ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – April 15, 2021

IN THE MATTER OF sections 121, 122, 123 and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211 212, 213, 225, 228, 229, and 230 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 Notice of Administrative Penalty 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*, (15 April 2021), Appeal No. 20-0003-R (A.P.L.A.B.), 2021 ABPLAB 3.

BEFORE:		Mr. Gordon McClure, Chair; Anjum Mullick, Board Member; and Ms. Barbara Johnston, Board Member.
	Board Staff:	Mr. Gilbert Van Ness, Board General Counsel; Mr. Andrew Bachelder; Board Legal Counsel; and Ms. Denise Black, Board Secretary.
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.
WITNESSES:		
	Appellants:	Colette Benson and Albert Benson; Daryle (Jon) Warren, Former Vice President, Northgate Contractors Inc.
	Director:	Simon Tatlow, Director, Alberta Environment and Parks, Dylan Cummins, Environmental Protection Officer, Alberta Environment and Parks

EXECUTIVE SUMMARY

CRC Open Camp & Catering Ltd. (CRC) is the leaseholder of a Department Miscellaneous Lease (the DML). Ms. Colette Benson is the sole corporate 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, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks (the Director), initiated an investigation of the DML and the Appellants when an AEP Public Lands Officer observed two separate camps located on the DML. The Director issued a Preliminary Assessment to the Appellants and requested the Appellants provide any evidence or arguments within one week. The Appellants responded that they were unable to meet the Director's one-week deadline to provide further information due to the COVID-19 pandemic and the need to quarantine themselves after returning from the United States. The Appellants asked for additional time to respond to the Director's request.

The Director did not provide an extension of time and issued a Notice of Administrative Penalty for $6,798,862.85 to the Appellants for allegedly subleasing the DML without authorization. The Administrative Penalty consisted of:

- three counts of subleasing the DML without authorization at $5,000.00 per count, for a total of $15,000.00;
- three counts of receiving money for allowing access to public land at $5,000.00 per count, for a total of $15,000.00;
- one count of failing to furnish all information that an officer reasonably required for the exercising of powers and duties required under the *Public Lands Act* or the *Public Lands Administration Regulation*, at $5,000.00 (collectively, the Penalty); and
- $6,763,862.85 for proceeds from the alleged contraventions (the Proceeds).

The Appellants filed a Notice of Appeal with the Public Lands Appeal Board (the Board).

The Director reduced the Proceeds portion of the Administrative Penalty by $508,534.00 when the Appellants provided evidence that some of the Proceeds had been incorrectly attributed to CRC. The reduction in the Proceeds reduced the total of the Administrative Penalty to $6,290,328.85 ($35,000.00 for the Penalty and $6,255,328.85 for the Proceeds).

The Board set a schedule for file written submissions and a date for an oral hearing to be held by videoconference on the following issues:

> Did the Director in issuing the Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/02-AP-NR-20/01:
>
> (a) err in the determination of a material fact on the face of the record;
>
> (b) err in law; or
>
> (c) exceed the Director's or Officer's jurisdiction or legal authority?

Before the hearing, the Board received a motion from the Director to dismiss the Appellants' willsays and related witnesses, dismiss the Appellants' evidence in Appendixes B and C of the Appellants' initial written submissions, and admit additional evidence from the Director.

At the hearing, the Board considered the Director's motions decided:

- willsays and witnesses not rationally connected to the Director's Record would not be permitted;
- Appendixes B and C would not be considered by the Board as they are not rationally connected to the Director's Record; and
- the Director's evidence would not be admitted as it was submitted too close to the hearing date to provide the Appellants with a fair time to respond.

The Board, after reviewing the Director's Record, the written and oral submissions from the Appellants and the Director, and considering the relevant legislation and case law, found the following:

(a) the Board is not able to determine if the Director erred in the determination of a material fact on the face of the record due to a incomplete record resulting from the Director's error in law;

(b) the Director erred in law by misapplying or misinterpreting section 59.7 of the *Public Lands Act*. The Board found this error in law resulted in the Director applying an incorrect limitation date to the investigation of contraventions by Appellants. The incorrect limitation date resulted in the

Director denying procedural fairness to the Appellants by setting an unrealistic deadline of one week for the Appellants to provide evidence to the Director in the midst of a serious pandemic.

(c) The Board cannot determine if the Director exceeded his jurisdiction due to the incomplete Director's Record.

The Board noted appeals under the *Public Lands Act* are based on the decision and record of the decision-maker. The Director's error in law and breach of procedural fairness caused the record to be incomplete. The Board cannot speculate what evidence the Appellants might have introduced had they been provided with a reasonable period of time to respond to the Director's Preliminary Assessment. The Board found the Director's breach of procedural fairness struck at the fundamental procedural rights of the Appellants to a fair and reasonable opportunity to present its case and to be heard by the decision-maker.

The Board recommended the Minister reverse the Director's decision to issue the Notice of Administrative Penalty.

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I. INTRODUCTION

[1] This is the report and recommendations of the Public Lands Appeal Board (the "Board") regarding an appeal filed by CRC Open Camp & Catering Ltd. ("CRC"), Ms. Colette Benson, and Mr. Albert Benson (collectively, the "Appellants"), of the decision by the Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks (the "Director"), to issue Notice of Administrative Penalty No. PLA-20/02-AP-NR-20/01 (the "Administrative Penalty") in the amount of $6,798,862.85 (later reduced to $6,290,328.85). The Administrative Penalty was issued to the Appellants 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 corporate director of CRC, and Ms. Benson and Mr. Albert Benson (collectively, the "Bensons") are 99% shareholders of CRC.

[3] Sometime in 2012, CRC entered into an agreement with Northgate Contractors Ltd. ("Northgate Contractors") to expand the CRC camp and create a second camp on the DML. The Appellants refer to this agreement as a "Joint Venture Agreement." There were at least two inspections of the DML by AEP Public Lands Officers ("Lands Officer(s)" or "PLO") after the second camp began operating.

[4] On May 25, 2018, a Lands Officer inspected the DML and observed two camps operating on the DML. The Lands Officer filled out an Incident Triage Form (the "Incident Triage Form") detailing his observations from May 25, 2018, and subsequent investigation results. The Incident Triage Form listed "May 25, 2020" as the "Statute of Limitations Date."

[5] On January 9, 2019, Mr. William Black, the Approvals Manager, digitally signed the Incident Triage Form and wrote: "I recommend this incident be referred to the Compliance Program for enforcement review."[1]

[6] On January 10, 2019, the Incident Triage Form was digitally signed by Mr. Dean Litzenberger, Compliance Assurance Lead/Manager.

[7] On February 1, 2019, Environmental Protection Officer (Investigator) ("EPO") Mr. Dylan Cummins sent a Notice of Investigation to the Appellants advising they were being investigated for alleged contraventions, including unauthorized subleasing of the DML.[2]

[8] On October 28, 2019, the EPO sent a Request for Information[3] to the Appellants. On October 31, 2019, the Appellants' legal counsel responded and advised the Appellants were out of the country until November 30, 2019, and would not be able to provide the requested information until December 16, 2019. The EPO responded on the same date and agreed to receive the requested information on December 16, 2019.

[9] On December 16, 2019, the Appellants provided documents to the EPO along with a letter providing further information.[4]

[10] On January 20, 2020, EPO Cummins sent a Request for Interview letter to the Appellants.[5] On January 27, 2020, the Appellants' legal counsel wrote to the EPO and advised the Appellants were not returning to Alberta until the week of March 23, 2020, and offered to meet on March 24 or March 27, 2020.[6] The Appellants and the EPO agreed to meet on March 24, 2020.[7]

[11] On March 17, 2020, the Appellants' legal counsel wrote to the EPO and advised it was recommended that the Appellants' legal counsel self-isolate for three weeks due to COVID-

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1 Director's Record, at Tab 7.2.1.
2 Director's Record, at Tab 7.7.1.
3 Director's Record at Tab 7.13.1.
4 Director's Record, at Tab 7.14.1.
5 Director's Record, at Tab 7.16.
6 Director's Record, at Tab 7.16.3.
7 Director's Record, at Tab 7.16.7.

19 protocols and that the Appellants were still in the United States due to problems with air travel. The Appellants' legal counsel requested the meeting be rescheduled or conducted by phone.[8]

[12] On March 19, 2020, the EPO wrote the Appellants with an Additional Information Request in lieu of a meeting.[9] On March 31, 2020, the Appellants' legal counsel responded to the letter on behalf of the Appellants. The Appellants' legal counsel noted the following in response to the Additional Information Request:

> "The Notice of Investigation in this matter states that the investigation, and thus the request for documents and additional information, relates to an alleged unauthorized sublease of the Lands by CRC and Colette Benson. As can be imagined, numerous records were generated in relation to the operation of a commercial campsite on the Lands, a permitted use under the Disposition. We ask that the Director provide further information in support of this request for additional records and details, so that we can narrow the focus of the search and provide the most relevant information. In any event, given the fact that Ms. Benson is currently required to self-isolate at her home with her family, she has no means of making copies or scans of these documents in any event. Any further information which you can provide to assist in narrowing the potential number of records at issue would be appreciated."[10]

The Appellants' legal counsel concluded the response letter as follows:

> "As noted above, Ms. Benson does not currently have the ability to make scans or photocopies of the physical records in her possession. Once she is no longer under quarantine and has had an opportunity to obtain physical or electronic copies of these documents, we may choose to forward additional records in response to this request after we have had an opportunity to review same with our client. We look forward to your comments with respect to our request …, and please advise if you have further questions."[11]

[13] On April 1, 2020, the EPO responded to the Appellants as follows:

> "Alberta Environment and Parks ('AEP') acknowledges that these are difficult and unprecedented times that the Province of Alberta has not seen before. AEP acknowledges the letter received from Ms. Hamelin on March 31, 2020.

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8 Director's Record, at Tab 7.17.1.

9 Director's Record, at Tab 7.18.1.

10 Director's Record, at Tab 7.19.1.

11 Director's Record, at Tab 7.19.1.

> Based on the evidence gathered during the investigation and the responses provided to me in this letter, I will be making a recommendation to the Director to make a decision about an administrative penalty."[12]

[14] On May 7, 2020, the Director issued a Preliminary Assessment of Administrative Penalty PLA-AP-20/02-NR (the "Preliminary Assessment") and served it on the Appellants by email at 4:37 p.m.[13] In the letter accompanying the Preliminary Assessment, the Director wrote:

> "I am requesting written correspondence by May 15, 2020 to provide your review of the facts on which this preliminary assessment is based and any documentation you may wish to provide on behalf of the parties relating to these contraventions. Please note that this will be on a with prejudice basis.
>
> If I do not hear from you by Friday, May 15, 2020 by 4:30 pm, I will proceed to make my decision without further notice…. In your letter to the EPO on March 31, 2020, your legal counsel stated that you have numerous documents that could be produced. I am asking that you send all records that pertain to the DML 090102 and the Lands that you feel would be beneficial to me in making my decision on this file." [Emphasis in the original].

[15] On May 8, 2020, the Appellants' legal counsel responded on behalf of the Appellants and stated:

> "Given the considerable jeopardy which our clients potentially face as a result of the Penalty, the substantial new information included in your findings which has not been previously disclosed to our clients and the ongoing social distancing and business closure measures currently in place, it will simply not be possible to provide the requested response by your stipulated deadline… the social distancing and self-quarantine measures that our clients have been required to observe as a result of the COVID-19 pandemic make it extremely unlikely that they will be in a position in the next week to provide our office with the records which will need to be reviewed. These records all exist in hard copy format only, and they will need to be scanned…. There is no question that the potential jeopardy facing our clients is extremely serious – the Penalty is approximately $7,000,000, an amount which would certainly guarantee personal and business financial collapse for our clients. As such, we submit that the duty of fairness on the Director in the course of his investigation is correspondingly broad. Providing CRC with a week to respond to such significant and adverse findings, in the absence of the information required for them to determine the relevant records and information required in response, would place them in an untenable position."[14]

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12 Director's Record, at Tab 7.20.1.

13 Director's Record, at Tab 1.2.1.

14 Director's Record at Tab 3.2.1.

[16] On May 11, 2020, the Director responded to the Appellants and offered to hold a video call or teleconference to accommodate the social distance measures necessitated by the pandemic. The days offered by the Director were May 12, 13 or 14, 2020. The Director also offered the Appellants to provide a written response to the Preliminary Assessment by May 15, 2020. The Director concluded his letter as follows:

> "Finally, would you please confirm by no later than May 15, 2020 at 4:30 pm that you have instructions to accept service of the Notice of Administrative Penalty on behalf of each of CRC Open Camp and Catering Ltd, Colette Benson and Albert Benson. Otherwise, we will serve the Administrative Penalty on each of your clients personally."[15]

[17] The Appellants' legal counsel responded on behalf of the Appellants on May 12, 2020. In the letter to the Director, the Appellants' legal counsel stated:

> … it is disappointing that your office is unwilling to provide our clients with the time and information necessary to properly assess the case against them in this matter and to prepare a fulsome rebuttal to the issues raised in the Preliminary Assessment. This is particularly puzzling given that there are no imminent limitation periods or deadlines of which we are aware. While we appreciate your willingness to schedule a video meeting with our clients this week, that would in no way remedy the problems which we outlined in our May 8th correspondence. There are thousands of records in our clients' possession which could potentially be relevant to this matter, but until we have an opportunity to review those records, we will not be able to determine which are relevant or what additional information may be required. This has become a particularly important consideration in light of the substantial amount of previously undisclosed information which was included in your Preliminary Assessment…. CRC intends to provide a fulsome response and all supporting records in relation to the Preliminary Assessment as soon as possible, but it does not seem possible that we will be in a position to do so by May 15th. We will keep you advised of our progress in that regard."[16]

[18] On May 20, 2020, 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 and receiving money for allowing access to public land. The Director alleged the Appellants subleased the DML to Northgate Contractors Ltd. ("Northgate

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15 Director's Record at Tab 1.4.1.

16 Director's Record, at Tab 1.5.1.

Contractors"), Northgate, and Northern Mat and Bridge LP ("Northern Mat"). 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, for a total of $15,000.00;
- three counts of receiving money for allowing access to public land at $5,000.00 per count, for a total of $15,000.00;
- 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").

[19] The Director later reduced the Administrative Penalty by $508,534.00 upon learning that payments originally attributed to CRC were actually made in relation to a debt owed by CRC by another party unrelated to this appeal. The deduction revised the total of the Administrative Penalty to $6,290,328.85 ($35,000.00 for the penalty and $6,255,328.85 for Proceeds).

[20] 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 Director'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 "Director's Record"). The Director's Record was received by the Board on July 9, 2020, and provided to the Appellants on July 13, 2020.

[21] On July 8, 2020, the Appellants requested the Board grant a stay of enforcement of the Administrative Penalty.

[22] On October 6, 2020, the Board held a mediation meeting, by conference call. The Parties did not reach a resolution to the appeal during the mediation meeting, but agreed to review documents and meet again.

[23] On October 26, 2020, after reviewing written submissions from the Parties regarding the stay application, the Board found the Appellants met the requirements of the stay

test and granted a stay of the Administrative Penalty until the Board lifted the stay or until the Minister of Environment and Parks (the "Minister") made a decision regarding the appeal.[17]

[24] On November 13, 2020, the Appellants made two preliminary motions (the "Preliminary Motions"):

(a) to introduce further records and evidence (the "Additional Documents"); and

(b) to obtain further disclosure from the Director.

The Board requested and received written submissions from the Parties regarding the Preliminary Motions.

[25] On November 20, 2020, the Board scheduled an oral hearing by video conference for March 3, 2021, and set a schedule for the Parties to provide written submissions before the hearing. The Board set the following issues for the hearing:

> Did the Director in issuing the Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/02-AP-NR-20/01:
>
> - err in the determination of a material fact on the face of the record;
> - err in law; or
> - exceed the Director's or Officer's jurisdiction or legal authority?

[26] On January 11, 2021, after reviewing written submissions from the Parties regarding the Preliminary Motions, the Board decided as follows:

(a) the Board would admit the Additional Documents and determine the appropriate weight to give them as part of its deliberations after the hearing:

(b) the Board refused the Appellants' request for further disclosure and advised that the Appellants could make an adverse inference argument as part of their hearing submissions if they desired; and

(c) the Board requested the Director provide any documents that were provided by the EPO in relation to the appeal that had not already been provided to the Board.[18]

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[17] See: *Stay Decision: CRC Open Camp & Catering Ltd. et al.* v. *Director, Regional Compliance, Regulatory Assurance Division-North Region, Alberta Environment and Parks* (26 October 2020), Appeal Nos. 20-0003-ID1 (A.P.L.A.B.), 2020 ABPLAB 18.

[27] A second mediation meeting was held on January 12, 2021, via video conference. The Parties did not reach a resolution to the appeal during the mediation.

[28] On January 26, 2021, the Appellants expressed concern that they may require more time to present their evidence in the hearing than the Board had scheduled. The Board responded on January 28, 2021, and added March 4, 2021, to the hearing schedule. The Board also requested the Parties provide willsay statements for each witness presenting evidence at the hearing.

[29] On February 2, 2021, in response to the Board's request to provide the documents from the EPO, the Director advised that the Board had all the records related to the appeal, including the records provided to the Director by the EPO.

[30] On February 5, 2021, the Appellants provided their written submission for the hearing and willsay statements for their witnesses. On February 22, 2021, the Director provided a written response submission and raised a preliminary issue requesting the Board not accept the new evidence the Appellants sought to admit through the willsay statements and witnesses (the "Director's Preliminary Motion"). The Director also applied to have the Board admit rebuttal evidence entitled "Lac La Biche County Utility Bylaws 2014-2020" and "Northgate Rebuttal Evidence" (the "Director's Additional Evidence").

[31] On March 1, 2021, the Appellants provided their Response Submissions and a rebuttal to the Director's Preliminary Motion and the Director's Additional Evidence.

[32] The hearing was held by video conference on March 3 and March 4, 2021. The Board had additional questions for the Appellants, which were sent to the Parties on March 8, 2021. After receiving the Parties' answers to the additional questions, the Board met again on March 18, 2021, to consider the appeal and make its report and recommendations to the Minister of Environment and Parks.

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[18] See: *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.

III. ISSUES

[33] The Board set the following issues for the hearing:

> Did the Director in issuing the Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/02-AP-NR-20/01:
>
> (a) err in the determination of a material fact on the face of the record;
>
> (b) err in law; or
>
> (c) exceed the Director's or Officer's jurisdiction or legal authority?

IV. SUBMISSIONS

[34] The Parties provided written submissions and oral arguments. The Board considered all the submissions and arguments, including the Director's Record. The following is a summary of the submissions and oral arguments.

A. Appellants

[35] The Appellants submitted the standard of review for the appeal is correctness. The Appellants said there were no unique circumstances or facts which should cause the Board to depart from its previous findings on the standard of review. The Appellants noted the Board has a duty to provide the Minister with the best possible advice and recommendations. Therefore, it is essential that the Board determine if the decision is correct. The Appellants stated the standard of correctness requires a lesser degree of deference to the Director's decision.

[36] The Appellants said the evidence demonstrates that the relationship between CRC and Northgate was a joint venture and not a sublease as determined by the Director. The Appellants refer to *Williston on Contracts, 3rd edition*, which states:

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

(d) Expectation of profit, or the presence of 'adventure,' as it is sometimes called;

(e) A right to participate in the profits;

(f) Most usually, limitation of the objective to a single undertaking or *ad hoc* enterprise."[19]

[37] The Appellants stated CRC and Northgate entered into a joint venture agreement (the "Joint Venture Agreement") in 2012, which allowed them to pool their resources in a way that would mutually benefit them both. The Appellants submitted that the terms of the Joint Venture Agreement were unwritten but can be evidenced by CRC and Northgate's conduct.

[38] The Appellants said that as approval from AEP for a joint venture was not required, the Joint Venture Agreement was not a contravention of the Act or the terms of the DML. The Appellants stated that as a result, the Administrative Penalty was improperly assessed against the Appellants, and the appeal must be allowed.[20]

[39] The Appellants submitted the Director lacked jurisdiction to issue the Administrative Penalty, or alternatively, erred in law in issuing the Administrative Penalty, as it was issued outside of the two-year statutory limitation period established 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,

whichever is later."

[40] The Appellants submitted the Director had knowledge of the contraventions related to Administrative Penalty Counts 1 to 4, as early as an August 16, 2012 inspection by a Lands Officer. The Appellants said the inspection noted two separate camp operators on the DML.

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19 Appellants' Initial Submission, February 5, 2021, at paragraph 39.

20 Appellants' Initial Submission, February 5, 2021, at paragraph 57.

[41] The Appellants noted Tab 6.3 of the Director's Record shows another Industrial Inspection of the DML occurred on September 18, 2015, which identifies a separate "Northgate camp."

[42] The Appellants stated the January 9, 2019 Incident Triage Form (the "Incident Triage Form") listed the Statute of Limitations date as May 25, 2020, and noted Lands Officer Jeff Bleach visited the DML on May 25, 2018, and observed signs which indicated an NEC camp and a Northgate camp operating on the DML. The Appellants said the signs were existing in 2012 and were unchanged during the period covered by the Joint Venture Agreement.

[43] The Appellants observed that in *Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* ("*Normko*"),[21] the Board held that the date of "which the contravention occurred was the date on which the appellants ceased to collect payments from the card lock operators."[22] The Appellants noted payments received by CRC from Northgate ended on June 29, 2017. The Appellants submitted that as the date of the Preliminary Assessment was May 7, 2020, the Administrative Penalty was issued outside of the limitations period set in section 59.7 of the Act, and should be dismissed.

[44] The Appellants alleged the Director erred by failing to provide reasons for departing from AEP's past practices and internal decisions regarding enforcement and informal subleasing of DMLs. The Appellants stated that until the mid-2010s, the economic boom for resource industries in the Conklin region created a demand for land-use options. The Appellants submitted that during this period, AEP managed public lands in a manner that avoided creating a fractured landscape with widely dispersed areas of development.

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21 *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.

22 Appellants' Initial Submission, February 5, 2021, at paragraph 70.

[45] The Appellants stated:

> "There was a recognition in AEP's Lac La Biche office at that time that strict adherence to the sublease rules under the Act and the terms of the MLLs themselves acted against this important balancing of interests, and would have resulted in a dramatically increased development footprint and resulting habitat fragmentation. There was also a recognition that the lengthy delays in the approval process for any applications in relation to public lands were untenable given the substantial industry demands which existed in the area at that time.
>
> It was recognized by AEP internally that obtaining an informal sublease of public lands from an existing disposition holder was the only realistic way that businesses in the region could function, given the extensive delays at that time in obtaining sublease approvals or new MLLs and the extremely pressing business needs which existed. As a result, informal subleases were considered to be an allowable deviation from the strict terms of the Act and the MLLs which reasonably balanced land management priorities with the pressing demands of industry in the region."[23]

[46] The Appellants submitted AEP was aware of informal subleases in the area and allowed them to continue without authorization. The Appellants stated it was "extremely uncommon"[24] for AEP to investigate when it became aware of an unauthorized sublease. The Appellants alleged unauthorized subleasing has been common for decades and is still a common practice without any compliance or enforcement.

[47] The Appellants referred to the case of *Canada (Attorney General)* v. *Honey Fashions Ltd*. ("*Honey Fashions*")[25] and said the Court required a public decision-maker to provide reasons when departing from a long-standing practice. The Appellants noted that in *Normko,* the Board had distinguished *Honey Fashions* on the grounds that AEP had not made clear, unambiguous and unqualified representations "that the rules against unauthorized subleasing would not be enforced, and that legitimate expectations could not supersede legislation."[26] The Appellants submitted that the Supreme Court of Canada decision in *Canada*

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23 Appellants' Initial Submission, February 5, 2021, at paragraphs 77-78.

24 Appellants' Initial Submissions, February 5, 2021, at paragraph 80.

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

26 Appellants' Initial Submissions, February 5, 2021, at paragraph 87.

(Minister of Citizenship and Immigration) v. *Vavilov* ("*Vavilov*")[27] governed the doctrine of legitimate expectations. The Appellants stated:

> "As noted in *Vavilov*, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain. Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable."[28]

[48] The Appellants said the Court in *Honey Fashions* found it was not enough for the decision-maker in that case to claim the decisions it made complied with the statutory scheme and that the decision was found to be unreasonable because an explanation as to why past practices were not followed was not provided.

[49] The Appellants submitted AEP had a long-standing past practice to not penalize disposition holders for unauthorized subleases, as long as the use of the sublease was consistent with the disposition agreement. The Appellants said: "In fact, these informal arrangements were encouraged, as they allowed AEP to balance its development and environmental priorities during a time of phenomenal industrial growth in the Conklin region."[29]

[50] The Appellants stated AEP had a history of encouraging cooperative compliance efforts when a breach of the Act or the lease terms occurred, and enforcement was looked upon as a last resort only after other efforts to achieve compliance had failed.

[51] The Appellants submitted the Director's actions in assessing the Administrative Penalty without providing an opportunity for the Appellants to bring themselves into compliance was a substantial departure from AEP's long-standing practices "on which the Appellants had relied and conducted themselves in relation to the DML."[30] The Appellants point to the inspections that occurred before 2017 as evidence AEP endorsed unauthorized subleases in the area.

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

28 Appellants' Initial Submissions, February 5, 2021, at paragraph 89.

29 Appellants' Initial Submissions, February 5, 2021, at paragraph 93.

30 Appellants' Initial Submissions, February 5, 2021, at paragraph 95.

[52] The Appellants stated:

> "It is submitted that the Appellants were denied procedural fairness in the course of the investigation as AEP's long-standing past practices in relation to unauthorized subleases were not considered by the Director prior to the imposition of the Administrative Penalty."[31]

[53] The Appellants submitted that if the Administrative Penalty is upheld, $533,960.70 should be deducted as it related to CRC's agreement with Smoking Diesel for payment of preparation costs for the Waddell Camp, which was funded by CRC. The Appellants stated:

> "In 2013, CRC (through NEC) undertook all of the site preparation work for Smoking Diesel Contracting Ltd. ('Smoking Diesel') in relation to MLL 090155 ('the Waddell Camp'). CRC's agreement with Smoking Diesel was that CRC would pay all of the site preparation costs ('the Development Costs') up front, and would in turn receive all payments related to the operation of the Waddell Camp until such time as the Development Costs were repaid in full. Smoking Diesel was indebted to CRC for the Development Costs in the amount of $487,969.42 including GST.
>
> Northgate was indebted to Smoking Diesel in relation to the operation of the Waddell Camp, and in accordance with the agreement between CRC and Smoking Diesel (and with the concurrence of Northgate) CRC issued invoices to Northgate each month in relation to the operation of the Waddell Camp. A total of $533,960.70 (including GST) was billed by CRC to NEC for the Waddell Camp, and the amount of $44,332.00 was refunded to Smoking Diesel as an overpayment."[32]

[54] The Appellants submitted that $949,999.00 for the sale of camp assets should be deducted from the Proceeds. The Appellants said the sale of camp assets to Northgate were improvements on the DML and were not a breach of the Act or the terms of the lease.

[55] The Appellants submitted that as the Joint Venture Agreement did not result in an economic benefit or advantage for CRC, the Proceeds should be reduced to reflect net proceeds. The Appellants stated the following amounts should be deducted from the Proceeds:

(a) $533,960.70 for CRC's agreement with Smoking Diesel for payment of preparation costs for the Waddell Camp, which was funded by CRC.

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31 Appellants' Initial Submissions, February 5, 2021, at paragraph 104.

32 Appellants' Initial Submission, February 5, 2025, at paragraphs 107-108.

(b) $949,999.00 for the sale of camp assets to Northgate. The Appellants submitted the camp assets were improvements on the DML.

(c) $536,000.00 for development costs of the Joint Venture Camp.

(d) $4,736,064.30 for services over the term of the Joint Venture Agreement. The Appellants submitted there was no profit built into the amounts invoiced by CRC to Northgate.

(e) $225,537.25 for GST; and

(f) $656,410.00 for property taxes paid by CRC to the Regional Municipality of Wood Buffalo between 2013 and 2017, of which CRC's share was $203,013.00.

[56] The Appellants submitted the Director erred by assessing a penalty under count 7 for failure to provide documents. The Appellants maintained they responded to all requests for information made by the Director and offered to provide further information within 30 days of receiving the Preliminary Assessment.

[57] The Appellants concluded by submitting the appeal must be allowed as:

(a) the Director erred in law in finding that the relationship between the parties was one of a sublease and not joint venture;

(b) the Director erred in law in failing to consider and to provide reasons for departing from AEP's internal policies or practices with respect to enforcement and unauthorized subleases in the Administrative Penalty;

(c) the Director erred in including payments unrelated to the DML in the Proceeds portion of the Administrative Penalty;

(d) the amount of the Proceeds, if enforced, must be calculated as net proceeds as the Joint Venture Agreement did not result in an economic benefit or advantage for the Appellants in the amount assessed; and

(e) the Director erred in law in determining that the Appellants had failed to comply with requests for records during the investigation.

B. Director

[58] The Director submitted the Appellants were in breach of the following sections of the Act:

- 43(1), which prohibits the subleasing of public lands without permission;[33]
- 54.01(5), receiving money or other consideration for access or use of public land unless entitled at law;[34] and
- 69.6, requiring a disposition holder to assist an officer to exercise their powers and duties and furnish information required.[35]

[59] The Director noted AEP is the administrator of public land for the Province. The Director stated:

> "If 'Middle Men' start trying to acquire public land dispositions then rent them out for profit, it frustrates the public lands regulatory regime because AEP can lose control of the persons occupying public lands under disposition and the intended purpose of a disposition."[36]

[60] The Director said that on May 25, 2018, an AEP Lands Officer inspected the DML and observed two separate camps located on the DML. The Lands Officer suspected an unauthorized sublease existed and completed an Incident Triage Form recommending the file be transferred to Compliance/Enforcement for further investigation. The Director stated that on January 10, 2019, the AEP Compliance Assurance Lead/Manager received the Incident Triage from the Lands Officer. The Director noted the Incident Triage Form indicated the Statute of Limitations date was May 25, 2020, based on the May 25, 2018 inspection.

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[33] Section 43(1) of the 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."

[34] 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."

[35] Section 69.6 of the Act states:

"The disposition holder of, and every person found on, any land in respect of which an officer is exercising powers or carrying out duties under this Act or the regulations shall

(a) give the officer all reasonable assistance to enable the officer to exercise those powers and carry out those duties, and

(b) furnish all information that the officer may reasonably require for the exercising of those powers and the carrying out of those duties."

[61] The Director submitted AEP identified the following three companies that paid money in the form of rent to the Appellants to sublease a portion of the DML over approximately five and a half years:

(a) Northgate Contractors, who paid $2,199,415.50;

(b) Northgate, who paid $3,524,016.10; and

(c) Northern Mat, who paid $90,431.25.

[62] The Director confirmed that the Appellants did not have approval or consent to use the DML as a laydown yard, nor to sublease portions of the DML to Northgate Contractors, Northgate, or Northern Mat. The Director submitted the Appellants knew AEP's consent was required to sublease public land.

[63] The Director stated the Appellants sold the DML for $950,000.00 to Northgate through an auction conducted by Ritchie Bros.

[64] The Director said the Appellants did not provide information to AEP as required under section 69.9 of the Act.[37]

[65] The Director submitted the Appellants were given an opportunity to provide any relevant documentation for the Director to consider when making the decision on the Administrative Penalty. The Director stated that on May 11, 2020, the Appellants were invited to submit written correspondence by May 15, 2020, to explain their view of the facts contained in the Preliminary Assessment. The Director said that due to the COVID-19 situation, he offered the Appellants the option to hold a video or conference call to discuss the Preliminary Assessment rather than an in-person meeting. The Director stated that despite the requests and the offers of accommodation, the Appellants did not provide documents by May 15, 2020.[38]

[66] The Director said he made the decision to issue the Administrative Penalty on May 20, 2020, which was served on the Appellants' legal counsel on May 22, 2020.

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36 Director's Response Submission, February 22, 2021, at paragraph 62.

37 Director's Response Submission, February 22, 2021, at paragraphs 102-116.

[67] The Director submitted the purpose of issuing administrative penalties was to promote compliance with the public lands regulatory system. The Director said the Administrative Penalty had a regulatory purpose rather than a penal purpose.[39]

[68] The Director noted he was designated a director under Ministerial Order 44/2019, which "authorizes Compliance Managers under section 59.3 of the Act."[40]

[69] The Director submitted that under section 59.91 of the Act[41] it was appropriate to issue the Administrative Penalty to Ms. Benson and Mr. Benson in their "personal capacities because they directed, authorized, assented to, acquiesced in or participated in the commission of the contravention."[42]

[70] The Director stated the penalty component of the Administrative Penalty was calculated based on the following:

(a) one count for each of the three companies who were subleased portions of the DML (3 x $5,000.00 = $15,000.00);

(b) one count for each of the three companies who paid monies to the Appellants for the subleases (3 x $5,000.00 = $15,000.00); and

(c) one count for failing to provide assistance to officers as required under section 69.9 of the Act (1 x $5,000.00 = $5,000.00).

The Director assessed the total penalty amount at $35,000.00.

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38 Director's Response Submission, February 22, 2021, at paragraphs 119-130.

39 Director's Response Submission, February 22, 2021, at paragraphs 141-143.

40 Director's Response Submission, February 22, 2021, at paragraph 144.

41 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."

42 Director's Response Submission, February 22, 2021, at paragraph 159.

[71] The Director noted section 59.4(4) of the Act[43] authorized the Director to require payments of proceeds from a person who received such proceeds in contravention of the legislation. The Director submitted the payment of proceeds deters future contraventions and levels "the economic 'playing field' for the regulated community."[44]

[72] The Director argued proceeds is not the same as economic benefit.[45] Economic benefit is considered by the Director as one of several factors in section 171(4) of PLAR to increase or decrease the amount of the Administrative Penalty.[46] The Director noted economic benefit is a concept used in administrative penalties issued under the *Environmental Protection and Enhancement Act* ("EPEA")[47] and the *Water Act*.[48] The Director submitted proceeds are not profits or net proceeds.[49] The Director said: "Whether the Appellants make a profit or not, they are required to follow the law. Therefore proceeds should be all the monies received by the Appellants for the use of the Lands in contravention of the Act."[50]

[73] The Director stated the total money received by the Appellants in contravention of the Act was estimated based on the best evidence from AEP's investigation, as the Appellants

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43 Section 59.4(4) of the Act states:

"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."

44 Director's Response Submission, February 22, 2021, at paragraph 180-186.

45 Director's Response Submission, February 22, 2021, at paragraphs 187-202.

46 Section 171(4)(f) 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: …

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

47 *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

48 *Water Act*, R.S.A. 2000, c. W-3.

49 Director's Response Submission, February 22, 2021, at paragraphs 203-219.

did not provide any evidence for the Director to consider. The Director submitted that the lack of evidence from the Appellants does not prevent the Director from exercising his authority to assess the Proceeds. The Director said the Proceeds were calculated from the $5,813,862.85 the Appellants received as rent from Northgate Contractors, Northgate, and Northern Mat, and $950,000.00 received for the purchase of the DML by Northgate, for a total of $6,763,862.85. The Director noted the total Proceeds was revised by deducting $508,534.00 for payments made by Northgate to Smoking Diesel. This deduction revised the total Proceeds to $6,255,328.85.

[74] The Director noted the Board in previous decisions has followed the approach by the Environmental Appeals Board ("EAB") in *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red Deer-North Saskatchewan Region* ("*Alberta Reclaim*").[51] The Director stated that in *Alberta Reclaim*, the EAB took two approaches in determining the economic benefit. The Director submitted that both approaches are distinguishable from the appeal in this case as the EAB used a different statutory regime to apply economic benefit to the administrative penalty issued under EPEA. However, the Director stated that if the Board decided to use the first approach from *Alberta Reclaim*, then the Director said the Board should note the unauthorized subleasing was always unlawful.[52] The Director stated subleasing for the primary purpose of revenue generation is never authorized.

[75] The Director submitted the Appellants were provided with an opportunity to bring themselves back into compliance when they received written notice in AEP's October 8, 2013 letter, but did not follow AEP's suggestion to apply for an amendment to the DML to withdraw lands and apply for a new disposition for the operations of the subtenant.[53]

[76] The Director said that if the Board decided to apply the second approach in *Alberta Reclaim*, then:

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50 Director's Response Submission, February 22, 2021, at paragraph 219.

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

52 Director's Response Submission, February 22, 2021, at paragraphs 228-234.

53 Director's Response Submission, February 22, 2021, at paragraphs 250-254.

> "… the Director's position is that only those costs and expense incurred as a result of the use of the DML in contravention of the *Public Lands Act* can be deducted, rather than all expenses and costs incurred by the Appellants to prepare, develop and maintain the Lands."[54]

The Director submitted annual rent payable to AEP, and property taxes are not an appropriate deduction as those are costs the Appellants must pay to comply with their regulatory obligations.

[77] The Director submitted *Newton* v. *Criminal Trial Lawyers' Association* ("*Newton*"),[55] governs the standard of review applicable to appeals before the Board. The Director stated the Board's reasons in previous appeals do not distinguish *Newton* and *Yee* v. *Chartered Professional Accountants of Alberta* ("*Yee*")[56] from applying to appeals under the Act.

[78] The Director argued the Appellants' willsay statements and new evidence should be dismissed because the Appellants did not bring an application before the Board to enter the new evidence. The Director said he had no knowledge of AEP's past subleasing policy or practice as asserted by the Appellants, and the Appellants have not established the relevance of the alleged past policies and practice.[57]

[79] The Director noted the Appellants could have raised the past policies with the Director when they were served with the Preliminary Assessment, and that if the Appellants had done so, any evidence the Appellants raised at that time would have been included in the Director's Record and would have been properly before the Board.

[80] The Director submitted he fulfilled any duty of procedural fairness owed to the Appellants by following "AEP standard practice of issuing the Preliminary Assessment, inviting the Appellants to present their case, providing any additional information for his consideration and attending a meeting, which the Appellants declined."[58]

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54 Director's Response Submission, February 22, 2021, at paragraph 255.

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

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

57 Director's Response Submission, February 22, 2021, at paragraphs 290-300.

58 Director's Response Submission, February 22, 2021, at paragraph 312.

[81] The Director stated *Honey Fashions* was distinguishable because it dealt with different legislative requirements.

[82] The Director submitted the limitation date is based on notice to the director who issued the Administrative Penalty. The Director noted that in "the Preliminary Assessment, the Director stated that he became aware the Appellants had entered into sublet agreements with Northgate Contractors, Northgate, and Northern Mat on May 25, 2018."[59]

[83] The Director requested the Board:

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

(b) recommend to the Minister the appeal be dismissed.

C. Appellants' Reply

[84] The Appellants submitted the evidence they sought to use at the hearing was relevant to materials before the Board and that were before the Director when the Administrative Penalty was issued. The Appellants said the legislation, the Board's rules, and caselaw do not appear to impose any duty on the Appellants to advise the Director of every argument, strategy and evidence they intend to rely on in the appeal.

[85] The Appellants noted that during the investigation, the Director asked the Appellants to provide answers to specific questions related to the DML but did not advise the Appellants they would not be permitted from raising further legal arguments or additional witness evidence if they did not disclose those arguments or evidence at the investigation stage.

[86] The Appellants stated:

> "In addition, it would amount to a procedural injustice to require the Appellants to disclose during the investigation stage all of their witnesses and legal arguments when the Director has no such obligation, and in fact, failed to provide the evidence and records which were requested by the Appellants during the course of the investigation. The Appellants cannot be aware of the full extent of the Director's position and their potential arguments in response until such time as

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[59] Director's Response Submission, February 22, 2021, at paragraph 330.

> they receive the Director's Record, which does not happen until after an appeal is filed."[60]

[87] The Appellants stated the magnitude of the penalty justifies a greater degree of procedural fairness to allow them to respond to the Director's findings as fully as possible.

[88] The Appellants noted the Director's Additional Documents were provided just over a week before the hearing and consisted of approximately 900 pages of new records from Northgate. The Appellants said:

> "The Appellants state that this late disclosure of records and issues from the Director would lead to a substantial procedural unfairness, as it does not provide the Appellants with sufficient time to review these records in detail and to attempt to obtain the necessary records and evidence to respond in a fulsome manner."[61]

[89] The Appellants stated if the Board allowed the Director's Additional Records, then the Appellants submitted the materials were irrelevant to the issues raised in the Administrative Penalty as they related to services provided by NEC to the joint venture camp or to separate camps operated or controlled by Northgate.[62]

[90] The Appellants said the Director's position on limitation periods under the Act would result in an absurd situation which could leave the disposition holder in a state of uncertainty for a potentially unlimited period.[63] The Appellants stated:

> "Taken to its most extreme interpretation, AEP could indefinitely postpone the issuance of any administrative penalty by either intentionally selecting a "director" with no prior knowledge of the contraventions for the purpose of section 59.7, or by simply withholding the relevant information from the person who has been so appointed."[64]

[91] The Appellants maintained the sale through Ritchie Bros. was for camp assets only. The Appellants noted Ritchie Bros. was responsible for the drafting of sale documents, advertising, and negotiations with Northgate. The Appellants submitted the Director had already

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60 Appellants' Reply Submission, March 1, 2021, at paragraph 17.

61 Appellants' Reply Submission, March 1, 2021, at paragraph 26.

62 Appellants' Reply Submission, March 1, 2021, at paragraphs 30-52.

63 Appellants' Reply Submission, March 1, 2021, at paragraphs 53-61.

64 Appellants' Reply Submission, March 1, 2021, at paragraph 58.

accepted that a sale of improvement is not a breach of the Act, and therefore, this portion of the Administrative Penalty must be dismissed.

V. ANALYSIS

A. Standard of Review

[92] When a court or an administrative tribunal reviews a decision made by a lower court or tribunal, it applies a particular legal approach to analyzing the decision, called the "standard of review." For this appeal, the Appellants submitted the standard of review the Board should apply is correctness. Although the Director dedicated twenty-one paragraphs of the Director's written submission to the standard of review, the Director did not specifically state which standard the Board should apply. Instead, the Director said *Newton* governs the standard of review in internal appeals, including this appeal. The Director also said the Board should follow the approach outlined by the Court of Appeal in *Yee*.

[93] In previous appeals,[65] the Board conducted a detailed analysis of the standard of review for appeals under the *Act* and PLAR. As there is a general consistency to the appeals the Board considers, the Board's determination of the standard of review will usually be the same. However, to provide more fulsome reasons for the standard of review the Board applies to the appeal, the Board will engage in a thorough standard of review analysis.

[94] The Supreme Court of Canada in *Dunsmuir* v. *New Brunswick* ("*Dunsmuir*")[66] held that reasonableness and correctness are the two standards of review applicable in Canada. When a reasonableness standard is applied to a review of a decision, it "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[67] The decision-maker's decision

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

66 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 34.

67 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 47.

is given deference, meaning "the concept by which one sublimate's one's own view to that of another. That is to say, even though one's conclusion differs from that of another, there is good reason to defer to the other's conclusion."[68] Deference does not mean "unquestioning acceptance,"[69] but it does mean that if the decision is "reasonable," the reviewing court (or tribunal) should not substitute its own decision for that of the decision-maker.

[95] A correctness standard of review requires no deference by the reviewing tribunal to the decision-maker. The Court has described the correctness standard of review as follows:

> "Under the correctness standard, a reviewing court shows no deference to the decision maker's reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision maker's determination. Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter. When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair."[70]

The correctness standard of review focuses on determining if the decision-maker made the right decision and did so fairly.

[96] In the Board's previous decisions on the standard of review, the Board applied the factors outlined by the Alberta Court of Appeal in *Newton*. The factors are suggested by the Court to assist an appellate administrative tribunal (the Board) in determining the standard of review to apply to the decision by an administrative tribunal of first instance (the Director). The Court said the following factors "should generally be examined:

(a) the respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation;

(b) the nature of the question in issue;

(c) the interpretation of the statute as a whole;

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68 *X*, Re (2015), 2015 CarswellNat 2916, Immigration and Refugee Board of Canada (Refugee Appeal Division), at paragraph 39.

69 *McKenney* v. *Ontario (Labour Relations Board)*, [2012] O.L.R.B. Rep. 289, at paragraph 7.

70 *Leung* v. *Canada (Citizenship and Immigration)*, 2017 FC 636, at paragraph 19. See also: *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 50.

(d) the expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;

(e) the need to limit the number, length and cost of appeals;

(f) preserving the economy and integrity of the proceedings in the tribunal of first instance; and

(g) other factors that are relevant in the particular context."[71]

The Court chose four of the factors which it considered to be most relevant and based its decision on the standard of review on its analysis of those factors.

[97] The Board has adopted the same approach to the standard of review it applies to appeals before it. Although the Court of Appeal did not analyze all the factors listed in *Newton*, the Board will apply all the factors to determine the appropriate standard of review for this appeal.

(a) The respective roles of the tribunal of first instance and the appellate tribunal, as determined by interpreting the enabling legislation

[98] The Board finds the interpretation of the relevant legislation to be the most important determiner of the standard of review. The Saskatchewan Court of Appeal in *City Centre Equities Inc.* v. *Regina (City)* stated:

> "In my view, this is the proper approach to determining the standard of review that the Committee should apply in the present case. The standard of review should be determined by conducting a full exercise in statutory interpretation, which ultimately will answer what respective roles the Legislature intended the Committee and Board to fulfill."[72]

[99] The Court of Appeal of Alberta also found the analysis of the legislation was crucial to determining the standard of review. In *Yee*, the Court stated: "Of central importance in setting the internal standard of review is the role assigned to the appeal tribunal by the governing statute."[73]

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

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

73 *Yee* v. *Chartered Professional Accountants of Alberta*, 2020 ABCA 98, at paragraph 34.

[100] The Act and PLAR provide for a statutory right of appeal of certain decisions made by the Director. The Board was established to hear those appeals and provide recommendations to the Minister. In appeals of administrative penalties, as in other appeals before the Board, there are three legislative purposes or roles to consider: the role of the Director, the role of the Board, and the role of the Minister.

The Role of the Director

[101] Section 59.3 of the Act authorizes the Director to issue an administrative penalty if a person has contravened certain sections of the Act.[74] The Director considers the evidence on the record before him and uses those facts and his discretion of the seriousness of the contravention to determine the amount of the penalty in accordance with the legislation. The Director has an important role in the Act's enforcement provisions and overall management of public lands.

The Role of the Board

[102] The second legislative purpose is the role of the Board. The Legislature clearly understood that the Director may make mistakes in exercising his powers when issuing an administrative penalty. To balance the potential for error by the Director, which could have significant impacts upon Albertans, the Legislature provided for a process where a person

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[74] Section 59.3 of the Act states:

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

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

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

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

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

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

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

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

receiving an administrative penalty could appeal the decision. The Board was granted jurisdiction to hear appeals prescribed in PLAR.[75]

[103] As per section 120 of the Act, appeals before the Board "must be based on the decision and the record of the decision-maker." In addition to the decision and the record, the Board is also authorized to consider the submissions of the parties to an appeal through a written or oral hearing. This is not a hearing *de novo,* as appeals before the Board are based on the decision and the record of the decision-maker, but in the course of the appeal the Board may consider whether the record is complete, whether the Director followed the rules of procedural fairness, and whether the evidence supports the Director's decision to issue the administrative penalty. Additionally, to fulfill its mandate, the Board will hear 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.[76]

[104] The Board considers the Director's decision, the record, the submissions from the parties, the legislation, and relevant case law, and determines whether the Director made the correct decision. The Board must also consider the Appellants' rights and reasons for appealing, which are reflected in the grounds of appeal the Appellants are relying on, as indicated in its Notice of Appeal. Those grounds of appeal are set out in section 213 of PLAR:

> "A decision is appealable only on the grounds that
>
> (a) the director or officer who made the decision
>
> (i) erred in the determination of a material fact on the face of the record,
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> (ii) erred in law,
>
> (iii) exceeded the director's or officer's jurisdiction or authority, or
>
> (iv) did not comply with an ALSA regional plan;

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[75] Section 122(1) of the Act states: "On receipt of a notice of appeal under this Act and compliance with the applicable process set out in this Act, the regulations and the rules established by the appeal body, the appeal body has jurisdiction to determine an appeal."

[76] *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.

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

The onus is on the appellant to prove the grounds of appeal.

[105] It is important to note that the Board is not the decision-maker on the appeal. The Board's role and mandate is to provide the Minister of Environment and Parks (the "Minister") with a report that includes representations or a summary of the representations made before the Board and recommendations that the Minister confirm, reverse, or vary the decision to issue the Administrative Penalty.

The Role of the Minister

[106] The Act makes the Minister the final decision-maker on the appeal. Section 124(3) of the Act states:

> "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."

[107] By granting the Minister the authority to reverse or vary the Director's decision, and to make any decision that the person whose decision was appealed could have made, the Legislature intended the Minister to have the ability to substitute his own decision for that of the Director's. The authority to "make any further order that the Minister considers necessary for the purpose of carrying out the decision" is evidence of the Legislature's intent for the Minister to have the discretion to overrule the Director's decision. The Minister's powers strongly suggest correctness as the standard of review the Minister would apply to the Director's decision.

[108] The Board has the statutory duty to advise the Minister if the Director's decision should be confirmed, reversed, or varied. As the expert advisor to the Minister, the Board must provide the best possible advice. The Minister needs to determine if the Director's decision was correct, and he relies, to a large extent, on the Board to advise him. The Board, having reviewed the decision, the record of the decision-maker, the legislation, the submissions from the parties to the appeal, and the relevant case law, is best situated to determine if the Director's decision is correct and to advise the Minister whether he should confirm, reverse, or vary the decision. The

Minister does not have to follow the Board's recommendation, as he may take into account other factors in making his decision, but the Board's report and recommendations are important for the Minister in his deliberations. The Board's advice would not be as effective if it was limited to the standard of reasonableness. In order to provide the best possible advice to the Minister, the Board must consider the Director's decision under appeal on a standard of correctness.

(b) The nature of the question in issue

[109] The nature of the question in issue in this appeal, as in other appeals on administrative penalties and appeals under the Act in general, are a combination of facts, law, and policy. The issues in the appeal are determined by the grounds selected by the Appellants in the Notice of Appeal, which are also listed in section 213 of PLAR.

[110] The Board set the issues for the hearing in this appeal as follows:

> Did the Director in issuing the Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/02-AP-NR-20/01:
>
> - err in the determination of a material fact on the face of the record?
> - err in law?
> - exceed the Director's jurisdiction or legal authority?

[111] In determining whether the Director erred in the determination of a material fact on the face of the record, the Board considers whether the Director correctly interpreted and relied on the record before when making the decision to issue the Administrative Penalty. The Board must also consider whether the Director's Record is complete, which, in this appeal, involved a claim from the Appellants that the record was missing particular documents. To determine if the record is complete, the Board must conduct a thorough review of the record, relevant legislation, and arguments from the parties.

[112] Of particular importance in this appeal is the question of Proceeds and whether the Director determined the Proceeds correctly. This required the Board to undertake a detailed review of the evidence, relevant legislation and policy, and complex accounting practices and

principles. A correct determination of the material facts on the face of the record may have significant impacts on the timelines and the calculation of the Penalty and Proceeds.

[113] Errors in law are determined by a review of the legislation, policy, and relevant case law. In this appeal, the Board had to determine if the Director correctly interpreted the legislation in calculating the limitation date and assessing the Penalty and Proceeds. An error in law, if consequential to the outcome of the appeal, may require the Board to recommend the Minister vary or reverse the Director's decision. Issues of procedural fairness do not require any deference to the Director.[77] The Board must determine if the Director acted in a procedurally unfair manner and if the breach is mitigated by a hearing before the Board. In this appeal, the Appellants claimed the Director erred in law and was procedurally unfair.

[114] To determine if the Director exceeded his jurisdiction or legal authority, the Board must review the relevant legislation, policies and the record. The Board must understand the Director's authority and understand the Director's responsibilities. An exceedance of jurisdiction or legal authority may be a question of fact, law, or mixed fact and law, depending on the nature of the alleged excess of jurisdiction or authority. In this appeal, the Board had to consider whether the Director had the jurisdiction to issue the Administrative Penalty, which required the Board to review the legislation, a Ministerial Order, the Director's Record, and the submissions of the Parties.

[115] The consideration of the nature of the questions in issue is a fundamental part of the Board's determination of an appeal. While the Director may have the same set of facts as the Board when he made his decision to issue the Administrative Penalty, the Board had the added benefit of written and oral submissions, which place the record in context, and more fulsome arguments from the Parties. The Board also had evidence that met the test of being 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. Although the standard of review may be variable depending on the nature of the question at issue, the

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[77] See: *Khela* v. *Mission Institution*, 2014 SCC 24, at paragraph 79; and *Murray Purcha & Son Ltd.* v. *Barriere (District)*, 2019 BCCA 3, at paragraph 28.

Board considers the overall factors and the Board's legislated duty to provide the best possible advice to the Minister on appeals to be indicators the Legislature intended to have the Board review the appeals based on whether the Director made the correct decision related to the grounds of appeal.

(c) The interpretation of the statute as a whole

[116] An interpretation of the statute as a whole confirms that the appropriate standard of review for the Board to apply to appeals of administrative penalties is correctness. The Act and PLAR provide for a system that grants authority, with terms and conditions, for the use of public land and a system of enforcement when a party is alleged to have breached the terms and conditions. The legislation also provides for an appeals system to enable appellants to appeal certain decisions, including the issuance of administrative penalties. The Board is given authority under the Act to hear those appeals and make a report and recommendations to the Minister. The Legislature provided for a comprehensive system that would ensure the effective use of public land, the protection of the rights of disposition holders, and the ability for the Minister to make corrections where needed.

(d) The expertise and advantageous position of the tribunal of first instance, compared to that of the appellate tribunal;

[117] The Director has knowledge about the enforcement of the Act and PLAR. The Director authorizes investigations into alleged contraventions of the legislation and reviews the evidence available before making the decision to issue a penalty. The Board respects this knowledge.

[118] The Board has expertise in multiple areas relative to public lands appeals. Members of the Board have experience and expertise in public lands administration, regulatory compliance and enforcement, auditing and accounting, engineering, administrative law, public service, environmental sciences, business, energy resources, land reclamation and remediation, land-use planning, wildlife biology, agriculture, and multiple other areas. Board members bring this experience and expertise to the appeal process. In addition to Board member expertise, the Board has developed its knowledge and proficiency in the legislative framework it operates in.

The Supreme Court of Canada in *Dunsmuir* noted: "[w]hen an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules."[78]

[119] The Minister has access to Board's experience, which is incorporated into the Board's report and recommendations. The Minister may call upon other expertise accumulated in the Board, AEP, or elsewhere.

[120] The knowledge of the Director, although significant, does not rule out a standard of correctness as the Board and Minister have corresponding knowledge and expertise. With respect to the Director, the Board is in a more advantageous position. As discussed earlier, the Board has the benefit of submissions and evidence from the parties to add context and clarity to the record.

(e) The need to limit the number, length and cost of appeals;

[121] The Act and PLAR have specific provisions to ensure the number, length and costs of appeals are not excessive. Some of these are listed below:

Public Lands Administration Regulation

- section 211 limits appeals to prescribed decisions;
- section 212 states that only persons who have received the decision or are directly and adversely affected by the decision may appeal;
- section 213 limits the appeal to specified grounds;
- section 216 sets requirements for the Notice of Appeal and requires the appeals coordinator to reject the Notice of Appeal if it does not comply with the requirements;
- section 217 sets timelines for the appeal to be served on the Board;
- section 220 authorizes the appeals coordinator to combine Notices of Appeal that appeal the same decision;
- section 225 provides for written submissions;

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78 *Dunsmuir* v. *New Brunswick*, 2008 SCC 9, at paragraph 162.

- section 226 states that mediation meetings may be used to resolve the appeal; and
- section 236(1) provides a timeframe for the appeal to be resolved (appeals of an administrative penalty must be resolved within one year of the appeal being served on the Board).

The Act

- section 121 indicates a decision is not stayed by a notice of appeal and must be applied for;
- Section 122(2) gives the Board the discretion to hold an oral or written hearing;
- Section 122(3) allows the Board, with the consent of the parties, to make its report to the Minister without a hearing;
- Section 123(5) authorizes the Board to dismiss a notice of appeal for being frivolous or vexatious, or without merit, or for any other reason the Board considers the notice of appeal to not be properly before it;
- Section 123(6) bars appeals that have been adequately dealt with in a hearing or review under any other legislation;
- The Board has 30 days after the completion of a hearing to submit the report and recommendations to the Minister; and
- Section 126 protects the Minister from judicial review or orders where the Minister has acted within his authority.

These provisions indicate the Legislature intended an appeal process that is efficient and effective. The Board strives to meet those objectives and reviews its processes frequently to improve its service to the public, the AEP, and the Minister. As the legislation already has provisions controlling the number, length and cost of appeals, there is less need for deference to the Director. If the Board were to give greater deference to the Director, the appeal process would be stifled and less effective. The Board is satisfied its process in this appeal has been conducted in a manner that limited the length and cost of the appeal.

(f) Preserving the economy and integrity of the proceedings in the tribunal of first instance

[122] Before an administrative penalty is assessed, the person who is under investigation has the opportunity to engage with the Director and provide evidence or explanations that the person wishes the Director to be aware of before the Director makes the

decision. The matter is appealed to the Board when the appellant believes the Director has made an error as listed in the grounds of appeal. Through the appeal process, the Board is able to determine if the Director was correct in assessing the penalty. The Board's appeal process does not undermine the Director's process. The Board only recommends the Minister reverse or vary the decision in cases where the Director has erred. The Board is of the view that the appeal process preserves and protects the economy and integrity of the Director's process as the Director's decision will be supported by the Board if it is correct. The Board's ability to recommend an incorrect administrative penalty assessment is reversed or varied by the Minister serves to preserve and protect the economy and integrity of the Director's process and of the AEP as a whole. The appeals process is evidence of the Legislature's intent to demonstrate to the public that the government is aware mistakes can be made and corrected. The Board again notes the Minister makes the final decision, not the Board.

[123] Preserving the economy and integrity of the proceedings in the tribunal of first instance is provided for by the appeal process as set out in the legislation and does not require the Board to give greater deference to the Director. The legislation's aims are met with the Board applying the standard of correctness.

(g) Other factors that are relevant in the particular context

[124] The Board considers any other factors that may be relevant to the standard of review in each appeal. In this appeal there were no other factors the Board considered relevant.

Discussion

[125] The Board's review of the *Newton* factors confirms the appropriate standard of review to apply to this appeal is correctness.

[126] The Director referred to *Yee* and argued that the *Regulated Accounting Profession Act* ("RAPA")[79] was substantially similar to the *Public Lands Act*. The Director stated:

> "In other words, the fact that the Board ultimately only makes a recommendation to the Minister does not change the Board's fundamental role as an appellate

[79] *Regulated Accounting Profession Act*, R.S.A. 2000, c. R-12.

> body. The recommendation must be with respect to the decision appealed from and not a substitute recommendation which sets aside the Director's decision."[80]

[127] The Board respectfully disagrees with the Director's analysis and interpretation of the legislation and *Yee*. Section 120 of the RAPA provides that the appeal tribunal is the final decision-maker for appeals under that legislation, whereas section 124 of the *Public Lands Act* provides that the Minister is the final decision-maker on appeals that are before the Board. Section 124(3) states:

> "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."

As already noted, the Minister's power to vary the appealed decision is effectively the same as substituting the Minister's own decision for that of the Director's.

[128] The Board notes the Court in *Yee* considered a decision of an appeal tribunal's review of a disciplinary tribunal. The Court's guidelines, which were quoted by the Director, refer to the legislative relationship between the appeal and discipline tribunals. The Court does not suggest the guidelines are intended for any other type of appellate review, and indeed, some of its suggested guidelines are clearly only applicable to the particular legislative scheme in the RAPA, such as where the Court refers to "professional standards," and "professional misconduct."[81] Nevertheless, to the extent that *Yee* follows *Newton,* the Board finds *Yee* to be instructive and helpful in determining the standard of review. However, the substantial dissimilarities between the legislation and appeal process in the RAPA and the *Public Lands Act* limits *Yee*'s applicability to this appeal.

[129] Although the Board adopts *Newton* as a guide, that case also dealt with a legislative scheme that was significantly different from the *Public Lands Act,* specifically regarding the role of the Minister in the appeal process. The British Columbia Supreme Court noted that *Newton* "turns on the interpretation of a very different statute regarding an appeal

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80 Director's Response Submission, February 22, 2021, at paragraph 283.

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

process that may appear, superficially, similar to the one here, but is in fact quite different – involving, as it does, professional discipline."[82] The Board notes the Court of Appeal of Alberta in *Newton* wisely chose to not prescribe a "one size fits all" approach to an internal standard of review, but rather set out a broad and flexible method for determining the appropriate standard to apply. The Court of Appeal in *Yee* also did not mandate a firm standard of reasonableness or correctness for internal reviews. The Court instead stated appeal tribunals should review the decisions of the lower tribunal flexibly and holistically, "without a rigid focus on any abstract standard of review."[83] The Board has endeavoured to do this by considering the factors outlined in *Newton* and applying those factors to the legislative scheme set out in the *Public Lands Act* and PLAR and to the facts in this appeal.

[130] Based on the Board's analysis of the *Newton* factors, the Board finds the standard of correctness is appropriate to apply to this appeal. The Board will continue to review the facts of each future appeal separately to determine the applicable standard of review.

B. Preliminary Motions

(i) Appellants' Preliminary Motions

[131] The Appellants made two preliminary motions on November 13, 2020:

(a) to introduce further records and evidence; and

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

[132] The Board's decision on the Preliminary Motion was issued on January 11, 2021, 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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82 *British Columbia Society for the Prevention of Cruelty to Animals* v. *British Columbia (Farm Industry Review Board)*, 2013 BCSC 2331, at paragraph 31.

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

(b) The Board refuses the Appellants' request for further disclosure. 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."[84]

[133] As the Board already determined the Additional Documents were admissible, the Board must determine the appropriate weight to assign them.

[134] In its Preliminary Motion Decision, the Board found the Additional Documents would have been part of the Director's Record had the Appellants been in a position to submit them. The Board admitted the Additional Documents in order to better complete the Director's Record. As an additional part of the Director's Record, the Board assigns the same weight to the Additional Documents as it would to any other document in the Director's Record. This weight is variable depending on a document's relevancy to the issues of appeal. When reviewing the Director's Record, the Board identifies certain records which are more relevant than others to the appeal issues. The Board took the same approach to the Additional Documents, reviewing them with the other records for their relevancy.

(ii) Director's Preliminary Motions

[135] The Director's Preliminary Motions, contained within the Director's Response Submission, requested the Board:

(a) not admit several of the Appellants' willsay statements and witnesses and the evidence in Appendix B and C of the Appellants' Initial Submissions; and

(b) admit the Director's Additional Evidence.

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[84] *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.

[136] The Board provided time for the Parties to present their positions on the Director's Preliminary Motion at the start of the hearing. The Board recessed to consider the motion and the submissions.

[137] Appeals before the Board are based on the decision and record of the decision-maker, meaning that the Board bases its recommendations to the Minister on AEP's records and generally does not hear new evidence regarding the appeal. However, the Director's Record is not always complete, and parties may have evidence, or knowledge of evidence, the Director failed to include in the Director's Record, but should have. There are also instances of a party having evidence related to the Director's Record that would be appropriate to include as a supplemental to the Director's Record. Where a party has evidence that it claims should be included in the Director's Record or has related evidence supplemental to the Director's Record, the Board will consider whether it should be admitted. When the Board considers such evidence, it looks for the following:

(a) Has the evidence been sufficiently identified by the requesting party so that it can be reasonably determined if the evidence exists?

(b) Is the evidence relevant to the issues under appeal?

(c) Is the evidence rationally connected to evidence in the Director's Record? By "rationally connected," the Board means the evidence refers to records found in the Director's Record.

(d) Will the evidence provide detail, clarification, or assist the Board to better understand the evidence in the Director's Record?

(e) Is the request for the evidence a "fishing expedition?"[85]

[138] The Board reviewed the Appellants' willsay statements and proposed witness list and found the following:

(a) The willsay statements of Ms. Colette Benson and Mr. Albert Benson, and their participation as witnesses in the hearing, were admissible because they were parties to the appeal and may have evidence relevant to the issues under appeal.

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[85] "A speculative demand for information without any real expectation about the outcome of the demand or its relevance to the matter." *Legal Dictionary, <www.duhaime.org>*.

(b) The willsay statement and participation as a witness in the hearing of Mr. Daryle Jon Warren was permitted because Mr. Warren's willsay was rationally connected to the Director's Record. Mr. Warren's willsay statement referred to the issues in the appeal. The willsay statement also referenced events documented in the Director's Record and indicated he would discuss matters such as the Joint Venture Camp, the Joint Venture Agreement, the signage at the entrance to the DML, and other matters which were rationally connected to the Director's Record.

(c) The Board found the willsay statements of Mr. Evert Smith, Ms. Angela Clarke, Mr. Andrew Bibo, Mr. Everett Normandeau, and Mr. David Lind were not rationally connected to the Director's Record, and the Board did not permit them to participate in the hearing as witnesses, based on their willsay statements.

[139] The Board considered Appendix B and Appendix C of the Appellants' Reply Submission and found the following:

(a) Appendix B (Actual Water and Sewer Costs as per Lac La Biche County By-Laws) to the Appellants' Reply Submission March 1, 2021, was not rationally connected to the Director's Record and would not be admitted as evidence in the hearing;

(b) Appendix C (Costs to Operate Equipment) to the Appellants' Reply Submission March 1, 2021, was not rationally connected to the Director's Record and would not be admitted as evidence in the hearing; and

(c) The Board considered the Director's Preliminary Motion to admit the Director's Additional Records. The Director applied to admit the "Lac La Biche County Utilities Bylaws 2014-2020" and the "Northgate Rebuttal Evidence."

[140] The Board found the Lac La Biche County Utilities Bylaws 2014-2020" to be rationally connected to the Director's Record as it referred to the matter of Proceeds. The Board also notes the Appellants were not opposed to admitting this document.

[141] The Board found the Director's "Northgate Rebuttal Evidence" was not rationally connected to the Director's Record. The Board noted Northgate is not a party to the appeal and that the document was provided on short notice to the Appellants. The Board found it would be unfair to the Appellants to respond to an 878 page, detailed document on only nine days' notice. Admitting such a document as evidence would have been prejudicial to the Appellants and would have been procedurally unfair.

C. Limitation Period

[142] One of the issues in the appeal is whether the Director erred in law or exceeded his jurisdiction in issuing the Notice of Administrative Penalty and Proceeds Assessment. The Appellants alleged the Director erred in law and exceeded his jurisdiction by issuing the Administrative Penalty outside of the two-year limitation period prescribed in section 59.7. The Director argues he issued the Administrative Penalty within the two-year limitation period. In the Director's submissions, the Director said he became aware of the alleged contraventions on May 25, 2018.

[143] 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."

[144] The legislation contemplates two possible dates for the limitation period to start: the date of the contravention or the date the contravention came to the Director's notice. In this appeal, the Director alleged in the Administrative Penalty that the date of the offence was May 25, 2018. If this date is accepted, then the two-year limitation period under section 59.7(a) would expire on May 25, 2020. Section 59.7(b) provides for a second date by which the limitation period can be calculated, which is when the Director became aware of the contravention. In the submissions, the Director stated he was first aware of the contraventions on May 25, 2018, which would make the limitation date the same as calculated under section 59.7(a). The Appellants dispute the limitation date chosen by the Director alleging the Director, through AEP employees, had knowledge of the subleases as early as 2012. The Board notes section 59.7 is clear that the limitation date is the later of the possible two dates.

[145] To determine when the Director had knowledge of the contravention, the Board reviewed Ministerial Order 44/2019, "*Designation of Director's under the Public Lands Act, Forest Land Use and Management Regulations* and *Public Lands Administration Regulation*"

(the "Designation MO"). The Designation MO designates certain positions within AEP as directors for the administration of specific sections in the Act and PLAR. Section 59.3 of the Act provides authority to the Director to issue an administrative penalty. The Designation MO specifies that only employees in the following positions are considered a director ("Designated Director") authorized to issue administrative penalties under section 59.3:

- Assistant Deputy Minister;
- Executive Director;
- Regional Compliance Manager;
- Provincial Compliance Manager;
- Compliance Manager; and
- District Compliance Manager.

[146] Section 59.7 of the Act refers to the "director." As section 59.7 relates to limitation periods for issuing administrative penalties, the Board finds the "director" is a Designated Director as appointed in the Designation MO.

[147] Based on the Board's review of the legislation, the Designation MO, and the Director's Record, the Board has determined that the Appellants' argument that AEP employees who conducted investigations and visits to the DML had knowledge of the subleases prior to May 25, 2018, is irrelevant to the calculation of the limitation date. Section 59.7(b) is clear that the limitation period starts when the Designated Director first has knowledge of the contravention. The Director's Record shows that none of the Lands Officers who visited or conducted inspections on the DML were designated directors for the purpose of sections 59.3 or 59.7 of the Act. Therefore, the Appellants' argument the limitation period should be calculated earlier is incorrect.

[148] The Board also finds the Director miscalculated the limitation date, and this miscalculation has a significant impact on the appeal. The Director based the limitation date for the Administrative Penalty on the Incident Triage Form[86]. The Triage Form stated the "Statute of Limitations Date" is May 25, 2020. The Triage Form refers to a visit by "Lands Officer Bleach" to the DML on May 25, 2018, where the Lands Officer observed signs posted on the

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86 Director's Record, at Tab 7.1.

lease that indicated two separate camps were within the boundaries of the DML. The Incident Triage Form also refers to Mr. Jamie Laird, identified in emails in the Director's Record as the Lands Approval Team Lead, and EPO Paul Smith, gathering further information regarding possible contraventions of the Act. The next section of the Incident Triage Form is titled "Approvals Manager Endorsement" and includes the wording: "Recommendation: I recommend this incident be referred to the Compliance Program for enforcement review." The "Approvals Manager Endorsement" section was signed digitally by Mr. William A. Black on January 9, 2019. The final section of the Incident Triage Form is titled "Compliance Assurance Lead/Manager Decision." This section was digitally signed on January 10, 2019, by Mr. Dean Litzenberger, Compliance Assurance Lead/Manager, and recommends the incident be investigated.

[149] The Board notes that out of all the AEP employees involved in the Incident Triage Form, only Mr. Litzenberger, as the Compliance Assurance Lead/Manager, was a Designated Director.

[150] The Board sees two arguments that can be made regarding what is meant by "director" in section 59.7 of the Act. The first, based on a strict reading of section 59.7, is that the limitation date starts when the contraventions first came to the notice of the same director who issued the Administrative Penalty. This is the argument the Director made in his submissions, stating: "The applicable limitation date is based on notice to the specific director who issued the Administrative Penalty."[87]

[151] The second argument is that the Designation MO refers to positions and not individuals and, therefore, the limitation date starts when evidence of the contravention first came to the notice of a Designated Director, regardless of whether that director issued the Administrative Penalty. The Board accepts the second argument as correct. To base the limitation date on an individual director's first notice of a contravention invites absurdity. If the individual director ceases to be a director and a new director is appointed, the limitation date

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87 Director's Response Submission, February 22, 2021, at paragraph 326.

would change to the date the new director became aware of the evidence of the contraventions. Such a situation does not invite certainty or clarity.

[152] The Board further notes that there is no evidence in the Director's Record to show any Designated Director was aware of the contraventions on May 25, 2018. According to the Director's Record, the earliest that any Designated Director was aware of the contraventions was January 10, 2019, when Compliance Manager Litzenberger recommended the incident be investigated.

[153] The Board is aware that the Director has submitted in previous appeals the limitation date under section 59.7 of the Act is determined by when the director issuing the administrative penalty first becomes aware of the contravention and has argued the same point in this appeal. The Director stated:

> "The applicable limitation date is based on notice to the specific director who issued the Administrative Penalty.
>
> Section [59.7] of the Act provides that a notice of administrative penalty may not be issued more than 2 years after the date on which the contravention first came to the notice of the director.
>
> On these facts, Simon Tatlow, Compliance Manager, Lower Athabasca Region was the director for the purpose of section [59.7].
>
> The date on which evidence of a possible contravention came to the notice of any other employee of AEP is not relevant to the determination of the limitation period in section [59.7].
>
> In the Preliminary Assessment, the Director stated that he became aware that the Appellants had entered into sublet agreements with Northgate Contractors, Northgate and Northern Mat on May 25, 2018." [88]

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[88] Director's Response Submission, February 22, 2021, at paragraphs 326-330. The Board notes section 59.7 is the section dealing with limitation periods for the Administrative Penalty, and the Director's references to section 59.8 appear to be an error. Section 59.7 of the Act provides:

> "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 states:

> "(1) Subject to any right to appeal the notice of administrative penalty, the director may file a

[154] The Board found no evidence in the Director's Record to support the Director's statement that evidence of the contraventions first came to his notice on May 25, 2018. In fact, the Board finds the evidence in the Director's Record shows the Director did not know of the contraventions until February 1, 2019, when he was copied on the Notice of Investigation.[89] The Board does not understand why the Director has argued he was aware of the contraventions on May 25, 2018, but has provided no evidence to support that argument.

[155] As noted previously, the earliest the Director's Record shows that a Designated Director became aware of the contraventions is January 19, 2019, when the Incident Triage Form was provided to Compliance Manager Litzenberger. The Board finds that January 19, 2019, is the correct date to base the limitation period on, resulting in a two-year limitation date of January 19, 2021, which is 239 days after the incorrect limitation date of May 25, 2020.

[156] The Board finds the Director applied section 59.7 of the Act incorrectly to the facts and, therefore, erred in law in determining the limitation date was May 25, 2020.[90]

[157] The "Statute of Limitations" date of May 25, 2020, as listed on the Incident Triage Form, was correct only if AEP was planning to proceed with a prosecution under section 56 of the Act. In instances of prosecutions, where the matter would be heard in court, the limitation period is set out in section 56.1 of the Act, which states:

> "A prosecution in respect of an offence under this Act or the regulations may not be commenced later than 2 years after
>
> (a) the date on which the offence was committed, or
>
> (b) the date on which evidence of the offence first came to the attention of the director,
>
> whichever is later."

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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."

89 Director`s Record, at Tab 7.1.

90 See: *Altus Group* v. *City of Edmonton*, 2014 ABQB 657, at paragraph 25.

[158] The wording in section 56.1 is similar to section 59.7, but it does not refer to administrative penalties. Further, the Designation MO designates the entire list of positions in the chart as designated directors for the purposes of section 56.1. This would include those mentioned in the Incident Triage Form, such as Lands Officer Bleach, who were aware of the contraventions before any Designated Directors were informed. However, AEP proceeded with an administrative penalty and not a prosecution.

D. Error in Law and Procedural Fairness

[159] Having determined the Director made an error in law, the Board must now determine the impact of that error. When a statutory decision-maker commits an error, it can result in the loss of jurisdiction, which means the decision-maker does not have the authority to make the decision. However, not all errors of law cause the decision-maker to lose jurisdiction.[91] In this appeal, the Appellants have raised the issue of procedural fairness, which may have resulted from the Director's error in miscalculating the limitation date.

[160] The Appellants said they were denied procedural fairness when the Director:

(a) did not provide sufficient reasons for abandoning a long-standing practice (legitimate expectations); and

(b) did not provide sufficient time to provide evidence after the Preliminary Assessment was issued.

The Board examined both issues to decide if the Director acted in a procedurally fair manner.

[161] Although the case law is not completely settled on the issue of whether a standard of review applies to a question of procedural fairness, the Board notes that most authorities hold that a standard of review is not required for a determination of procedural fairness, and if it did, it would be correctness. In C*anadian Pacific Railway Company* v. *Canada (Attorney General)*, the Federal Court of Appeal stated:

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[91] David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., P*rinciples of Administrative Law*, 6th ed (Toronto: Carswell, 2014), at page 482.

> "A court assessing a procedural fairness argument is required to ask whether the procedure was fair having regard to all the circumstances, including the *Baker* factors.... [I]t asks, with a sharp focus on the nature of the substantive rights involved the consequences for an individual, whether a fair and just process was followed.... [E]ven though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied… Attempting to shoehorn the question of procedural fairness into a standard of review is also, at the end of the day, an unprofitable exercise." [92]

[162] In Alberta, the Court recently stated:

> "The fairness of the proceedings is not measured based on whether they are 'correct' or 'reasonable' in the *Dunsmuir v New Brunswick*, sense. Rather, these issues are reviewed based on whether the proceedings met the level or standard of fairness required by law. Because the court affords no deference when deciding whether the fairness standard has been met, in that sense fairness is reviewed on a standard of correctness."[93]

[163] The Board must determine whether the Director met the level of fairness required by law. In making this determination, the Board considered the following:

(i) Was a duty of fairness owed by the Director to the Appellants?

(ii) What was the level of procedural fairness owed?

(iii) Did the Director meet the appropriate level of procedural fairness?

(i) Was a duty of fairness owed by the Director to the Appellants?

[164] The Supreme Court of Canada in *Cardinal* v. *Director of Kent Institution* stated that public authorities have a duty to act fairly:

> "This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual."[94]

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92 *Canadian Pacific Railway Company* v. *Canada (Attorney General)*, 2018 FCA 69, at paragraphs 54 to 55.

93 *Zarooben* v. *the Workers' Compensation Board*, 2021 ABQB 232, at para 75.

94 *Cardinal* v. *Director of Kent Institution*, [1985) 2 SCR 643 at paragraph 14.

[165] The Court reaffirmed this principle in *Canada (Attorney General)* v. *Mavi*:

> "Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies."[95]

[166] AEP is a public body with legislated powers and must exercise those powers according to the principles of administrative law.[96] It is the Director's responsibility to ensure an appropriate level of procedural fairness exists within the decision-making process.

[167] The Board finds the Director owed a duty of procedural fairness to the Appellants.

(ii) What was the level of procedural fairness owed?

[168] The courts have held:

> "The basic objective of the duty to act fairly is to ensure that an individual is provided with a sufficient degree of participation necessary to bring to the attention of the decision-maker any fact or argument of which a fair-minded decision-maker would need to be informed in order to reach a rational conclusion."[97]

[169] The intent of the duty of fairness is not to create "procedural perfection" but to attain an appropriate balance between the need for fairness, efficiency, and predictability of the outcome.[98] If the balance is incorrect, the decision-maker has breached the duty to act fairly. If the breach is significant, the decision-maker's actions may be void. However, not every breach of the duty of fairness will render a decision void. Minor procedural technicalities or errors that are immaterial to a decision or did not affect the outcome will generally not be fatal to the decision.[99]

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95 *Canada (Attorney General)* v. *Mavi*, [2011] 2 S.C.R. 504, at paragraph 39.

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

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

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

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

[170] The degree of procedural fairness owed by the Director to the Appellants "is to be decided in the specific context of each case."[100] In *Baker* v. *Canada (Minister of Citizenship and Immigration)* ("*Baker*"), the Supreme Court of Canada listed factors to be considered when determining the duty of procedural fairness required.[101] The list is not meant to be restricted to just the five listed by the Court, as other factors may be relevant. Although the factors were given in the context of a judicial review, the Board considers them helpful:

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

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

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

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

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

(a) Nature of the Decision

[171] The more a decision is judicial in nature, the more procedural fairness is required. A decision that is more legislative requires less procedural fairness. The decision to issue the Administrative Penalty has mainly judicial characteristics. The weighing of evidence, the opportunity for the Appellants to make representations, and the exercise of discretion by the Director, are hallmarks of a judicial process, as is the availability of an appeal to the Board.

(b) Statutory Scheme

[172] Where no appeal of a decision is available, or if the decision is final, there is a greater degree of procedural fairness required. The Act provides for an appeal to the Board. A right of appeal typically lessens the degree of the duty of fairness owed by the decision-maker. However, the Act requires that the appeal be based on the decision and record of the decision-maker. As the record is central to the determination of the appeal, it is extremely important the Director's Record is complete. The reliance of the appeal on the Director's Record creates a higher level of procedural fairness owed by the Director, especially with respect to the record.

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

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

(c) Importance of the Interest to the Appellants

[173] The more important the decision is to the Appellants, the higher the duty of fairness is required.[102] The Appellants, in their letter to the Director dated May 8, 2020, stated: "There is no question that the potential jeopardy facing our clients is extremely serious – the Penalty is approximately $7,000,000, an amount which would certainly guarantee personal and business financial collapse for our client."[103] The Board accepts the high amount of the Administrative Penalty could have drastic economic impacts on the Appellants. As the decision to issue the Administrative Penalty could significantly affect the Appellants' interests, the Board finds the duty of procedural fairness owed by the Director is high.

(d) Legitimate Expectations

[174] The Appellants made arguments regarding legitimate expectations but not related to this issue. The Board will address those arguments.

[175] The Supreme Court of Canada in *Vavilov* stated: "Where a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons."[104]

[176] The Appellants submitted "the Director erred in failing to consider or provide reasons for departing from AEP's long-standing past practices and internal decisions regarding enforcement and informal subleasing of MLLs [DMLs] when imposing the Administrative Penalty."[105] The Appellants alleged AEP was aware of unauthorized subleasing in the Fort McMurray area and considered them to be an "allowable deviation from the strict terms of the Act…"[106] and that AEP had a lengthy history of encouraging cooperative compliance efforts

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102 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 25.

103 Director's Record, at Tab 1.3.

104 *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65, at paragraph 131.

105 Appellants' Initial Submission, February 5, 2021, at paragraph 74.

106 Appellants' Initial Submission, February 5, 2021, at paragraph 78.

with disposition holders in relation to any breaches of the Act or terms of their dispositions and that enforcement was considered a last resort only after all compliance efforts had failed.[107]

[177] The Appellants stated the Director denied them procedural fairness by not providing them with an opportunity to become compliant and by not providing reasonable notice for departing from AEP's past practices regarding subleasing of dispositions.

[178] The doctrine of legitimate expectations is based on the principle that procedural fairness must take into account the promises or regular practices of the delegate. It would be unfair for the Director or AEP to vary from their usual practice without good reason. The Appellants did not provide any significant evidence to demonstrate AEP had departed from its previous practices relating to the subleasing of dispositions. The Board acknowledges the Appellants stated the evidence they had sought to admit at the hearing may have been related to AEP's past practices.

(e) Procedural Choices

[179] The more statutory discretion the Director has to create his own procedure; the more procedural fairness is owed. The Act leaves much of the process for assessing administrative penalties to the discretion of the Director. For example, there is nothing in the legislation mandating that a person served with a preliminary assessment of an administrative penalty must be provided with an opportunity to submit evidence to the director before the director's decision is made to issue an administrative penalty. However, the AEP, to its credit, has developed that practice, which usually includes a due process meeting with the person accused of the contravention. The Board notes that in previous appeals before the Board regarding administrative penalties, the Director has provided a varying period for an appellant to provide evidence for the Director to consider before deciding on the Administrative Penalty. The Board reviewed its most recent appeals of administrative penalties involving similar facts and found the following:

- In *Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks,*[108]

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107 Appellants' Initial Submission, February 5, 2021, at paragraph 94.

> the director issued a preliminary assessment on August 6, 2019, and accepted submissions from the appellants as late as September 17, 2019. There is no indication in the Director's Record for that appeal of a deadline to provide further evidence after September 17, 2019. The administrative penalty was issued on November 15, 2019. The director provided at least 43 days for the appellants to provide further evidence.

- In *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*,[109] the director issued a preliminary assessment on July 26, 2019, and accepted evidence from the appellants as late as August 23, 2019, before issuing the administrative penalty on August 29, 2019. The Director provided at least 29 days for the appellants to provide further evidence.
- In *Colette Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks (14 September 2020)*,[110] the preliminary assessment was provided to the appellants on September 28, 2018. The director accepted submissions from the appellants as late as November 14, 2018, with the administrative penalty being issued on December 19, 2018. The director provided at least 48 days for the appellants to provide further evidence for the director to consider.

[180] The Board notes the seven-day period the Director gave the Appellants seems to be a departure from AEP's usual practice. The Appellants wrote to the Director on May 8, 2020, expressing their concerns with the short response period:

> "There is no question that the potential jeopardy facing our clients is extremely serious – the Penalty is approximately $7,000,000, an amount which would certainly guarantee personal and business financial collapse for our clients. As such, we submit that the duty of fairness on the Director in the course of his investigation is correspondingly broad. Providing CRC with a week to respond to such significant and adverse findings, in the absence of the information required

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108 See: *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.

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

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

> for them to determine the relevant records and information required in response, would place them in an untenable position."[111] [Emphasis by the Board.]

[181] The Director has discretion to set the procedures for the issuance of the Administrative Penalty, but that discretion must be exercised appropriately and fairly. The opportunity for an accused person to present its evidence before the final decision by the Director is an essential element of procedural fairness. The Board concludes the discretion afforded to the Director to control his own procedure results in a high degree of procedural fairness owed to the Appellants.

[182] The Board's application of the factors listed in *Baker* suggests the Director owed a high level of procedural fairness to the Appellants. The Board acknowledges its discretionary determination is not a precise measurement, and the requirements for procedural fairness may differ from appeal to appeal, depending on the facts and circumstances, as noted by the Court.[112]

(iii) Did the Director meet the appropriate level of procedural fairness?

[183] The Courts have held that the duty of procedural fairness is fundamentally about the principle of *audi alteram partem*, which means "hear the other side." This principle refers to the right of a person to know the case being made against them and be allowed to respond to the decision-maker. [113] The Court has stated:

> "The minimum standard of procedural fairness in Canadian administrative law has long been held, and articulated as, *audi alteram partem*. The party affected by a decision has the right to know the case against it, and be provided a meaningful opportunity to address it."[114]

[184] The Supreme Court of Canada has considered the principle of procedural fairness in multiple cases over the last few decades. In *Dunsmuir*, the Court stated:

> "…procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern:

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111 Director's Record at Tab 3.2.

112 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 21.

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

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

> administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, '[t]he observance of fair procedures is central to the notion of the 'just' exercise of power.'"[115]

In *Charkaoui, Re,* The Court stated:

> "Last but not least, a fair hearing requires that the affected person be informed of the case against him or her, and be permitted to respond to that case. This right is well established in immigration law. The question is whether the procedures 'provide an adequate opportunity for [an affected person] to state his case and know the case he has to meet.'"[116]

[185] The case law establishes that a person affected by an administrative decision has a right to a fair and open decision-making process and an opportunity to submit their evidence and make their case. The opportunity does not have to be perfect, but it must be adequate in relation to the facts and circumstances of the matter, including the duty of procedural fairness owed by the decision-maker.

[186] In this appeal, the Director's error in law resulted in an inadequate opportunity for the Appellants to fully make their case and present their evidence. The evidence in the Director's Record shows the Director was aware of the contraventions by January 10, 2019, when the first designated director became aware of the contraventions. However, for reasons unexplained, the Director chose to proceed with the "Statute of Limitations" date listed in the Incident Triage Form of May 25, 2020, as the start of the limitation period. The date listed on the Incident Triage Form appears to have been accepted by the Director without any independent analysis. The incorrect limitation date significantly influenced the Director's choice of procedures.

[187] On May 7, 2020, the Director emailed the Preliminary Assessment to the Appellants and their legal counsel. The letter accompanying the Preliminary Assessment stated:

> "I am requesting written correspondence by May 15, 2020 to provide your review of the facts on which this preliminary assessment is based and any documentation you may wish to provide on behalf of the parties relating to these contraventions. Please note that this will be on 'with prejudice' basis.

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115 *Dunsmuir* v. *New Brunswick,* 2008 SCC 9, at paragraph 90.

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

> If I do not hear from you by Friday, May 15, 2020 by 4:30 pm, I will proceed to make my decision without further notice to you.
>
> It would be most efficient if you could provide any relevant documents to me via email…. In your letter to the EPO on March 31, 2020, your legal counsel stated you have numerous documents that could be produced. I am asking that you send **all** records that pertain to DML 090102 and the Lands that you feel would be beneficial to me in making my decision on this file."[117] [Emphasis in the original.]

[188] This would be an entirely appropriate letter - if not for the one week the Director provided to the Appellants to provide all the records. The Appellants indicated the enormity of the task the Director asked of them in the return letter from the Appellants' legal counsel dated May 8, 2020:

> "Given the considerable jeopardy which our clients potentially face as a result of the Penalty, the substantial new information included in your findings which has not been previously disclosed to our clients and the ongoing social distancing and business closure measures currently in place, it will simply not be possible to provide the requested response by your stipulated deadline."[118]

[189] The Director responded on May 11, 2020, and offered to hold a video or audio call before May 15, 2020, so that the Appellants could "have access to any documents they might wish to refer to during the conversation while respecting social distancing requirements." The Director reiterated the May 15, 2020 deadline to provide any response to the Preliminary Assessment.[119]

[190] The Appellants' legal counsel responded on May 12, 2020, and stated:

> "Further to your correspondence of May 11, 2020, it is disappointing that your office is unwilling to provide our clients with the time and information necessary to properly assess the case against them in this matter and to prepare a fulsome rebuttal to the issues raised in the Preliminary Assessment. This is particularly puzzling given that there are no imminent limitation periods or deadlines of which we are aware…. As we indicated in our correspondence of May 8th, giving our clients a mere week to provide a fulsome response to a Preliminary Assessment of approximately $7,000,000, together with all information and records necessary to

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117 Director's Record at Tab 3.1.

118 Director's Record at Tab 3.2.

119 Director's Record at Tab 3.3.

> support that response hardly seem equitable in the circumstances given that AEP has had many months to compile its own information. This would be so even without the current COVID pandemic and the difficulties this has created in formatting and exchanging hard copy records."[120]

[191] The Appellants' legal counsel further stated the Appellants intended to provide a fulsome response and supporting records as soon as possible, but maintained it was unable to do so by the May 15, 2020 deadline set by the Director. The Director proceeded to issue the Administrative Penalty on May 20, 2020.

[192] The influence of the incorrect limitation date can be seen in the extremely short period the Director gave the Appellants to provide evidence. The Director acknowledged in his written submissions that the limitation period was significant in the Director's procedural choices:

> "In the circumstances of the public health emergency and the imminent expiry of the Director's limitation date to issue the Administrative Penalty, the Director provided the Appellants with reasonable alternatives to meeting-in-person, which was AEP's normal practice."[121]

[193] While the alternatives to an in-person meeting may have been reasonable, the one week time period to provide evidence to the Director during a worldwide pandemic was not. The Appellants noted in their written submissions the circumstances of the pandemic:

> "… international travel was being discouraged or banned, mandatory quarantine was required for anyone returning from out of country, non-essential businesses were closed, and there was widespread uncertainty and anxiety about the spread of the virus."[122]

[194] The Director was advised, several times, that the Additional Records only existed in hard copy format and that the Appellants would need additional time to obtain a scanner or copier to provide those records. Once the Appellants had completed scanning or copying the thousands of records in their possession, they would then need to send those records to counsel for review to determine which records were relevant to the Director's request and which additional records might be needed. Despite the considerable period of time that this would

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120 Director's Record at Tab 3.4.

121 Director's Response Submission, February 22, 2021, at paragraph 125.

122 Appellants' Initial Submission, February 5, 2021, at paragraph 141.

necessarily take to complete, the Appellants advised the Director on May 8, 2020, that they would provide the Additional Records within 30 days.

[195] The Appellants noted 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."[123]

[196] The Board finds the Director's error in law in determining the expiry of the limitation date to be May 25, 2020, resulted in unnecessary and unreasonable efforts to have the Administrative Penalty issued by the incorrect deadline. The procedural process initiated by the Director failed to "provide an adequate opportunity"[124] for the Appellants to state their case and know the case they had to meet. One week to provide a sufficient number of documents in the midst of a pandemic did not meet the Supreme Court of Canada's underlying notion for procedural fairness. The Court stated in *Baker*:

> "I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."[125]

[197] The Board finds the Director's error in law resulted in the failure to provide procedural fairness to the Appellants. The Board also finds that even if the Director had not erred in law, providing one week for the Appellants to provide their evidence in the circumstances that existed at the time was a denial of procedural fairness. The Director's incorrect belief of an imminent limitation period does not justify infringing on the procedural rights of the Appellants.

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123 Appellants' Initial Submission, February 5, 2021, at paragraph 144.

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

125 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699, at paragraph 22.

E. Impact of the Error in Law

[198] The result of the Director's error in law and the denial of procedural fairness to the Appellants was that the Director's Record was incomplete, and the Director based his decision on that incomplete record. In *Alberta (Workers' Compensation Board)* v. *Alberta (Workers' Compensation Board Appeals Commission)*, the Alberta Court of Appeal stated:

> "In terms of the right to be heard, a tribunal must not abuse its discretion by basing its decision on insufficient or no evidence, or on irrelevant considerations: *Principles of Administrative Law*, *supra*, at 289. The decision-maker must consider relevant evidence, inform the parties of that evidence, and allow the parties to comment on it and present argument on the whole of the case."[126]

[199] The Board finds the Director based the decision to issue the Administrative Penalty on insufficient evidence and an incomplete record. The Board notes, as it has previously stated in this report and recommendations that the Act requires appeals to be based on the decision and the record of the decision-maker. When the record of the decision-maker is incomplete, the decision made may be void.

[200] The Director and the Board do not know what evidence the Appellants may have introduced had they been given a reasonable opportunity to do so. On November 13, 2020, the Appellants applied to have the Additional Documents admitted as evidence. The Board allowed the Additional Documents as those documents would have been part of the Director's Record had the Director provided sufficient time for the Appellants to provide further evidence. Essentially, the Board was trying to complete the Director's Record. However, the Board was not prepared to make a finding on the Appellants' allegation that the Director's deadline to submit evidence prevented them from providing the Additional Documents at the time. The Board wanted to consider the arguments in the context of the merits of the appeal. The Board admitted the Additional Records on the grounds that the Director's Record may have been incomplete, and the Board would determine the weight to give the Additional Records as part of the hearing process.

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

[201] Having considered the circumstances of the Director's deadline, the Parties' submission, and the legislation and relevant case law, the Board is concerned the denial of procedural fairness to the Appellants was greater than just the Additional Records. Before the hearing, the Appellants requested various willsays and witnesses be admitted. As discussed already, the Board refused to allow willsays and witnesses that were not rationally connected to the Director's Record. But would the Appellants have introduced those willsays and witness evidence if the Director had not been under pressure from an incorrect limitation period?

[202] The Director argues the Appellants had the opportunity in their November 13, 2020 application to admit further evidence but did not do so. The Board has considered this argument carefully. The Appellants and their legal counsel are not new to the Board's procedures and governing legislation. They are aware that the appeal must be based on the decision and record of the Director. It may be that if the Appellants had reasonable time to produce evidence for the Director that they would have brought forward evidence similar to the evidence they attempted to introduce at the hearing. The Board cannot know what the Appellants would have done with more time to prepare their case.

[203] The Supreme Court stated in *Cardinal* v. *Director of Kent Institution*:

> "The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing."[127] [Emphasis by the Board.]

[204] The Board cannot speculate on what the Appellants would have done if not for the Director's breach of procedural fairness. The Board can only find if a breach did occur, determine its severity, if possible, and make a recommendation to the Minister.

[205] The Board must determine if the breach of procedural fairness can be remedied. In many situations, a procedural fairness breach is remedied by the appeal process, where the

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127 *Cardinal* v. *Director of Kent Institution*, [1985] 2 S.C.R. 643, at paragraph 23.

appellant has an opportunity to present their case more fully. However, some procedural fairness breaches are so grievous that they permeate the entire appeal and are not able to be remedied.

[206] In Re: *Taiga Works Wilderness Equipment Ltd*, the British Columbia Court of Appeal reviewed the question of curing procedural defects and noted the following factors for determining if the defect can be remedied:

> (a) the gravity of the error committed at first instance;
>
> (b) the likelihood that the prejudicial effects of the error may also have permeated the rehearing;
>
> (c) the seriousness of the consequences for the individual;
>
> (d) the width of the powers of the appellate body; and
>
> (e) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.[128]

[207] The Board has already found the gravity of the error to deny procedural fairness to the Appellants to be severe and that the prejudicial effects have impacted the entire appeal. The Board has also noted the potential of serious consequences for the Appellants increases the level of procedural fairness owed by the Director. The Board does not have wide-ranging powers to do anything other than make recommendations to the Minister, and it is limited to a hearing based on the decision and record of the decision-maker, meaning it does not have the authority for a *de novo* hearing where new evidence can be introduced.

[208] The Alberta Court of Appeal in *Stewart* v. *Lac Ste. Anne (County) Subdivision & Development Appeal Board* ("*Stewart*")[129] found that a hearing *de novo* can act as an adequate remedy in some situations, but not all. The Court quoted from *Essentials of Canadian Law, Administrative Law*, as follows:

> "Of course, not all appeal bodies will have the capacity necessary to engage in a process that will accord the person appealing the previously denied benefit of the rules of procedural fairness. However, the actual outcome… is unaffected provided the appeal body can entertain the appeal on the grounds of procedural

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[128] *Taiga Works Wilderness Equipment Ltd*, Re, 2010 BCCA 97, at paragraph 28.

[129] *Stewart* v. *Lac Ste. Anne (County) Subdivision & Development Appeal Board*, 2006 ABCA 264, at paragraph 27.

> unfairness and, without itself curing the defect, nonetheless remit it back to the first instance body for rehearing. Indeed, in many instances even where the appeal body has curative capacities, if that first instance body is not otherwise tainted (such as by way of a reasonable apprehension of bias), that may be the appropriate step to take. The applicant in that way is provided with a procedurally fair hearing where it should have taken place initially - at first instance, not on appeal. Nonetheless, on other occasions, countervailing considerations of administrative convenience may indicate that the appeal body should exercise its curative capacities rather than have the matter go back to the initial stage once again." [Emphasis by the Board.]

[209] As the Board has already noted, appeals under the Act are based on the decision and record of the decision-maker. The Board does not have the "curative capacities" the Court referred to in *Stewart* and cannot cure the procedural defect or send the matter back to the Director for reconsideration with further time for the Appellants to provide more evidence. The Board is only able to recommend to the Minister that the Director's decision be confirmed, reversed, or varied.

[210] The Board finds the error in law committed by the Director in incorrectly interpreting the limitation date set by section 59.7 of the Act led to a serious breach of the Director's duty of procedural fairness owed to the Appellants. The Board finds the breach to be of such magnitude as to have deprived the Appellants of a fair and fulsome hearing, which the Board is unable to cure or remedy due to its inability to hear matters *de novo.* Therefore, the Board recommends to the Minister that the Director's decision to issue the Administrative Penalty be reversed.

[211] The Board did a thorough review of all the evidence in the Director's Record and considered the submissions and evidence of the Parties along with the legislation and relevant case law. Had it not been for the Director's error in law and breach of procedural fairness, the Board's recommendation to the Minister may have been different. However, as the record appears to be incomplete, the Board cannot properly assess whether the Director was correct in issuing the Administrative Penalty and if the Proceeds amounts were appropriate.

[212] The Board emphasizes the importance of procedural fairness in administering public land. AEP has a duty to ensure public lands are administered fairly. The Board recognizes the Director faces a difficult task in balancing the need to enforce the Act and

ensuring procedural fairness for persons accused of contraventions. The Supreme Court in *Canada (Attorney General)* v. *Mavi* stated:

> "In determining the content of procedural fairness a balance must be struck. Administering a 'fair' process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on 'erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion.'"[130]

When procedural fairness is breached, it is vital to quickly correct the error and restore the proper balance.

VI. RECOMMENDATIONS

[213] The Board set the following issues for the appeal:

> Did the Director in issuing the Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/02-AP-NR-2-/01:
>
> (a) err in the determination of a material fact on the face of the record;
>
> (b) err in law; or
>
> (c) exceed the Director's or Officer's jurisdiction or legal authority?

[214] The Board, after reviewing the written and oral submissions from the Parties, the Director's Record, and considering the relevant legislation and case law, finds the following:

(a) On the issue of whether the Director erred in the determination of a material fact on the face of the record, the Board is unable to determine if the Director erred due to a incomplete Director's Record resulting from the Director's error in law;

(b) On the issue of whether the Director erred in law, the Board finds the Director erred in law by misapplying or misinterpreting section 59.7 of the Act. The Board finds this error in law resulted in the Director applying an incorrect limitation date to the investigation of contraventions by the

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130 *Canada (Attorney General)* v. *Mavi*, [2011] 2 S.C.R. 504, at paragraph 40.

Appellants. The incorrect limitation date resulted in the Director denying procedural fairness to the Appellants by setting an unrealistic deadline of one week for the Appellants to provide evidence to the Director.

(c) On the issue of whether the Director exceeded his jurisdiction, the Board cannot determine if the Director exceeded his jurisdiction due to the incomplete Director's Record.

[215] The Board finds the Director's breach of the duty of procedural fairness strikes at the Appellants' fundamental procedural right to have a fair and reasonable opportunity to present its case and be heard by the decision-maker.

[216] The Board recommends the Minister reverse the Director's decision to issue Notice of Administrative Penalty No. PLA-20/02-AP-NR-20/01.

Dated on April 15, 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

ALBERTA
ENVIRONMENT AND PARKS

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

Ministerial Order
63/2021

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

and

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

Order Respecting Public Lands Appeal Board
Appeal No. 20-0003

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 No. 20-0003.

Dated at the City of Edmonton, Province of Alberta, this 4 day of June, 2021.

Jason Nixon
Minister

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

Appendix

Order Respecting Public Lands Appeal Board Appeal No. 20-0003

With respect to the decision of the Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks (the "Director"), to issue Notice of Administrative Penalty No. PLA-20/02-AP-NR-20/01 (the "Administrative Penalty"), to Colette Benson, Albert Benson, and CRC Open Camp & Catering Ltd., in the amount of $6,290,328.85, pursuant to sections 59.3 and 59.4(4) of the *Public Lands Act*, R.S.A. 2000, c. P-40, I, Jason Nixon, Minister of Environment and Parks, in accordance with section 124(3) of the *Public Lands Act*, order that the decision of the Director to issue the Administrative Penalty is reversed.