ALBERTA
PUBLIC LANDS APPEAL BOARD

Report and Recommendations

Date of Report and Recommendations – November 12, 2021

IN THE MATTER OF sections 121, 123, and 124 of the *Public Lands Act,* R.S.A. 2000, c. P-40, and sections 211, 212, 213, and 216 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Smoking Diesel Contracting Ltd. and Trent Zelman of the decision by the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks, to issue Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/11-AP-NR-20/10 to Smoking Diesel Contracting Ltd. and Trent Zelman.

Cite as: *Smoking Diesel Contracting Ltd. and Zelman* v. *Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (12 November 2021) Appeal No. 20-0024-R (A.P.L.A.B.), 2021 ABPLAB 23.

WRITTEN HEARING BEFORE: Mr. Gordon McClure, Board Chair, Dr. Brenda Ballachey, Board Member, and Ms. Barbara Johnston, Board Member.

PARTIES:

Appellants: Smoking Diesel Contracting Ltd. and Mr. Trent Zelman, represented by Ms. Tara Hamelin, Bishop & McKenzie LLP.

Director: Mr. Simon Tatlow, Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks, represented by Ms. Vivienne Ball, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

In 2013, Smoking Diesel Ltd. was granted a Department Miscellaneous Lease (DML) by Alberta Environment and Parks (AEP) for a campsite and industrial storage yard near Fort McMurray. In January 2019, the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks (the Director), received information that Smoking Diesel was allegedly illegally subletting the DML to Northgate Industries Ltd., and Northgate was operating a camp on the DML site. AEP investigated the allegations, and in January 2021, the Director issued a Notice of Administrative Penalty and Proceeds Assessment (the Administrative Penalty) against Smoking Diesel and Mr. Trent Zelman (collectively, the Appellants), the sole shareholder of Smoking Diesel, in the amount of $905,533.34. The Administrative Penalty consisted of a penalty amount of $15,000.00 for three contraventions of the *Public Lands Act* (the Act) and $890,533.34 for proceeds received from the contraventions.

The Appellants appealed the Administrative Penalty to the Public Lands Appeal Board (the Board), alleging the Director had erred in the determination of a material fact on the face of the record, erred in law, and exceeded the Director's jurisdiction or legal authority.

The Board decided to hold a hearing by written submissions. After considering the record provided by the Director, the written submissions, the legislation, and the relevant case law, the Board found the Appellants had contravened the Act, but the Director erred in the determination of a material fact on the face of the record and erred in law by incorrectly assessing the proceeds portion of the Administrative Penalty. The Director's error is correctable by varying the Administrative Penalty. The Board recommended the Minister order:

1. the Director's decision that the Appellants contravened sections 43(1) and 54.01(5) of the Act be confirmed;
2. the proceeds assessment portion of the Administrative Penalty be varied by reducing it by $649,750.77, from $890,533.34 to $240,782.57;
3. the adjustment factor for section 171(4)(g) of the Public Lands Administration Regulation (PLAR) be varied by reducing it from $1,500.00 to $0.00, but the penalty portion of the Administrative Penalty remains at $15,000.00 as per section 171(5) of PLAR; and
4. the total Administrative Penalty amount be varied by reducing it by $649,750.77, from $905,533.34 to $255,782.57.

TABLE OF CONTENTS

I. INTRODUCTION

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the "Board") to the Minister, Environment and Parks (the "Minister"), for Appeal No. PLAB 20-0024 (the "Appeal"). The Appeal was filed by Mr. Trent Zelman ("Mr. Zelman") and Smoking Diesel Contracting Ltd. ("Smoking Diesel") (collectively the "Appellants"), who appealed the decision of the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks (the "Director"), to issue Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/11-AP-NR-20/10 (the "Administrative Penalty"), under the *Public Lands Act*, RSA 2000, c. P-40 (the "Act"), to the Appellants.

[2] The Director assessed the Administrative Penalty to the Appellants in the amount of $905,533.34 for allegedly subletting Departmental Miscellaneous Lease DML 090115 (the "DML") without authorization.[1] The DML is held by Smoking Diesel. Mr. Zelman is the sole shareholder of Smoking Diesel and was named in the Administrative Penalty.

[3] The Board reviewed the record provided by the Director, and the written submissions of the Appellants and the Director (collectively, the "Parties") and has provided a summary of the relevant facts and arguments in the Appeal.

II. DECISION

[4] After considering the legislation, the record provided by the Director, relevant case law, and the Parties' written submissions, the Board recommends the Minister order the following:

1. the Director's decision that the Appellants contravened sections 43(1) and 54.01(5) of the Act be confirmed;
2. the Proceeds Assessment portion of the Administrative Penalty be varied by reducing it by $649,750.77, from $890,533.34 to $240,782.57;

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[1] Director's Record, at Tab 1.1.

3. the adjustment factor for section 171(4)(g) of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 ("PLAR") be varied by reducing it from $1,500.00 to $0.00, but the Penalty portion of the Administrative Penalty remains at $15,000.00 as per section 171(5) of PLAR;
4. the total Administrative Penalty amount be varied by reducing it by $649,750.77, from $905,533.34 to $255,782.57;
5. the Appellants are to submit payment for the Administrative Penalty within thirty (30) days of the date of the Minister's Order; and
6. no interest is payable on the Administrative Penalty until thirty (30) days after the date of the Minister's Order.

III. BACKGROUND

[5] On January 29, 2013, Alberta Environment and Parks ("AEP") granted the DML to Smoking Diesel for a campsite and industrial storage yard, on public lands (the "Lands")[2] near what was then the City of Fort McMurray, in the Regional Municipality of Wood Buffalo.[3] Mr. Zelman is the sole shareholder of Smoking Diesel. A camp known as Waddell Lodge was operated on the Lands and catered to oilfield workers (the "Camp").

[6] AEP inspected the Lands on July 22, 2016, and July 25, 2017, but did not note any subletting in the Industrial Inspection Reports filed for each inspection.[4] The Director stated that on January 24, 2019, he became aware the Appellants were allegedly subletting the DML to Northgate Industries Ltd. ("Northgate") without authorization from AEP. The Director obtained the information on the alleged subletting during an interview with Northgate related to a separate investigation by AEP.[5]

[7] On September 15, 2020, AEP informed the Appellants they were being investigated for unauthorized subletting of the DML and requested the Appellants provide

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2 The public lands are legally described as Section 34-78-09-W4M.

3 The City of Fort McMurray is now referred to as the Urban Service Area of Fort McMurray.

4 Director's Record, at Tabs 6.1 and 6.2.

5 Director's Record, at Tab 7.1.

information regarding the use and occupation of the Lands.[6] The Appellants responded to the information request on October 21, 2020.[7] AEP made a supplemental information request on October 29, 2020, and required a response from the Appellants by November 12, 2020.[8] The Appellants requested an extension to respond until November 30, 2020, as Mr. Zelman was out of the Province.[9] On November 9, 2020, AEP denied the extension request and proceeded with a recommendation to the Director regarding the Administrative Penalty assessment.

[8] On November 27, 2020, the Director provided the Appellants with a letter advising the Director had received a recommendation that an administrative penalty be assessed against the Appellants for unauthorized subleasing of the DML.[10] The letter included an Administrative Penalty Assessment Form ("Preliminary Assessment"). The Director's letter explained the Preliminary Assessment consisted of $15,000.00 for three separate offences (the "Contraventions") of sections 43(1) and 54.01(5) of the Act,[11] and $890,533.34 for proceeds received as a result of the Contraventions ("Proceeds Assessment"), for a total of $905,533.34. The Director gave the Appellants until December 10, 2020, to provide any review of the facts or documentation they would like the Director to consider before deciding on the Administrative Penalty, and advised he would be available for a conference or video call. The Appellants responded on December 10, 2020, with the information they wanted the Director to consider.[12]

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6 Director's Record, at Tab 2.5.

7 Director's Record, at Tab 2.10.

8 Director's Record, at Tab 2.12.

9 Director's Record, at Tab 2.14.

10 Director's Record at Tab 1.7.

11 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."

Section 54.01(5) of the Act provides:

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

12 Director's Record, at Tab 3.2.

[9] The Director issued the Administrative Penalty on January 15, 2021. The Administrative Penalty consisted of the following:

> Count 1: contravention of section 43(1) of the Act - sublet without consent
> Seriousness of contravention: Major
> Extent of actual or potential loss or damage to resource or Crown revenue: Major
> Amount for Count 1: $5,000.00
>
> Count 2: contravention of section 43(1) of the Act - sublet without consent
> Seriousness of contravention: Major
> Extent of actual or potential loss or damage to resource or Crown Revenue: Major
> Amount for Count 2: $5,000.00
>
> Count 3: 54.01(5) of the Act - contravene a provision of the Act; receive money for access to public land
> Seriousness of contravention: Major
> Extent of actual or potential loss or damage to resource or Crown Revenue: Major
> Amount for Count 3: $5,000.00
>
> Factors to vary assessment applicable to this case:
> - The Appellants contravened the DML and the *Act*.
> Factor amount: $1,500.00
> - No mitigation. The Appellants continued to sublet without authority for 6.5 years.
> Factor amount: $1,500.00
> - The Appellants entered into a development agreement of the lands with a third party that accepted proceeds from Northgate to recuperate costs of development of the Lands.
> Factor amount: $1,500.00.[13]
>
> Proceeds Assessment[14]
> - $312,499.95 in rent from Northgate to the Appellants;
> - $413,236.69 reimbursement by Northgate for tax payments made on behalf of the Appellants to the Regional District of Wood Buffalo;
> - $103,306.38 for out of scope yard maintenance payments from Northgate to the Appellants;
> - $13,900.00 for Stat Oil road use agreement fees paid by Northgate to Stat Oil on behalf of the Appellants; and
> - $46,548.60 for CRC Open Camp & Catering Ltd. ("CRC") overpayment

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[13] The Director explained why the penalty was capped at $15,000.00: "Under section 171(5) of the *Public Lands Administration Regulation*, [Alta. Reg. 187/2011 ("PLAR")], the total amount of an administrative penalty is $5,000.00 per count per day. Thus while the total of the counts and the factors would total $19,500.00 it is reduced to the maximum permitted penalty of $15,000.00." Director's Record, at Tab 1.7

[14] Director's Record, at Tab 1.7.

paid by Northgate to Smoking Diesel.
Total Proceeds Assessment amount: $890,533.34

Total assessment: $905,533.34

[10] The Board received a Notice of Appeal from the Appellants on January 27, 2021, appealing the Director's decision to issue the Administrative Penalty. The Appellants alleged the Director erred in the determination of a material fact on the face of the record, erred in law, and exceeded the Director's jurisdiction or legal authority.

[11] On February 2, 2021, the Board wrote to the Appellants and the Director (the "Parties") and acknowledged receipt of the Appellants' Notice of Appeal. The Board also requested the Director provide a copy of the Department's Record, which includes all records (and electronic media) in AEP's possession concerning the Administrative Penalty and the DML, policy documents, guidelines, and directives, along with an index.

[12] On February 18, 2021, the Appellants requested the Board stay the Administrative Penalty. On March 9, 2021, the Director responded that he would not enforce the Administrative Penalty without providing notice to the Board and the Appellants. The Board accepted the Director's undertaking and advised the Appellants they could apply for a stay at any time during the appeal process if it should become necessary.

[13] The Director provided the Director's Record[15] on April 1, 2021. The Board distributed the Director's Record to the Parties on April 13, 2021.

[14] On May 17, 2021, the Board received preliminary motions to admit evidence from the Director and the Appellant. The Board set a schedule to receive written submissions from the Parties on the preliminary motions. On June 30, 2021, the Board issued its decision on

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[15] The Director's Record is considered by the Board to be the same as the Director's file, which is defined in section 209(f) as: "'director's file', in respect of a prescribed decision made by the director, means records of the Department that are considered by the director in making the decision." The Board considers the Director's Record to be a subset of the Department's Record.

the preliminary motions.[16] The Board refused to permit the Director's evidence gathered after the Administrative Penalty was issued because it was a breach of the Appellants' right to procedural fairness. Portions of the evidence that did not relate to evidence gathered after the Administrative Penalty was issued were permitted. As Mr. Zelman is a party to the Appeal, the Board allowed his affidavit, sworn on July 28, 2021 (the "Zelman Affidavit"). The Zelman Affidavit included photographs of the signs at the entrances to the Camp. The Board refused to admit the proposed affidavits of the Appellants' other witnesses as they were not rationally connected to the Director's Record. The Board indicated it would determine the appropriate weight to give to the admitted evidence at the hearing.

[15] The Board scheduled a hearing by written submissions and received the Parties' submissions from July 29, 2021, to August 20, 2021. The Board's panel assigned to hear the Appeal (the "Panel") met on September 8, 2021. The Panel wrote to the Parties on September 15, 2021, requesting the Parties answer the following questions:

> "The Board notes that section 54.01(5) of the Public Lands 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.'
>
> Question 1: Under what circumstances, if any, can a public lands disposition holder enter into a joint venture involving the disposition?
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> Question 2: Does section 54.01(5) of the Public Lands Act, or any other legislation, prevent a disposition holder from entering into a joint venture involving a disposition?
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> Question 3: Under section 54.01(5) of the Public Lands Act, is Smoking Diesel "entitled at law?" to receive money or other consideration for its agreement with Northgate Industries?"

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[16] See: *Smoking Diesel Contracting Ltd. and Trent Zelman* v. *Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024-ID1 (A.P.L.A.B.), 2021 ABPLAB 12.

[16] The Board received the responses from the Parties on October 8, 2021 and October 15, 2021. The Panel reconvened on October 19, 2021, to consider the evidence and make its report and recommendations to the Minister.

IV. ISSUES

[17] The Board identified the following issues to be determined in the hearing:

> Did the Director, in issuing the Administrative Penalty,
>
> (a) err in a material fact on the face of the record?
>
> (b) err in law?
>
> (c) exceed the Director's jurisdiction or legal authority?

V. STANDARD OF REVIEW

[18] The Appellants submitted the standard of review for the Appeal is correctness. The Director noted the Alberta Court of Appeal provided direction on internal appeals in *Moffat* v. *Edmonton (City) Police Service*,[17] *Newton* v. *Criminal Trial Lawyers' Association*,[18] and *Yee* v. *Chartered Professional Accountants of Alberta*.[19]

[19] The Board notes the Supreme Court of Canada, in *Dunsmuir* v. *New Brunswick*, held that it was not necessary to do an extensive analysis of the standard of review in every case if the analysis has already been completed. The Courts wrote:

> "An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard. This simply means that the analysis required is already deemed to have been performed and need not be repeated."[20]

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17 *Moffat* v. *Edmonton (City) Police Service*, 2021 ABCA 183. At paragraph 4, the Alberta Court of Appeal stated, "...*Vavilov* has not altered the internal standard of review to be applied by the [Law Enforcement Review Board] or otherwise overruled this Court's decision in *Newton v Criminal Trial Lawyer's Association*, 2010 ABCA 399...."

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

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

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

[20] The Board completed a thorough standard of review analysis in *CRC Open Camp & Catering Ltd. et al.* v. *Director, Regional Compliance, Regulatory Assurance Division, North Region, Alberta Environment and Parks* ("CRC#2").[21] After considering the Parties' arguments, the facts of the Appeal, and the relevant case law, the Board determined there are no unique circumstances or facts that would cause the Board to depart from its previous findings in CRC#2 regarding the standard of review. Accordingly, the Board finds the standard of review for this Appeal is correctness.

VI. ANALYSIS

[21] The Appellants submitted the Director erred in the following areas:

(a) the Director found the relationship between Smoking Diesel and Northgate was a sublet and not a joint venture;

(b) the Director issued the Administrative Penalty outside of the two-year limitation period;

(c) the Director failed to consider or provide reasons for departing from AEP's historical internal policies or practices related to unauthorized subleases and enforcement;

(d) the Proceeds Assessment portion of the Administrative Penalty did not reflect the actual economic benefit or advantage received by Smoking Diesel as a result of the joint venture with Northgate;

(e) the Director did not appropriately calculate the adjustment factors for the Administrative Penalty; and

(f) the Director breached procedural fairness by not complying with provincial COVID-19 protocols and not mediating in the Appeal.

[22] The Appellants requested the Appeal be allowed.

[23] The Director submitted he did not err in issuing the Administrative Penalty, and the penalty amount was reasonable.

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[21] See: *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, at pages 24-37.

A. Sublet or Joint Venture

i. Submissions

[24] The Appellants submitted the Director erred in fact and law by finding the relationship between Smoking Diesel and Northgate was a sublet rather than a joint venture. The Appellants noted that while there is no single definition of a joint venture in case law, *Williston on Contracts* provides a list of factors that indicate when a joint venture exists:

> "Besides the requirement that a joint venture must have a contractual basis... the decisions are in substantial agreement that the following factors must be present:
>
> (a) A contribution by the parties of money, property, effort, knowledge, skill or other asset to a common undertaking;
>
> (b) A joint property interest in the subject matter of the venture;
>
> (c) A right of mutual control or management of the enterprise;
>
> (d) Expectation of profit or the presence of 'adventure,' as it is sometimes called;
>
> (e) A right to participate in the profits;
>
> (f) Most usually, limitation of the objective to a single undertaking or ad hoc enterprise."[22]

[25] The Appellants stated Smoking Diesel and Northgate entered into a mutually beneficial agreement (the "Agreement") that allowed the two companies to pool their resources as a joint venture. Smoking Diesel wanted to build and operate an industrial camp on the DML but lacked the financial means to do so. Northgate required an industrial camp in the area but lacked the experience to operate it. The Appellants submitted the joint venture enabled both companies to achieve their objectives and benefit financially.[23]

[26] The Appellants said the Agreement set out Smoking Diesel's and Northgate's contributions to the Camp:

> (a) Northgate invested in accommodations, kitchen and dining facilities at no cost to Smoking Diesel;

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22 Appellants' Initial Submission, July 29, 2021, at paragraph 43.

23 Appellants' Initial Submission, July 29, 2021, at paragraph 45.

(b) Smoking Diesel provided the development and civil work required to prepare the Lands for the Camp;

(c) Smoking Diesel provided necessary services, maintenance work, and shared in the administrative work at no cost to Northgate; and

(d) Northgate was responsible for municipal taxes.[24]

[27] The Appellants stated both Smoking Diesel and Northgate faced a financial risk in the Camp's operation, and both parties suffered financial loss when the economic activity in the area decreased.[25]

[28] The Appellants noted joint ventures are not prohibited under the Act or PLAR.

[29] The Director submitted the relationship between Smoking Diesel, and Northgate was a sublet, and it was not necessary for the Director to establish whether a joint venture existed. The Director stated the evidence AEP collected in its investigation found Smoking Diesel and Northgate were engaged in a sublet relationship. The Director stated the investigation:

> "... found that there were two separate businesses conducting activities for different purposes on the Lands during the contravention dates. The Appellants held the DML and conducted itself as a 'landlord' who rented out the Lands to Northgate. Northgate conducted itself as a 'tenant' and rented the Lands from the Appellants to operate the Waddell Camp. The two businesses shared no profit or losses."[26]

[30] The Director noted the Meriam-Webster Dictionary defined "sublet" as: "to lease all or part of a leased property."[27] The Director submitted subletting without authorization was prohibited under section 43(1) of the Act,[28] and the Appellants had not requested or received permission to sublet to Northgate.

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24 Appellants' Initial Submission, July 29, 2021, at paragraphs 50 to 52.

25 Appellants' Initial Submission, July 29, 2021, at paragraphs 58 to 61.

26 Director's Response Submission, August 13, 2021, at paragraph 104.

27 Director's Response Submission, August 13, 2021, at paragraph 106.

28 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."

[31] The Director said AEP did not have a direct regulatory relationship with Northgate regarding the DML, as Northgate was not the disposition holder.[29] The Director stated:

> "The presence of Northgate's operations on the Lands without AEP's consent frustrated the public lands regulatory regime because, first, AEP needs to directly regulate the persons occupying and using public lands under disposition and second, AEP needs to directly regulate the use of the Lands."[30]

The Director submitted that only AEP had the authority to determine who occupied the Lands and what usage was permitted.

ii. Analysis

[32] The Board finds no evidence the Act or PLAR prohibits a disposition holder from entering into a joint venture involving a disposition. The Appellants are entitled to structure their business arrangements in any manner they deem appropriate. However, the effect of any business arrangement, including a joint venture, must not cause the disposition holder to breach the legislation or the terms of the disposition. The Director alleged the Appellants breached section 43(1) of the Act, which provides: "The holder shall not mortgage, assign, transfer or sublet the land contained in the holder's disposition, or any part of it, without the written consent of the director." The Board notes that section 9 of the DML between AEP and Smoking Diesel states: "The Lessee may not sublet nor assign the said lands and premises or any part thereof without the written consent of the Lessor."[31]

[33] The Board accepts the following meanings of keywords in section 43(1):

- "Assign" is defined as "for a person to execute and perform every necessary or suitable deed or act for assigning, surrendering or otherwise transferring land of which that person is possessed, either for the whole estate or for any less estate."[32]

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29 Director's Response Submission, August 13, 2021, at paragraph 257.

30 Director's Response Submission, August 13, 2021, at paragraph 258.

31 Director's Record, at Tab 4.1.

32 Daphne A. Dukelow & Betsy Nurse, *The Dictionary of Canadian Law*, 2 ed. (Toronto: Thomson Canada, 1995) at pages 79-80.

- "Transfer" is defined as "to give or hand over property from one person to another."[33]
- "Sublet" is defined as "for a tenant to lease the whole or part of the premises during a portion of the unexpired balance of the lease's term."[34]

Each of these definitions involves the transferring of property rights to another party. The objective of section 43(1) of the Act is to prohibit a disposition holder from conveying[35] rights granted under the disposition lease to another party without AEP's consent. The rights referred to are the right to occupy and use the land within the parameters set by the lease.

[34] The business relationships of the Appellants are only relevant if the relationship results in the assignment, transfer, or sublet of the rights associated with the disposition without the consent of AEP. An unauthorized conveyance of disposition rights would be a breach of the Act, PLAR or the terms of the disposition. Northgate was not a party to the DML, and no evidence has been presented to indicate AEP provided written consent for Smoking Diesel to establish a camp run by a different party. The Agreement between Smoking Diesel and Northgate is not the same as an agreement between a disposition holder and a service provider. In a disposition holder/service provider agreement, the disposition holder retains all the rights from the disposition lease, and the service provider may only enter onto the disposition lands to perform the services agreed to. In the operation of the Agreement for the Camp, Smoking Diesel conveyed to Northgate the right to occupy and use the Lands as if they were the disposition holder. As Smoking Diesel did not have the AEP's consent to convey those rights to Northgate, the Board finds the Appellants are in breach of section 43(1) of the Act.

[35] The Director also found the Appellants had contravened the disposition and section 54.01(5) of the Act, which states:

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

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33 *Murphy* v. *R.* (1980), 1980 CarswellNat 18, at paragraph 67.

34 Daphne A. Dukelow & Betsy Nurse, *The Dictionary of Canadian Law*, 2 ed. (Toronto: Thomson Canada, 1995) at page 1208.

35 "Convey" means "to create a property right or change it between persons." Daphne A. Dukelow & Betsy Nurse, *The Dictionary of Canadian Law*, 2 ed. (Toronto: Thomson Canada, 1995) at page 355.

(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."

[36] The Board finds Northgate received access to the Lands to operate the Camp, and collected revenue from the Camp operations, and remitted money to the Appellants. The Appellants argued that Smoking Diesel was legally entitled to the money because Smoking Diesel and Northgate were in a joint venture. The Board disagrees. As noted earlier, the terms of the business relationship between Smoking Diesel and Northgate breached section 43(1) of the Act because under its arrangement with Northgate, Smoking Diesel, without AEP approval, conveyed to Northgate rights granted to Smoking Diesel by the DML. Therefore, the Appellants are in breach of section 54.01(5) of the Act, as the Appellants were not entitled at law to receive money or other consideration for allowing Northgate to use and occupy the Lands without AEP's consent.

[37] The Board finds the Director did not err in the determination of a material fact on the face of the record or err in law in finding the Appellants breached sections 43(1) and 54.01(5) of the Act and assessing an Administrative Penalty against the Appellants.

B. Limitation Period

i. Submissions

[38] The Appellants submitted the Director issued the administrative penalty outside of the two-year limitation period prescribed in 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."

[39] The Appellants referred to the Board's findings in *Normand Menard and Normko Resources Inc.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks.*[36] In that case, the contravention ended on the last date on which the appellant ceased to collect unauthorized payments. The Appellants stated that in the Appeal, the Director's Record showed payments from Northgate to Smoking Diesel ended March 31, 2015, meaning the Administrative Penalty was issued more than two years after the Contraventions occurred.

[40] The Appellants stated that a Public Lands Officer ("PLO") inspected the DML in 2016 and 2017. The PLO filed an Industrial Inspection Report for each inspection, which the Appellants argued indicated the PLO was aware Smoking Diesel and Northgate were operating the Camp together on the Lands.[37] The Zelman Affidavit included photos of signs placed at the entrance to the Camp,[38] which included the words "Northgate Industries Ltd. Waddell Open Camp" and "Northgate Industries Ltd. Smoking Diesel Partnership." The Appellants submitted the signs were continuously present on the Lands from 2013 to 2020. The Appellants stated: "There is no possibility that AEP officers visiting the [DML] during the operation of the Camp would not have seen the signs and been aware of the partnership between Smoking Diesel and Northgate."[39]

[41] The Appellants referred to the Board's determination in *Jason King and Kingdom Properties Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*,[40] that if a public lands officer had knowledge of an unauthorized sublet, the officer would be duty-bound to raise the matter with the Director. The Appellants argued the PLO who inspected the Lands in 2016 and 2017 had a duty to inquire about the business relationship between Smoking Diesel and Northgate and raise the matter with the Director. The

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36 *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.

37 Director's Record, at Tabs 6.1 and 6.2.

38 Exhibit "A", Affidavit of Trent Zelman, Sworn, July 28, 2021.

39 Appellants' Initial Submission, July 29, 2021, at paragraph 70.

40 *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.

Appellants submitted the Director had constructive knowledge through the PLO of the Contraventions as early as 2016. The Appellants stated that as the Director issued the Administrative Penalty on January 15, 2021, the Administrative Penalty was issued beyond the two-year limitation period.

[42] The Director submitted the limitation period started when the Environmental Protection Officer ("EPO") became aware of the unauthorized subletting on January 24, 2019, and recommended AEP Compliance investigate. The Director noted section 59.7 of the Act provides that the limitation period is two years from the date evidence of the contravention first came to the attention of the director.

[43] The Director stated the Appellants provided no documentary evidence to support the assertion that the Director knew of the Contraventions before January 24, 2019. The Director submitted that if the Appellants believed the Director's Record was missing documents, they could have raised the matter with the Director during the investigation.

ii. Analysis

[44] The Board notes section 59.7 of the Act provides two possible dates for the limitation period to start: the date of the Contraventions or the date the Contraventions first came to the Director's notice. In its decision on the preliminary motions, the Board allowed the Zelman Affidavit and the photos of the signage at the Camp entrance, which the PLO would have seen in his inspections of the DML, to be introduced into evidence. The Appellants state the Director had "constructive knowledge" of the Contraventions through the PLO as early as 2016. The Appellants do not define the term "constructive knowledge," but the courts have defined it as "knowledge of circumstances which would indicate the facts to an honest person, or knowledge of facts which would put an honest person on inquiry."[41] The Appellants alleged the PLO's knowledge of two separate businesses operating on the Lands should have prompted the PLO to raise the matter with the Director.

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41 *Air Canada* v. *M & L Travel Ltd.*, 1993 CarsewellOnt 568, at paragraph 41.

[45] The Board finds the Appellants' argument that the PLO's inspection of the Lands should be considered the start of the limitation period is not relevant to the calculation of the limitation date for two reasons. The first reason is there is no evidence in the Director's Record that the PLO who inspected the Lands recognized any contravention related to an unauthorized sublet of the DML. The Industrial Inspection Report filed by the PLO after each inspection contain no reference to a possible sublet.[42] In a letter to the EPO dated January 13, 2021, the PLO stated: "My inspection for DML090115 from 2017 did not take any notes while in the field as the only noncompliance matter observed was scentless chamomile and I believe a weed notice was issued."[43] The signage photos from Mr. Zelman's affidavit may indicate two businesses were operating the Camp, but there is no evidence the PLO observed the signs or identified any reason to be concerned by them.

[46] The second reason the Board dismisses the Appellants' arguments regarding the limitation date and the PLO inspections is that the Board finds the Act's wording rejects the concept of constructive knowledge related to the limitation period under section 59.7. The Act specifies the Administrative Penalty must be issued no more than two years "after the date on which evidence of the contravention first came to the notice of the director." [Emphasis is the Board's.]. Ministerial Order 44/2019, "Designation of Directors under the Public Lands Act, Forest Land Use and Management Regulations and Public Lands Administration Regulation" (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;

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42 Director's Record, at Tabs 6.1 and 6.2.

43 Director's Record, at Tab 6.3.

- Provincial Compliance Manager;
- Compliance Manager; and
- District Compliance Manager.

[47] 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. The PLO was not a director for the purposes of sections 59.3 and 59.7 of the Act. Section 59.7(b) states the limitation period starts when the director first has knowledge of the contravention. The Director, Mr. Simon Tatlow, was a Compliance Manager when he issued the Administrative Penalty. A Compliance Manager is one of the positions designated in the Designation MO as a director for the purposes of issuing administrative penalties.

[48] The Board finds the Director first became aware of the Contravention on January 24, 2019, and issued the Administrative Penalty on January 15, 2021, which is within the two-year limitation period set by section 59.7 of the Act.

[49] The Board is well aware the wording of section 59.7(b) of the Act could possibly lead to the absurdity of a director being willfully blind to a contravention to manipulate the start of a limitation period, but the Appellants have not alleged this has happened in this Appeal and the Board has never seen evidence of such behaviour in any of the appeals it has heard.

C. AEP's Historical Practices and Policies

i. Submissions

[50] The Appellants stated the Director erred in law by failing to consider or provide reasons for departing from AEP's historical internal policies or practices related to unauthorized subletting and enforcement.

[51] The Appellants noted that a boom in oil and forestry resource extraction in the Conklin area created a "demand from the business community for both short and long-term land

use options...."[44] The Appellants submitted that in response to the business community's need, AEP purposely did not enforce its policies against unauthorized subletting and had not taken enforcement actions for decades prior to 2017. The Appellants stated the Director's assessment of the Administrative Penalty without providing any opportunity for the Appellants to bring themselves into compliance was a departure from AEP's longstanding internal practice.

[52] The Appellants submitted the departure from AEP's non-enforcement practice required reasonable notice to affected parties and that the Appellants had a legitimate expectation of such notice. The Appellants referred to *Canada (Attorney General)* v. *Honey Fashions Ltd.* ("*Honey Fashions*"),[45] where the Federal Court of Canada held that when a decision-maker departs from longstanding practices, it must provide an explanation to the affected parties. The Appellants submitted they "were denied procedural fairness in the course of the investigation as AEP's long-standing practices in relation to unauthorized subleases were not considered by the Director prior to the imposition of the Administrative Penalty."[46]

[53] The Director submitted the Appellants were provided with the opportunity to raise any concerns regarding AEP's past practices. The Director stated:

> "Had the Appellants considered AEP's past policies/practices to be a complete defence to any compliance action by AEP including the issuance of an administrative penalty, the Appellants could have at any time after receiving the Notice of Investigation on September 15, 2020 advised the Director of their position, but failed to do so."[47]

The Director also said the Appellants could have raised the issue of past practices with the Director after they received the Preliminary Assessment on November 27, 2020, either at a meeting with the Director or in writing. The Director stated:

> "Despite these opportunities, at no time before the Director made his decision to issue the Administrative Penalty did the Appellants raise their concerns about AEP's alleged historical policies and practices as it related to the Appellants and

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44 Appellants' Initial Submission, July 29, 2021, at paragraph 79.

45 *Canada (Attorney General)* v. *Honey Fashions Ltd.*, 2020 CarswellNat 807.

46 Appellants' Initial Submission, July 29, 2021, at paragraph 104.

47 Director's Response Submission, August 13, 2021, at paragraph 282.

> DML 090115. Had they done so, the Director would have been obligated to consider their concerns as part of his decision-making.
>
> Further, had the Appellants raised these concerns and presented their supporting evidence to the Director before he made his decision, the proposed evidence would have been in the Director's Record upon which this appeal is based."[48]

[54] The Director noted the Board denied the Appellants' preliminary motion to introduce evidence regarding AEP's past subletting policy and practice and found no evidence of a practice in the Director's Record similar to the one alleged by the Appellants.[49] The Director referred to *Colette Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*,[50] where the Board considered similar claims about AEP's past practice. The Director stated the Board found there was not an express practice of allowing subleasing.

[55] The Director submitted that *Honey Fashions* was not applicable because it involved a different regulatory scheme. The Director stated the Appellants failed to establish any duties of procedural fairness owed by the Director based on the factors in *Baker* v. *Canada (Minister of Citizenship and Immigration)* ("Baker").[51]

[56] In the Appellants' rebuttal submissions, the Appellants submitted it would be procedurally unfair to "foreclose an appellant's ability to make all possible arguments on appeal to the Board, simply because that evidence was not disclosed during the course of the Director's investigation or perhaps did not even exist until later in the appeal process."[52]

[57] The Appellants stated there was no evidence that during the investigation, the Director turned his mind to AEP's past practices, and the failure of the Director to do so

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48 Director's Response Submission, August 13, 2021, at paragraph 282.

49 See: *Smoking Diesel Contracting Ltd. and Trent Zelman* v. *Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024-ID1 (A.P.L.A.B.), 2021 ABPLAB 12.

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

51 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

52 Appellants' Rebuttal Submission, August 20, 2021, at paragraph 35.

constituted a breach of procedural fairness. The Appellants submitted the breach is a reversible error in the issuance of the Administrative Penalty.[53]

ii. Analysis

[58] Section 120 of the Act states: "An appeal under this Act must be based on the decision and the record of the decision-maker." Appeals before the Board are not hearing *de novo* that allows for a more fulsome defence with new evidence and argument. Only in extraordinary circumstances will the Board allow additional evidence, not in the Director's Record, and then that evidence must be rationally connected to the evidence in the Director's Record. Both Parties applied earlier in the appeal process to have additional evidence admitted. The Board rejected most of the evidence the Parties sought to add to the Director's Record,[54] including evidence about AEP's past practices on subletting. The Board rejected this evidence because it was not rationally connected to the Director's Record and, therefore, the Board did not have the jurisdiction to consider it. The Appellants have argued AEP breached procedural fairness by not explaining why it allegedly changed its practices towards unauthorized subletting, but the Appellants have not presented sufficient evidence from the Director's Record to prove such practices existed. The Board's decision from the preliminary motion to admit additional evidence still stands.

[59] If the Appellants had raised the matter with the Director before the Director decided to issue the Administrative Penalty, then the issue of AEP's past practices would have appeared in the Director's Record, and the Board could have considered related evidence. The Board agrees that before a hearing, an appellant does not have to raise every argument it intends to rely on, but an appellant must keep in mind that the Board can only consider evidence in or rationally connected to the Director's Record.

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53 Appellants' Rebuttal Submission, August 20, 2021, at paragraph 40.

54 See: *Smoking Diesel Contracting Ltd. and Trent Zelman* v. *Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks* (30 June 2021), Appeal No. 20-0024-ID1 (A.P.L.A.B.), 2021 ABPLAB 12.

[60] The Appellants submitted the Zelman Affidavit to support their arguments on past practices. However, the affidavit's evidence in this area is not related to the evidence found in the Director's Record, and therefore, the Board cannot place any significant weight on the affidavit.

[61] The Appellants argued they had a legitimate expectation AEP would provide either an opportunity for Smoking Diesel to become compliant before the Director undertook enforcement actions or explain why AEP was abandoning the alleged practice of not enforcing the rule against unauthorized subleases. The Supreme Court of Canada defined legitimate expectations as follows:

> "[Legitimate expectations] is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights."[55]

[62] The Supreme Court of Canada also set the following requirements for what constitutes a legitimate expectation:

1. a public authority makes a promise;
2. that promise is to follow a certain procedure;
3. in respect to an interested person, and
4. they relied and acted upon that promise.[56]

[63] The Board finds there is insufficient evidence to prove AEP made a promise (explicitly or by practice) not to take enforcement action regarding unauthorized subletting of leases. As there is insufficient evidence to demonstrate the existence of a legitimate expectation, the Board finds the Director did not breach the Appellants' right to procedural fairness.

[64] The Board finds the Director did not err in the determination of a material fact on the face of the record, err in law, or exceed his jurisdiction by not considering alleged past AEP

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55 *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paragraph 26.

56 *Old St. Boniface Residents Association Inc.* v. *Winnipeg (City of)*, [1990] 3 SCR 1170.

practices or policies regarding unauthorized subletting of leases.

D. Proceeds Assessment

i. Submissions

[65] The Appellants submitted the Director erred in fact and law in assessing the Proceeds Assessment portion of the Administrative Penalty. The Appellants stated the Proceeds Assessment "did not reflect the actual economic benefit or advantage received by Smoking Diesel as a result of the joint venture Agreement."[57] The Appellants noted the term "proceeds" is not defined in the Act or PLAR, and there is no clarification in the legislation whether "proceeds" refers to all funds received by the disposition holder or whether it refers to net proceeds after all related costs are deducted.

[66] The Appellants referred to the Environmental Appeals Board ("EAB") decision in *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red-Deer North Saskatchewan Region, Alberta Environment and Parks* ("*Alberta Reclaim*").[58] In *Alberta Reclaim*, the EAB found that where an illegal activity could be made legal with authorization from AEP, then proceeds should be assessed as net proceeds. The Appellants stated that the alleged subletting agreement with Northgate could have been made legal with prior authorization and, therefore, the Proceeds Assessment should be assessed as net proceeds. The Appellants said the EAB's approach in Alberta Reclaim ensures the offending party does not profit from the contravention.

[67] The Appellants submitted the following amounts should be deducted from the Administrative Penalty to accurately reflect the net economic benefit the Appellants received from the joint venture with Northgate:

(a) $162,370.36 for development costs on the DML;

(b) expenses related to the services Smoking Diesel provided to the Camp, including snow removal, yard maintenance, operating expenses for equipment and personnel, erosion control, environmental assessments, and

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57 Appellant's Initial Submission, July 29, 2021, at paragraph 33.

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

administrative support;

(c) $103,306.38 for work developing the parking lot, which was not included as responsibilities listed in the Agreement ("Out of Scope");

(d) $87,847.36 for Goods and Services Tax ("GST") and corporate taxes ($23,117.76 for GST and $64,729.60 for corporate taxes); and

(e) $330,783.00 for property taxes;

[68] The Director submitted the Proceeds Assessment was assessed appropriately. The Director noted the Proceeds Assessment was determined as follows:

(a) $312,499.95 for rent received by Smoking Diesel from Northgate for the use of the Lands;

(b) $414,277.91 for the municipal taxes paid to the Regional Municipality of Wood Buffalo by Northgate on behalf of Smoking Diesel for the Lands;

(c) $13,900.00 for the use of the Stat Oil Road to access the Lands;

(d) $103,306.88 from Northgate for Out of Scope maintenance costs; and

(e) $46,548.60 from CRC for an overpayment for preparing the Lands for the Camp.[59]

[69] The Director referred to the Supreme Court of Canada decision in *Guindon* v. *Canada,* where the Court found large penalties can be imposed to deter non-compliance with administrative regulations and rules.[60] The Director stated AEP's objective in requiring the payment of proceeds received from a contravention of the Act is to "level the economic 'playing field' for the regulated community."[61]

[70] The Director noted the English Oxford Dictionary defined "proceeds" as: "that which proceeds, is derived, or results from something else; that which is obtained or gained by any transaction or process; and outcomes; *esp.* the money obtained from an event, activity or enterprise."[62] The Director submitted that proceeds is not the same as economic benefit.[63] Economic benefit is one of several factors in section 171(4) of PLAR the Director may consider

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59 Director's Record, at Tab 1.7.

60 *Guindon* v. *Canada*, [2015] 3 SCR 3, at paragraphs 77 and 108.

61 Director's Response Submission, August 13, 2021, at paragraph 142.

62 Director's Response Submission, August 13, 2021, at paragraph 26.

63 Director's Response Submission, August 13, 2021, at paragraph 151.

to increase or decrease the amount of the Administrative Penalty.[64] The Director noted economic benefit is specifically used in administrative penalties issued under the *Environmental Protection and Enhancement Act* ("EPEA")[65] and the *Water Act*[66] but is not used in the same manner in the Act and PLAR.

[71] The Director stated the EAB took two approaches towards determining economic benefit in *Alberta Reclaim*. If the Board were to apply *Alberta Reclaim* to this Appeal, then the Director submitted the Board should use the first approach, which the EAB described as:

> "Under the first approach, the activity is 'always unlawful' meaning there is no lawful way to carry out the activity. An activity that is 'always unlawful' cannot be made lawful by way of an authorization (i.e. approval, license, or permit) under the regulatory scheme."[67]

[72] The Director noted the unauthorized subleasing by the Appellants was always unlawful.[68] AEP would not have given consent to the sublet to Northgate as the purpose was to generate revenue. The Director submitted that if the Board uses the first approach in *Alberta Reclaim*, none of the Appellants' costs are deducted from the Proceeds Assessment.

[73] The Director submitted the facts on which the Administrative Penalty was issued are not compatible with the second approach taken by the EAB in *Alberta Reclaim*. The Director stated, "Under AEP's policy at the time of the contraventions, it would not have been possible for the Appellants to obtain AEP's consent to its illegal activity."[69] The Director stated the Appellants' unlawful conduct could not be made legal and, therefore, this Appeal is not an

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64 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;"

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

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

67 *Alberta Reclaim and Recycling Company Inc. et al.* v. *Director, Red-Deer North Saskatchewan Region, Alberta Environment and Parks*, Appeal Nos. 14-025-027-D (A.E.A.B.), at paragraphs 95 to 96.

68 Director's Response Submission, August 13, 2021, at paragraph 189.

69 Director's Response Submission, August 13, 2021, at paragraph 195.

appropriate case to deduct expenses and costs from the revenue the Appellants received as a result of the Contraventions. The Director argued AEP would not have consented to the Appellants subletting the DML for the following reasons:

> "(a) AEP should directly regulate the occupier of public lands;
>
> (b) A sublease can hinder AEP's ability to regulate land use and frustrates the use of certain enforcement tools against the person who is not the holder of the disposition; and
>
> (c) AEP does not consent to disposition holders adopting a primary role as an intermediary or sub-landlord."[70]

[74] The Director stated the Appellants could not have become compliant with the legislation as Mr. Zelman's affidavit stated the Camp ceased operating in April 2015. The Director became aware of the unauthorized subletting on January 24, 2019, almost four years after Mr. Zelman said the Camp ceased operations.

[75] The Director submitted that if the Board decides to use the second approach from *Alberta Reclaim*, then:

> "... the Director's position is that only those costs and expenses incurred as a result of the use of the Lands in contravention of the Act can be deducted, rather than all expenses and costs incurred by the appellants in the course [of] developing and conducting operations on the lands."[71]

ii. Analysis

[76] Section 59.4(4)(b) and (c) of the Act provides authority for the Director to assess the proceeds portion of an administrative penalty:

> "A notice of administrative penalty under this section may require one or more of the following...
>
> (a) 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;

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70 Director's Response Submission, August 13, 2021, at paragraph 196.

71 Director's Response Submission, August 13, 2021, at paragraph 207.

(b) 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."

[77] The legislation does not state whether proceeds are to be determined as net proceeds (proceeds amount after all costs and expenses are deducted) or gross proceeds (proceeds without deducting costs and expenses). To help determine the appropriate approach to the question of proceeds, the Board looked at the purpose of the proceeds assessment.

[78] In the Administrative Penalty, the Director addresses the purpose of the proceeds portion:

> "Where the penalty portion of the administrative penalty is meant to be a deterrence for the regulated community to prevent the reoccurrence of the activity, the proceeds portion of the administrative penalty is separate from the penalty portion and I do not consider payment of proceeds to be punitive in any way. The objective of paying proceeds is to level the playing field for the regulated community. The payment of proceeds restores the economic status quo back to the situation that existed before the non-compliance occurred. To deter non-compliances and to promote compliance in the future, violators should not be left to profit from their unlawful gains. In addition, they should not consider the penalties as a cost of doing business in the nature of the offences."
>
> [Emphasis is the Board's.]

[79] If the proceeds portion of the Administrative Penalty is not intended to be punitive but rather to prevent the offender from profiting and deter potential contraventions, net proceeds would be more appropriate than gross proceeds. Net proceeds would remove any potential profit from a contravention, while gross proceeds would unduly penalize the offender by making them pay more than they realized from the undertaking.

[80] The Board also considered the arguments of the Parties regarding *Alberta Reclaim*. In *Alberta Reclaim*, the appellant was assessed an administrative penalty, which included proceeds, for an offence that could never be made legal. The EAB considered whether gross proceeds or net proceeds would be appropriate. The EAB found that penalizing an offender for the gross proceeds was appropriate where the offence was something that could not be made legal. Further, the EAB found that for something that was illegal but could have been

made legal with the appropriate authorization, the appropriate approach is for the proceeds to be assessed as net proceeds.

[81] The Director stated that under AEP's policy, AEP would not have consented to the Appellants subletting the DML. However, a policy is not law, and the Director has not indicated wherein the Act or PLAR it would be "impossible" to consent to the DML being sublet. An inflexible approach to the implementation of a policy may create a situation where a decision-maker, such as the Director, fetters their discretion. The Alberta Court of Appeal stated:

> "Procedural fairness demands that administrative decision-makers do not fetter their discretion by adopting inflexible policies or rules, as the very existence of discretion implies that it can and should be exercised differently in different cases. A decision-maker who always exercises its discretion in a particular way improperly limits the ambit of its power."[72]

[82] The Board finds the business relationship between Smoking Diesel and Northgate could have been made into a legal sublet, assignment, or transfer by obtaining the proper consent from AEP. It may have required a different approach by the Appellants and Northgate, but AEP could have approved it had the appropriate conditions been met. AEP could also have refused to grant a sublet, but only after considering the facts and circumstances of a consent request. The noted authors of *Principles of Administrative Law* wrote: "Any administrator faced with a large volume of discretionary decisions is practically bound to adopt rough rules of thumb. This practice is legally acceptable, provided each case is individually considered on its merits."[73] [Emphasis is the Board's.] The Director provided reasons why a sublet would not be approved,[74] and those reasons may be valid, but the Director is required to consider each case and make a determination based on the merits, not pre-judging the situation and dismissing the possibility out of hand.

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72 *Lac La Biche (County)* v. *Lac La Biche (County) (Subdivision and Development Appeal Board)*, 2014 CarswellAlta 1626, at paragraph 11.

73 David Phillip Jones, Q.C. & Anne de Villars, Q.C., *Principles of Administrative Law*, 6th ed (Toronto: Carswell, 2014) at page 207.

74 Director's Response Submission, August 13, 2021, at paragraph 196.

[83] As a sublet between Smoking Diesel and Northgate could have been made legal, the Board finds the appropriate approach for determining the Proceeds Assessment is net proceeds. The Board finds the Director erred in fact and law in assessing the Proceeds Assessment portion of the Administrative Penalty by including items that are not arising out of the Agreement between the Appellants and Northgate and by failing to deduct costs and expenses which should have been deducted in determining net proceeds, as follows:

(a) Out of Scope maintenance costs paid by Northgate to Smoking Diesel;
(b) municipal taxes paid by Northgate;
(c) corporate taxes;
(d) GST;
(e) Hetu Logging costs;
(f) Sign Dezign; and
(g) Lakelle Solutions 2019 Environmental Inspections;

The Director's error is not fatal to the Administrative Penalty as it may be corrected by varying the Director's Proceeds Assessment. The Board's reasons for varying the Proceeds Assessment are below.

(a) Out of Scope maintenance costs

[84] The Director included yard maintenance payments from Northgate to Smoking Diesel in the amount of $103,306.88. The Appellants said the payments were Out of Scope payments that were not part of the Agreement with Northgate. Under the Agreement, Northgate had "sole discretion and decision-making abilities regarding catering, repair maintenance and on-site management of the camp facility."[75] It was within Northgate's authority to enter into a sub-contract with Smoking Diesel to complete additional work not covered by the Agreement. There is no evidence to show that the Out of Scope work was not, in fact, a separate, arm's length agreement negotiated between Northgate and Smoking Diesel for additional work. Therefore, the payments for the Out of Scope work should be treated similarly to payments made by Northgate to other sub-contractors in that they should not be attributed to the Appellants as a

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75 Director's Record, at Tab 8.7.

benefit forming part of the Proceeds Assessment. The Board would reduce the Proceeds Assessment as calculated by the Director for Out of Scope maintenance costs by the total amount of $103,306.88.

(b) Municipal taxes

[85] Municipal taxes are an expense that the Appellants would have incurred due to being a disposition holder on the Lands. Improvements on the Lands as a result of the arrangement with Northgate increased the amount of the municipal taxes. Between 2014 and 2020, Northgate paid a total of $414,277.91 in property taxes for the Lands, which the Director included in the Proceeds Assessment as an economic benefit to the Appellants.[76] However, the Board finds that had it not been for the arrangement with Northgate, the Appellants would not have proceeded with the Camp and the municipal taxes for this period would have been much less. The only evidence the Board has of the amount of taxes that would have been payable had the DML not been developed is the 2014 property tax assessment in the amount of $1,014.22. The Appellants would have paid the approximate amount of $1,014.22 for seven years, for a total of $7,099.54. Based on this evidence, the Board finds that the Proceeds Assessment should be adjusted as follows:

Total Property Taxes included in the Proceeds Assessment portion of the Administrative Penalty:	$414,277.91
Less Adjusted Proceeds Assessment:	$407,178.37
Estimated property taxes had the DML remained undeveloped for 7 years (7 years * $1,014.22/year) **Adjusted Property Tax Assessment:**	**$7,099.54**

[86] The Board would reduce the amount of municipal taxes assessed by the Director by $407,178.37 from $414,277.91 to $7,099.54.

(c) Corporate Taxes

[87] Corporate taxes are a cost paid to the Canadian Revenue Agency ("CRA") by Smoking Diesel as a result of the taxable income earned from its arrangement with Northgate.

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76 Director's Record, at Tab 8.14.

Smoking Diesel provided evidence[77] that an estimate of the amount of corporate taxes paid can be made using an effective tax rate on revenues of 14%. The Appellant submitted they paid $64,729.60 in corporate taxes.[78] While the Board would have preferred a more accurate rate, it understands the Appellants did not have sufficient records to provide such information as tax records are only required to be kept for seven years. Corporate taxes were not considered by the Director in the Assessment. The Board finds that had it not been for the arrangement with Northgate, the corporate taxes paid by Smoking Diesel would have been less. Therefore, the Proceeds Assessment should be reduced by the corporate taxes attributable to the revenues received under the arrangement, but no adjustment should be made for the corporate taxes related to the Out of Scope work. As the Board has determined that the Out of Scope work should not be included in the Proceeds Assessment, the Appellants would not be entitled to a corresponding deduction for corporate taxes. The corporate tax adjustment to the Proceeds Assessment is as follows:

Corporate Taxes per Appellant Submissions:	$64,729.60
Less: Portion attributable to Out of Scope work:	$14,462.96
Corporate Tax Adjustment to Proceeds Assessment:	**$50,266.64**

[88] The Board would reduce the Proceeds Assessment as determined by the Director by $50,266.71 for corporate taxes paid by the Appellants related to the Agreement.

(d) GST

[89] GST must be remitted to the CRA and does not represent an economic benefit to the Appellants. The Appellants submitted they paid $23,117.76 for GST related to the Agreement with Northgate.[79] As the Board does not believe that the Out of Scope payments to Smoking Diesel should be included in the Proceeds Assessment, the Board has not deducted GST on those amounts. The GST adjustments to the Proceeds Assessment is as follows:

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77 Director's Record, at Tab 7.21.

78 Appellants' Initial Submission, July 29, 2021, at paragraph 126.

79 Appellants' Initial Submission, July 29, 2021, at paragraph 126.

GST per Appellants Submissions:	$23,117.76
Less: Portion attributable to Out of Scope Work:	$5,165.34
GST Adjustment to Proceeds Assessment:	**$17,952.42**

[90] The Board would reduce the Proceeds Assessment as calculated by the Director by $17,952.42 for GST paid by the Appellants related to the DML.

(e) Hetu Logging costs

[91] The Director did not deduct expenses for the work done by Rudy Hetu Logging Ltd. ("Hetu Logging") in clearing the DML to prepare for the Camp. The Hetu Logging costs of $31,500.00 were incurred September 30, 2013, after Smoking Diesel and Northgate entered into their Agreement regarding the DML.[80] These costs pertain to the development of the Camp on the DML, which would not have occurred but for the Agreement with Northgate. The Board would reduce the Proceeds Assessment as determined by the Director by $31,500.00, which was the amount paid by the Appellants to Hetu Logging for costs related to the development of the DML.

(f) Sign Dezign

[92] The Director did not deduct from the Proceeds Assessment the signage costs of $1,641.82 from Sign Dezign Ltd. incurred in November 2013, after Northgate and Smoking Diesel entered into their Agreement to develop the DML.[81] The signage costs pertain to the development and operation of the camp on the DML. Therefore, similarly to the logging costs, the signage costs should be deducted in the determination of net proceeds. The Board would reduce the Proceeds Assessment as calculated by the Director by $1,641.82 for amounts paid by the Appellants to Sign Dezigns Ltd. for costs related to the development of the DML.

(g) Lakelle Solutions, 2019 Environmental Inspections

[93] The Director did not deduct $3,158.72 for work done by Lakelle Solutions Inc. Lakelle Solutions Inc. performed environmental inspections, maintenance and snow plowing in

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80 Director's Record, at Tab 7.21.

81 Director's Record, at Tab 7.21.

2019.[82] These were costs incurred before the termination of the business relationship between Smoking Diesel and Northgate. As these costs are attributable to the development and operation of the Camp, they should be deducted in the determination of the Proceeds Assessment. The Board would reduce the Proceeds Assessment as determined by the Director by $3,158.72 for amounts paid by the Appellants to Lakelle Solutions Inc. for costs related to the development and operation of the Camp.

Summary

[94] The total of the deductions from the Proceeds Assessment as recommended by the Board is $649,742.84, which would reduce the Proceeds Assessment from $890,533.34 to $240,782.57 as represented in the table below.

Total Proceeds Assessment as per the Administrative Penalty:	$890,533.34
Less:	
Out of Scope Maintenance Costs paid by Northgate to Smoking Diesel:	$103,306.88
Municipal Taxes Paid by Northgate relating to developed DML:	$407,178.37
Corporate Taxes:	$50,266.64
GST:	$17,952.42
Hetu Logging – Costs to fall, skid and haul logs:	$31,500.00
Sign Dezign – Signage for Campsite:	$1,641.82
Lakelle Solutions 2019 Environmental Inspections:	$37,904.64
Total Adjustment of Proceeds Assessment as per Administrative Penalty:	$649,750.77
Adjusted Proceeds Assessment	**$240,782.57**

[95] The Board believes the adjustment to the Proceeds Assessment more accurately reflects the economic benefit to the Appellants and corrects the Director's error. In varying the Proceeds Assessment, the Director's objectives of not permitting the Appellants to profit from the Contraventions, levelling the economic playing-field, deterring potential future contraventions from other parties, and not punitively impacting the Appellants are still achieved.

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82 Director's Record, at Tab 7.21.

E. Adjustment Factors

i. Submissions

[96] The Board found the submissions from the Parties on the penalty assessment under section 171(4)(g) to be limited. The Appellants submitted the Director erred by considering irrelevant issues when determining "Adjustment Factors" for the Administrative Penalty. The Director had increased the penalty assessment by $1,500.00 under section 171(4)(g), which 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…
>
> (g) any other factor that, in the opinion of the director, is relevant."

In the Preliminary Assessment, the Director provided the following reason for increasing the penalty amount under section 171(4)(g): "The [Appellants] entered into a development agreement of the lands with a third party that accepted proceeds from Northgate to recuperate costs of development of the lands."[83]

[97] The Appellants said the Director relied on "supposed knowledge of an unrelated third party"[84] as an aggravating factor to adjust the penalty. The Appellants submitted there was no evidence before the Board that the Appellants knew of the matters referred to by the Director. The Director responded that he "relies on the Preliminary Assessment."[85]

ii. Analysis

[98] The Board found there was insufficient evidence from the Director regarding the section 171(4(g) adjustment factor. The Preliminary Assessment referred to a "third party" but did not identify the party. The Board expects the Director to be explicit in the Preliminary Assessment, the Administrative Penalty, and the submissions. The Board also found a lack of

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83 Director's Record, at Tab 1.7.

84 Appellants' Initial Submission, July 29, 2021, at paragraph 133.

85 Director's Response Submission, August 13, 2021, at paragraph 307.

reasons why the Director considered it appropriate to increase the amount of the Administrative Penalty based on section 171(4)(g).

[99] The Board finds the Director erred in the determination of a material fact on the face of the record and erred in law by assessing the adjustment factor for section 171(4)(g) of PLAR to be $1,500.00. The Director's error is correctable by varying the amount assessed by the Director for section 171(4)(g) from $1,500.00 to $0.00 (zero). The Board recognizes the Director has already capped the amount of the penalty portion of the Administrative Penalty at $15,000.00, as per section 171(5) of PLAR. Therefore, although the Board finds the amount under 171(4)(g) of PLAR should be reduced to $0.00, there will be no reduction in the overall total of the Administrative Penalty.

F. Breach of Procedural Fairness

i. Submissions

[100] The Appellants alleged the Director breached the duty of procedural fairness owed to the Appellants by not following COVID-19 protocol when serving the Appellants the Administrative Penalty. The Appellants stated the EPO did not give Mr. Zelman an opportunity to put on a facial mask or a protective glove before handing him the Administrative Penalty documents. The Appellants also said the Director breached procedural fairness by not participating in a mediation of the Appeal.

[101] The Director argued there was no duty of procedural fairness related to the service of Administrative Penalty documents, and the Appellants had not established the duty existed based on *Baker*. The Director stated Mr. Zelman did not express any concerns regarding the service of the Administrative Penalty at the time of service.

ii. Analysis

[102] The Board finds the manner in which the Administrative Penalty documents were served is not a relevant matter to the issues under appeal and does not constitute a breach of procedural fairness.

[103] Mediations in the Board's appeal process are frequently successful when both parties participate in good faith. Mediations are voluntary, and a party may choose not to participate for various reasons. As mediations are not mandatory, the Director did not owe a duty of procedural fairness to the Appellants to participate in a mediation. However, in this appeal, it was not the Director who chose not to participate in the mediation. The Board was concerned the Parties were not able to agree on a date for mediation. As the Act provides for a one-year deadline to resolve appeals, the Board chose to proceed to a written hearing.

VII. CONCLUSION

[104] The Board finds:

(a) the Director did not err in the determination of a material fact on the face of the record, err in law, or exceed his jurisdiction, by finding the Appellants contravened sections 43(1) and 54.01(5) of the Act and assessing an Administrative Penalty against the Appellants;

(b) the Director issued the Administrative Penalty within the timelines specified in section 59.7 of the Act;

(c) the Director did not err in the determination of a material fact on the face of the record, err in law, or exceed his jurisdiction, by not considering alleged past AEP practices or policies regarding unauthorized subletting of leases;

(d) the Director erred in the determination of a material fact on the face of the record and erred in law in determining the Proceeds Assessment in the Administrative Penalty to be $890,533.34. The Director's error is correctable by reducing the Proceeds Assessment amount by $649,750.77, from $890,533.34 to $240,782.57;

(e) the Director erred in the determination of a material fact on the face of the record and erred in law by assessing the adjustment factor for section 171(4)(g) of PLAR to be $1,500.00. The Director's error is correctable by varying the amount assessed by the Director for section 171(4)(g) of PLAR from $1,500.00 to $0.00 (zero), with no corresponding reduction in the total Administrative Penalty as the penalty portion was capped at $15,000.00 under section 171(5) of PLAR; and

(f) the Director did not breach the Appellants' right to procedural fairness in the service of documents related to the Administrative Penalty and did not breach procedural fairness by not engaging in mediation.

[105] The Board's reductions of the Administrative Penalty are outlined in the following table:

Total Administrative Penalty:	$905,533.34
Less:	
Adjustment to Proceeds Assessment:	$649,750.77
Adjusted Administrative Penalty Total:	**$240,782.57**

VIII. RECOMMENDATIONS

[106] The Board recommends the Minister order the following:

1. the Director's decision that the Appellants contravened sections 43(1) and 54.01(5) of the Act be confirmed;
2. the Proceeds Assessment portion of the Administrative Penalty be varied by reducing it by $649,750.77, from $890,533.34 to $240,782.57;
3. the adjustment factor for section 171(4)(g) of PLAR be varied by reducing it from $1,500.00 to $0.00, but the Penalty portion of the Administrative Penalty remains at $15,000.00 as per section 171(5) of PLAR;
4. the total Administrative Penalty amount be varied by reducing it by $649,750.77, from $905,533.34 to $255,782.57;
5. the Appellants to submit payment for the Administrative Penalty within thirty (30) days of the date of the Minister's Order; and
6. no interest is payable on the Administrative Penalty until thirty (30) days after the date of the Minister's Order.

IX. OBITER

[107] The Board understands the complexities of gathering and analyzing financial and contractual information necessary to determine a proceeds assessment. However, the Board encourages AEP to adopt a standardized methodology for the determination and presentation of a proceeds assessment as it would greatly assist both persons subject to a proceeds assessment and the Board in understanding how such amounts are determined and why. In particular, the Board would appreciate it if AEP could provide, when discussing or calculating the proceeds assessment, details of each amount pre-GST, the amount of GST applicable and the total amount

inclusive of GST. Confusion arises when amounts are presented in some cases with GST and others without GST.

Dated on November 12, 2021, at Edmonton, Alberta.

"*original signed by*"
Gordon McClure
Board Chair

"*original signed by*"
Brenda Ballachey
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
89 /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 Nos. 20-0024

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. 20-0024.

Dated at the City of Edmonton, Province of Alberta, this 1 day of Dec., 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. 20-0024

With respect to the decision of the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks, to issue Notice of Administrative Penalty and Proceeds Assessment No. PLA-20/11-AP-NR-20/10 (the "Administrative Penalty"), to Trent Zelman and Smoking Diesel Contracting Ltd., in the amount of $905,533.34, 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:

1. the Director's decision that Trent Zelman and Smoking Diesel Contracting Ltd. contravened sections 43(1) and 54.01(5) of the *Public Lands Act* is confirmed;
2. the proceeds portion of the Administrative Penalty is varied by reducing it by $649,750.77, from $890,533.34 to $240,782.57;
3. the adjustment factor for section 171(4)(g) of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 is varied from $1,500.00 to $0.00, but the penalty portion of the Administrative Penalty remains at $15,000.00 as per section 171(5) of the *Public Lands Administration Regulation*;
4. the total Administrative Penalty amount is varied by reducing it by $649,750.77, from $905,533.34 to $255,782.57;
5. the Appellants shall submit payment for the Administrative Penalty within thirty (30) days of the date of the Minister's Order; and
6. no interest is payable on the Administrative Penalty until thirty (30) days after the date of the Minister's Order.