ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – January 11, 2021

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

-and-

IN THE MATTER OF appeals filed by CRC Open Camp & Catering Ltd., Colette Benson, and Albert Benson, with respect to the decision of the Director, Regional Compliance, Regulatory Assurance Division – North Region, Alberta Environment and Parks, to issue No. PLA-20/02-AP-NR-20/01.

Cite as: *CRC Open Camp & Catering Ltd., et al.* v. *Director, Regional Compliance, Regulatory Assurance Division – North Region, Alberta Environment and Parks*, (11 January 2021), Appeal No. 20-0003-ID2 (A.P.L.A.B.), 2021 ABPLAB 1.

BEFORE: Mr. Gordon McClure, Chair; Anjum Mullick, Board Member; and Ms. Barbara Johnston, Board Member.

SUBMISSIONS BY:

Appellants: CRC Open Camp & Catering Ltd., Ms. Colette Benson, and Mr. Albert Benson, represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.

Director: Mr. Simon Tatlow, Director, Regional Compliance, Regulatory Assurance Division – North Region, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

CRC Open Camp & Catering Ltd. (CRC) is the leaseholder of a Department Miscellaneous Lease (the DML). Ms. Colette Benson is the sole Director of CRC. Ms. Benson and Mr. Albert Benson are 99% shareholders of CRC (collectively, the Appellants). Alberta Environment and Parks (AEP), issued the DML to CRC for an Industrial Campsite and Access Road. The Director, AEP Compliance (the Director) issued an Administrative Penalty for $6,798,862.85 to the Appellants for allegedly subleasing the DML without authorization. The Appellants filed a Notice of Appeal with the Public Lands Appeal Board (the Board).

The Appellants filed two preliminary motions with the Board. The first motion requested the Board admit evidence the Appellants could not provide before the Director decided to issue the Administrative Penalty. The Appellants stated they were unable to meet the Director's two week deadline to provide further information due to the COVID-19 pandemic and the need to quarantine themselves after returning from the U.S.A. The second motion requested the Board order the Director to provide further information not contained in the Director's Record. The Board asked for written comments from the Parties. The Director requested the Board dismiss the Appellants' applications.

After reviewing the submissions, the legislation, and relevant case law, the Board decided the following:

1. the evidence the Appellants sought to introduce would be admitted and the Board would accept submissions from the parties on the appropriate weight to assign the evidence;

2. the Board refused the Appellants' application for further information, finding the Appellants' request to be too broad and vague, and the Appellants did not sufficiently identify the documents sought;

3. the Board found the Director's Record may be incomplete, and requested the Director review information provided by AEP Compliance to ensure all records provided to the Director are included in the Director's Record.

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I. INTRODUCTION

[1] This is the decision of the Public Lands Appeal Board (the "Board") regarding two preliminary motions by CRC Open Camp & Catering Ltd. ("CRC"), Ms. Colette Benson, and Mr. Albert Benson (collectively, the "Appellants"), relating to the appeal of Administrative Penalty No. PLA-20/02-AP-NR-20/01 (the "Administrative Penalty"), issued to the Appellants by the Director, Regional Compliance, Regulatory Assurance Division – North Region, Alberta Environment and Parks, (the "Director"). The Administrative Penalty was issued by the Director on May 20, 2020, for alleged contraventions of the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act") and the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR").

II. BACKGROUND

[2] On May 7, 2010, Alberta Environment and Parks ("AEP") issued Department Miscellaneous Lease No. 090102 (the "DML") to CRC authorizing the use of public land near Conklin, Alberta, for an Industrial Campsite and Access Road. Ms. Colette Benson is the sole Director of CRC, and Ms. Benson and Mr. Albert Benson (collectively, the "Bensons") are 99% shareholders of CRC.

[3] On May 20, 2020, after conducting an investigation of alleged subleasing of the DML without authority (the "Investigation"), the Director issued the Administrative Penalty to the Appellants. The Director alleged the Appellants contravened the Act and PLAR by subleasing the DML without authorization. The Administrative Penalty was assessed at $6,798,862.85, which included:

- three counts of subleasing the DML without authorization at $5,000.00 per count;
- three counts of receiving money for allowing access to public land at $5,000.00 per count;
- one count of failing to furnish all information that an officer reasonably required for the exercising of powers and duties required under the Act or PLAR, at $5,000.00 (collectively, the "Penalty"); and
- $6,763,862.85 for proceeds (economic benefit) from the alleged contraventions (the "Proceeds Assessment").

[4] The Appellants filed a Notice of Appeal with the Board on May 27, 2020, appealing the Administrative Penalty. On May 28, 2020, the Board wrote to the Director and the Appellants (collectively the "Parties") acknowledging receipt of the Notice of Appeal. The Board also requested the Director provide the Department's Record consisting of all documents and electronic media that were available to the Director when making his decision and the applicable policy documents (the "Department's Record"). The Department's Record was received by the Board on July 9, 2020, and provided to the Appellants on July 13, 2020.

[5] On November 13, 2020, the Appellants made two preliminary motions:

(a) to introduce further records and evidence; and

(b) to obtain further "disclosure" from the Director.

[6] On November 20, 2020, the Board set a schedule for the Parties to provide written submissions on the Appellants' preliminary motions. The Board received written submissions from the Director on December 9, 2020, and from the Appellants on December 16, 2020.

[7] On December 18, 2020, the Director provided a Supplemental Affidavit from Mr. Dylan S. Cummins, an Environmental Protection Officer ("EPO") with AEP. Mr. Cummins stated in his Affidavit:

> "3. On December 11, 2020, I received an email from PLO Bleach with an electronic copy of his relevant documents as a result of his further file review as referenced in paragraph 54 from my December 9, 2020 sworn Affidavit. I have put documents that are relevant to the unauthorized subletting of DML 090102 in Exhibit "A" attached to my Affidavit. Exhibit 'A' is an email from PLO Bleach to myself and a PDF document from PLO Bleach notebook.
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> 4. On December 10, 2020, I took the original copy of my December 9, 2020 sworn Affidavit and secured the document in a binder. I observed that I had omitted the original triage report from Compliance Assurance Lead (CAL) Dean Litzenberger (Litzenberger) as referenced in paragraph 51 from my December 9, 2020 sworn affidavit in error. Exhibit 'A' is an email from CAL Litzenberger and the incident triage form from January 10, 2019.
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> 5. On December 17, 2020, I spoke with the Director to obtain EPO Shannon Simpkins field notebook. EPO Simpkins has since left the department in September 2020. I asked the Director to go through EPO Simpkins field notebooks and scan to me any documents that are relevant to the unauthorized subletting of DML 090102. I reviewed what the Director had provided me and I

have put documents that are relevant to the unauthorized subletting of DML 090102 in Exhibit 'A'.

6. I received all documents that are relevant to the unauthorized subletting of DML 090102. I spoke to all AEP employees that I had contacted for assistance during investigation 28820 and I confirm that to my knowledge as the lead investigator, I have submitted all relevant documents from the AEP Compliance team to the Director."[1]

[8] On December 18, 2020, and again on December 28, 2020, the Board met to consider the written submissions, the legislation, and the relevant case law, and to determine the applications.

III. SUBMISSIONS

A. Appellants

[9] The Appellants requested the Board admit the following documents into evidence, attached as Exhibit "A" to the Affidavit of Colette Benson, dated November 13, 2020:

- Billings to Northgate Contractors for Camp Services ("Billings Spreadsheet");
- Northgate Contractors Reconciliation ("Reconciliation Spreadsheet");
- Development cost summaries and supporting records in relation to the DML;
- CRC invoices to Northgate Contractors Inc. in date order between September 29, 2012 and March 13, 2017;
- Property tax payments for the DML to the Municipality of Wood Buffalo with supporting records;
- CRC's water and sewer cost summaries and supporting records in relation to the DML between September, 2012 and April, 2013; and
- Summaries and CRC invoices to Northgate in relation to the Waddell Camp (MLL 090155)

(collectively, the "Additional Records").

[1] Supplemental Affidavit of Dylan S. Cummins, December 18, 2020, at paragraphs 3 to 6.

[10] The Appellants said they provided the Director with the Additional Records on October 1, 2020. The Appellants submitted the Additional Records were necessary due to the Director's lack of procedural fairness during the Investigation before issuing the Administrative Penalty and circumstances resulting from the COVID-19 pandemic.

[11] The Appellants stated they received the Notice of Investigation from AEP on February 1, 2019, and a Request for Information on October 28, 2019. The Appellants said that their legal counsel informed AEP the Bensons would be out of the country until November 30, 2019, and sought an extension to December 16, 2019, to provide the information requested by AEP. The Appellants stated that on December 16, 2019, they provided AEP with the information requested.

[12] The Appellants said the Bensons were in the United States when AEP sought to confirm a meeting date with the Director, and upon their return, they had to isolate due to concerns about COVID-19. Additionally, the Appellants stated their legal counsel had to isolate for three weeks due to COVID-19. The Appellants stated March 24, 2020, was arranged as a meeting date with the Director.

[13] The Appellants said that on March 19, 2020, AEP requested additional information in place of meeting with them. The Appellants stated their legal counsel responded to AEP on March 31, 2020, and provided most of the additional information requested. The Appellants said their legal counsel advised AEP the Bensons were in mandatory quarantine with no access to a scanner or copier but would provide further records to the Director once they could scan the records and review them with their legal counsel.

[14] The Appellants stated they were served with the Preliminary Notice of Administrative Penalty (the "Preliminary Notice") on May 7, 2020. The Appellants noted the Director required them to respond with all supporting documents no later than May 15, 2020. The Appellants said their legal counsel responded to the Director and advised the Director that the Appellants required time to review the Preliminary Notice and they could provide the records and response within 30 days.

[15] The Appellants stated that on May 11, 2020, the Director advised them that a due process meeting could be held on any of the three following days by video, and the Appellants would have the opportunity to present the records they wanted to provide to the Director. The Appellants said that on May 12, 2020, their legal counsel advised the Director that the Appellants are still waiting to receive information and records requested from the Director previously, and that while the Appellants were willing to provide the requested documents, they were unable to do so by May 15, 2020.

[16] The Appellants stated that on May 20, 2020, the Director served them with the Notice of Administrative Penalty.

[17] The Appellants submitted the Director issued the Administrative Penalty, "without providing the Appellants with sufficient opportunity to adduce the Additional Records, which severely prejudiced the Appellants' opportunity to make a fulsome response to the Preliminary Notice."[2]

[18] The Appellants noted section 120 of the Act requires an appeal to be "based on the decision and record of the decision-maker." The Appellants also noted the Board has determined:

> "'the Board's decision can also be based on other evidence that is rationally connected to evidence found in the Director's Record, *meaning evidence that provides details, clarifies, or helps the Board understand the evidence found in the Director's Record*."[3] [Emphasis is the Appellants'.]

The Appellants submitted the Additional Records are necessary to provide clarity and to respond to the evidence contained in the Director's Record.

[19] The Appellants stated they would rely on the Additional Records to argue their grounds of appeal, including that CRC and Northgate were involved in a joint venture, and not a sublease, and that the proceeds penalty should be reduced by the costs the Appellants incurred in operating the DML.

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2 Appellants' Initial Response, November 13, 2020, at page 4.

3 *Zachary Kalinski and 1657492 Alberta Ltd.* v. *Director, Alberta Environment and Parks* (19 March 2018), Appeal No. 17-0031 (A.P.L.A.B.), 2018 ABPLAB 9, at paragraph 147.

[20] The Appellants said they "…were denied the degree of participation necessary for them to bring all relevant facts and arguments to the attention of the Director before he made his decision in this matter."[4] The Appellants noted the Director took over a year to finish the Investigation, but the Director only gave the Appellants a week to respond to the Director's findings and the Preliminary Notice. The Appellants stated the situation was aggravated by the pandemic-related restrictions and the number of hardcopy records they had to review and assess with their legal counsel. The Appellants said the Preliminary Notice included references to records and information relied upon by the Director but not disclosed to the Appellants, despite repeated requests.

[21] The Appellants submitted "the duty of fairness mandates the disclosure of all records in the Director's possession or control which relate in any way to the DML or the investigation."[5] The Appellants stated the Board has authority to order the Director to provide further disclosure under Rules 14.1 and 14.2 of the Board's Interim Appeals Procedure Rules for Complex Appeals (the "Rules"),[6] and under section 123(4) of the Act.[7]

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4 Appellants' Initial Response, November 13, 2020, at page 6.

5 Appellants' Initial Response, November 13, 2020, at page 7.

6 Rule 14.1 states:
"If a party makes a request for an order for disclosure, the request must:

(a) Identify as precisely as possible the information or material required and the issue(s) to which it relates, and

(b) Provide details explaining how the disclosure requested may be relevant to the issue(s) to be considered by the panel."

Rule 14.2 provides:

"The Board may grant an order for disclosure regarding:

(a) Material that has not been disclosed as required by these Rules, a preliminary hearing decision, *or* other legal requirement; or

(b) Material that is

(i) Within the control of another party,

(ii) Not readily available from another source,

(iii) *Prima facie* relevant to the proceedings before the Board, and .

(iv) Reasonably necessary for the person requesting the information to make its own submissions."

7 Section 123(4) of the Act provides:
"The appeal body may require the submission of additional information."

[22] The Appellants stated:

> "…without disclosure of all documents on the Director's file, they will be limited in their ability to fully respond to the matters at issue in this appeal. The knowledge of the Director and employees of AEP regarding the condition, status and use of the DML throughout the entire period of the disposition will be squarely in issue at the Appeal."[8]

[23] The Appellants submitted that due to the substantial amount of the Administrative Penalty and the potentially disastrous financial impact on the Appellants, the principles of natural justice require the Appellants be provided with the "fullest possible disclosure of materials from the Director's file in order to raise all possible arguments on the Appeal."[9]

[24] The Appellants argued that, in the alternative, if the Board did not order disclosure of all records in the Director's custody and control, then the Appellants requested the Board order disclosure of specific additional records, including:

- "Any records relating to follow-up communications or directives from AEP to the Appellants or any third parties resulting from any inspections of the DML performed prior to 2019;
- All records relating to any AEP employees who stayed in camp on the DML or otherwise visited the DML during the period at issue in the Administrative Penalty;
- All additional notes or other records prepared by AEP employees relating to the DML since the commencement of the disposition;
- All records contained in the GLIMPS system relating to the DML; and
- All AEP internal emails, memoranda, meeting notes and other records in relation to the DML."[10]

B. Director

[25] The Director noted the Board was not bound by previous decisions where the Board determined it could order the production of documents. The Director submitted the

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8 Appellants' Initial Response, November 13, 2020, at page 8.

9 Appellants' Initial Response, November 13, 2020, at page 8.

10 Appellants' Initial Response, November 13, 2020, at page 10.

Legislature chose not to expand the scope of evidence required for an appeal under the Act. The Director stated only the material considered by the Director when he made the decision to issue the Administrative Penalty was relevant to the appeal. The Director said the Board's function is to review the Director's decision and the Director's Record rather than deciding the matter anew.

[26] The Director stated that as the Compliance Manager, Regulatory Assurance Division - North Region, he was designated as a director for the purpose of section 59.3 of the Act and was the decision-maker when he issued the Administrative Penalty.

[27] The Director said the Alberta Court of Appeal decision in *IMS Health Canada Limited v. Information and Privacy Commissioner* ("*IMS*")[11] was the leading case in Alberta on the contents of a record for the purpose of a judicial review. The Director submitted the principles discussed by the Court in *IMS* applied to the contents of the record of the decision-maker as per section 120 of the Act. The Director stated *IMS* held that:

(a) the record is formed by what was before the decision-maker when making the decision; and

(b) a basis or reason for including a paper document in the record is required.

[28] The Director referred to the Alberta Court of Queen's Bench decision in *Campbell v. Alberta (Chief Electoral Officer),*[12] noting the Court stated relevant and material information should be before the Court and information that is not relevant and material should be excluded.

[29] The Director stated that after receiving the Appellants' application, the EPO assigned to lead the Investigation reviewed his investigation file for any other documents relevant to the Investigation and also contacted all other Environmental Protection Officers involved in the Investigation. The Director said the EPO found the following:

(a) additional documents relevant to the Investigation, which have been added to the Director's Record and included in Exhibit "B" to the EPO's affidavit;

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11 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner),* 2005 ABCA 325.

12 *Campbell v. Alberta (Chief Electoral Officer),* 2018 ABQB 248.

(b) other documents referring to the DML and the Appellants, but are not relevant to the Investigation, which were included in Exhibit "A" to the EPO's affidavit.

[30] The Director submitted that he searched for any additional documents relevant to the Investigation and his decision to issue the Administrative Penalty but found no such documents. The Director stated he reviewed the EPO's affidavit and the exhibits and confirmed that the documents described in the EPO's affidavit are the only documents in his possession or control relevant to the Investigation. The Director said the material facts on which he based his decision to issue the Administrative Penalty have not changed.

[31] The Director stated the Appellants requested more time and documents from the Director but did not raise legal or factual issues before the Administrative Penalty was issued. The Director noted that in his May 7, 2020 letter to the Appellants he invited them to provide any relevant documentation and requested they provide a review of the facts on which the Preliminary Assessment was based and any additional documentation they wish to provide to the Director before he made his decision. The Director said he provided three available dates for a telephone conference or video call has an alternative to the usual in-person meeting. The Director observed that the Appellants declined to meet by telephone conference or video call and did not "… provide any written representations to the Director in the timeframe he specified."[13]

[32] The Director noted the Preliminary Assessment indicated the Director first became aware on May 25, 2018, that the Appellants had entered into unauthorized sublet agreements. The Director stated he issued the Administrative Penalty on May 20, 2020.

[33] The Director made a number of submissions regarding the Board's previous decision in PLAB 18-0015. The Director disagreed with the Board's decision in that appeal to require further disclosure by the Director.

[34] The Director submitted that if the Board takes the position it has the authority to order production of information beyond the Director's Record, then the Board should only order the production of information that is relevant and material to the issues under appeal. The

[13] Director's Response, December 9, 2020, at page 6.

Director stated that "fishing expeditions" are not permitted. The Director submitted the Board should consider the following five principles to determine if the Appellants' request is reasonable or a fishing expedition:

(a) the information requested must be relevant;

(b) the information requested must be detailed by the Appellants;

(c) the Board must be satisfied the information requested by the Appellants is not a fishing expedition;

(d) the Appellants must establish a clear nexus between the information requested and the decision to issue the Administrative Penalty, and the matters at issue in the appeal;

(e) the Board must be satisfied that the requested information will not cause undue prejudice to either party.

[35] The Director stated the Appellants have not proven their request for the entirety of the Director's file and records are relevant to the Appeal. The Director said the Appellants failed to "… identify any substantive legal issues, raise any possible defences or present alternative material facts to the Director when they had opportunities to do before he issued the Administrative Penalty."[14] The Director submitted: "… the Appellants have not been forthcoming about the specific 'matters of issue' they assert in this appeal yet expect the Director to provide information beyond the Amended Director's Record responsive to their requests."[15]

[36] The Director noted the Appellants requested the following information: "Any records relating to follow-up communications or directives from AEP to the Appellants or any third parties resulting from any inspections of the DML performed prior to 2019." The Director submitted this request was not relevant, other than information related to the Investigation, which was included in the Amended Director's Record. The Director suggested the Bensons were in the best position to provide dates of inspections, the identity of AEP employees who conducted the inspections, follow-up communications from AEP to the Appellants, and any directives AEP sent to the Appellants. The Director identified this request as a "fishing expedition". The Director stated the request was general and vague.

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[14] Director's Response Submissions, December 9, 2020, at page 12.

[15] Director's Response Submissions, December 9, 2020, at page 12.

[37] The Director noted the Appellants requested: "All records relating to any AEP employees who stated the camp on the DML or otherwise visited the DML during the period at issue in the Administrative Penalty." The Director stated if the Appellants are attempting to raise a limitations date argument, then the issue is when the Director became aware of the unauthorized subletting. The Director stated:

> "If the Appellants believe the Director is not being truthful or has omitted evidence in this regard or otherwise, they are free to cross-examine him on his affidavit referred to above. Then, if in the course of cross-examination the Appellants are able to establish there are other documents that are relevant to an issue in the appeal, the Appellants are free to ask for production of those documents at that time."[16]

[38] The Director noted the Appellants requested: "All additional notes or other records prepared by AEP employees relating to the DML since the commencement of the disposition." The Director stated this request is irrelevant, other than the information included in the Amended Director's Record. The Director submitted he should not be required to produce all records prepared by unnamed AEP employees based on a mere allegation or suspicion. The Director stated the Appellants failed to provide particulars about the requested information. The Director stated this request was a "fishing expedition" that did not establish a nexus between the information requested and the matters under appeal and was general and vague.

[39] The Director noted the Appellants requested: "All additional records contained in the GLIMPS system relating to the DML." The Director stated this request was irrelevant, lacking in sufficient particulars to conduct the search, amounted to a "fishing expedition," and did not establish a clear nexus between the requested information and the issues under appeal.

[40] The Director said the Appellants requested: "All AEP internal emails, memoranda, meeting notes and other records in relation to the DML." The Director submitted the requested information was not relevant, did not provide any particulars such as the names of the AEP employees the Appellants wanted internal emails from, was a "fishing expedition," did not provide a clear nexus between the information requested and the matters under appeal, and was general and vaguely worded.

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[16] Director's Response Submissions, December 9, 2020, at page 14.

[41] The Director stated the Appellants' application or further information was outside the scope of the Director's record and irrelevant to any matters at issue in the appeal. The Director submitted the Appellants are attempting to use the appeal process to circumvent the requirements of the *FOIP Act*, and the Board should not permit the Appellants to use the appeal process in such a manner. The Director requested the Board dismiss the Appellants' application.

C. Appellants' Rebuttal

[42] The Appellants submitted that for an administrative tribunal to depart from a previous decision dealing with an identical subject matter, there must be objective and reasonable grounds for doing so. The Appellants stated the Director's response submissions repeats the same arguments raised by the Director in PLAB 18-0015 and the subsequent reconsideration decision by the Board. The Appellants said:

> "… allowing the Director to trod the same ground once again would constitute an abuse of process which is prejudicial to the Appellants, as they are now forced to expend time and incur additional expense in responding to issues that have been repeatedly raised and argued before the Board. This is particularly troubling given that the Director has provided no evidence that the within appeal raises sufficiently discrete legal or factual grounds to justify a reconsideration request."[17]

[43] The Appellants stated section 120 of the Act did not preclude the Board from ordering the Director to provide further information and had the Legislature intended otherwise, it could have made that intention clear by including words in section 120 that were analogous to "only" or "solely." The Appellants submitted *IMS* and *Campbell* were distinguishable from this appeal as they involve different statutory regimes.

[44] The Appellants said section 123(4) of the Act provided the Board with authority to request additional information from the parties to an appeal. The Appellants noted section 123 provided the Board with a wide range of authority in relation to procedural matters, and there was no indication the authority is confined solely to matters arising from the Notice of Appeal.

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[17] Appellants' Rebuttal, December 16, 2020, at page 4.

[45] The Appellants submitted:

> "… in order to effectively advance their position on appeal that the Director erred in the Notice of Administrative Penalty, the Appellants require disclosure of all of the materials in the Director's possession relating to the DML as well as the investigation."[18]

[46] The Appellants stated, "… the Director knowingly denied the Appellants the basic accommodations which would have allowed them to provide a more fulsome response during a time of pandemic and self-isolation."[19]

[47] The Appellants submitted the Director did not provide support for the position that the requested information was a "fishing expedition." The Appellants noted the requested information was already in possession of AEP, and the Director would not need to make wide-ranging inquiries to locate the records. The Appellants said they used the appeal process appropriately in their attempt to defend themselves against the Administrative Penalty.

IV. ANALYSIS

A. The Board's Mandate

[48] When the Board considers any preliminary motion, the Board reviews its governing legislation, relevant case law, and the Board's mandate. The Director stated the Board's "function is to review his [the Director's] decision and the Director's Record rather than deciding the matter anew" and that the Board's "statutory mandate" is to "provide an expeditious and inexpensive forum to adjudicate disputes…"[20] The Board agrees it does not have authority to hear a matter *de novo*, and that the goal of an inexpensive and expeditious appeal process is important. The Board's function is more than to simply review the Director's decision and record. The Board has been delegated under statute the responsibility to provide recommendations to the Minister on appeals before the Board. The Board has undertaken to provide the best possible advice to the Minister on appeals. This involves a careful consideration

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18 Appellants' Rebuttal, December 16, 2020, at page 8.

19 Appellants' Rebuttal, December 16, 2020, at page 8.

20 Director's Response, December 9, 2020, at pages 2 and 3.

of the legislation, the submissions of the parties, and the evidence contained in the record. The Board has found that in some cases, there is evidence that is not in the record, but should be.

B. Appellants' Application to Admit Evidence

[49] The Appellants have applied to have the Additional Documents admitted as evidence before the Board. These Additional Documents are:

- Billings to Northgate Contractors for Camp Services ("Billings Spreadsheet");
- Northgate Contractors Reconciliation ("Reconciliation Spreadsheet");
- Development cost summaries and supporting records in relation to the DML;
- CRC invoices to Northgate Contractors Inc. in date order between September 29, 2012 and March 13, 2017;
- Property tax payments for the DML to the Municipality of Wood Buffalo with supporting records;
- CRC's water and sewer cost summaries and supporting records in relation to the DML between September, 2012 and April, 2013; and
- Summaries and CRC invoices to Northgate in relation to the Waddell Camp (MLL 090155).

[50] The Additional Documents are records the Appellants stated they would have submitted for the Director's consideration if the Director had provided a reasonable opportunity. The Director said he did provide a reasonable opportunity, but the Appellants failed to provide any documents.

[51] When considering an application to admit evidence, the Board looks to its governing legislation, the Act and PLAR. Section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker." The Board, the Appellants, and the Minister, rely on the Director to provide all relevant information considered in making the decision under appeal.

[52] When the Director fails to provide the relevant information, or does not consider relevant evidence, the Director may be in breach of the rules of natural justice. The Supreme Court of Canada stated in *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*:

> "Refusing to hear relevant and admissible evidence is a breach of the rules of natural justice. It is one thing to adopt special rules of procedure for a hearing, and another not to comply with a fundamental rule, that of doing justice to the parties by hearing relevant and therefore admissible evidence."[21]

[53] Any evidence before the Board must meet the test set by the Supreme Court of Canada in McDougall that "… evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."[22]

[54] The Appellants argued the Director breached the principles of natural justice by not considering the relevant evidence in the Additional Documents. The Appellants submitted the Director's deadline to submit evidence for his consideration prevented them from providing the Additional Documents to the Director. The Board is not prepared to make a finding on the Appellants' argument without hearing the issue in the context of the merits of the appeal. However, the Board finds the evidentiary basis to the Appellants' argument that the record before the Director may have been incomplete, is sufficient to admit the Additional Records as evidence. In its deliberations after the hearing has concluded, the Board will determine the appropriate weight to give each of the Additional Documents. In their written submissions for the hearing, the Parties may include comments on the weight, if any, the Board should assign to the Additional Documents.

C. Appellants' Request for Further Disclosure

[55] The Appellants requested the Board order the Director to disclose "all records in the Director's possession or control which relate in any way to the DML or the investigation."[23] Alternatively, if the Board is not willing to issue an order for full disclosure of all the records relating to the DML or Investigation, the Appellants requested the following:

> "(a) Any records relating to follow-up communications or directives from AEP to the Appellants or any third parties resulting from any inspections of the DML performed prior to 2019;

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21 *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471, at paragraph 51.

22 *C. (R.) v. McDougall*, 2008 SCC 53, at paragraph 46.

23 Appellants' Initial Response, November 13, 2020, at page 7.

(b) All records relating to any AEP employees who stayed in camp on the DML or otherwise visited the DML during the period at issue in the Administrative Penalty;

(c) All additional notes or other records prepared by AEP employees relating to the DML since the commencement of the disposition;

(d) All records contained in the GLIMPS system relating to the DML; and

(e) All AEP internal emails, memoranda, meeting notes and other records in relation to the DML."[24]

[56] To determine if the Board should order the Director to produce further information as requested by the Director, the Board has examined its Rules, the legislation and case law.

[57] Rule 14.1 of the Board's Rules states:

"If a party makes a request for an order for disclosure, the request must:

(a) Identify as precisely as possible the information or ·material required and the issue(s) to which it relates, and

(b) Provide details explaining how the disclosure requested may be relevant to the issue(s) to be considered by the panel."[25]

[58] As noted earlier, section 120 of the Act requires an appeal to be based on the decision and record of the decision-maker. The Director stated the director's file is the only record the Director is required to produce. The director's file is described in PLAR section 209(f) as the "records of the Department that are considered by the director in making the decision…" The Board has previously noted the term "director's file" is defined in PLAR but does not appear in any other instance in the regulation or the Act. The term is an orphan clause that clouds the intent of the Legislature regarding what constitutes the record of the decision-maker.

[59] Section 209(m) of PLAR states, "'record' means record as defined in the *Freedom of Information and Protection of Privacy Act*…." (the "*FOIP Act*"). Section 1(q) of the *FOIP Act*, defines "record" as follows:

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[24] Appellants' Initial Response, November 13, 2020, at page 10.

[25] Public Lands Appeal Board, Interim Appeals Procedure Rules for Complex Appeals, at page 12.

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

These definitions do not shed any significant light on what is included in the "record of the decision-maker" other than it includes records in various formats.

[60] The term "decision-maker" is not defined in the legislation. However, section 5(2) of the Act[26] authorizes the Minister to designate a director for the purposes of making certain decisions. Section 59.3 of PLAR authorizes a director to issue an administrative penalty. Ministerial Order 28/2018 lists the following positions that are designated directors for the purposes of Section 59.3 of the Act: Assistant Deputy Minister, Executive Director, Regional Compliance Manager, Provincial Compliance Manager, District Compliance Manager, and Compliance Manager. Mr. Simon Tatlow was the Compliance Manager when the Administrative Penalty was issued, one of the positions designated as a director. The Board finds Mr. Tatlow was the decision-maker for the issuance of the Administrative Penalty. The director's file would be the records of the Department the Director considered in making the decision to issue the Administrative Penalty.

[61] However, the Board notes that decisions in AEP are not made in a vacuum. The final decision is often the result of advice provided by various AEP employees, who make a recommendation to the director, who considers the information provided and makes the final decision. There may be situations where the record forwarded by AEP employees to the director does not contain all records relevant to the issues under appeal. The exclusion of those records could impact the director's decision and influence the outcome of the appeal for all parties.

[62] The Director referred to the Alberta Court of Appeal's decision in *IMS*. In *IMS*,

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[26] Section 5(2) of the *Public Lands Act* states:

> "Without limiting the generality of subsection (1), the Minister may by order designate any person as a director for the purposes of all or part of this Act and the regulations."

the Court considered the "return" (the record) provided by Information and Privacy Commissioner on a judicial review. In paragraph 34 of *IMS*, the Court summarized conclusions reached in two cases, *Broda v. Edmonton (City)* ("*Broda*"),[27] and *Robertson v. Edmonton (City) Police Service* ("*Robertson*"):[28]

> "Two points can be drawn from these decisions. First, 'the matter' to be touched upon is the decision itself or the hearing that led to the decision. Only what was before the decision-maker at the hearing forms the return. Second, there must be a basis or reason for including a paper or document in the record."[29]

[63] In paragraph 35, the Court stated:

> "'The matter' is determined by what has been put in issue by the originating notice. In many instances what is in issue will be the ultimate decision made by a decision-maker. However, in some judicial reviews the substantive decisions are not the only focus of an attack; challenges can be made to procedural choices and prior, related decisions. To the extent that *Broda* and *Robertson* seem to have limited 'the matter' to the ultimate decision, I disagree with that conclusion."[30]

[64] The Court went on to examine the wording of the *Alberta Rules of Court*[31] related to the return for a judicial review. The Court found that there may be situations where a party alleges relevant evidence was not included in the record, but should have been. In those circumstances, there must be a threshold factual foundation to the allegation. The Court stated:

> "... for a further, more comprehensive production of records for judicial review, there must be an evidentiary basis and the allegations must not be intended to 'investigate the possibility.' Similarly, in *Tremblay* at 966, the Supreme Court also established a threshold for piercing the veil of deliberative secrecy:
>
> > by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the

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27 *Broda v. Edmonton (City)* (1989), 102 A.R. 255 (Alta. Q.B.).

28 *Robertson v. Edmonton (City) Police Service (2004)*, 2004 ABQB 243 (Alta. Q.B.).

29 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*, 2005 ABCA 325, at paragraph 35.

30 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*, 2005 ABCA 325, at paragraph 35.

31 *Alberta Rules of Court*, Alta. Reg. 124/2010.

> litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice."[32]

[65] After reviewing several cases with similar wording to the relevant *Alberta Rules of Court* sections, the Court in *IMS* stated:

> "These interpretations provide some guidance. Concerns about far ranging returns are alleviated by the fact that the return is only directed at what is in issue. Moreover, in circumstances where the administrative decision-maker is insulated from investigative and other preliminary processes, the decision-maker will not possess documents relating to those functions and cannot be expected to include them in the return. Demands for more expansive returns cannot become fishing expeditions because the party attacking administrative decisions will not be granted access to the documents unless they have raised a valid reason for belief in the allegations underlying their attack. The Commissioner is required to include in his return all things which touch on the issue of his decision to conduct an investigation and to issue an order relating only to the disclosures made by pharmacists and pharmacies to IMS."[33]

[66] In the *IMS* case, the Court found the return for the judicial review (the record) was incomplete, and ordered the Commissioner to review the return based on the Court's direction. The Court stated:

> "If the Commissioner concludes that documents fit the expanded approach directed in these reasons he should include them in the return. If he concludes that they do not, IMS may apply to the case management judge for a decision as to whether the documents are to be included in the return on the basis of the expanded scope of return set out in these reasons."[34]

[67] While *IMS* was exclusively related to judicial reviews, and the wording of the *Alberta Rules of Court* is different from the Act and PLAR, the Board finds the case does provide guiding principles for the Board where the Board's governing legislation may be unclear.

[68] After considering the case law and the legislation, the Board finds the following:

(a) the director's file is a subset of the record of the decision-maker (the Department's Record);

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32 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*, 2005 ABCA 325, at paragraph 43.
33 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*, 2005 ABCA 325, at paragraph 53.
34 *IMS Health Canada Ltd. v. Alberta (Information & Privacy Commissioner)*, 2005 ABCA 325, at paragraph 60.

(b) in most appeals, the director's file contains sufficient information for the Board to make its report and recommendations to the Minister;

(c) an appellant or the Board may request further records from the director when:

a. the director's file is demonstrated to be incomplete;

b. where there are matters of procedural fairness that may require a more fulsome record, such as bias or legitimate expectations; and

c. where the grounds of appeal listed in section 213(a) of PLAR require disclosure of an identified record to show the error or exceedance of jurisdiction or authority.

(d) when an appellant requests any records beyond the director's record, the appellant must provide evidence that:

a. the records should have been included in the director's record, but were not;

b. the record request is relevant to one of the grounds of appeal raised by the appellant;[35] and

c. any allegations intended to be addressed by the records have an evidentiary basis and the allegations are not be intended to "investigate the possibility."

(e) an appellant must provide as detailed particulars of the records requested as reasonably possible and an explanation of why the records are required; and

(f) the Board will not accept information requests that are "fishing expeditions."

[69] The Board notes that while it may have authority to order a director to provide relevant additional information, the legislation does not provide any way to compel a director to release the information. Where a director refuses to release information considered by an appellant to be relevant, the Board will consider adverse inference arguments from the parties, usually in the hearing submissions.

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[35] See: Sara Blake, *Administrative Law in Canada*, 6th ed. (LexisNexis Canada Inc.: Toronto, 2017), at paragraph 2.109:

> "In deciding whether a particular fact or item of evidence should be disclosed, the key criterion is relevance. Irrelevant information need not be disclosed. There are degrees of relevance. The more important the information is to a central issue to be decided, the more likely it should be disclosed, in contrast information that is relevant only to a peripheral issue or is repetitive of material already disclosed. The question to ask is: if the information is put before the decision-

[70] The Board has applied the above findings and has determined the Appellants' request for "all records in the Director's possession or control which relate in any way to the DML or the investigation"[36] to be too broad, vague, insufficient in particulars, and lacking an appropriate explanation of relevancy.

[71] The Board reviewed the Appellants' alternative request for the Additional Records. The following points are the Appellants' alternative requests followed by the Board's reasons:

(a) "Any records relating to follow-up communications or directives from AEP to the Appellants or any third parties resulting from any inspections of the DML performed prior to 2019."

The Board finds this request to be too broad and vague. It is unclear which third parties are involved in this request or what it meant by "directives." The Board is concerned regarding the potential for a breach of third party privacy rights if the request was granted. The Board denies the request.

(b) "All records relating to any AEP employees who stayed in camp on the DML or otherwise visited the DML during the period at issue in the Administrative Penalty."

The Board finds this request to be too broad and vague. The Appellants have not identified the records with any degree of certainty. The AEP employees were not identified, and there is not enough particulars to convince the Board the request is not fishing for information. The Board denies the request.

(c) "All additional notes or other records prepared by AEP employees relating to the DML since the commencement of the disposition."

The Board finds this request to be too broad and vague. The Appellants have not provided sufficient evidence to show the notes or records related to the DML would be relevant to the grounds of appeal. The Board denies the request.

(d) "All records contained in the GLIMPS system relating to the DML"

The Board finds this request to be too broad and vague. The Appellants have not provided sufficient evidence to convince the Board the GLIMPS records would be relevant to the grounds of appeal. The Board denies the request.

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maker, what is the likelihood that it will influence the result? If it is not likely, then it is not probative and need not be disclosed."

[36] Appellants' Initial Response, November 13, 2020, at page 7.

(e) "All AEP internal emails, memoranda, meeting notes and other records in relation to the DML."

The Board finds this request to be too broad and vague. The Appellants have not provided sufficient particulars on the records sought or how the records would be relevant to the grounds of appeal. The Board denies the request.

[72] In general, the Board finds the Appellants' request for further disclosure to be seeking unknown documents that may assist the Appellants' case. A request for further disclosure of information must demonstrate the relevancy of the requested record to the grounds of appeal. The Appellants' request does not sufficiently identify the records requested or link the requested records to the grounds of appeal. If the Appellants have knowledge of documents that should be in the record but are not, they must identify those documents with a degree of certainty.

[73] If the Appellants can identify such documents, they may apply again for further disclosure. It is also open to the Appellants to make an argument that the Board should take an adverse inference based on the evidence the Appellants allege is missing from the record.

[74] The Board, after reviewing the documents provided by the Director, found the record may be incomplete. In the Supplemental Affidavit of Dylan S. Cummins, Mr. Cummins stated he provided "all relevant documents from the AEP Compliance team to the Director." This occurred after the Director, in the Affidavit of Simon Tatlow, dated December 9, 2020, indicated he had provided all relevant documents to the Board. While Mr. Cummins included three exhibits attached to his Supplemental Affidavit, it is not clear if these were the only records submitted to the Director or if there are other "relevant documents from the AEP Compliance team" provided to the Director. The Board finds that all the records submitted to the Director by Mr. Cummins are part of the record before the Director and, therefore, must be included in the record submitted to the Board.

[75] The Board requests the Director review all the records provided by Mr. Cummins in relation to this appeal and provide any records to the Board that have not already been included in the record before the Director, the Amended Director's Record, or in the Affidavits of Mr. Cummins.

[76] The Board recognizes it has taken a broader view of additional information requests in past decisions. The Board must consider each appeal in its individual context, and past decisions and reports are not strictly binding on it.[37] Noted administrative law expert, Ms. Sara Blake, stated:

> "The principle of *stare decisis* does not apply to tribunals. A tribunal is not bound to follow its own previous decisions on similar issues. Its decisions may reflect changing circumstances and evolving policy in the field it governs. A departure from a previous ruling should be explained. The analytical framework of previous decisions should be reviewed to reduce the risk of arbitrariness and the tribunal should be open to argument as to why a previous decision ought not to be followed. Otherwise the different decision may be regarded as an aberration."[38]

[77] The Board notes the Appellants have argued the circumstances of PLAB 18-0015 are identical to this appeal, including the same parties, the same issue, and an Administrative Penalty assessed. Since the Board provided its report and recommendations to the Minister in PLAB 18-0015, the Board has considered other appeals and circumstances that caused the Board to evolve its position on the Department's record. Additionally, the case law reviewed by the Board since PLAB 18-0015 has caused the Board to review and adjust its position on the director's record. The Board is continually seeking to refine its interpretation and application of its governing legislation in light of emerging case law. In doing so, the Board may have to adjust its practices from time to time.

V. DECISION

[78] The Board, after reviewing the submissions of the Parties, the legislation, and the relevant case law, has decided as follows:

(a) The Board admits all of the Additional Documents submitted by the Appellants and will determine the appropriate weight to give the Additional Documents as part of its deliberations after the hearing. The Parties may provide submissions to the Board as part of their hearing submissions on the weight the Board should assign to the Additional Documents.

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37 See: Re: *Maitland Capital Ltd*., 2009 ABCA 186.

38 Sara Blake, *Administrative Law in Canada*, 6th ed. (LexisNexis Canada Inc.: Toronto, 2017), at paragraph 4.43.

(b) The Board refuses the Appellants' request for further disclosures. If the Appellants can better identity missing records from the Director's Record, they may apply for further disclosure. The Appellants may make adverse inference arguments as part of their hearing submissions if they desire.

(c) The Board requests the Director provide any documents that were provided by Mr. Cummins in relation to this appeal that have not already been provided to the Board.

Dated on January 11, 2021, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Anjum Mullick
Board Member

"*original signed by*"
Barbara Johnston
Board Member