ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – November 10, 2020

IN THE MATTER OF sections 121, 122, and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 212, 213, 228, 229, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF appeals filed by Normand Menard and Normko Resources Inc., with respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, to issue Administrative Penalty No. PLA-19/09-AP-LAR-19/12 to Normand Menard and Normko Resources Inc.

Cite as: *Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (10 November 2020), Appeal Nos. 19-0245-0246-R (A.P.L.A.B.), 2020 ABPLAB 20.

WRITTEN HEARING BEFORE: Mr. Gordon McClure, Board Chair; Ms. Meg Barker, Panel Member; and Ms. Line Lacasse, Panel Member.

SUBMISSIONS BY:

Appellants: Normand Menard and Normko Resources Inc., represented by Mr. Bradley Smith, Verhaeghe Law.

Director: Mr. Simon Tatlow, Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

Intervenor: Mr. Rod Veremy, on behalf of Green Leaf Fuel Distributers Inc.

EXECUTIVE SUMMARY

In 2009, Alberta Environment and Parks (AEP) issued a Miscellaneous Lease (the DML) for a storage site to Normko Resources Inc. (Normko). Mr. Normand Menard is the majority shareholder and corporate director of Normko (collectively, the Appellants).

In 2009, the Appellants were approached by a company about using the DML for a cardlock operation. The Appellants contacted AEP to obtain their advice regarding the change in purpose. AEP amended the purpose of the DML to allow for a cardlock operation. Between 2009 and 2019, Normko sublet part of the DML to various companies for the purpose of a cardlock operation, but did not have approval from AEP.

In 2018, AEP learned of the unauthorized subletting and began an investigation. In 2019, the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the Director) issued an Administrative Penalty to the Appellants in the amount of $583,448.21, which included $45,000.00 as a penalty for contravening the *Public Lands Act*, and $538,448.21 for economic benefits received as a result of the subletting (the Proceeds).

The Public Lands Appeal Board (the Board) received a Notice of Appeal from each of the Appellants appealing the issuance of the Administrative Penalty.

The Board held a mediation meeting between the Appellants and AEP, but an agreement was not reached.

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

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

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

After reviewing the AEP's Records, the Board's file, other relevant evidence, and considering the written submissions from the Appellants and AEP, the Board determined the Administrative Penalty was not properly issued or assessed. The Board found AEP erred in the determination of a material fact on the face of the Department's Record by improperly assessing factors to adjust the penalty under *Public Lands Administration Regulation* (PLAR). The Board found AEP did not err in issuing the rest of the Administrative Penalty, and the amount of the Administrative Penalty, including the Proceeds, was reasonable.

The Board recommended the Minister of Environment and Parks vary the decision to issue the Administrative Penalty by reducing the amount assessed under PLAR from $4,000.00 to $0.00 (zero). The recommendation reduced the overall penalty from $583,448.21 to $581,948.21.

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I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister of Environment and Parks (the "Minister"), regarding appeals filed by Normand Menard and Normko Resources Inc. (collectively, the "Appellants"), of the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), to issue Administrative Penalty No. PLA-19/09-AP-LAR-19/12 (the "Administrative Penalty") in the amount of $583,448.21. The Director issued the Administrative Penalty to the Appellants for alleged contraventions (the "Contraventions") of sections 43(1) and 54.01(5) of the *Public Lands Act*, R.S.A. 2000, c. P-40.[1] These provisions make it illegal to sublet a disposition and receive money to provide access to public lands without the Director's permission.

II. BACKGROUND

[2] On July 17, 2009, Alberta Environment and Parks ("AEP") issued Miscellaneous Lease MLL 080226 (the "DML") to Normko Resources Inc. ("Normko") for public lands located at SE 10-77-08-W4M and SW 11-77-08-W4 (the "Lands"), west of the Hamlet of Conklin, Alberta, in the Regional Municipality of Wood Buffalo. The DML was for a term of ten years and for the purpose of a "Storage Site." Mr. Normand Menard is the corporate director of Normko. Mr. Menard was also the CEO and Manager of Silvatech Resources Solutions Ltd. ("Silvatech").

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

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

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

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

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

[3] On August 28, 2009, Mr. Menard, in his capacity with Silvatech, wrote to AEP on behalf of Normko and explained that Exxon Mobil Corporation ("Esso"), a fuel provider, had approached Normko regarding using the DML as a cardlock site. Mr. Menard wrote: "Please advise if our client's intent for MLL 080226 is acceptable as described above."[2]

[4] On September 14, 2009, Silvatech contacted the Regional Municipality of Wood Buffalo on behalf of Normko, and applied for an amendment to Development Permit No. #2009-0485 to allow Esso to develop a cardlock site on the Lands.

[5] On September 23, 2009, AEP wrote to the Appellants and provided a Memorandum of Agreement changing the DML's purpose from a "Storage Site" to "Storage Site & Fuel Cardlock."[3]

[6] AEP inspected the Lands on August 24, 2011, and did not find any concerns. AEP inspected the Lands again on September 5, 2012, and noted a cardlock for Black Tiger Fuels Ltd. ("Black Tiger")[4] and an unauthorized camp were located on the Lands. AEP's Industrial Inspection Report for the September 5, 2012 inspection indicated AEP sent a letter to Normko regarding the camp.[5] The Board notes the Department's Record did not include the letter.

[7] The Lands were inspected again by AEP on April 5, 2018. The Industrial Inspection Report for this inspection noted, "On site there are three operators, Green Leaf Fuels LTD, Cougar Fuels LTD and Frontier Distributors. Review of the File shows that no sublease agreement is in place. Further follow-up is needed."[6]

[8] On April 23, 2018, AEP sent a letter to the Appellants informing them that the April 5, 2018 inspection found there were three fuel cardlock stations operating on the Lands. The letter noted the lease agreement for the DML stated:

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2 Department's Record, at Tab 4.3.1.

3 Department's Record, at Tab 4.2.

4 Black Tiger is a subsidiary of Esso.

5 Department's Record, at Tab 6.2.

6 Department's Record, at Tab 6.4.

> "The lessee may not sublet nor assign the said lands or premises or any part thereof without the written consent of the lessor. The above noted condition aligns with Section 43(1) of the *Public Lands Act*:
>
> > *43(1) The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director.*"[7]

The letter requested Normko provide AEP with a copy of a signed and executed sublease agreement if it existed. If the agreement did not exist, then Normko was to remove the fuel cardlock filling station by June 1, 2018.

[9] On May 1, 2018, Mr. Menard wrote to an AEP Lands Officer and stated:

> "... my original intentions were to set-up a much needed car-wash and possibly build a service and office to provide services from Conklin. However, my financial circumstances changed and with the economy change I decided to utilize the land for other purposes such as the cardlock vendors that are currently occupying this lease."

[10] In the letter, Mr. Menard indicated he had spoken to AEP in Edmonton and now understood the condition regarding subleasing in the DML agreement. Mr. Menard said he had long-standing agreements with the three companies and would need to get a sublease agreement with AEP. Mr. Menard stated AEP staff in Edmonton told him applying for a sublease approval "would be the most efficient way to bring this into compliance." Mr. Menard said he was checking with the Lands Officer to determine if the Lands Officer thought it "would be an equal[y] viable option from your standpoint...."[8]

[11] On May 28, 2018, Mr. Menard wrote to AEP to provide an update on Normko's efforts to address the noncompliance issues. Mr. Menard stated that Normko had completed the survey work and proposed to divide the DML into four separate leases assigned to the respective occupant.

[12] On July 3, 2018, Black Tiger, assisted by Normko, applied to AEP for its own disposition on the Lands to operate its cardlock.

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7 Department's Record, at Tab 7.2.1.

[13] On July 10, 2018, Mr. Menard submitted a Renewal Application and Request for the DML to AEP.

[14] On July 20, 2018, an Incident Triage Form (the "ITF") was sent to the Director by and AEP Inspector. The ITF set the limitation date for issuing an administrative penalty as April 4, 2019, which was two years after the AEP inspectors first noticed the offence was occurring. The ITF referred to the April 5, 2018 inspection and noted three different fuel cardlock operators were using the DML without authorization from AEP. The ITF recommended the file be reviewed and investigated.

[15] On August 8, 2018, AEP sent a letter to the Appellants titled "Land-Use Inspections – Request for Compliance." The letter addressed a follow-up inspection that was conducted by AEP. The letter focused on a sediment release from the Lands but did not mention the subleasing issues.

[16] On August 24, 2018, AEP served a Notice of Investigation on the Appellants. The notice stated:

> "AEP's investigation includes but is not limited to; the inducing or attempting to induce a person to provide money or other consideration, or the receiving of money or other consideration for the purpose of using the public land that is subject to that DML, as well as contravening provisions of the lease agreement established between the Crown and Normko Resources Inc. pertaining to DML 080226. As such these contraventions may constitute an offence under the applicable legislation.
>
> AEP may take compliance and enforcement action against you without further notice."[9]

[17] Between August 15, 2018, and November 30, 2018, AEP investigated the alleged contraventions and conducted interviews with companies with cardlock stations on the DML.

[18] On January 29, 2019, AEP sent a Notice of Non-compliance: Unauthorized Use of Public Lands, to the Appellants (the "Notice of Non-Compliance"). The Notice of Non-

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8 Department's Record, at Tab 7.2.1.

9 Department's Record, at Tab 7.8.

Compliance advised the Appellants that AEP was reviewing alleged contraventions under section 54.01(5) of the Act.[10] The Notice of Non-Compliance stated:

> "AEP has determined since receiving the Notice of Investigation dated August 24, 2018 that Normko has or is continuing to receive money or other consideration for the purpose of allowing access to public lands. Failure to comply with the legislation may result in enforcement action without further notice."[11]

[19] On February 13, 2019, Mr. Menard emailed AEP seeking further direction regarding the Notice of Non-Compliance. Mr. Menard wrote:

> "As for the Notice of Non-Compliance, I feel as though I'm in limbo not knowing what to do next. I had applied for separate DML parcels on this lease for each occupant however I have not heard anything back from AEP if this is going through or not. In our meeting in December it was mentioned that this was on hold until the non-compliance was resolved.
>
> I'm more than willing to work with AEP in whatever way necessary to resolve this and would like some direction as to what is the next step in doing so."[12]

[20] On February 19, 2019, AEP emailed Mr. Menard and acknowledged he was no longer accepting payments from the cardlock operators. The email stated, "... at this time no further action on your part will be required."[13]

[21] On August 6, 2019, the Director sent the Preliminary Assessment of Administrative Penalty (the "Preliminary Assessment") to the Appellants. The Preliminary Assessment recommended a base penalty against the Appellants of $45,000.00 and a proceeds amount of $534,562.00, for a total of $579,562.00. The Director assessed nine counts against the

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10 Section 54.01(5) of the Act states:

> "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."

11 Department's Record, at Tab 7.15.

12 Department's Record, at Tab 7.16.

13 Department's Record, at Tab 2.17.

Appellants for contraventions of the Act and PLAR. In assessing the amount of the penalty for each count in the Preliminary Assessment, the Director used the following Base Penalty Table from section 171(3) of PLAR:

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

[22] In count one, the Director alleged the Appellants contravened section 43(1) of the Act, which states, "The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director."

[23] The Director alleged the Appellants sublet the DML to Black Tiger without the consent of AEP. The Director found the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major." The Director assessed the penalty at $5,000.00

[24] In Count 2, the Director alleged the Appellants contravened section 54.01(5) of the Act, which states:

> "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."

The Director found the Appellants had allowed Black Tiger access to the DML in exchange for $170,000.00. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[25] In Count 3, the Director alleged the Appellants contravened section 43(1) of the

Act by subletting the DML to Cougar Fuels Ltd. ("Cougar Fuels") without authorization from AEP. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[26] In Count 4, the Director alleged the Appellants contravened section 54.01 (5) of the Act by receiving $255,360.00 from Cougar Fuels for allowing access and use of the DML. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[27] In Count 5, the Director alleged the Appellants contravened section 43 (1) of the Act by subletting the DML to Green Leaf Fuel Distributors Inc. ("Green Leaf") without authorization from AEP. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[28] In Count 6, the Director alleged the Appellants contravened section 43(1) of the Act by subletting the DML to Swift Oilfield Supply Ltd. ("Swift Oilfield") without authorization from AEP. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major" and assessed a penalty of $5,000.00.

[29] In Count 7, the Director alleged the Appellants contravened section 54.01 (5) of the Act by receiving $72,502.00 from Swift Oilfield for allowing access and use of the DML. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[30] In Count 8, the Director alleged the Appellants contravened section 43(1) of the Act by subletting the DML to Alpha Construction Inc. ("Alpha Construction") without authorization from AEP. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Moderate," and assessed a penalty of $3,500.00.[14]

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[14] The Board notes in the Preliminary Assessment for Count 8, the Director identified Cougar Fuels as the company the DML was sublet to. The Board recognizes the correct company was Alpha Construction as Count 8 was listed under the heading of "Alpha Construction," and Cougar Fuels was already included in Count 3.

[31] In Count 9, the Director alleged the Appellants contravened section 54.01 (5) of the Act by receiving $35,700.00 from Alpha Construction for allowing access and use of the DML. The Director assessed the seriousness of the contravention and the extent of actual or potential loss or damage to be "Major," and assessed a penalty of $5,000.00.

[32] The Director considered the factors listed in section 171(4) of PLAR,[15] and assessed additional amounts for the following factors:

- Section 171(4)(b): + $2,000.00 for the degree of willfulness or negligence. The Director stated the Appellants continued to collect money from Cougar Fuels after receipt of the Notice of Investigation.
- Section 171(4)(c): + $1,000.00 for not taking any steps to mitigate the consequences of contravention by continuing to sublet the DML without authority for 8 ½ years.
- Section 171(4)(d): + $1,000.00 for not taking any steps to prevent the contraventions and continuing to contravene the legislation and the DML.

[33] The total Base Assessment was $43,500.00, and the total of the factors to vary the assessment was $4,000.00, for a total of $47,500.00. The Director noted that the total amount exceeded the maximum amount prescribed by section 171(5) of PLAR and reduced the amount to $45,000.00.

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[15] Section 171(4) of PLAR provides:

"The director may, in any particular case, increase or decrease the amount of the administrative penalty determined under subsection (3) if, after considering the following factors, the director considers it appropriate to do so:

(a) the importance to the regulatory scheme of compliance with the provision that was contravened;

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

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

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

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

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

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

[34] The Director found the total amount of the proceeds (the "Proceeds") the Appellants received from subleasing the DML without authority was $534,562.00. The Director assessed a total penalty of $579,562.00 in the Preliminary Assessment.

[35] On September 6, 2019, legal counsel for the Appellants responded to the Preliminary Assessment.

[36] On September 10, 2019, the Director met with Mr. Menard and his legal counsel in a Due Process Meeting.

[37] On September 11, 2019, Mr. Menard provided further information to AEP on the costs associated with development of the DML.

[38] On November 15, 2019, the Director issued the Administrative Penalty for $583,448.21, which included a penalty portion of $45,000.00 and a Proceeds portion of $538,448.21. The Director increased the Proceeds amount by $3,886.21 from the Preliminary Assessment based on the Director's review of the Appellants' information. The Director noted he did not include money collected from three other companies as he did not have the financial records when the Administrative Penalty was issued.

[39] On December 6, 2019, the Board received Notices of Appeal from the Appellants appealing the Administrative Penalty. The Appellants stated the Director, by issuing the Administrative Penalty, had erred in the determination of a material fact on the face of the record, erred in law, and exceeded his jurisdiction or legal authority.

[40] On December 6, 2019, the Board acknowledged receipt of the Notices of Appeal and requested the Director provide the Department's Record.

[41] On December 13, 2019, the Appellants requested the Board grant a stay of enforcement of the Administrative Penalty. The Board wrote to the Director on December 17, 2019, inquiring if the Director consented to a stay. The Director responded on December 20, 2019, advising the Board that he did not consent to a stay. The Board requested and received written submissions from the Appellants and the Director (collectively, the "Parties") regarding the stay application.

[42] On January 8, 2020, the Board contacted various parties identified by AEP as being a potentially interested party in the appeal. Green Leaf responded on January 14, 2020, that they would like to participate in the appeal process. Neither the Appellants nor the Director opposed Green Leaf's participation.

[43] The Board held a mediation meeting between the Parties on March 19, 2020, by teleconference due to the COVID-19 pandemic. The Parties did not reach an agreement during the mediation meeting.

[44] On March 19, 2020, after it considered the submissions, the case law, and the legislation, the Board decided to grant a stay of the Administrative Penalty until the Board lifted the stay or until the Minister made a decision regarding the appeals.[16]

[45] On April 15, 2020, the Board made the decision to hold a written hearing due to the COVID-19 pandemic. The Board provided the Parties with a schedule to file written submissions and received submissions from June 1, 2020 until July 14, 2020.

[46] On October 14, 2020, the Board's Panel hearing this matter met to determine its recommendations to the Minister.

III. ISSUES

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

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

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[16] See: Stay Decision: *Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* (19 March 2020), Appeal Nos. 19-0245-0246-ID1 (A.P.L.A.B.), 2020 ABPLAB 2.

- Did the Director err in the determination of a material fact on the face of the Record?
- Did the Director err in law?
- Did the Director exceed his jurisdiction or legal authority?

IV. SUBMISSIONS

[48] The Board reviewed the Parties' and Green Leaf's submissions on the issues, which are summarized below.

A. Appellants' Initial Submission

[49] The Appellants submitted the Administrative Penalty was not issued in accordance with the purpose and intention of the Act. The Appellants stated that since 2015 AEP has increased its use of administrative penalties and decreased its use of prosecutions under sections 56 and 59 of the Act ("Civil Prosecutions"). The Appellants noted the Civil Prosecutions sections of the Act limit the maximum amount imposed in a penalty. The Appellants also said the Civil Prosecution sections have a lower specified penalty for offences that do not require proof of a willful intent to commit a contravention. The Appellants observed the administrative penalty sections in the Act are "absolute liability" in nature.

[50] The Appellants noted some offences can be enforced either under administrative penalties or Civil Prosecutions. The Appellants stated AEP has purposely chosen to use administrative penalties instead of Civil Prosecutions because it is easier to prosecute on an absolute liability basis as few defences are available, and the penalties are potentially greater.

[51] The Appellants said the legislative intent of the Act was to limit the jurisdiction of the Director by:

(a) prescribing overall limits to the fines that can be imposed for contraventions of the Act; and
(b) punish negligent conduct on a strict liability basis only, with lesser penalties.

[52] The Appellants submitted the Director exploited a loophole in the Act by imposing fines of an unlimited amount on an absolute liability basis. The Appellants stated that if this practice continued, the Civil Prosecutions sections of the Act are in danger of becoming essentially moot.

[53] The Appellants noted the rationale of the Proceeds provisions in the Act is to ensure fines or other punishment imposed under the Act are not merely seen as a "cost of doing business." The Appellants said that if this was the Proceeds provisions' purpose, then case law suggested that willful conduct is required, particularly if there is a large Proceeds penalty.

[54] The Appellants referred to the Environmental Appeals Board ("EAB") decision in *Alberta Reclaim and Recycling Company Inc. et al. v. Director* ("Alberta Reclaim").[17] The Appellants submitted that in Alberta Reclaim, there was clear intention to obtain revenue improperly. The Appellants noted the EAB quoted the Supreme Court of Canada in *Guindon* v. *Canada*:

> "Some statutes prescribe very high administrative monetary penalties, at times over a million dollars, and these have been upheld where it is demonstrated that the penalty serves regulatory purposes. In some cases, sizable penalties are necessary so the penalty is not simply considered a cost of doing business."[18]

[55] The Appellants said the EAB discussed four approaches to assessing Proceeds that were suggested by the director in that appeal, which the Appellants summarized as follows:

> "1. Always unlawful activity - total revenue generated without deduction for costs;
> 2. Unlawful at time of occurrence, but could be made lawful by meeting certain requirements - total revenue generated with deduction for costs;
> 3. Unlawful actions were taken to avoid incurring costs, where subsequent expenditures cannot correct the non-compliance - (no discussion on calculating disgorgement); and,

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

[18] *Guindon* v. *Canada*, [2015] 3 SCR 3, 2015 SCC 41 at paragraph 80. See also *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks* (18 August 2016), Appeal Nos. 14-025-027-D (A.E.A.B.), at paragraph 94.

4. Unlawful actions were taken to avoid incurring costs, but subsequent expenditures can correct the non-compliance - (no discussion on calculating disgorgement)."[19]

[56] The Appellants stated the EAB appeared to apply the director's first approach in Alberta Reclaim, which the Appellants disagreed with. The Appellants submitted:

> "Notably, it appears that the Director did not even follow their own methodology in the Appellants' case as the impugned conduct could have easily been brought into compliance by amending the Disposition to allow for subletting. No allowance was made for the expenses that Normko incurred from the activities on the Lands, even though a summary of expenses was provided to the Director..."[20]

[57] The Appellants submitted it was not appropriate to obtain large Proceeds penalties on absolute liability basis, or even a strict liability basis, as doing so does not correlate with the purpose of the penalties to deter profiteering from contraventions of the Act.

[58] The Appellants stated it was never their intention to not comply with the DML, and it was an honest, but mistaken, belief that the September 23, 2009, Memorandum of Agreement allowed for Black Tiger to operate the cardlock on the Lands. The Appellants said the mistaken belief was reinforced by the Regional Municipality of Wood Buffalo's approval for the development on the Lands, and silence from AEP's investigations regarding the cardlocks, despite the open operation. The Appellants submitted that only when they received the April 23, 2018, Notice of Non-Compliance from AEP did they learn the cardlock operations were not approved. The Appellants stated when they received the January 29, 2019, Notice of Non-Compliance, they immediately stopped taking payment from the cardlock operators.

[59] The Appellants noted the Administrative Penalty did not provide an analysis of the Appellants' intent concerning the alleged contraventions, which indicated the Administrative Penalty was prosecuted on an absolute liability basis. The Appellants submitted the Administrative Penalty must be quashed because the Director had no evidence to establish the Appellants' intentions.

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[19] Appellants' Initial Submission, June 1, 2020, at page 11.

[60] The Appellants stated Mr. Menard is not the holder of the DML and was not the signatory to any of the sublets, and cannot be personally liable for the Contraventions. The Appellants said the Administrative Penalty provides no rational basis for piercing the corporate veil to find Mr. Menard liable for any acts or omissions of Normko. The Appellants stated there was no inquiry into the Proceeds that Mr. Menard may have received personally from the Contraventions. The Appellants said the Administrative Penalty appears to have incorrectly assumed that revenue received by Normko was also received by Mr. Menard.

[61] The Appellants acknowledged Mr. Menard was the director of Normko, but he only received benefit from his work as an employee of Normko. The Appellants stated there is no evidence of any impropriety or overcompensation for Mr. Menard's work for the company.

[62] The Appellants submitted section 59.4(4)(b) of the Act requires the person themselves to have committed the contravention of the Act in order to be liable. The Appellants said the Administrative Penalty does not contain any reasons or rationale as to the nature of the contravention Mr. Menard may have committed.

[63] The Appellants made arguments under the *Charter of Rights and Freedoms*, which the Board does not have the jurisdiction to consider.[21]

[64] In the alternative, the Appellants submitted that as far back as August 2009, the Director was aware and informed of the very same activities that form the basis for the Administrative Penalty. The Appellants said the Director did not interfere with those activities for approximately 10 years. The Appellants noted AEP conducted inspections throughout this period, and all activities, including the cardlock activities, were conducted in plain view. The Appellants stated:

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[20] Appellants' Initial Submission, June 1, 2020, at page 11.

[21] Section 11 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, states: "Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so." The *Designation of Constitutional Decision Makers Regulation* designates boards and commissions that have jurisdiction to make decisions on Constitution matters, and the Board is not listed in the regulation.

> "The Administrative Penalty violates section 59.7 of the [Act], as the alleged counts and associated revenue calculations mostly pertain to instances that occurred more than two years prior to the date of the Notice of Non-Compliance was issued or when the Administrative Penalty was issued."

[65] The Appellants submitted they had legitimate expectations the Director approved the commercial cardlock in 2009, and would continue to allow the subleasing unless the Director provided reasonable notice of any change in his approach. The Appellants stated their legitimate expectations were supported by the numerous inspections of the Lands since the DML was granted.

[66] The Appellants referred to the Federal Court of Canada's decision in *Honey Fashions Limited* v. *President of Canada Border Services Agency and the Attorney General of Canada* ("*Honey Fashions*"), as a case addressing the doctrine of legitimate expectations in an administrative context. The Appellants stated:

> "As per the Federal Court's decision in Honey Fashions, it is not available to the Director to impugned and punish conduct that may have occurred prior to the Director giving Notice of Non-Compliance on January 29, 2019. As noted above, the Appellants have been in compliance since that time since they have not received any funds from the cardlock operators from that date on.
>
> In the alternative, the limitation of two years as per section 59.7 of the PLA applies; however, if is difficult to determine the period of time in which the limitation period is "open", since the Director had, at minimum, constructive knowledge of the subletting since 2009. Certainly it could be no earlier than two years from the date these compliance proceedings commenced."[22]

B. Director's Initial Submission

[67] The Director stated the Appellants did not apply to AEP for approval for:

- Occupation of the Lands by the cardlock operators;
- Use of the Lands as a lay-down yard; or
- Subletting of the Lands.

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22 Appellants' Initial Submission, June 1, 2020, at page 12.

The Director said a search of AEP's records found no documentation of an inquiry from the Appellants about authorization to sublet the Lands.

[68] The Director stated that the Act is strict liability legislation, meaning that willful intent is not required for the Director to find a party contravened the Act. The Director indicated intent may be considered under section 171(4)(b) of PLAR[23] when applying the adjustment factors. The Director noted the penalty was increased by $2,000.00 for willfully receiving $15,960.00 from the subletting after the Appellants had been provided with the Notice of Investigation.

[69] The Director stated section 59.5 of the Act[24] allows for penalties to be assessed for each day the contravention took place. The Director noted the contraventions took place over 7,878 days with five to eight companies on the Lands. The Director stated these circumstances could have resulted in an administrative penalty of $39,360,000.00 if the Director applied section 171(5) of PLAR[25] to its maximum. Instead, the Director assessed the penalty at $5,000.00 per count for eight counts and $3,350.00 for one of the counts.

[70] The Director noted the Regional Municipality of Wood Buffalo does not have jurisdiction over public land belonging to the Government of Alberta.

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23 Section 171(4)(b) of PLAR states:

"The director may, in any particular case, increase or decrease the amount of the administrative penalty determined under subsection (3) if, after considering the following factors, the director considers it appropriate to do so:...

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

24 Section 59.5 of the Act provides:

"A person is liable for an administrative penalty for each day or part of a day on which the contravention occurs or continues, and where this Act or the regulations prescribe the maximum amount of an administrative penalty, the maximum is the maximum for each day or part of a day on which the contravention occurs or continues."

25 Section 171(5) of PLAR states:

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

[71] The Director said the Appellants did not provide evidence the eight companies were operating the cardlock stations on behalf of the Appellants as a contractor or employee.

[72] The Director submitted he became aware of the Contraventions on March 23, 2018.

[73] The Director stated that Mr. Simon Tatlow, Compliance Manager, was designated under section 5(2) of the Act as the Director.

[74] The Director noted that in July 2017, AEP issued a policy document titled "Subleasing Miscellaneous Leases, Pipeline Installation Leases and Surface Material Leases Using Section 146 of the *Public Lands Administration Regulation* (PLAR)."

[75] The Director stated AEP administers all public land in Alberta. The Director submitted that allowing "middle men" to acquire public land dispositions and rent them for profit would bring the system into disrepute by AEP losing control over who occupied specific public lands as intended by a specific disposition. The Director said the purpose of clause 9 in the DML and section 43 of the Act was to prohibit such activities.

[76] The Director noted:

> "AEP will only consider the subleasing of public land by a disposition holder to meet a short-term need for the purpose of effective resource utilization if the disposition holder is unable to utilize their disposition. The sublet must not have the primary purpose or outcome of revenue generation for the disposition holder."[26]

[77] The Director stated that the evidence gathered during AEP's investigations established that Mr. Menard was active in the management of the Lands and was the sole decision-maker for Normko.

[78] The Director noted the objective of assessing Proceeds was to restore the economic status quo to before the Contraventions occurred. The Director said the penalty component of the Administrative Penalty was $45,000.00, which would not be a significant deterrent to future contraventions when compared to the Proceeds amount.

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26 Director's Initial Submission, June 1, 2020, at paragraph 57.

[79] The Director stated:

> "Where proceeds have clearly occurred as a result of a contravention as it is on these facts, failing to consider proceeds in the penalty process results in unfair treatment of compliant regulated parties. It also conveys a message that promotes future non-compliant behaviour as a 'cost of doing business.'"[27]

[80] The Director said that Mr. Menard told AEP that he charged the sub-lessees an amount to cover his costs of preparing the Lands to be used for cardlocks. The Director submitted he did not include those costs in his assessment as the Appellants could have recovered those costs if the DML was sold to the sub-lessees.

[81] The Director submitted he assessed the Proceeds using the best evidence from AEP's investigation. The Director considered the Appellants information on costs and expenses and deducted $6,444.50 for AEP disposition fees, and $7,107.29 for taxes paid to the Municipality of Wood Buffalo.

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

C. Appellants' Response Submission

[83] The Appellants disagreed with the Director's assertion that the Act is strict liability legislation. The Appellants submitted that only certain offences under the Act and PLAR are strict liability offences. The Appellants noted that section 59(3) of the Act provides for a due diligence defence for these strict liability offences.[28]

[84] The Appellants observed the Act explicitly allows for greater penalties in the case

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27 Director's Initial Submission, June 1, 2020, at paragraph 78.

28 Section 59(3) of the Act provides:

"No person may be convicted of an offence under

(a) section 56(1)(b), (d), (g), (j), (k), (l), (n), (o) or (p), or

(b) a provision of this Act or the regulations that is prescribed in the regulations for the purposes of this section,

if the person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission."

of "intent" offences, but the Act also prescribed limits on those penalties. The Appellants stated section 59(1) of the Act limits fines to $25,000.00 for an individual and $100,000.00 for a corporation for strict liability offences. The Appellants said that section 59(2) of the Act, which deals with "intent" offences limits fines to $100,000.00 for an individual and $1,000,000.00 for a corporation.[29]

[85] The Appellants stated that section 59.91 of the Act[30] requires that for a director of a company to be responsible for the acts of that company, it must be found that the company's director "directed, authorized, assented to, acquiesced in or participated" in the wrongful act. The Appellants submitted that this was not the language of strict liability, but instead, it indicated the Director has the onus to prove the company's director was actively, knowingly, and intentionally participating in the wrongful act. The Appellants submitted the Director did not provide the necessary evidence.

[86] The Appellants stated the Act is silent on intent or strict liability in the case of administrative penalties. The Appellants submitted, "the Director has been taking inappropriate advantage of this silence and applying administrative penalties on an absolute liability basis in order to extract large amounts from persons."[31]

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29 Sections 59 (1) and (2) of the Act state:

"(1) A person who is guilty of an offence referred to in subsection (3) is liable

(a) in the case of an individual, to a fine of not more than $25 000, or

(b) in the case of a corporation, to a fine of not more than $100 000.

(2) Unless otherwise provided in this Act or the regulations, a person who is guilty of offence under this Act or the regulations is liable

(a) in the case of an individual, to a fine of not more than $100 000, or

(b) in the case of a corporation, to a fine of not more than $1 000 000."

30 Section 59.91 of the Act states:

"If a corporation commits an offence or is subject to an administrative penalty as a result of a contravention of this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence or contravention is guilty of the offence or responsible for the contravention and is liable to the punishment provided for the offence or the administrative penalty, whether or not the corporation has been prosecuted for or convicted of the offence or has been given notice of the administrative penalty."

31 Appellants' Response Submission, June 22, 2020, at page 2.

[87] The Appellants said the case law states it is inappropriate to impose large penalties on an absolute liability basis or even a strict liability basis. The Appellants stated:

> "Absolute and strict liability has been traditionally reserved for minor penalties, such as parking and speeding tickets. Absolute and strict liability is justified where penalties are generally low in order to keep the cost of enforcement and prosecution low for public policy reasons. It would generally not be in the public interest to have prosecution and enforcement costs be greater than the amount the government receives from the imposition of smaller fines."[32]

[88] The Appellants submitted the Director's allegation that the Appellants continued to sublet the lands and collect money without AEP's consent is untrue. The Appellants said they have not "collected any funds from any company occupying the lands since at least January 29, 2019, if not earlier."[33]

[89] The Appellants noted that its August 29, 2009 letter to AEP specifically stated that Esso was interested in locating a cardlock on the Lands and asked AEP if this was acceptable. The Appellants observed that "the DML was originally approved as a storage site (i.e. "lay down yard") and has been approved for a storage site" continuously since the DML was issued.[34]

[90] The Appellants stated that after they became aware of the Contraventions, they worked with the cardlock operators on a proposal to become compliant. The proposal was submitted to AEP and would have the DML divided into separate dispositions for each cardlock operator. The Appellants note that the proposal would not generate any revenue for the Appellants. The Appellants said they were more concerned with ensuring the cardlocks continued to operate than they were with deriving economic benefits for themselves. The Appellants noted that AEP did not issue a stop order regarding the cardlock operations and have allowed the cardlock operations to continue.

[91] The Appellants submitted that intention is relevant to this matter. The Appellants

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32 Appellants' Response Submission, June 22, 2020, at page 2.

33 Appellants' Response Submission, June 22, 2020, at page 3.

34 Appellants' Response Submission, June 22, 2020, at page 4.

stated: "Persons who intentionally do wrong require greater punishment than those who simply make unintentional mistakes. Ignoring these fundamental principles of justice treat fundamental injustices."[35]

D. Director's Response Submission

[92] The Director noted that section 59.8 of the Act provided that a notice of administrative penalty may not be issued more than two years after the date evidence of the contravention first came to the director's notice.[36] The Director stated the date which evidence of the Contraventions first came to his notice was August 10, 2018. The Director said he issued the Administrative Penalty on November 15, 2019, well within the Act's specified time period.

[93] The Director submitted that based on the Alberta Court of Appeal decision of *Yee v. Charter Professional Accountants of Alberta* ("*Yee*"),[37] the Director's finding of the date on which the limitation period is based should be given significant deference. The Director stated the standard of review applicable to these appeals is reasonableness.

[94] The Director stated the first time AEP inspectors suspected the Appellants were subletting the DML without authorization was during an inspection of the Lands on April 12, 2018. The Director submitted the date on which evidence of a possible contravention came to

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35 Appellants' Rebuttal Submission, July 14, 2020, at page 3.

36 The Director referred to section 59.8 of the Act throughout the submissions on the limitation date. The Board assumes the Director meant section 59.7 of the Act, which refers to limitation dates for administrative penalties. Section 59.8 of the Act refers to enforcement in the Court of Queen's Bench. Section 59.7 of the Act states:

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

Section 59.8 of the Act provides:

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

the notice of an employee of AEP is not relevant to the determination of the limitation period, but even if the limitation period was based on the April 12, 2018 inspection, the Administrative Penalty was issued within the two years required under the Act.[38]

[95] The Director disagreed with the Appellants' assertion that the Director should have known of the nature of the cardlock operations on the Lands due to the inspections AEP conducted. The Director said the cardlocks could have been operating commercial arrangements made with third parties on the Lands, which the AEP inspectors would not have been aware of, particularly as the purpose of the DML was for Storage Site and Cardlock.

[96] The Director stated the Appellants provided no evidence to support their claim they had legitimate expectations the Director would allow the unauthorized subletting to continue. The Director submitted that *Honey Fashions* does not apply to the facts in this appeal. The Director stated:

> "The Court in Honey Fashions found that the long-standing administrative practices of the CBSA [Canadian Border Services Agency] lead to a legitimate expectation on behalf of Honey Fashion and that the refusal to refund duties following the change in the administrative process was unfair...
>
> Honey Fashion does not stand for the proposition that a regulated party such as the appellants who carried out unlawful activities on the Lands for a number of years in contravention of the *Public Lands Act* have a legitimate expectation that the Director will never take any enforcement action once evidence of the contraventions comes to his notice."[39]

[97] The Director said he does not have jurisdiction to approve any activities on public land. The Director stated a different AEP decision-maker is responsible for applications related to the use of the Lands.

[98] The Director submitted the appellants did not meet the onus to prove their allegations that the Director made errors in issuing the Administrative Penalty.

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

38 Director's Response Submission, June 22, 2020, at paragraphs 107, 101, and 111.

39 Director's Response, June 22, 2020, at paragraphs 123 and 126.

E. Appellants' Rebuttal Submission

[99] The Appellants acknowledged there should be consequences to their mistakes. The Appellants stated:

> "... any consequences should be appropriate and proportional considering that the breaches were a matter of mere inadvertence and that the activities that occurred could have been compliant throughout had the approvals that had been put in place in 2009 simply had been done more thoroughly."[40]

[100] The Appellants submitted the Director did not prove any significant or tangible harm resulted from the Contraventions. The Appellants stated the Director's concerns the system would be brought into disrepute if a lesser penalty was assessed are speculative. The Appellants said the Director's concerns could be effectively addressed with a penalty appropriate and proportional to the actual Contraventions.

[101] The Appellants stated that to restore the economic status quo to what it was before the Contraventions occurred is not possible. The Appellants said that for the Administrative Penalty not to be punitive it "should put the Appellants in the same present position as they would be had the noncompliance not occurred. In order for that to occur, what the Appellants gave up during the time of the noncompliance needs to be considered."[41]

[102] The Appellants submitted they invested expenses and considerable personal labor for ten years, which cannot be recovered. The Appellants said the Administrative Penalty deprives the Appellants of the benefits of their labour and expenses put towards the DML. The Appellants stated that this was not "restorative", but rather punitive "as it leaves the Appellants economically devastated and much worse off than they would have otherwise been, regardless of whether the non-compliance had occurred or not."[42]

[103] The Appellants noted that the cardlocks are mobile and are the cardlock operators' property and, therefore, the Appellants cannot recover any of their investments

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40 Appellants' Rebuttal Submission, July 14, 2020, at page 3.

41 Appellants' Rebuttal Submission, July 14, 2020, at page 4.

42 Appellants' Rebuttal Submission, July 14, 2020, at page 4.

towards "improvements" on the Lands. The Appellants stated the cardlock operators and Normko have agreed that if the proposal to divide the DML is approved, no funds would be transferred to Normko to cover improvement expenses, as Normko has already received compensation by the payments received from the cardlock operators.

[104] The Appellants acknowledged the Board does not have jurisdiction to address Charter issues.

[105] The Appellants stated that *Honey Fashions* is based on broad equitable principles. The Appellants said that where a regulator has acquiesced to a certain activity, including activities that may not be in compliance, the regulator cannot arbitrarily change its practice. The Appellants stated that the regulator could change practices only after reasonable notice of those changes has been provided. The Appellants stated: "Equity requires that the persons who will be affected by such changes be provided reasonable opportunity to become compliant once the notice has been provided and therefore does not allow for retroactive enforcement."[43]

[106] The Appellants said:

> "... there is sufficient evidence on the record to indicate that the Director had, at minimum, constructive knowledge of the sublet arrangement regarding the cardlocks and the Director had, whether by act, omission, or even inadvertence, acquiesced to the sublets from September, 2009 up until the time that the Appellants were provided with a Notice of Non-Compliance on January 29, 2019. As such, it is inequitable to retroactively enforce for any actions that may have occurred prior to that date."[44]

[107] The Appellants submitted that all "directors" are agents of the Minister and, as such, the authority and knowledge of one director is representative of AEP as a whole. The Appellants stated the Director cannot use the internal lines of authority within AEP as a defence.

[108] The Appellants submitted the Administrative Penalty should be quashed in its entirety. Alternatively, the Appellants stated the Administrative Penalty should be quashed, and

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43 Appellants' Rebuttal Submission, July 14, 2020, at page 5.

44 Appellants' Rebuttal Submission, July 14, 2020, at page 5.

a penalty of an amount that is appropriate and proportional to the facts of the case should be substituted and should not exceed what is available under the Civil Prosecution sections of the Act.

F. Green Leaf's Submission

[109] The president of Green Leaf provided its submissions. Green Leaf stated, "the Alberta Government may be misrepresenting lease land, intended uses, and stance on revenue-generating."[45] Green Leaf said that a person or business leasing public land does so intending to profit and perform business on the land, including generating revenue from the land, improvements, or resources. Green Leaf stated, "... the government should encourage persons or businesses to consolidate operations into one focused area to help ensure proper monitoring occurs in the least amount of environmental impact."[46]

[110] Green Leaf submitted the penalty was not properly issued, and the Director exceeded his jurisdiction or legal authority. Green Leaf stated generating business profits from the improvement of public land is the primary intention of all tenants including Normko, grazing leases, gravel companies, work camps, trappers, and oil companies. Green Leaf stated the director misinterpreted Normko's intentions to profit from the improvements on the lease, not the "raw land."

[111] Green Leaf argued the Administrative Penalty is not reasonable, and the Director should reconsider the penalty. Green Leaf stated the Director did not consider the initial and ongoing costs that Normko put into the DML. Green Leaf said the initial costs included surveying, land clearing, gravel, grading, ditching, culverts, power, road infrastructure, and environmental monitoring, while ongoing costs included power service, garbage collection, environmental precautions, weed control, and security.

[112] Green Leaf concluded by stating:

> "...Normand Menard and Normko Resources did not intend to defraud or mislead the province. He conducted business in a professional upfront manner that

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45 Green Leaf Submission, May 13, 2020, at page 1.

46 Green Leaf Submission, May 13, 2020, at page 1.

> respected the use of government land. He completed the necessary land improvements to provide a responsible solution to a demand for land use in the area. His intentions and idea to provide a consolidated location for fuel supply provided the government an ideal location for monitoring. His concept ensured a minimal environmental footprint and impact on land use."[47]

V. STANDARD OF REVIEW

[113] The Director stated the standard of review should be reasonableness and referred to the Alberta Court of Appeal decision in *Yee* v. *Chartered Professional Accountants of Alberta.*[48] The Director made no further argument on the standard of review. The Appellants and Green Leaf had no comments on the standard of review.

[114] In the current appeals, the Board has considered the legislation, the Department's Record, and the Parties' submissions. The Board 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.

[115] 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."[49]

[116] 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*,[50] and in *North East Bulk Transportation Services Ltd.* v. *Director, Aggregate Assessments and Continuations,*

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47 Green Leaf Submission, May 13, 2020, at page 2.

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

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

50 *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region,*

Alberta Environment and Parks.[51] In those appeals the Board determined the appropriate standard of review was correctness. As per *Dunsmuir*, the Board relies on its standard of review analysis for the appeals currently before the Board.

VI. ANALYSIS

[117] The Appellants' Notice of Appeal indicated the Director, in issuing the Administrative Penalty, erred in the determination of a material fact on the face of the record, erred in law, and exceeded his jurisdiction or authority. The Board used these grounds to set the issues for the appeal:

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

A. Limitation Date

[118] The Appellants alleged the Director erred in determining the limitation date under section 59.7 of the Act, which states:

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

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Alberta Environment and Parks 31July 2020), Appeal Nos. 19-0005-0006-R (A.P.L.A.B.), 2020 ABPLAB 12.

[51] *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.

whichever is later."

[119] In determining the limitation date for the Administrative Penalty, the Board considered the Appellants' argument that the Director had "constructive knowledge" of the Contraventions as far back as 2009, when AEP approved the change in purpose of the DML to include a commercial cardlock. Section 59.7 of the Act specifies the limitation date is the later of either the date of the contravention, or the date when the Director became aware of the contravention. The Board notes the last date the Contraventions occurred was January 29, 2019, when the Appellants ceased to collect payments from the cardlock operators. The Board finds that under section 59.7(a) of the Act, the limitation period for issuing the Administrative Penalty is January 29, 2021. The Director issued the Administrative Penalty within the limitation period specified in the Act.

B. Legitimate Expectations

[120] The Appellants stated they had legitimate expectations the Director would continue to allow the subleasing of the DML unless the Director provided reasonable notice of any change in his approach. The Director stated there was no evidence to support the Appellants' claim of legitimate expectations. The Parties disagreed on the applicability of the Federal Court of Appeal decision in *Honey Fashions*.

[121] A breach of legitimate expectations is an error of law. The doctrine of legitimate expectations arises from the conduct of administrative decision-makers, such as the Director, if the decision-maker's exercise of discretionary powers creates an expectation that a certain practice or decision will be followed. Legitimate expectations are an extension of the procedural fairness doctrine. As such, a legitimate expectation does not create substantive rights.

[122] The Supreme Court of Canada described legitimate expectations in *Baker* v. *Canada (Minister of Citizenship and Immigration)*:

> "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."[52]

[123] In *Agraira* v. *Canada (Public Safety and Emergency Preparedness)*, the Supreme Court of Canada set the following principles for legitimate expectations:

- the conduct of a decision-maker or other relevant actor may lead to legitimate expectations;
- the practice or conduct said to give rise to the legitimate expectation must be clear, unambiguous and unqualified;
- a legitimate expectation may arise when a public authority or agency:
  - made representations about the procedure it will follow in making a particular decision;
  - has consistently adhered to certain procedural practices the past in making a similar decision;
  - has made representations on a substantive result to an individual; or
  - has created administrative rules of procedure or a procedure on which the agency had voluntarily embarked in a particular instance.[53]

Another important principle of legitimate expectations is that it cannot supersede legislation where the law and expectations are inconsistent.[54]

[124] The Board considered the arguments of the Appellants and the Director in determining whether AEP and the Director's conduct created legitimate expectations. The Board finds the lack of enforcement of the Appellants' unauthorized subleasing did not create legitimate expectations for the following reasons:

(a) while the AEP may have been aware of the existence of cardlocks and approved an amendment to the disposition to add this use, the evidence does not show knowledge by AEP or disclosure by the Appellants that the operations of such cardlocks were conducted by third parties rather than by the disposition holder;

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52 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 26.

53 *Agraira* v. *Canada (Public Safety and Emergency Preparedness)*, [2013] 2 SCR 559, at paragraphs 94 to 97.

54 *Canada (Minister of Employment and Immigration)* v. *Lidder*, [1992] 2 F.C. 621 (C.A.).

(b) there was no "clear, unambiguous and unqualified" representations by AEP or the Director that the rule against unauthorized subleasing would not be enforced; and

(c) the Act, PLAR, and the DML's terms and conditions are "clear, unambiguous and unqualified" that subleasing without authorization is prohibited, and legitimate expectations cannot supersede legislation.

[125] While the case of *Honey Fashions* deals with legitimate expectations, the Board finds it is distinguishable because the decision-maker (the Canada Border Services Agency) changed its policies without providing reasonable notice or reasons. In this appeal, the Director and AEP did not change policies; they enforced them once the Director discovered the Contraventions.

C. Choice of Procedure

[126] The Appellants submitted the use of administrative penalties instead of Civil Prosecutions as an enforcement tool was based on a desire by AEP and the Director to levy greater fines. The Director argued the use of administrative penalties was a discretionary decision based on the facts of the situation. The Director noted the potential penalty under Civil Prosecutions could be greater than under an administrative penalty.

[127] The Board notes the Act and PLAR provide that some contraventions may be addressed through either Civil Prosecutions or administrative penalties. The Director has the discretion in these situations to choose which approach would be most effective in achieving the intent and goals of the legislation. The Director must consider objectives such as public deterrence, protecting the environment, fairness to other disposition holders, maintaining the government's interest, and preventing abuse of public lands.

[128] In most cases, the Board finds addressing contraventions through the administrative penalty process is a preferable option, for both the disposition holder accused of a contravention and AEP. The Board notes the Court system is overburdened with a backlog of cases, which causes delays in resolving disputes. Compared to Civil Prosecutions through the Court system, administrative penalties are significantly less expensive and less complex to

understand. Furthermore, an inexpensive and timely appeal process is available through the Board, which includes the potential of resolving the matter in mediation.

[129] An assessment of Proceeds is determined from the economic benefit a disposition holder received from contravening the Act. Even if the Director had chosen a Civil Prosecutions approach, if the Appellants lost their case, the Courts could still order the disgorgement of Proceeds.

[130] Although the Appellants' evidence showed an increase in the use of administrative penalties and assessment of Proceeds, the Board found the Appellants' evidence did not prove the Director and AEP are using administrative penalties for the purpose of collecting large proceeds amounts.

[131] The Appellants argued the legislative intent was to limit the Director's jurisdiction by capping the amount of fines for contraventions and punishing negligent acts on a strict liability basis with lesser penalties. The Appellants stated the Director proceeded with the Administrative Penalty because it was easier to prosecute on an absolute liability basis as fewer defences are available and the penalties are greater. The Director responded that the Act is strict liability legislation, and willful intent is not required to find a person contravened the Act.

[132] The Courts have defined absolute liability as follows:

> "An absolute liability offence only requires proof beyond a reasonable doubt that the accused committed an illegal act (in this case that would be that the accused participated in an illegal scheme). The mental state or belief of the accused is legally irrelevant to the outcome ... if the offence is one of absolute liability then the accused does not have a defence of not knowing that what she was doing was illegal or being mistaken in her belief that what she was doing was, in the vernacular of ordinary people, 'legal'."[55]

[133] The Courts have also noted the defence of mistaken belief is not available for absolute liability offences:

> "... the term 'absolute liability' is commonly used to describe offences in which it is not open to an accused to avoid criminal liability on the ground that he acted

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55 *R.* v. *Canning*, 2004 SKPC 13, at paragraph 29.

under a reasonable mistake of fact which, if the facts had been as the accused believed them to be, would have made his act innocent."[56]

[134] In contrast, a strict liability offence has been found by the Courts to mean:

> "Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability."[57]

[135] The Board finds the Appellants did not demonstrate the Director breached the Act by proceeding with the Administrative Penalty and, therefore, the Board does not need to determine whether offences under the Act are strict or absolute liability. Even if the Board were to make such a determination, the Board can only determine if the Director has applied the legislation correctly. The Board does not have the jurisdiction to overrule or change the legislation.

D. Factors to Adjust Assessment

[136] The Board notes the provisions in the Act and PLAR for administrative penalties allow for the consideration of intent. In section 171(4)(b) of PLAR, it states:

> "The director may, in any particular case, increase or decrease the amount of the administrative penalty determined under subsection (3) if, after considering the following factors, the director considers it appropriate to do so: ...
>
> (b) the degree of wilfulness or negligence, if any, on the part of any person responsible for the contravention ..."

The consideration of willfulness in assessing an administrative penalty means contraventions that an administrative penalty applies to are considered under a strict liability basis, but only within the limited confines set out in the legislation. The only consideration of willfulness is found in

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56 *R.* v. *Metro News*, 1986 CarswellOnt 131, at paragraph 33.

57 *R.* v. *Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, at paragraph 60.

the factors to adjust the penalty, and to a much lesser degree, in the Base Penalty Table in section 171(3) of PLAR. The intent and wilfulness of a disposition holder could, in some cases, be one of the factors considered in the assessment of the seriousness of the contravention in the Base Penalty Table.

[137] The Board reviewed the Director's assessment of the factors for adjusting the penalty and found the Director had erred in his findings.

[138] In the assessment based on section 171(4)(b), degree of willfulness or negligence, the Director stated the Appellants continued to collect money from the cardlock operators after AEP provided the Notice of Investigation to the Appellants. The Appellants stated they ceased collecting money from the cardlock operators on January 29, 2019, when they received the Notice of Non-Compliance. The August 24, 2018 Notice of Investigation put the Appellants on notice that they were being investigated for accepting money for the use of public land that was subject to the DML, but the letter does not state the Appellants were to stop receiving the money. Presumably, at this point, the Appellants still thought they and AEP could resolve the matter without too much difficulty as the Appellants had proposed some measures to bring themselves into compliance. When the Appellants received the Notice of Non-Compliance, it was clear the Appellants were in violation of the Act. The Notice stated:

> "To clarify what the Public Lands Act sets forth, every time money is received for allowing access to public lands it may be considered an additional contravention. AEP has determined since receiving the Notice of Investigation dated August 24, 2018 that Normko has or is continuing to receive money or other consideration for the purpose of allowing access to public lands. Failure to comply with the legislation may result in enforcement action without further notice."[58]

[139] The Board finds the Appellants were not willfully contravening the Act by continuing to receive money after the Notice of Investigation. There was no clear indication of an expectation to stop collecting money in the Notice of Investigation, and the Appellants corrected the situation upon receipt of the Notice of Non-Compliance. The Director's assessment of + $2,000.00 under section 171(4)(b) for willfulness is not appropriate in these

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58 Department's Record, at Tab 7.15.1.

circumstances, and the Board would reduce the amount to $0.00 (zero).

[140] In the assessment based on section 171(4)(c) the Director increased the penalty by $1,000.00 against the Appellants for not taking steps to mitigate the consequences of the contravention. The Director said the Appellants continued to sublet the DML without authority for 8 1/2 years.

[141] The Board finds the Appellants took steps to mitigate the consequences of the contravention. When Esso approached the Appellants regarding installing a cardlock operation on the DML, the Appellants contacted AEP and inquired if AEP would consider a change in the DML's purpose. The Appellants informed AEP of Esso's request, which should have raised questions regarding access to the DML. If AEP had clarified the Appellants' intent, the situation might have turned out differently. However, the Board notes the letter to AEP regarding the Esso request was not as clear as it should have been regarding who would operate the cardlock. It appears to the Board that both sides communicated poorly in this instance.

[142] The Board finds on the evidence that the Appellants took steps to mitigate the consequences of the Contraventions. The Board would reduce the amount for this factor to $0.00 (zero).

[143] In the assessment based on section 171(4)(d), the Director increased the penalty against the Appellants by $1,000.00 for not taking steps to prevent the Contraventions and continuing to contravene the legislation and the DML. As noted above, the Board finds the Appellants took steps to prevent the Contraventions and stopped the Contraventions once it was clear to them that they were in breach of the legislation. The Board would reduce the amount for this factor to $0.00 (zero).

[144] Under section 171(5) of PLAR, the Administrative Penalty's total amount cannot exceed $5,000.00 per count per day. The Director reduced the total penalty amount of the counts and adjustment factors to $45,000.00, to comply with the maximum amount allowed under section 171(5). The Director's original calculations assessed the penalty portion at $47,500.00. The Board would decrease this amount by reducing the adjustment factors from $4,000.00 to $0.00 (zero). The total of the penalty portion of the Administrative Penalty would be

$43,500.00.

[145] The Board considered whether to reduce the Director's Base Penalty Table assessment from "Major" to "Moderate" or "Minor," based on the Appellants' arguments. As a consultant, Mr. Menard would be experienced with the legislation and the AEP process. Mr. Menard had the legislation and the leases available to him which, if read, would have indicated the Director's permission was required for subleasing the DML. Although the Board does not find the evidence demonstrates Mr. Menard willfully contravened the DML and the legislation, the Board finds not familiarizing himself with his responsibilities and obligations as a disposition holder is not a valid excuse. Mr. Menard ought to have been more aware than he was. For this reason, the Board determined not to reduce the Director's assessment in the Base Penalty Table.

E. Personal Liability

[146] The Appellants stated that Mr. Menard should not be liable for the Administrative Penalty as he was not a signatory to the DML agreement and only benefited from Normko through his employment with it. The Director stated Mr. Menard was active in the management of the Lands and was the sole decision-maker for Normko. The Director found Mr. Menard controlled Normko and was "indistinct from Normko."[59]

[147] In Canadian business law, a corporation is an independent legal entity that can be held liable for wrongful acts. When a corporation is liable for a wrongful act, shareholders and officers of a corporation are usually protected from personal liability by the corporation's legal entity status. This is often referred to as the "corporate veil." Unless there are extraordinary circumstances, the Courts have been reluctant to "pierce the corporate veil" and hold individual shareholders, officers, or others responsible for the corporation's actions. However, the Courts will pierce the corporate veil where legislation allows it.

[148] Section 59.91 of the Act provides authority for the Director to hold an officer, director, or agent of the corporation responsible for the corporation's actions:

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59 Director's Response Submission, June 22, 2020, at paragraph 89.

> "If a corporation commits an offence or is subject to an administrative penalty as a result of a contravention of this Act or the regulations, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence or contravention is guilty of the offence or responsible for the contravention and is liable to the punishment provided for the offence or the administrative penalty, whether or not the corporation has been prosecuted for or convicted of the offence or has been given notice of the administrative penalty."

[149] A corporate search of Normko shows Mr. Menard was one of two directors, and a 51 percent shareholder in the corporation.[60] Before September 6, 2019, when legal counsel for the Appellants became involved in the Administrative Penalty matter, no one other than Mr. Menard wrote AEP on behalf of Normko. Some of the cardlock operators identified Mr. Menard as the person they dealt with for the cardlock leases.[61] Mr. Menard signed the sublease agreements with the cardlock operators.[62] The Appellants have not provided any convincing evidence that Mr. Menard was not the one who "directed, authorized, assented to, acquiesced in or participated in" the Contraventions.

[150] The Board finds the Director did not err in naming Mr. Menard as a party to the Administrative Penalty.

F. Proceeds

[151] The Appellants argued an order to disgorge proceeds must be based on intent. The Appellants also claimed the Director did not consider the expenses Normko incurred from activities on the Lands. The Director stated the purpose of the Proceeds provisions in the legislation was to restore the economic status quo to what it was before the Contraventions occurred.

[152] Section 59.4 of the Act states:

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60 Department's Record, at Tab 2.4.

61 Department's Record, at Tabs 8.1.5.2, 8.1.9, and 8.3.5.

62 Department's Record, at Tabs 8.1.5.3, 8.2.2.2, 8.3.5.1, 8.4.5.2, and 8.5.6.1

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

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

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

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

[153] Section 59.4 of the Act provides the Director with the authority to assess a disgorgement of Proceeds. The assessment is a calculation of funds, or equivalent value, received by a person (including a corporation) as a result of a contravention specified in the Act and PLAR. The intent of the Appellants is not a factor in the Proceeds assessment.

[154] The Director detailed the assessment of the Proceeds amount in the Administrative Penalty.[63] The Director reduced the Proceeds by $6,444.60 for lease payments to AEP and $7,107.29 for property taxes paid to the Regional Municipality of Wood Buffalo. The Appellants did not provide sufficient evidence to show the Director erred in the assessment of the Proceeds. The Appellants' argument that the Proceeds assessment was inappropriate because "... the disgorgement provisions of the Administrative Penalties [section 59.4(4)] does not provide a 'due diligence' defence..." is beyond the Board's jurisdiction. The Board may recommend the Minister confirm, reverse, or vary, a decision under appeal, but the Board is bound by the Act and PLAR.

[155] The Board finds the Director did not err in the assessment of the Proceeds.

VII. DECISION

[156] 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

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63 Department's Record, at Tab 1.1.

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."

[157] 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 consideration, the Board's findings and recommendations are listed below.

1. On the issue of whether the Administrative Penalty properly issued, the Board finds:

   (a) the Director erred in the determination of a material fact on the face of the Record as follows:

      (i) the Director erred by assessing factors to adjust the penalty under section 171(4)(b) by + $2,000.00. The Board would reduce this amount to $0.00 (zero);

      (ii) the Director erred by assessing factors to adjust the penalty under section 171(4)(c) by + $1,000.00. The Board would reduce this amount to $0.00 (zero); and

      (iii) the Director erred by assessing factors to adjust the penalty under section 171(4)(d) by + $1,000.00. The Board would reduce this amount to $0.00 (zero);

   (b) the Director did not err in law; and

   (c) the Director did not exceed his jurisdiction or legal authority.

2. On the issue of whether the amount of the Administrative Penalty, including the proceeds assessment (economic benefit), was reasonable, the Board finds:

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

   (b) the Director did not err in law; and

   (c) the Director did not exceed his jurisdiction or legal authority.

VIII. RECOMMENDATION

[158] The Board recommends the Minister vary the Director's decision to issue the Administrative Penalty to the Appellants as follows:

(a) The amount of the factors to adjust the penalty under sections 171(4)(a), 171(4)(b), and 171(4)(c), be reduced from $4,000.00 to $0.00 (zero). The Director assessed a penalty of $47,500.00, but reduced it to $45,000.00 in keeping with section 171(5) of PLAR. The Board recommends subtracting the $4,000.00 for the factors to adjust the penalty from the Director's original amount of $47,500.00. This would reduce the amount of the penalty portion to $43,500.00.

(b) The Proceeds portion of the Administrative Penalty would remain at $538,448.21.

(c) The total of the Administrative Penalty would be reduced from $583,448.21 to $581,948.21, reflecting the removal of the factors to vary the assessment.

[159] 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. Bradley Smith, Verhaeghe Law, on behalf of the Appellants;

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

(c) Mr. Rod Veremy, on behalf of Green Leaf Fuel Distributers Inc.

Dated on November 10, 2020, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Meg Barker
Board Member

"*original signed by*"
Line Lacasse
Board Member

ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order
64/2020

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. 19-0245 and 19-0246

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. 19-0245 and 19-0246.

Dated at the City of Edmonton, Province of Alberta, this 23 day of NOV, 2020.

Jason Nixon
Minister

323 Legislature Building, 10800 97 Avenue, Edmonton, Alberta T5K 2B6 Canada Telephone 780-427-2391

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Appendix

Order Respecting Public Lands Appeal Board
Appeal Nos. 19-0245 and 19-0246

With respect to the decision of the Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (the "Director"), to issue Administrative Penalty No. PLA-19/09-AP-LAR-19/12 (the "Administrative Penalty") to Normand Menard and Normko Resources Inc., in the amount of $583,448.21, pursuant to sections 59.3 and 59.4(4) of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"), I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the Act, order that:

1. The Administrative Penalty is varied by assessing the factors to adjust the Administrative Penalty under sections 171(4)(a), (b), and (c) of the *Public Land Administrative Regulation,* Alta. Reg. 187/2011, from $4,000.00 to $0.00. This assessment varies the amount of the penalty portion of the Administrative Penalty from $45,000.00 to $43,500.00.
2. The proceeds portion of the Administrative Penalty under section 59.4(4)(b) of the Act in the amount of $538,448.21, is confirmed.
3. The total amount of the Administrative Penalty is varied from $583,448.21 to $581,948.21.
4. The Administrative Penalty is due 30 days after the date of this Order.
5. No interest is payable on the Administrative Penalty until 30 days after the date of this Order.