.

[86] The Director requested the Board admit the following evidence submitted in response to the Appellants' Exhibits:

- (a) the Affidavit of Simon D. Tatlow, sworn May 29, 2020; and
- (b) the Affidavit of Corinne Kristensen, sworn May 29, 2020.

[87] The Director noted the Board in its April 22, 2020 letter set the issues in these Appeals. The Director stated whether the Heighs have any current status to occupy the Lands is not an issue before the Board. The Director noted the Board made comments in the Board's decision on the Appellants' stay application regarding the status of the Heighs presence on the Lands. The Director submitted the comments were not required for the Board to determine the stay application and, therefore those comments were obiter.

[88] The Director said that if the Board decides to consider the Appellants' current status related to the Lands, then the Director submitted the Heighs have been unlawfully occupying the Lands since November 25, 2015, when AEP cancelled the Leases. The Director stated AEP has the exclusive jurisdiction to determine who has the right to enter and occupy public land and to cancel or terminate those rights.

[89] The Director submitted the Board erred in law when it found that upon the cancellation of the Leases the Heighs became overholding tenants.

[90] The Director stated the Heighs have lived at Shelter Bay for more than 33 years in contravention of section 21(1) of PLAR.³³ The Director said the Heighs are in contravention of section 54.01(5) of the Act³⁴ by collecting rent from the Shelter Bay Campers, and compensation from Husky for the use of the access road.

[91] The Director submitted AEP has authority under section 170(1) of PLAR to collect payments from the Heighs for using the Lands without authority. The Director noted Section 170(1) reads:

“The director may require

- (a) a person that makes use of public land without authority, or
 - (b) a disposition holder that makes use of the public land under the disposition or authorization for any purpose other than that for which it was granted
- to pay a sum of money in an amount determined by the director, in addition to any other rent, fee, cost or other amount prescribed under section 9.1 of the Act for the use.”

[92] The Director stated:

“Persons who occupy public lands without authority should not be permitted to do so free of charge. To do so would disincent persons who occupy public lands without authority to bring themselves into compliance with the public lands regulatory regime.

If the Department were to allow persons to occupy public land without the requirement to pay rent, there would be no incentive for the regulated community to comply with the public lands regulatory regime.”³⁵

³³ Section 21(1)(i) of PLAR states:

“The holder of a formal disposition...

- (i) shall not use or allow the use of a structure or building on the subject land as a dwelling place or an office unless the director has first issued a formal disposition, an approval or an authorization to the holder for that use....”

³⁴ 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.”

³⁵ Director’s Response Submission, June 25, 2020, (the “Director’s Response Submission”) at paragraphs 63 and 64.

[93] The Director submitted payments of annual rent by the Heighs, and acceptance of those payments by AEP, does not create rights or authority under the Act or PLAR to occupy the Lands. The Director noted the Decision clarified the operation of section 170(1) as follows:

“As per section 170(1)(a) of the Public Lands Administration Regulation, the director may require a person that makes use of public land without authority to pay a sum of money in an amount determined by the director, in addition to any other rent, fee, cost or other amount prescribed under section 9.1 of the Act for use. The payments made by Mr. and Mrs. Heigh after the cancellation of the dispositions in November 25, 2015 were accepted by AEP pursuant to this section for the continued unauthorized use and occupation of the public lands by the Heighs and Shelter Bay Resort. Payments by the Heighs and Shelter Bay Resort have no effect on the Heighs’ and Shelter Bay Resort’s lack of regulatory authority to occupy and use the public lands.”³⁶ (Emphasis is the Director’s.)

[94] The Director stated procedural fairness is about creating a fair decision-making process. The Director noted the Supreme Court in *Baker* set out the factors to be considered when assessing the extent of the duty to be fair:

- (a) the nature of the decision being made and the process followed in making the decision;
- (b) the nature of the statutory scheme and the terms of the statute under which the body operates;
- (c) the importance of the decision to the individuals affected;
- (d) the legitimate expectations of the person(s) affected by the decision; and
- (e) the agency or administrator’s choice of procedure.³⁷

[95] The Director said *Baker* noted the closer the decision-making process resembles a judicial process, the greater the requirement of procedural fairness. The Director submitted the exercise of authority under PLAR is administrative in nature. The Director stated the nature of the decision being made suggested a less stringent duty of procedural fairness.

[96] The Director submitted the role of a decision within the regulatory scheme helps determine the content of the duty of fairness owed. The Director noted the Minister has sole jurisdiction to determine who is authorized to occupy public land, and has delegated the Director with authority to issue or refuse to issue dispositions for public land. The Director also noted that greater procedural fairness is required where there is no appeal procedure. The Director

³⁶ Department’s Record, at Tab 1.2, page 4.

stated that as the Act provides for a right of appeal to this Board, the regulatory scheme suggests a less stringent duty of procedural fairness.

[97] The Director noted *Baker* said the more important the decision is to the lives of those affected and the greater its impact on the person is, the more stringent the procedural fairness duty owed.³⁸ The Director stated: “Although the issuance of the administrative penalty results in an economic cost to the Appellants, the decision is of the nature contemplated by *Baker* that would attract a less stringent duty of procedural fairness.”³⁹ The Director submitted the importance of the regulatory regime suggested the Director has a more stringent duty of procedural fairness.

[98] The Director stated if a person challenging the decision has a legitimate expectation that a certain procedure would be followed, or a certain result will be reached, procedural fairness may involve more extensive rights than would otherwise be expected.

[99] The Director submitted any legitimate expectation the Heighs could have regarding AEP’s decision-making process was limited to the expectation AEP would follow its normal regulatory review process and they would have a right to participate. The Director said the Director went “above and beyond” to provide opportunities for the Heighs to participate in the decision-making process, and considered the concerns expressed by the Heighs.

[100] The Director stated there was no requirement in the Act or PLAR for the Director to provide a copy of any of the documents on which she relied to make the Decision, unless there is an appeal to the Board. The Director submitted it was not standard practice for AEP to release copies of inspection reports unless enforcement action is taken and there is a legal challenge.

[101] The Director said the Appellants’ legitimate expectations suggest the Director has a less stringent duty of procedural fairness.

[102] The Director stated the content of the duty of procedural fairness should take into account and respect the choices of procedure made by the decision-maker. The Director said

³⁷ Department’s Record, at Tab 3, *Baker* at paragraphs 23 to 28.

³⁸ Director’s Response Submission, June 25, 2020, at 100.

³⁹ Director’s Response Submission, June 25, 2020, at paragraph 101.

important weight must be given to the choice of procedures made by the decision-maker and any institutional constraints. The Director stated AEP and the Director reviewed the Applications according to its normal regulatory review process, and provided opportunities to the Heighs to participate, which was the extent of the duty of procedural fairness owed by the Director. The Director submitted AEP and the Director satisfied the duty of procedural fairness.

[103] The Director stated it was not the duty of AEP to “oversee” the Heighs’ operation, but rather it is the Heighs’ responsibility to understand and comply with the law applicable to the Lands.

[104] The Director said the Appellants’ suggestion on the intent of the May 2019 Inspection is without merit. The Director stated the inspection occurred because the Director did not want to make a decision based on outdated facts.

[105] The Director noted she has no jurisdiction to conduct compliance inspections under the Act and must rely on other AEP staff who have expertise in inspections. The Director submitted it was reasonable to rely on the officers who conducted the May 2019 Inspection, and there was no need to ensure the information she was correct.

[106] The Director submitted the Heighs had the responsibility to ensure persons from whom they collected payment and allowed to enter on the Lands complied with the law, specifically as it related to the proper registration of vehicles on the Lands. The Director noted section 53 of the *Traffic Safety Act*, R.S.A. 2000, c. T-6, prohibits persons from operating or parking a motor vehicle unless the licence plate for the vehicle is displayed.⁴⁰

⁴⁰ Section 53(1) of the *Traffic Safety Act* provides:

“Except as otherwise permitted under this Act, a person shall not do any of the following:

- (a) operate or park a motor vehicle or trailer on a highway unless the subsisting licence plate issued for that vehicle or that is otherwise permitted under this Act is displayed on that vehicle in accordance with the regulations;
- (b) display on a motor vehicle or trailer a licence plate other than a licence plate issued or authorized for use on that vehicle;
- (c) operate or park a motor vehicle or trailer on a highway with an expired licence plate displayed on it;
- (d) permit any licence plate issued to that person to be used in contravention of this Act.”

E. Appellants' Final Comments

[107] The Appellants stated the Exhibits, which were part of the Appellant's Initial Submission, were rationally connected to the Department's Record, provide details, clarify, and help the Board understand the evidence. The Appellants submitted Exhibits 7 and 12 should be considered by the Board, as Exhibit 7 is copies of rent cheques issued by the Heighs to AEP, and Exhibit 12 is a letter from Husky regarding Husky's payments to the Heighs for use of the access road on the Lands. The Appellants said Exhibits 2, 3, 22 and 23, are admissible as evidence, although the Board does not need to rely on them to reach its decision.

[108] The Appellants disagreed with the Director's assertion that the Heighs' status as it relates to the Lands is not an issue before the Board. The Appellants stated the Heighs' legal status in respect of the Lands is undoubtedly an issue before the Board, and that they became overholding tenants of the Lands when the Leases expired in August 2007.

[109] The Appellants submitted the assertion that the Lease was "cancelled" is plainly wrong. The Appellants noted the Director attempted to justify her assertion that the Heighs do not have authority to occupy the Lands as the Lease was "cancelled." However, the Appellants stated the Lease expired in August 2007 and there was no formal disposition for AEP to cancel, making the Appellants overholding tenants on the Lands.

[110] The Appellants submitted there is no evidence to support the re-characterization of the Heighs' annual rental payments as penalty payments required by the Director for use of the Lands. The Appellants stated AEP never invoked section 170 of PLAR in respect of the Lands.

[111] The Appellants referred to paragraph 30 of *Baker*, where the Supreme Court of Canada noted, with respect to participatory rights, "[a]t the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly."⁴¹ The Appellants submitted AEP did not provide the Heighs with such an opportunity. The Appellants noted much of the Department's Record upon which the Director reached the Decision was gathered after the Director informed

⁴¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 20.

the Heighs that the Decision would be made on the existing Record. The Appellants stated the Heighs were not aware that new materials were being gathered or given an opportunity to respond to them.

[112] The Appellants said the Director and AEP's handling of the Business Development Plan, specifically the rejection of the Dispositions based on concerns with the Business Development Plan that were not shared with the Heighs, misled them and denied them an opportunity to be heard. The Appellants alleged the Director's attempts to raise new evidence and justifications for the Decision has complicated the Appellants' ability to respond to the Record upon which the Decision was based, as the Appellants must now respond to several new and uncorroborated allegations raised by the Director on appeal.

[113] The Appellants noted the Supreme Court of Canada in *Baker*, proposed several factors to consider when assessing the extent of the duty to be fair.⁴² The Appellants stated the first of these factors, the nature of the decision being made, means that to the extent the decision to be made resembles judicial decision-making, the duty of procedural fairness required will be high. The Appellants submitted that in these appeals, while there are public policy considerations at issue in the Heighs' Applications, the rejection of the Applications most profoundly impacted the Heighs, given their longstanding use and occupation of the Lands and the impact of the decision on the Heighs' personal and economic interests. The Appellants submitted that on this ground, the duty of fairness is high.

[114] The Appellants said the second factor, the nature of the regulatory scheme, provides that where the decision is determinative of the issue and further requests cannot be submitted, a greater duty of fairness is required. The Appellants submitted the Director's Decision is of a determinative nature. The Appellants acknowledged the Act provides for a right of appeal to the Board, but noted the appeal process demanded tremendous time and resources from the Heighs. The Appellants stated the Heighs could not submit further requests to the Director or AEP regarding the Decision. The Appellants submitted the nature of the regulatory scheme suggested the Director owed a more stringent duty of procedural fairness.

⁴² *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 23 to 28.

[115] The Appellants stated the third factor is the importance of the decision to the individuals affected. The Appellants noted the Court in *Baker* cited its previous decision in *Kane v. Board of Governors of the University of British Columbia*, which said: “A high standard of justice is required when the right to continue in one’s profession or employment is at stake.”⁴³

[116] The Appellants also noted the Court referred to the English Court’s decision in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.) at p. 667, which stated:

“[w]hile the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be... what makes it ‘judicial’ in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.”⁴⁴

The Appellants submitted the nature of the issue is a significant factor affecting the nature and extent of the duty of procedural fairness.

[117] The Appellants noted the Heighs have lived at the Shelter Bay Resort for 33 years and built their livelihood on operating the campground. The Appellants said:

“Respectfully, the Director’s characterization of the Decision simply resulting in an ‘economic cost’ to the Appellants is incorrect and does not adequately address the gravity of her Decision on the Heighs’ livelihood, particularly given the Heighs’ age and the current economic climate in Alberta.”

[118] The Appellants submitted the importance of the decision on the Heighs and the Shelter Bay Campers suggested the Director owed a high duty of procedural fairness.

[119] The Appellants said the fourth factor for the Board to consider is the legitimate expectations of the person challenging the decision. The Appellants stated a legitimate expectation exists when the person challenging the decision has an expectation that a certain procedure will be followed, and that it would be unfair for the decision-maker to depart from substantive promises given or representations made regarding procedures, without first providing procedural rights. The Appellants submitted they had a legitimate expectation that the Director would review the Applications based on the information the Director had, and that if the Director

⁴³ *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at paragraph 3.

⁴⁴ *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.) at page 667.

required further information the Heighs would be notified and have an opportunity to respond. The Appellants said that instead, the Director ordered additional inspections and relied on the information in the inspection reports without providing the Heighs a chance to reply. The Appellants stated the Heighs had a legitimate expectation of the Director and she owed a high duty of procedural fairness.

[120] The Appellants said the final factor listed in *Baker* is the choice of procedure by the decision-maker. The Appellants noted the Director's Response Submission said, "The extent of the Director's duty of procedural fairness was for the Department to follow its normal regulatory review process and give the Heighs opportunities to participate."⁴⁵ The Appellants stated that in the June 2018 Letter, the Director indicated the Record that existed at that time would be the basis of the Decision. The Appellants submitted the Director relied on inspections conducted after the June 2018 Letter and did not provide the Heighs with an opportunity to participate in supplementing the Record, contrary to the procedure promised. The Appellants stated the Director's choice of procedure suggested the Director owed the Appellants a higher duty of procedural fairness.

[121] The Appellants submitted the factors outlined in *Baker* required the Director to provide a high degree of procedural fairness to the Appellants, which the Director failed to do.

[122] The Appellants noted the Director claimed the May 2019 Inspection Report was intended to gather current information to make the Decision, and that the Director purposely requested inspectors not already involved in the file to ensure objectivity of the inspection. The Appellants submitted there was no evidence to support the Director's claim and requested the Board give it no weight in its considerations.

[123] The Appellants observed that the Director claimed she did not err by not ensuring the information provided to her for the Record was correct, as it was normal practice and reasonable for her to rely on the findings of AEP employees. The Appellants submitted that if the Director did not take steps to ensure the information in the May 2019 Inspection Report was

⁴⁵ Director's Response Submission, June 25, 2020, at paragraph 138.

correct, then she knowingly took the risk that the Decision could be overturned on appeal. The Appellants stated they rebutted many of the facts in the 2018 May Inspection.

[124] The Appellants said the administrative penalty issued against them on March 5, 2012, was a single incident with respect to clearing of the camping loops. The Appellants noted the Heighs responded with a letter, part of which stated:

“We understand the importance of the regulatory scheme of compliance that serves to protect public Lands. It was not my intention to proceed without approval, however... we have been trying to complete our lease renewal process for the past six years. We have been met with one setback after another including resurveying requirements, changes in Public Lands protocol and computer systems, and generally getting lost in the ‘bureaucratic jungle’. Finally, after must conversation with the Public Lands department last year, I was given a verbal go-ahead to continue development and was informed that because new computer systems were being implemented in that department, a letter would follow in six to eight weeks.”⁴⁶

[125] The Appellants stated the Notice of Penalty Assessment acknowledged the Heighs did not intend to breach the requirements and the cleared area had in fact been applied for well in advance of the contravention and was approved shortly after. As a result, the Penalty Assessment amount was reduced.

[126] The Appellants stated in the oral hearing an overholding tenancy occurs when at the end of the term, the tenant does not vacate. The Appellants said the landlord could remove the overholding tenant or accept their presence and allow them to stay on the basis they continue to pay rent. The Appellants submitted the Heighs continued to pay rent, and AEP continued to accept it, resulting in a year-to-year tenancy that would have expired at the end of the 2020 camping season.

[127] The Appellants submitted at the oral hearing that any breach of municipal requirements is not a ground of the Decision and, therefore not relevant.

[128] The Appellants said in the oral hearing the legislation does not provide authority to cancel an expired disposition. The Appellants stated the Director could have evicted the Heighs at the end of the year.

⁴⁶ Appellants’ Response Submission, July 17, 2020, Exhibit 1.

F. Director's Final Comments

[129] The Director submitted the Board does not need to determine the Heighs' current status relative to the Lands because if any dispositions are issued for the Lands those dispositions will govern the use and occupation of the Lands.

[130] At the oral hearing, the Director stated the intent of section 20 of PLAR is to avoid penalizing the former holder of a disposition for AEP taking too long to make a decision.

[131] The Director said at the oral hearing AEP supports a campground on the Lands. The Director stated AEP was trying to work with the Heighs to bring them into compliance, but AEP had to "put a line in the sand and move to a decision."

[132] The Director noted at the oral hearing the payments by the Heighs went to Alberta Energy and AEP was not notified. The Director acknowledged AEP did not determine the amount of any fee under section 170(1) of PLAR or communicate an amount to the Heighs. The Director stated AEP did not know payments were being made by the Heighs until the Heighs told AEP. The Director stated section 170 of PLAR did not give rights to enter the Lands to occupy or charge others rent for occupying public lands.

[133] The Director stated the Appellants have the onus to prove the Director erred in making the Decision as alleged in the Notices of Appeal.

[134] The Director noted section 120 of the Act⁴⁷ requires that these Appeals must be based on the decision and the record of the decision-maker.

[135] The Director stated:

"As part of her decision making process, the Director conducted a thorough and comprehensive review of each of the files for the Cancelled Dispositions, the applications made by the Heighs, Appellants' Counsel's written representations and summarized her review in a detailed 38-page note to file."

The Director said the note demonstrated the Director carefully considered the history of the Heighs' occupation of the Lands, the interactions between the Heighs and AEP, and the representations made by legal counsel for the Heighs.

⁴⁷ Section 120 of the Act provides: "An appeal under this Act must be based on the decision and the record of

[136] The Director restated the following arguments submitted previously:

- AEP made best efforts to work with the Heighs;
- the Director's and AEP's duty of fairness was satisfied;
- the Heighs are statute barred from challenging the 2015 cancellation of the leases or the decision not to reinstate;
- the 2015 cancellation extinguished the Heighs' rights to occupy the Lands;
- the 2015 cancellation did not give rise to overholding tenancy;
- the Heighs continue to occupy public lands without authorization;
- collection of payments by AEP did not give rise to rights;
- the Director had authority to consider non-compliance in making the Decision;
- it was reasonable for the Director to rely on the compliance inspections;
- the Director's first reason for the Decision was the non-compliance of the Heighs between November 14, 2016 and October 7, 2019;
- the Director's second reason for the Decision was the non-compliance of the Heighs between April 21, 1988 and July 12, 2016;
- the Heighs remain in non-compliance;
- the Heighs are in non-compliance with the MD of Bonnyville's requirements;
- AEP tried to work with the Heighs, but was not successful;
- AEP took enforcement action against the Heighs in December, 2019, which was not appealable to the Board; and
- AEP policy considerations are part of the Director's decision and record.

[137] The Director concluded by stating:

“For the reasons set out in these final comments, the Director's Initial Submission, and the Director's response submission, the Director was within her authority under the *Public Lands Act* and the *Public Lands Administration Regulation* to refuse to issue the new dispositions to the Heighs based on their non-compliance during the time the Applications were under review by the Department, their demonstrated historical pattern of non-compliance and because their proposal only benefitted a small number of Albertans contrary to the applicable Department policies applicable to the Lands.”⁴⁸

[138] The Director submitted the Appellants failed to discharge its onus to prove the Director erred in the Decision.

the decision-maker.”

⁴⁸ Director's Closing Submission, July 17, 2020, paragraph 81.

G. Cold Lake First Nations

[139] The CLFN noted that the Shelter Bay Resort was located on Thiteli Tuwe (Marie Lake) within Dene Ni Nene. The CLFN said they had lived within the Dene Ni Nene since time immemorial, and have a responsibility from the Creator to steward the lands, waters animals, and plants within Dene Ni Nene for future generations.

[140] The CLFN stated some of their member used the Shelter Bay Resort as a camping area within which they exercise their Section 35 Rights.⁴⁹ The CLFN said some members have connections with the Heighs, who acted as foster parents for a number of CLFN youth over the years.

[141] The CLFN stated they took no position on the record provided by the Board, but believed the Crown holds a duty to uphold its own environmental regulations where violation of the regulations could negatively impact the ecosystem on which CLFN's Section 35 rights depend. The CLFN is concerned that if the Dispositions were not granted the Lands could fall into disrepair and become a risk to the environment. The CLFN stated they want to be involved in any future discussions regarding the Shelter Bay Resort.

H. Municipal District of Bonnyville

[142] The MD of Bonnyville stated it had concerns regarding the Shelter Bay Resort that included the proper disposal of wastewater and the following permits, and inspections that are required:

- approved development and building permits and inspections for all structures, especially those used as dwellings;

⁴⁹ Section 35 Rights refer to section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, which provides:

- “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, ‘*aboriginal peoples of Canada*’ includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) ‘*treaty rights*’ includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

- approved safety code permits and inspections for all existing gas, plumbing, electrical or septic systems; and
- approved development permits for the expansions of the campground over the years.

V. STANDARD OF REVIEW

A. Appellants

[143] The Appellants noted the Board determined in *Inshore* that the standard of review for appeals before it is correctness. The Appellants stated section 124(3) of the Act⁵⁰ authorizes the Board to submit a report to the Minister who then may confirm, reverse, or vary the decision being appealed.

[144] The Appellants submitted the Board was correct in *Inshore* that the standard of review is correctness. The Appellants stated that in *Inshore* the Board dealt with the factors set out in *Newton v. Criminal Trial Lawyers' Association* (“*Newton*”)⁵¹ and found that three of the factors were applicable to the appeal. The Appellants said the Board has already dealt with the standard of review arguments raised by the Director, and there is no reason to reconsider the issue in this appeal.

[145] The Appellants submitted that given the broad discretion section 124 of the Act confers upon the Minister the appropriate standard of review for the Appeals is correctness.

B. Director

[146] The Director stated that *Newton* governs the standard of review applicable to internal appeals, including appeals before the Board. The Director said that in an internal appeal, different standards of review may apply, depending on the nature of the question being asked.

⁵⁰ Section 124(3) of the Act provides:

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

⁵¹ *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 39.

[147] The Director submitted “the Board in *Inshore* failed to consider several findings in *Newton*”⁵² that were reiterated by the Court of Appeal of Alberta in *Yee v. Chartered Professional Accountants of Alberta*:⁵³

- (a) the fundamental purpose of an appeal is to review a decision made by a lower decision-maker, and the primary purpose of a record in an appeal is to enable an appeal board to review the particular decision for error;
- (b) most appeal tribunals exist to review the decisions that come before them for fairness, accuracy, or compliance with the acceptable range of outcomes having regard to the standard of review; and
- (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.

C. Standard of Review Analysis

[148] The Director stated the Board failed to consider several findings in *Newton* that were reiterated in *Yee*. In *Newton* the Court of Appeal stated:

“The following factors should generally be examined:

- (a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;
- (b) the nature of the question in issue;
- (c) the interpretation of the statute as a whole;
- (d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;
- (e) the need to limit the number, length and cost of appeals;
- (f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and
- (g) other factors that are relevant in the particular context.”⁵⁴ (Emphasis by the Board)

[149] The Board notes the Court of Appeal did not mandate that all the factors are mandatory in every decision, but rather the Court stated these factors should be “generally” examined. In *Inshore*, the Board listed the factors from *Newton*, and then wrote:

⁵² Director’s Response Submission, July 25, 2020, at paragraph 153.

⁵³ *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at paragraph 32.

⁵⁴ *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 11, at paragraph 43.

“As per the Court in *Newton*, the Board considered all the factors, and determined the most applicable factors in this appeal are:

- (a) the interpretation of the relevant legislation as a whole and the respective roles of the Director and the Board, as determined by interpreting the relevant legislation;
- (b) the relative expertise of the Director and the Board; and
- (c) the nature of the question in issue.”⁵⁵

[150] Contrary to the Director’s claim, the Board did not “fail” to consider the factors from *Newton* in making its decision on the standard of review for *Inshore*. The Board considered all the factors from *Newton* carefully and determined which factors were most relevant to the appeal. The Board then applied those factors to determine the applicable standard of review.

[151] The Board notes the Supreme Court of Canada, in *Dunsmuir v. New Brunswick* (“*Dunsmuir*”), said it is not necessary to do an extensive analysis of the standard of review in every case if the analysis has already been completed. The Courts wrote:

“An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard. This simply means that the analysis required is already deemed to have been performed and need not be repeated.”⁵⁶

[152] The Board has completed a thorough standard of review analysis in recent reports and recommendations in *Jason King and Kingdom Properties Ltd. v. Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (“*King*”),⁵⁷ and in *North East Bulk Transportation Services Ltd. v. Director, Aggregate Assessments and Continuations, Alberta Environment and Parks* (“*North East Bulk*”).⁵⁸ Both *King* and *North East Bulk*, along with *Inshore*, determined the appropriate standard of review for appeals before the Board is correctness. In the current Appeals, the Board has considered the legislation, the Department’s

⁵⁵ *Inshore Developments Ltd. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 December 2018), Appeal No. 16-0023-R2 (A.P.L.A.B.), at paragraph 113.

⁵⁶ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 57.

⁵⁷ *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.

⁵⁸ *North East Bulk Transportation Services Ltd. v. Director, Aggregate Assessments and Continuations, Alberta Environment and Parks* (5 June 2020), Appeal No. 19-0004-R (A.P.L.A.B.), 2020 ABPLAB 9.

Record, and the submissions of the Parties and finds there are no unique circumstances or facts that would cause the Board to depart from its previous findings that the appropriate standard of review for appeals before the Board is correctness. As per *Dunsmuir*, the Board relies on its analysis of the standard of review in *Inshore*, *King*, and *North East Bulk*, for the standard of review analysis in these Appeals currently before the Board.

VI. ANALYSIS

[153] The Board usually addresses each ground of appeal from section 213 of PLAR⁵⁹ separately. The Board notes the Appellants have combined alleged errors of material fact on the face of the record and errors of law into “errors of fact and law” and also has some allegations solely of errors of law. The Board will address those combined errors of fact and law together and address errors of law separately.

A. Admissibility of Evidence

[154] The Parties both requested the Board admit documents into evidence, which were not a part of the Department’s Record. When considering whether evidence is admissible in a hearing before the Board, the first consideration is the governing legislation. Section 120 of the *Act* states: “An appeal under this Act must be based on the decision and the record of the decision-maker.”

[155] In section 120, the “record” is the Department’s Record. In an appeal on the record, the Board’s decision must be based on the evidence found in the record provided by the Director. Appeals before the Board are not *de novo*, meaning that the Board does not hear new evidence and testimony regarding the appeal. However, the Department’s Record is not always

⁵⁹ Section 213 of PLAR provides:

“A decision is appealable only on the grounds that

- (a) the director or officer who made the decision
 - (i) erred in the determination of a material fact on the face of the record,
 - (ii) erred in law,
 - (iii) exceeded the director’s or officer’s jurisdiction or authority, or
 - (iv) did not comply with an ALSA regional plan.

or

- (b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section

complete, and parties may have evidence the Director failed to include in the Department's Record. The Board can consider other evidence that is rationally connected to evidence found in the Department's Record, "meaning evidence that provides details, clarifies, or helps the Board understand the evidence found in the Director's Record."⁶⁰ The Board refers to this type of evidence as "Supplemental Evidence."

[156] Whether the evidence is found in the Department's Record or is Supplemental Evidence, it will have greater weight with the Board if it meets the standard set by the Supreme Court of Canada in *Nelson (City) v. Mowatt*, where the Court stated:

"This Court said in *McDougall* ... that 'evidence must always be sufficiently clear, convincing and cogent'. Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced."⁶¹

If evidence before the Board is not "sufficiently clear, convincing and cogent" the Board may give it little weight in the Board's considerations.

[157] The Board applied the principles above to the evidentiary issues raised by the Parties.

[158] The Appellants noted the inspection conducted on July 5, 2018 and the inspection with the MD of Bonnyville on Sept 5, 2018, were not relied on by the Director in the Decision and were only raised in the written submissions for these Appeals. The Appellants submitted the Board should only consider the May 2019 Inspection referred to by the Director in the Decision.

[159] The Board finds the July 5, 2018 and September 5, 2018 inspections are rationally connected to the Department's Record and are admissible. The Appellants, through these Appeals, have had the opportunity to respond to the inspections and provide argument on their content.

15(4)."

⁶⁰ 1657492 *Alberta et al. v. Director, Provincial Approvals Section, Alberta Environment and Parks* (14 August 2018), Appeal Nos. 17-0022, 0025-0027, and 0045-R (A.P.L.A.B.), at paragraph 147.

⁶¹ *Nelson (City) v. Mowatt*, [2017] 1 S.C.R. 138, at paragraph 40.

[160] The Appellants included in their Initial Submissions six exhibits that are not found in the Department's Record, which the Director objects to:

- (a) Exhibit 2: press clippings about a dispute with Oil Sands Underground Mining Corp. The Board admits this exhibit but finds it has little or no weight on the Board's considerations.
- (b) Exhibit 3: letters of support for the Heighs. The Board admits this exhibit but finds it has little or no weight on the Board's considerations.
- (c) Exhibit 7: rental cheques from the Heighs to AEP from 2007 to 2019. The Board admits this exhibit. The Board finds the rental cheques should have been a part of the Department's Record but were not included. The Board considers this evidence to be rationally connected to the Department's Record.
- (d) Exhibit 12: Husky's letter to the Heighs, dated February 14, 2019. The Board admits this exhibit but finds it has little or no weight on the Board's considerations.
- (e) Exhibit 22: Order to Vacate OV-2019/24-LAR. The Board finds the Order to Vacate to be outside of the scope of these Appeals. The Board does not admit this exhibit as evidence.
- (f) Exhibit 23: Originating Application and Affidavit for Stay of Order to Vacate and Reasons for Decision, filed in the Court of Queen's Bench, May 28, 2020. The application and affidavit were in support of a stay of the Order to Vacate. The Board finds the Originating Application for a stay to be outside of the scope of these Appeals. The Board does not admit this exhibit as evidence.

[161] In response to the Appellants' submission of Exhibits 22 and 23, the Director submitted two new records that were not part of the Department's Record:

- (a) Affidavit of Simon D. Tatlow, sworn on May 29, 2020, Court file number 2001 06550 (there is no stamp to indicate it was filed with the Court). Mr. Tatlow's affidavit describes the involvement of AEP Compliance in the issuance of the Order to Vacate. The Board finds the Order to Vacate and the stay application to the Court to be outside of the scope of these Appeals. The Board does not admit this affidavit as evidence.
- (b) Affidavit of Corrine Kristensen, sworn on May 29, 2020, Court file number 2001 06550 (there is no stamp to indicate it was filed with the Court). Ms. Kristensen is the Director in these Appeals. Ms. Kristensen's affidavit summarizes her review of the Applications. The affidavit was made in response to the stay application. The Board finds the Order to Vacate and the stay application to the Court to be outside of the scope of these Appeals. The Board does not admit this affidavit as evidence.

[162] During the oral portion of the hearing, the Board asked questions of the Parties. The Appellants objected to an answer provided by the Director, where she spoke to challenges facing AEP at the time of the Heighs Application. The Board considered the objection and the information provided in the answer from the Director. The Board found the answer from the Director was not significant to the Board's deliberations and afforded the answer low weight.

B. Duty of Fairness

[163] The duty of fairness, often referred to as the duty to act fairly, or procedural fairness,⁶² is a basic principle of administrative law. The Supreme Court of Canada stated 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.”⁶³

[164] AEP is a public body that must exercise its legislated powers according to the principles of administrative law.⁶⁴ The Director has the responsibility to ensure an appropriate level of procedural fairness exists within her decision-making process. The courts have stated:

“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.”⁶⁵

[165] The intent of the duty of fairness is not to create “procedural perfection” but to attain an appropriate balance between the need for fairness, the need for efficiency, and the need for predictability of the outcome.⁶⁶ If the balance is incorrect, the decision-maker has likely 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

⁶² This report uses the terms “duty of fairness,” “procedural fairness,” and “duty to act fairly” interchangeably.

⁶³ *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, at paragraph 14.

⁶⁴ *Knight v. Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 26.

⁶⁵ *Kindler v. Canada (Minister of Justice)*, [1987] 2 F.C. 145, at paragraph 18.

⁶⁶ *Knight v. Indian Head School Division No. 19*, 408, [1990] 1 S.C.R. 653, at paragraph 53.

procedural technicalities or errors that are immaterial to a decision, or did not affect the outcome will generally not be fatal to the decision.⁶⁷

[166] 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.⁶⁸ The degree of procedural fairness owed by the Director to the Appellants “is to be decided in the specific context of each case.”⁶⁹

[167] In *Baker*, the Supreme Court of Canada listed factors to consider when determining the duty of fairness required.⁷⁰ The list is not set, as other factors may be relevant. Although the factors were given in the context of a judicial review, the Board considers them helpful:

- (a) the nature of the decision being made and the process followed in making the decision;
- (b) the nature of the statutory scheme and the terms of the statute under which the body operates;
- (c) the importance of the decision to the individuals affected;
- (d) the legitimate expectations of the person(s) affected by the decision; and
- (e) the agency or administrator’s choice of procedure.

(a) *Nature of the Decision*

[168] Administrative decisions fall along a spectrum ranging from decisions which are discretionary, to those which are entirely judicial. The more a decision is judicial in nature, the more procedural fairness is required. A decision that has a more legislative nature, requires less procedural fairness. The weighing of evidence, the opportunity for the Appellants to make representations, and the exercise of discretion by the Director, are hallmarks of a judicial process. The provisions in the *Public Lands Act* governing the issuance of an Administrative Penalty are detailed and extensive, which indicates a legislative nature to the Decision. The nature of the Decision is a mixture of judicial and legislative characteristics. The mixture suggests the Director owed a medium level of procedural fairness to the Appellants.

⁶⁷ See: *Manyfingers v. Calgary (City) Police Service*, 2005 ABCA 183.

⁶⁸ *Institute of Chartered Accountants of Alberta v. Barry*, 2016 ABCA 354, at paragraph 5.

⁶⁹ *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at paragraph 50.

⁷⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraphs 21 to 28.

(b) *Nature of the Statutory Scheme*

[169] Where an appeal of a decision is not available, or if the decision is final, there is a greater degree of procedural fairness required. Most decisions by the Director are not final, as the *Act* provides for an appeal to the Board. The existence of a right to appeal reduces level of procedural fairness owed by the Director. However, the appeal process compensates for the lesser degree of procedural fairness, as an appellant (and AEP) may be afforded greater procedural rights, including a more fulsome disclosure, cross examination of witnesses, and preliminary motions such as stays of the decision, to name just a few. As the decision of the Minister in appeals 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 to the provision of the Department's Record.

(c) *Importance of the Decision to the Appellants*

[170] The more important the decision is to the Appellants, the higher the duty of fairness that is required. The Director's decision is extremely important to the Appellants and may have a significant impact on the Heights as it may result in a loss of livelihood and their home. The importance of the decision to the Heights indicates the Director owed a high level of procedural fairness to the Heights. For the Shelter Bay Campers, the amount of procedural fairness owed is much lower in comparison to the Heights.

(d) *The Legitimate Expectations of the Appellants*

[171] As the question of legitimate expectations was prominent in the Parties' submissions, the Board will address it in more detail than the other factors. In *Baker*, the Court described legitimate expectations as follows:

Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded.... This doctrine, as applied in Canada, is based on the

principle that the ‘circumstances’ affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.”⁷¹(Emphasis by the Board)

[172] As described in *Baker*, the doctrine of legitimate expectations is based on the principle that procedural fairness must take into account the promises or regular practices of the public authority. It would be unfair for the Director or AEP to vary from their usual practice without providing a good reason.

[173] The determination of the existence of legitimate expectations is a two-step process. First, it must be determined whether legitimate expectations were created, and second, whether a failure to comply with the expectations was substantial and material.⁷² The Supreme Court of Canada stated in *Mavi v. Canada (Attorney General)*:

“Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectation are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking.”⁷³ [Emphasis by the Board.]

[174] The Board considered the Parties’ arguments regarding whether the June 2018 Letter created a legitimate expectation that the Director would make a decision based on the information before her. The June 2018 Letter stated:

“AEP will proceed with reviewing your application on June 25, 2018 with the information provided to date and then make a decision about the application. Please provide any additional information, including the information requested below, that you wish AEP to consider in relation to this application no later than June 22, 2018.”⁷⁴

The June 2018 Letter continued with a request for information on 24 items requested in the SIR 1, which had not been addressed by the Appellants.

⁷¹ *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 26.

⁷² *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Hyson*, 2017 NSCA 46, at paragraph 42.

⁷³ *Mavi v. Canada (Attorney General)*, 2011 SCC 30, at paragraph 68.

[175] The Director did not make a decision with the information provided to-date, but instead gathered further information through additional inspections of the Lands before issuing the Decision on October 7, 2019.

[176] The Appellants submitted the June 2018 Letter:

“...informed the Heighs’ legitimate and reasonable expectation that the Director’s Decision would be based on the Record before her as of that date. Further, the Heighs had a legitimate and reasonable expectation that if the Director required further information to supplement the Record upon which the decision would be based, the Heighs would be notified and provided an opportunity to respond to any forthcoming inspections or reports prior to the Director making her decision.”⁷⁵

[177] The Director argued the Appellants were entitled to only the legitimate expectation that AEP would follow its normal regulatory review process and the Appellants would have a right to participate. The Director said she went “above and beyond” to provide opportunities for the Heighs to participate in the decision-making process.

[178] The Appellants have identified two instances of legitimate expectations:

- (1) the Director would make the Decision based on the record as of June 22, 2018; and
- (2) the Director would provide the Heighs with an opportunity respond to any additional information the Director relied on in making her Decision.

[179] The Board agrees the Director and AEP went “above and beyond” to assist the Appellants, however, by doing so, they created an expectation those actions would continue. The Director did nothing to dissuade the Heighs from such expectations. The Director could have satisfied the duty of fairness by clearly communicating to the Heighs the intent of the inspections, and the reason for the departure from the regulatory path outlined in the June 2018 Letter.

[180] The representation from the Director in the June 2018 Letter that the Director would make the Decision based on the record at the time, was “clear, unambiguous and unqualified.” The June 2018 Letter states “AEP will proceed with reviewing your application on

⁷⁴ Department’s Record, at tab 2.50.

⁷⁵ Appellants’ Final Comments, July 17, 2020, at paragraph 35.

June 25, 2018 with the information provided to date and then make a decision about the application.” [Emphasis by the Board] The fact the Director was authorized to determine a different approach does not change the duty of fairness owed to the Appellants regarding legitimate expectations.

[181] The other legitimate expectation owed by the Director to the Appellants is that the Director would provide the Heighs with an opportunity to respond to any additional information the Director relied on in making her Decision. The duty to act fairly includes the principle of *audi 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.⁷⁶

[182] 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 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.’”⁷⁷

[183] 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. Stinchombe*,⁷⁸ 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 *Stinchombe* 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 *Stinchombe* principles do not apply in the

⁷⁶ David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law*, 6th ed. (Toronto: Thompson Reuter Canada Limited, 2014), at page 259.

⁷⁷ *Charkaoui, Re*, 2007 SCC 9, at paragraph 53.

⁷⁸ *R. v. Stinchombe*, [1991] 3 S.C.R. 326.

administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. The requirement is that the individual must know the case he or she has to meet. If the decision maker fails to provide sufficient information, his or her decision is void for lack of jurisdiction.⁷⁹ [Emphasis by the Board]

[184] 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 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 and initial decision-making stage compared to the appeal stage.

[185] The Appellants stated the Director breached the duty of fairness by failing to provide an opportunity to respond to the May 2019 Inspection conducted by AEP after the June 2018 Letter. The Director argued the legislation does not require AEP to release copies of inspection reports unless enforcement action is pursued and there is a legal challenge. The Director also stated that the Heighs should have requested a copy of the May 2019 Inspection Report.

[186] While the Director is correct that the legislation does not "require" the disclosure of inspection reports, it does not prohibit the Director from releasing the reports. Requiring the Heighs to request a document that should have been routinely disclosed is an erroneous interpretation of the meaning of procedural fairness, "which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker."⁸⁰ The onus is on the Director, not the Appellants, to ensure the procedural process meets the duty of fairness.

⁷⁹ *May v. Ferndale Institution*, 2005 SCC 82, at paragraphs 91 and 92.

⁸⁰ *0896022 B.C. Ltd., Re (2016)*, 2016 CarswellBC 2711, at paragraph 19.

[187] The Board finds the level of procedural fairness owed by the Director with regards to legitimate expectations is high. The Director created the legitimate expectations by making clear, unambiguous and unqualified written representations in the June 2018 Letter. It was within the Director's power to release the May 2019 Inspection Report to the Heighs. The Director failed to ensure the Appellants' legitimate expectations were honoured, and failed to provide the opportunity for the Appellants to know the case to be met and to respond to the additional evidence gathered by AEP before the Director made the Decision.

[188] However, finding a legitimate expectation was not met is only the first step in determining whether the Appellants were denied procedural fairness. "Prejudice of the Appellants' right to be heard must also be shown, including proof of detrimental reliance."⁸¹ The Court of Appeal of Alberta noted in *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*:

"But where procedural expectations are created, and not met, it is relevant to inquire whether there is any prejudice to the parties to the hearing. Unless there has been some detrimental reliance on the expectation, the tribunal can, in many cases, adapt the proceedings as circumstances change."⁸²

Although the Director's breach of the Appellants legitimate expectations is a serious failure to act fairly, the Board finds there are factors that mitigate any prejudice to the Appellants' procedural rights.

[189] In *Yee* the Court of Appeal of Alberta determined that a breach of procedural fairness cannot be cured,⁸³ and returned the matter to a newly constituted disciplinary panel. In these Appeals, the *Act* and PLAR provide for an appeal process that accomplishes essentially the same purpose a new panel did in *Yee*, which is to preserve and restore the procedural fairness owed to the Appellants.

[190] Administrative law authority, Ms. Sara Blake, noted:

"To determine whether fair procedure has been followed, one must examine the entire proceeding. Although procedural irregularities at one stage may appear to

⁸¹ Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2017), at page 24.

⁸² *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2012 ABCA 84, at paragraph 22.

⁸³ *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98, at paragraph 14.

have prejudiced a party's rights, they may diminish in significance if the party has been accorded a full and fair hearing at a later stage in the proceedings."⁸⁴

[191] An appeal to the Board involves a higher level of fairness owed to the Appellants by both the Board and the Director. In these Appeals, the Appellants have had opportunity to review the May 2019 Inspection and to respond to it.

[192] A breach of procedural fairness is an error of law, which is one of the grounds of appeal listed in section 213 of PLAR.⁸⁵ The Appellants are able to appeal this ground to the Minister through the Board and have a final decision made. Although the Director erred in law, the Board finds the error is immaterial, as the availability of an appeal to the Board mitigates any meaningful damage to the Appellants' procedural rights.

(e) *Procedural Choices*

[193] The greater statutory discretion the Director has to create her own procedure, the greater the procedural fairness owed. In these Appeals, the Director had discretion to choose whether to issue the Dispositions and to make some choices such as whether to require inspections or set deadlines for submission of information. However, the Director's discretion is limited by the legislation and by AEP policy. The broad discretion the Director has to create her own procedure suggests the Director owed the Appellants a duty of fairness in the mid-range.

[194] The Board's application of the factors listed in *Baker* suggests an overall duty of fairness in the mid-range of the spectrum, somewhere 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

⁸⁴ Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc., 2017), at page 25.

⁸⁵ Section 213 of PLAR provides:

"A decision is appealable only on the grounds that

- (a) the director or officer who made the decision
 - (i) erred in the determination of a material fact on the face of the record,
 - (ii) erred in law,
 - (iii) exceeded the director's or officer's jurisdiction or authority, or
 - (iv) did not comply with an ALSA regional plan,

or

- (b) the decision is expressly subject to an appeal under section 59.2(3) of the Act or section 15(4)."

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 Decision and increased significantly after the Notices of Appeal were filed with the Board.⁸⁶

[195] The Board finds the Appellants, particularly the Heighs, had a right to be informed of, and make representations on, the evidence the Director relied on to make the Decision. The Director failed to meet this responsibility at the investigation and decision-making stage, but the availability of an appeal to the Board restores the procedural fairness owed to the Appellants and removes any significant prejudice. The Board finds the duty of fairness to the Appellants has been met.

C. Errors of Fact and Law

[196] The Appellants alleged the Director's Decision contained errors of fact and law. The Director based her Decision on three reasons:

1. Non-compliance with the *Public Lands Administration Regulation* and *Public Lands Act*.
2. Pattern of non-compliance over the years.
3. Proposal only benefits a small number of Albertans.

Reason 1: Non-compliance with the Public Lands Administration Regulation and Public Lands Act.

[197] The Director's Decision listed several examples of the Appellants' alleged non-compliance with the legislation:

- (a) Non-compliance observed during the May 2019 Inspection, including:
 - unauthorized structures, including 30 boat lifts/docks;
 - waste water discharges to the environment
 - debris piles, and
 - unregistered motor vehicles and camping units.
- (b) receiving monies for the use of public lands without authorization;
- (c) demanding money from Husky Energy for use of an access road; and

⁸⁶ See: *Tanaka v. Certified General Accountants' Association (Northwest Territories)*, [1996] N.W.T.R. 301.

- (d) initiation of activity on the Lands without the required authorization under the *Water Act*.

Other alleged non-compliance issues were detailed in the Director's submissions and have been summarized in this report and recommendations.

[198] The Appellants submitted the Director erred in fact and law by finding the Heighs were non-compliant with the legislation. The Appellants alleged the Director made the following errors:

- (a) finding the Heighs received money for use of the Lands without authorization;
- (b) finding the Heighs received compensation without authority from Husky for use of the access road;
- (c) relying on the May 2019 Inspection; and
- (d) finding the Heighs were trespassers with no right to use and enjoy the Lands;

The Appellants submitted explanations for many of the Director's allegations, which have been summarized in this report.

[199] The Board will address the Appellants' allegations the Director erred and then consider the Director's allegations of non-compliance by the Heighs.

[200] There is no disagreement the Heighs accepted payments from the Shelter Bay Campers. The Director issued several warnings to the Heighs regarding their rights on the Lands:

- November 25, 2015: "The cancellations are effective August 12, 2007 and you have no further authority to occupy these lands."⁸⁷
- April 12, 2017: "The submission of an application does not grant authority to occupy public lands until approval has been given by the department."⁸⁸
- May 2, 2018: "The campground must remain closed to users, until such time appropriate approvals are in place."⁸⁹
- June 6, 2018: "There is no lease or other disposition under the Public Lands Act to permit the occupation of these public lands by either Shelter Bay [Resort] or Mr. and Mrs. Heigh."⁹⁰

⁸⁷ Department's Record at tab 3.35.

⁸⁸ Department's Record, at tab 2.11.

⁸⁹ Department's Record, at tab 2.45.

- October 7, 2019: “This means that you continue to have no regulatory authorization to continue to use and occupy this public land and are trespassers.”⁹¹

[201] Despite these warnings, the Heighs continued to require and accept payment for access to the Lands from the Shelter Bay Campers. However, AEP did not take any enforcement action and continued to work with the Heighs to help them become compliant. This may have led the Heighs to believe the payment structure for the campground operations was acceptable to AEP. The Board finds it inappropriate for the Director to use this issue as a basis for the Decision when AEP was well aware the campers paid fees after the Leases expired.

[202] On the issue of the Heighs requesting payment from Husky for use of the access road, the Board finds there was insufficient evidence to draw any conclusions. In many ways, the issue is similar to the Heighs receiving payment for the use of the campground.

[203] The Appellants submitted the Director erred in fact and law by finding the Heighs were trespassers with no right to use and enjoy the Lands. The Director based the claim the Heighs were trespassers on lack of any disposition or authorization to occupy the Lands and, therefore, were non-compliant with the legislation.

[204] The Appellants noted the Heighs paid rent every year for the Leases, even after they expired and then were cancelled, and that AEP accepted the rent. The Appellants stated AEP’s acceptance of the rental payments made the Heighs overholding tenants on a month-to-month basis.

[205] The Director argued the payments by the Heighs were for unauthorized use under section 170(1)(a) of PLAR, which states:

“The director may require

(a) a person that makes use of public land without authority...

to pay a sum of money in an amount determined by the director, in addition to any other rent, fee, cost or other amount prescribed under section 9.1 of the Act for the use.”

⁹⁰ Department’s Record at tab 2.50.

⁹¹ Department’s Record at tab 1.2.

[206] On questioning from the Board at the hearing, the Director explained payments under section 170(1) of PLAR go to Alberta Energy without any notification to AEP. The Director acknowledged AEP did not determine the payment amount and that she had not followed any process in relation to section 170(1) of PLAR. The Board notes the Department's Record shows AEP was unaware of the payments from the Heighs until July 13, 2017.⁹² Even after AEP became aware of the payments, no action was taken to prevent acceptance of future payments, and the Heighs paid rent in 2019 for the 2020 camping season.

[207] The Board finds no evidence to support the argument the rents were required by AEP under section 170(1)(a) of PLAR. The Board agrees with the Appellants that this argument was an afterthought to try to justify the acceptance of the rental payments.

[208] The Board has reviewed section 20(3) of PLAR, which states:

“Where a disposition expires without being renewed and the former holder of the disposition does not vacate the subject land, the former holder is deemed to be an overholding tenant on a month-to-month basis in respect of the subject land, and the director may do one or more of the following as the director considers appropriate in the circumstances:

- (a) take one or more enforcement actions in respect of the subject land or any activity on it;
- (b) issue a formal disposition to the holder of the expired disposition in place of the expired disposition, whether or not an application has been made for the formal disposition;
- (c) issue an authorization to the holder of the expired disposition to carry out any work on the subject land that the director considers necessary, whether or not an application has been made for the authorization;
- (d) dispose of chattels and improvements in accordance with section 62 of the Act;
- (e) direct that any interest of the holder in the subject land be offered for sale by public tender or auction.”

[209] The Heighs had a formal disposition in the form of the Leases. The Leases expired on August 13, 2007. At that point, the Heighs were overholding tenants. When the Heighs did not provide the necessary surveys to complete their renewal application, AEP

⁹² Department's Record, at tab 3.56.

cancelled the expired Leases on November 25, 2015. The Director argues the cancellation ended all rights to the Lands.

[210] The Board notes AEP did not treat the Heighs as trespassers with no rights. AEP continued to accept rent, albeit unknowingly at first, continued to work with the Heighs to bring them into compliance, and continued to allow the Heighs to remain on the Lands and operate the campground. Section 20(3)(c) of PLAR states the director may issue authorizations to a holder of an expired disposition to carry out work on the lands. The Department's Record does not contain any evidence of authorizations such as a Temporary Field Authorization or any other approval permitting the work AEP was requiring the Heighs to complete. The Board finds AEP followed very few of the procedures required by the legislation in relation to the Heighs. The Board believes AEP "went above and beyond" to assist the Heighs, but AEP was complicit in allowing the situation to drag on without any effective resolution.

[211] The Board finds the legislation does not address the circumstances created jointly by the Heighs' non-compliance with AEP's requirements and AEP's reluctance to take any firm enforcement actions. The Board is unable to make a determination regarding the status of the Heighs on the Lands after the cancellation of the Leases.

[212] The Director's reasons from the Decision included the non-compliance observed during the May 2019 Inspection, the receipt by the Heighs of monies for the use of public lands, demanding compensation for use of the access road from Husky Energy, and initiation of activity on the Lands without authorization under the *Water Act*. In addressing the Appellants' allegations the Director made errors of fact and law, the Board has dismissed the reasons involving the collection of monies from the campers and from Husky Energy. The Board notes it does not have authority to consider legislation other than the Act and PLAR and, therefore, the Board will not consider the question of activity regulated by the *Water Act*. The remaining reason from the Director's first reason in the Decision is the non-compliance observed in the May 2019 Inspection.

[213] The Appellants received the May 2019 Inspection Report with the Department's Record and has had the opportunity to know the case to be met and provide argument in response. The Board has considered the Appellants' explanations provided in response to the

Director's concerns stemming from the May 2019 Inspection, and listed in the Decision. The Board finds the concerns are consistent with the other inspections conducted both before and after the June 2017 Letter. The Board finds any progress towards the Heighs becoming compliant with AEP's requirements was slow and difficult to achieve. Often what the Heighs considered improvement was not what AEP considered acceptable. The Board finds the Appellants' response to the May 2019 Inspection was insufficient to rebut the Director's observations of non-compliance. The Board finds the Appellants were non-compliant with AEP's requirements for the Dispositions.

Reason 2: Pattern of non-compliance over the years

[214] The Director's second reason for the Decision is the Heighs had a pattern of non-compliance with the legislation. The Department's Record documents the history of the Leases, including the non-compliance of the Heighs. The Director's submissions list various non-compliance matters, which the Board summarized earlier in this report. The Director provides some examples of the pattern of non-compliance in the Decision:

“You also have a demonstrated pattern of non-compliance with the applicable regulatory regime. For example, you have a documented history of not following the conditions of the cancelled disposition (MLL 870094), not seeking appropriate authorizations from AEP before undertaking activities, and then continuing to operate on the public land without having the appropriate authorizations.”⁹³

[215] The Appellants responded that the Department's Record demonstrates a pattern of effort by the Heighs to comply with AEP's requirements, and the incidents of non-compliance are relatively few. The Appellants submitted the Director erred in fact and law by placing too much weight on a penalty assessment issued to the Heighs on March 5, 2012, as evidence of a pattern of non-compliance with the regulatory regime.

[216] The Board notes the many of the historical non-compliance issues continued into the period after the Applications for the Dispositions. This included the accumulation of debris and abandoned equipment, unauthorized structures, items within the 30 metre buffer zone, unauthorized aggregate removal, derelict vehicles, unauthorized trails, new campsites built

⁹³ Department's Record, at tab 1.2.

without approval, and accumulation of garbage and general tidiness problems. While the more recent inspections noted improvement, a common theme was there was still much work required.

[217] Additionally, the Heighs' tendency to act without authorization is evident throughout the Department's Record, as is their consistent failure to adhere to deadlines set by AEP. The Board finds AEP to have been very accommodating and patient with the Heighs and provided numerous extensions of deadlines and due dates, which the Heighs frequently missed, even after the extensions.

[218] The administrative penalty the Director referred to in the Decision is only one of several examples the Director considered as evidence of a pattern of non-compliance. The Board finds there is no evidence the Director placed an undue amount of weight on the administrative penalty.

[219] The Board finds the Director did not err in fact or law in the consideration of the pattern of non-compliance of the Appellants in the Decision.

Reason 3: Proposal only benefits a small number of Albertans

[220] The third reason the Director provided in the Decision for refusing to issue the Dispositions is that the Business Development Plan only benefits a small number of Albertans.

The Director's Decision states:

“The Business Plan that accompanied the application for DML 160081 contemplates a small number of short term camping spots to be available for the public while the rest of the spots will only be available for long term existing campers. This means that only a small number of Albertans will be able to utilize this campground located on public lands. There is nothing in the Business Plan that indicates how short term campers would be attracted to the campground. However, it is noted in the Business Plan that there has been limited interest in short term spots over the years. The Business Plan indicates that you are not contemplating putting any further investment into attracting or enabling short-term camping spots at this time. The Business Plan did state that short term camping would be considered in the future.”⁹⁴

⁹⁴ Department's Record, at tab 1.2.

[221] The Heighs submitted a revised Business Development Plan on January 30, 2018, where they propose to create 36-38 short-term, public use sites.⁹⁵ In AEP's letter, dated March 15, AEP reviewed the Business Development Plan and stated:

“As referred to in the last point in the Business Description section above, the 8% of sites identified within the campsite loops as short stay sites are far less than what AEP expects as short stay opportunities. As previously mentioned, the department would consider a phased approach in the conversion of additional sites to short term stay opportunities. Please elaborate and include in an updated Short Stay Proposal, additional sites, their locations, and the proposed timelines for conversion.”⁹⁶ [Emphasis by the Board]

[222] The Heighs submitted revised Business Development Plans, including the final one on June 20, 2018, but they did not meet the requirements clearly listed by AEP. The number of short-term sites proposed in the May 1, 2018 BDP was 36 to 38. In the June 20, 2018 BDP, the number of short-term sites proposed is 36. The Heighs failed to meet AEP's requirements regarding the BDP.

[223] The Appellants stated the Shelter Bay Resort is a “rustic camping experience, and weekend campers are more likely to prefer other nearby camping destinations.” The Appellants had over a year from the submission of the June 20, 2018 Business Development Plan to the date of the Decision to make a case to the Director that “weekend campers” would not be interested in the campsite. However, the Heighs failed to provide any evidence for the Director to consider.

[224] The June 20, 2018 plan committed to providing information on the short-term site use and vacancies to AEP by September 30, 2018, as required by AEP in the June 2018 Letter.⁹⁷ The Director said AEP did not receive the information on short-term use and vacancies as required. The failure of the Heighs to meet deadlines is a frequent occurrence throughout the Department's Record.

[225] The sentence in the Business Development Plan about conducting a cost-benefit analysis to “justify additional future short-term sites” does not seem to the Board like a strong commitment to making the campground more accessible to the public. A cost-benefit analysis is

⁹⁵ Department's Record, at tab 2.37.

⁹⁶ Department's Record, at tab 2.38.

⁹⁷ Department's Record, at tab 2.53.

an accepted business practice, but AEP had mandated that more sites be opened to public use, and the Heighs seem to be suggesting their future compliance would hinge on whether it made business sense to them.

[226] The Appellants said they did not hear from the Director regarding the last Business Development Plan, which led them to believe it was acceptable to AEP. The Board notes AEP did not provide any response to the June 20, 2018 Business Development Plan, and did not respond to an August 7, 2018 letter from the Heighs that stated, "...we continue to operate within our Business Development Plan as it was submitted to you on June 20, 2018."⁹⁸ However, it is likely AEP was waiting for the documentation the Heighs had committed to provide by September 30, 2018 before determining if the increase in public sites was acceptable.

[227] By failing to provide the documentation on short-term use and vacancies by September 30, 2018, or at all, the Heighs undermined their own efforts at convincing the Director they were meeting AEP's requirement to provide better public access to the campground. The Board finds the lack of information on short-term use, the failure to meet the deadline to provide the information, and failure to increase the number of short-term sites, lead to the assumption the Heighs had no real intention to increase public accessibility to the Shelter Bay Resort to a level the AEP found acceptable.

[228] The Board finds the Director did not err in fact or law by refusing to issue the Dispositions on the grounds that the proposal only benefited a small number of Albertans.

D. Errors in Law

[229] The Appellants noted an internal email dated July 30, 2018, in which the AEP Approvals Lead referenced potential unauthorized wastewater disposal, and stated, "We unfortunately didn't discover during our initial investigation at the site."⁹⁹ The Appellants alleged the email was evidence the AEP prejudicially sought out evidence to build a case in favour of denying the Dispositions. If the Appellants are correct, it would be an error in law.

⁹⁸ Department's Record, at tab 2.58.

⁹⁹ Email from James Laird, Lands Approvals Team Lead, dated July 30, 2018, Department's Record at tab 2.57.

[230] The Board has carefully considered this allegation, which would be disturbing if correct. Email correspondence can be problematic in determining meaning and motive, as it is frequently abbreviated. A review of the Approval Lead's entire internal correspondence and correspondence with the Appellants, as contained on the Department's Record, does not reveal bias or prejudice against the Appellants. In fact, the Board finds the Approval Lead put considerable effort into assisting the Heighs to become compliant with AEP's requirements, even though he recommended the applications for the Dispositions be refused. The Board finds the email does not constitute an error in law.

[231] The Appellants alleged the Director erred in law by improperly sub-delegating her decision-making authority to the AEP inspectors responsible for the May 2019 Inspection. The Appellants said the Director did this by relying on the AEP inspectors without verifying the accuracy of their report. The Appellants referred to *Inshore*, where the Board wrote:

“[w]hile the Director can rely upon the AEP field staff for recommendations, the Director cannot claim the Decision was [hers] when [s]he simply accepted the [field staff's recommendations] without taking any steps to ensure the information [s]he was provided with was correct and reliable... [b]y improperly sub-delegating [her] decision-making authority ... the Director violated the principles of natural justice and created an unfair situation for the Appellant.”¹⁰⁰

The Director responded it was reasonable to rely on the officers who conducted the May 2019 Inspection.

[232] The Board finds there are significant differences between *Inshore* and these Appeals. In *Inshore*, the Board found the record and the director's oral testimony was evidence the director deferred to the AEP staff's recommendations and the existence of a Protective Notation (“PNT”). The Board found in *Inshore* that the director did not make an independent assessment of the application, and that AEP staff did not have sufficient grounds on which to base their recommendations.

[233] In these Appeals, the Department's Record shows the Director undertook a thorough review of the documentation and considered the input from the Heighs and their legal counsel. The Director also considered the May 2019 Inspection Report in context of the file

¹⁰⁰ *Inshore Developments Ltd. v. Albert Environment and Parks*, 2018 PLAB 37, at paragraphs 129 and 130.

before her. The Director wrote in the document entitled “Final Review: DML 160081, DLO 160190, DLO 160191, “I have reviewed the files for DML-160081, DLO-160190 and DLO-160191. I have also reviewed the files associated with the cancelled dispositions: DML-870094, DLO-870644 and DLO-870573. My review also included the letters of representation from the Heighs.”¹⁰¹

[234] There is no evidence the inspectors were biased or incompetent in their duties. The Board finds the Director was correct to rely on the findings of the May 2019 Inspection as she considered the inspection in the context of the entire file. The Board determined the Director did not improperly sub-delegate her decision-making authority and did not err in law.

E. Errors in jurisdiction or legal authority

[235] The Board notes the Appellants did not make specific representations regarding the exceedance by the Director in jurisdiction or legal authority.

VII. DECISION

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

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

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

¹⁰¹ Department’s Record, at tab 1.1.

1. Did the Director in refusing to issue formal dispositions DML 160081, DLO 160190 and DLO 160191 err in the determination of a material fact on the face of the record?
 - The Board finds the Director did not err in the determination of a material fact on the face of the record.
2. Did the Director in refusing to issue formal dispositions DML 160081, DLO 160190 and DLO 160191 err in law?
 - The Board finds the Director did not err in law.
3. Did the Director in refusing to issue formal dispositions DML 160081, DLO 160190 and DLO 160191 exceed her jurisdiction or legal authority?
 - The Board finds the Director did not exceed her jurisdiction or legal authority.

VIII. RECOMMENDATION

[238] The Board recommends the Minister confirm the Director's decision to refuse to issue formal dispositions DML 160081, DLO 160190 and DLO 160191 to the Heighs.

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

- (a) Mr. Michael Theroux, Bennett Jones LLP, on behalf of the Appellants;
- (b) Ms. Vivienne Ball, Alberta Justice and Solicitor General, on behalf of the Director.
- (c) Mr. Findlay MacDermid, on behalf of the Cold Lake First Nations; and
- (d) Ms. Caroline Palmer, on behalf of the Municipal District of Bonnyville, No. 87.

IX. ADDITIONAL COMMENTS

[240] The Heighs made payments to the Government of Alberta as rent for their use of the Lands. AEP was not aware of these payments until the Heighs advised the department. The Director informed the Board the existing procedure requires that payments are received by Alberta Energy, and no notification is provided to AEP. Although there are many changes to the procedure that could be made, the Board suggests, at minimum, AEP should have a means of knowing when all payments are received that includes situations where a disposition has expired or been cancelled.

[241] The Board also recommends that the Department make a concerted effort to get a new campground operator in place as soon as possible to provide some level of certainty for the Shelter Bay Campers in terms of their access to the site for the remainder of the 2020 camping season and the prospects for access to the campground in 2021.

Dated on August 20, 2020, at Edmonton, Alberta.

“original signed by”
Gordon McClure
Board Chair

“original signed by”
Meg Barker
Board Member

“original signed by”
Chris Powter
Board Member



ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order
49/2020

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

and

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

**Order Respecting Public Lands Appeal Board
Appeal Nos. 19-0009-0011 and 19-0014-0244**

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal Nos. 19-0009-0011 and 19-0014-0244.

Dated at the City of Edmonton, Province of Alberta, this 9 day of Sept, 2020.



Jason Nixon
Minister

Appendix

Order Respecting Public Lands Appeal Board Appeal Nos. 19-0009-0011 and 19-0014-0244

With respect to the October 7, 2019 decision of the Director, Provincial Approvals Section, Alberta Environment and Parks (the "Director") to refuse to issue Department Miscellaneous Lease DML 160081, Department Licence of Occupation DLO 160190, and Department Licence of Occupation DLO 160191, to Mr. Robert Heigh and Ms. Sharon Heigh, I, Jason Nixon, Minister of Environment and Parks, order that the decision of Director is confirmed.