ALBERTA
PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision – July 27, 2022

IN THE MATTER OF sections 121, 123 and 125 of the *Public Lands* Act, R.S.A. 2000, c. P-40, and sections 211, 221, 223, and 228 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Syncrude Canada Ltd., with respect to the decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, to amend a disposition issued under the *Public Lands Act* and the variation under the *Public Lands Act* of a term or condition of a disposition, specifically the dispositions are Surface Material Leases 000002 and 000033.

Cite as: *Syncrude* v. *Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (27 July 2022), Appeal No. 21-0003-ID3 (A.P.L.A.B.), 2022 ABPLAB 6.

BEFORE: Mr. Gordon McClure, Appeals Co-ordinator and Board Chair, Dr. Nick Tywoniuk, Board Member, and Ms. Barbara Johnston, Board Member.

SUBMISSIONS BY:

Appellant: Syncrude Canada Ltd., represented by Mr. Dan Collins, Dentons Canada LLP.

Director: Mr. Brendan Hemens, Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks, represented by Mr. Larry Nelson, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Syncrude Canada Ltd. (Syncrude) filed an appeal with the Public Lands Appeal Board (the Board) appealing the decision of Alberta Environment and Parks (AEP) to require Syncrude to pay royalties on sand and gravel extracted from two Surface Material Leases (SMLs) that Syncrude believed were exempt, based on past agreements with AEP's predecessors. The Director filed a motion to dismiss Syncrude's appeal for being late and beyond the jurisdiction of the Board. The Board determined that the appeal was not late and that it was within the jurisdiction of the Board.

The Board's Appeals Co-ordinator, as the sole panel member, set two issues to be considered at the hearing of the appeal:

1. Did the Director have the jurisdiction to make the decision that varied the SMLs? As questions of jurisdiction can be a broad matter, the grounds of appeal may include whether the Director made a material error of fact on the face of the record, made an error of law, and whether the Director exceeded his jurisdiction or authority, however, each ground of appeal must be relevant to the issue of the Director's jurisdiction; and
2. If the Board were to find the Director had jurisdiction to make the decision, is the Director's jurisdiction impacted by how the decision was implemented? Specifically, the Board would like the parties to comment whether *Canada* v. *Honey Fashions*, 2020 FCA 64, may be applicable in this case.

Upon reviewing these issues, the Director expressed concern that the Board had not included the question of whether the Director's decision (the "Director's Decision") requiring Syncrude to pay the royalties amended or varied the SMLs (the "Variation Question"). The Director requested the Board add the Variation Question as an issue for the hearing. The Director also noted the panel appointed by the Board to hear the appeal (the "Panel") was the appropriate body to set the hearing issues, not the Appeals Co-ordinator. The Appeals Co-ordinator subsequently added the Variation Question to the issues for the hearing. Syncrude objected to the addition of the Variation Question and the Board requested submissions from the parties on the addition of the Variation Question.

The Panel considered the submissions and identified the following issues for this decision:

A. Does the Board have the authority to rehear or reconsider its decisions?

B. Is the Panel the appropriate decision-maker to determine the issues for the hearing?

C. Is the Director's request to add the Variation Question to the issues for the hearing appropriate?

The Panel found the Board has the authority to rehear or reconsider its preliminary or interim decisions where an error has been made. The Panel found that it was the appropriate decision-maker to determine the issues for the hearing, and that the Appeals Co-ordinator had acted has the sole panel member when setting the initial two issues, but erred when making the decision to add the Variation Question to the hearing issues, as the addition occurred after the three-member Panel had been appointed. The Panel found the Director's request to add the Variation Question to be a valid request, however, the Panel disagreed with the Director's arguments on why the Variation Question should be added as a hearing issue and denied the request.

The Panel confirmed that the two initial issues set by the Appeals Co-ordinator as the sole member of the Panel, on February 23, 2022 were valid and would be the issues for the hearing.

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I. INTRODUCTION

[1] This is a preliminary motions decision by the Panel (the "Panel") appointed by the Public Lands Appeal Board (the "Board") to hear an appeal by Syncrude Canada Ltd. ("Syncrude"). Syncrude appealed the decision of the Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks (the "Director") to require Syncrude to pay royalties on sand and gravel extracted from its oil sands operations (the "Director's Decision") north of Fort McMurray in the Regional Municipality of Wood Buffalo.

[2] The Panel considered the preliminary motion by the Director to add the following third issue to the hearing of the appeal: "Were the SMLs amended or varied by the Director's Decision?" After considering the written submissions of the Syncrude and the Director (collectively, the "Parties"), the Panel denied the Director's preliminary motion and confirmed the issues for the hearing will be as follows:

1. Did the Director have the jurisdiction to make the decision that varied the SMLs? As questions of jurisdiction can be a broad matter, the grounds of appeal may include whether the Director made a material error of fact on the face of the record, made an error of law, and whether the Director exceeded his jurisdiction or authority, however, each ground of appeal must be relevant to the issue of the Director's jurisdiction; and
2. If the Board were to find the Director had jurisdiction to make the decision, is the Director's jurisdiction impacted by how the decision was implemented? Specifically, the Board would like the parties to comment whether *Canada* v. *Honey Fashions*, 2020 FCA 64, may be applicable in this case.

These are the only issues the Board will consider in the hearing of this appeal.

II. BACKGROUND

[3] Syncrude holds the following dispositions issued under the *Public Lands Act*, R.S.A. 2000, c. P-40 (the "Act"), and the *Public Lands Administration Regulation*, AR 187/2011 ("PLAR"):

(a) Mineral Surface Lease 352 ("MSL 352");
(b) Mineral Surface Lease 973220 ("Aurora MSL");
(c) Surface Material Lease 000002 ("SML 02"), and

(d) Surface Material Lease 000033 ("SML 33"), (collectively, the "Surface Material Provisions").

[4] Syncrude operates a mine and upgrader on these public lands leases and extracts sand and gravel as part of its operations. Syncrude submitted the Surface Material Provisions were amended by letters from Alberta Environment and Parks' ("AEP") predecessors in 1979 and 2000, to allow Syncrude to use sand and gravel for certain purposes without having to pay royalties (the "Royalty Exemption Letters").[1]

[5] On May 26, 2021, the Director wrote to Syncrude (the Director's Decision) and advised that its operations under the Surface Material Provisions were not exempt from paying royalties on the use of sand and gravel.[2]

[6] On June 14, 2021, Syncrude filed a Notice of Appeal with the Board, seeking to reverse the Director's Decision. On June 16, 2021, the Board wrote to the Parties acknowledging the Notice of Appeal and requested the Director provide the Department's Record. The Board also advised the Parties that the Appeals Co-ordinator was appointed to the Panel and that other members of the Board may be appointed to the Panel after the Department's Record was received.[3]

[7] On July 29, 2021, the Director filed a motion requesting the Board dismiss Syncrude's appeal (the "Jurisdiction Motion") on the basis the MSLs were not within AEP's or the Board's jurisdiction.

[8] The Board received written submissions from the Parties, and on January 14, 2022, the Board released its decision (the "Jurisdiction Decision"), finding that the Director's Decision varied the SMLs and was an appealable matter under section 211(d) of PLAR.[4] The Board found Syncrude's Notice of Appeal was properly before the Board and denied the

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1 Syncrude's Initial Submission, July 16, 2021, at paragraph 3.

2 Director's Submission, July 29, 2021, at paragraph 18. The Director's decision is often referred to as the May 2021 letter by the Parties.

3 Public Lands Appeal Board letter, June 16, 2021, at page 2 and 3.

4 Section 211(d) of PLAR provides:

"The following decisions are prescribed as decisions from which an appeal is available…

(d) the imposition or variation under the Act of a term or condition of a disposition…"

Director's motion to dismiss the Notice of Appeal for being outside the Board's jurisdiction.[5]

[9] February 23, 2022, the Appeals Co-ordinator, acting for the Board and in his capacity as the sole Panel member and Board Chair, wrote to the Parties and advised that the issues for the hearing of the appeal would be as follows:

> "1. Did the Director have the jurisdiction to make the decision that varied the SMLs? As questions of jurisdiction can be a broad matter, the grounds of appeal may include whether the Director made a material error of fact on the face of the record, made an error of law, and whether the Director exceeded his jurisdiction or authority, however, each ground of appeal must be relevant to the issue of the Director's jurisdiction.
>
> 2. If the Board were to find the Director had jurisdiction to make the decision, is the Director's jurisdiction impacted by how the decision was implemented? Specifically, the Board would like the parties to comment whether *Canada* v. *Honey Fashions*, 2020 FCA 64, may be applicable in this case."

[10] The Board also stated:

> "If [Syncrude] or Director have any comments with respect to the hearing procedures outlined below, or if they have any preliminary issues they wish the Board to decide prior to the written hearing, they are to advise the Board by noon on February 28, 2022."[6]

In the same letter, the Board advised that, in addition to the Appeals Co-ordinator, two other members had been appointed to the Panel and that the Appeals Co-ordinator was appointed as Panel Chair.

[11] On February 28, 2022, the Director wrote to the Board and requested that the issue of whether the SMLs were amended or varied by the Director's Decision be added to the issues to be determined in the appeal (the "Variation Question"). The Director stated the Variation Question was a fundamental question that must be determined by the Panel hearing the appeal.[7]

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5 See: *Syncrude* v. *Director, Public Lands Disposition Management Section, Land Policy and Programs Branch, Lands Division, Alberta Environment and Parks* (14 January 2022), Appeal No. 21-0003-ID2 (A.P.L.A.B.), 2022 ABPLAB 1, at paragraph 59.

6 Public Lands Appeal Board's letter, February 23, 2022, at page 1.

7 Director's letter, February 28, 2022, at page 2.

[12] On March 10, 2022, the Board wrote to the Parties and stated:

> "The Board considered the Director's arguments on this issue and found the decision did amend or vary the SMLs. The Board finds the Director had sufficient opportunity to present argument on whether the SMLs were amended by the decision…. The Board will not consider any further arguments regarding its jurisdiction."[8]

[13] On April 22, 2022 the Director wrote to the Board and submitted the Variation Question should be added to the issues for the hearing, arguing that the Board's finding that the SMLs were varied by the Director's Decision was premature and was a preliminary decision. The Director reiterated that he had not been provided with an opportunity to make submissions on the Variation Question. The Director noted the decision on the issues was made by the Appeals Co-ordinator, however, section 228(c) of PLAR stated that the issues for an appeal are to be set by the Panel hearing the appeal.[9]

[14] In a letter dated May 4, 2022, the Appeals Co-ordinator, acting without the other members of the Panel, added the Variation Question to the issues for the hearing, and worded it as follows: "Were the terms of the SMLs varied by the Director's decisions regarding payment of royalties?"[10]

[15] On May 10, 2022, Syncrude wrote to the Board and objected to the inclusion of the Variation Question. Syncrude argued that the Variation Question, "… was fully and finally resolved in the Jurisdiction Decision and there is no basis to continue arguing the matter."[11]

[16] On May 16, 2022, the Board requested comments from the Parties regarding Syncrude's objection to the inclusion of the Variation Question as an issue for the hearing. The Parties provided their comments by May 27, 2022, and the full Panel met to consider the Parties' written comments.

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8 Public Lands Appeal Board's Letter, May 10, 2022, at page 3.

9 Section 228(c) of PLAR states:

"A panel hearing an appeal may…

(c) determine the matters to be included under section 123(2) of the Act in the hearing of the appeal…"

10 Public Lands Appeals Board's letter, May 4, 2022, at page 2.

11 Syncrude's letter, May 10, 2022, at page 11.

III. ISSUES

[17] The Parties raised several issues in their submissions. The Panel has combined those issues into the following general issues to be determined in this decision:

A. Does the Board have the authority to rehear or reconsider its decisions?

B. Is the Panel the appropriate decision-maker to determine the issues for the hearing?

C. Is the Director's request to add the Variation Question to the issues for the hearing appropriate?

IV. ANALYSIS

A. Does the Board have the authority to rehear or reconsider its decisions?

(i) Submissions

[18] Syncrude submitted administrative tribunals, such as the Board, do not possess an inherent power to reconsider a decision after it has been issued. Syncrude noted that section 125 of the Act provided the Board with the authority to "reconsider, vary or revoke any report made by it." However, Syncrude argued "report" referred to the report submitted by the Board to the Minister of Environment and Parks (the "Minister"), and not to any decision made by the Board during the hearing process.

[19] Syncrude referred to *Practice and Procedure before Administrative Tribunals*, which explained that "interim" decisions may have at least two distinct meanings:

> "There will usually be many other decisions made in the course of a proceeding before an agency other than the final decision. There may be requests to add a party, or for an adjournment, or for a ruling on the admissibility of evidence, or for the agency to conduct a view, all of which must be 'decided.' An agency might have to "decide" the manner in which an investigation will be conducted or the scope of an inquiry. These types of decisions, which go to matters which are ancillary to the main question before the agency, are known as interim decisions.
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> The term "interim" is also used for decisions which an agency may make to tide the parties over pending the final decision. An example of this type of interim decision is a temporary rate increase that is granted which is intended by its nature to be temporary pending the final decision. This type of decision is also

> considered interim because it does not finally dispose of the matter.[12] [Emphasis is Syncrude's.]

[20] Syncrude also referred to the Supreme Court of Canada decision in *Bell Canada* v. *Canadian Radio-Television & Telecommunications Commission* ("*Bell Canada*"). Syncrude stated the Court found the interim order issued by the Canadian Radio-Television & Telecommunications Commission was a "tied the parties over" type of interim decision. Syncrude submitted *Bell Canada* and the quote from *Practice and Procedure before Administrative Tribunals* do not support the Director's suggestion that tribunals can reconsider any decision made before a hearing.

[21] Syncrude submitted that the Jurisdiction Decision was different from the interim decision in *Bell Canada*. The Jurisdiction Decision was a decision that was meant to be "final" and was not subject to further review at the hearing. Syncrude stated the Jurisdiction Decision, along with other decisions such as limitations decisions and extension of deadlines are final determinations of preliminary issues. Syncrude stated:

> "It was the Director who raised the question of whether the Director's Decision had the effect of amending or varying the terms of Syncrude's dispositions. The Director chose to raise that issue in a separate motion process. Ruling on the Director's motion necessarily required the Board to decide whether the Director's Decision varied the terms of Syncrude's SMLs. The Director cannot now complain and attempt to re-litigate the same issue simply because the Director was dissatisfied with the result."[13]

[22] Syncrude stated that the Jurisdiction Decision is final, and that the doctrine of abusive process, and the related doctrines of *res judicata*, issue estoppel, and collateral attack prevent the Director from re-litigating the Appeals Co-ordinator's decision.

[23] The Director submitted the Jurisdiction Decision was not a final decision, and the Board has a "continuing power" to reconsider preliminary decisions. The Director referred to *Practice and Procedure before Administrative Tribunals*, which stated:

> "Why care whether a decision is interim or final? One should be aware of the distinction because of different substantive and procedural rights and

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[12] Robert Macaulay, James Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada Limited, 2021), at §28.4.

[13] Syncrude's submission, June 1, 2022, at page 4.

> requirements which attach to the two types of decisions. … Interim decisions by their nature are capable of being re-opened and reconsidered while final decisions are not (unless they fall into one of the exceptions)."[14] [Emphasis is the Director's.]

[24] The Director also quoted from *Administrative Law in Canada*, "A tribunal has a continuing power to change his mind until the final decision is released.… Preliminary rulings on any issue may be revisited and changed in the final decision."[15] The Director noted that under the Act and PLAR the Board does not make the final decision on appeals before it, but rather the Minister is the final decision-maker.

(ii) Analysis

[25] The Court of Appeal of Alberta has confirmed:

> "… it is an accepted legal principle that generally speaking, administrative tribunals have no inherent jurisdiction to rehear, reconsider or vary a decision once it has been finalized. The general rule is that the authority to rehear, reconsider or vary a decision must be found in statute."[16] [Emphasis is the Board's.]

The relevant word when considering the Board's jurisdiction to rehear, reconsider, or vary its decisions is "finalized." This suggests a final decision by the Board may not be reopened unless there is statutory authority to do so, however, the Board does not make the final decision on appeals. The final decision on appeals before the Board is made by the Minister.

[26] Section 124 of the Act states: "The appeal body shall, within 30 days after the completion of the hearing of the appeal, submit a report to the Minister, including recommendations and the representations or a summary of the representations that were made to it." Section 125 states, "The appeal body may reconsider, vary or revoke any report made by it." The Board interprets these two sections to mean that the Board may make changes to the report

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[14] Robert Macaulay, James Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada Limited, 2021), at §28:5.

[15] Sarah Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada Inc. 2017), at paragraph 4.51.

[16] *Watson* v. *Alberta (Worker*'s *Compensation Board)*, 2011 ABCA 127, at paragraph 22.

and recommendations it provides to the Minister. There are no other references in the legislation to any reconsideration power relating to the Board.

[27] Although the general rule is that an administrative tribunal does not have the authority to reconsider a decision, exceptions are made by the courts where a decision was made without authority or outside of a tribunal's jurisdiction. The Supreme Court of Canada in *Chandler* v. *Association of Architects (Alberta)* ("*Chandler*") found that a tribunal may reopen a matter in order to cure significant defects. The Court stated: "… if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task."[17] The Court further stated, referring to the administrative tribunal in *Chandler*:

> "The board intended to make the final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal which makes a determination which is a nullity has been permitted to reconsider the matter afresh and render a valid decision."[18]

If the Board were to make a decision that was legally void then the Board would be entitled to correct that decision. The Board believes this is the intent behind section 125 of the Act.

[28] While it seems clear that the Board has the powers to and change the report and recommendations it provides to the Minister, the Parties disagreed whether the Board has the power to change decisions it makes during the course of an appeal. The question of whether an administrative tribunal has authority to make changes to its decisions before making a final decision does not appear to have been clearly addressed by the courts. However, guidance can be found in the Court of Appeal of Alberta decision in *Watson* v. *Alberta (Worker's Compensation Board).*[19] In *Watson*, the Dispute Resolution and Decision Review Body ("DRDRB") of the Worker's Compensation Board did not have the express statutory authority to reconsider its decisions. The Court found that the DRDRB had implied authority to change its decisions, based on its link with the WCB's Appeals Commission. Additionally, the Court found the DRDRB was entitled to make changes to a decision where an error was made that was detrimental to the worker. The Court wrote:

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17 *Chandler* v. *Association of Architects (Alberta),* [1989] 2 S.C.R. 848, at paragraph 79.

18 *Chandler* v. *Association of Architects (Alberta),* [1989] 2 S.C.R. 848,at paragraph 80.

> "Furthermore, a potential injustice is possible. For example, it is quite conceivable that after rendering its decision, the DRDRB might realize that it made an error that was to the detriment of the worker. If the DRDRB lacked an express power of reconsideration, then the only remedy that the affected worker would have (assuming that the DRDRB's decision was made within its jurisdiction) is to appeal to the Appeals Commission pursuant to section 46 of the Act. Even if the appeal is granted, it is far more cumbersome for the decision to be 'righted' than if the DRDRB could simply do that on its own. Obviously any express power of reconsideration must be exercised having regard to, *inter alia*, the rights of procedural fairness."[20]

While it is not clear from *Watson* if the authority to reconsider or rehear a decision is limited to a final decision, the principle that an administrative tribunal can correct errors in its decisions is in keeping with the Supreme Court's decision in *Chandler*.

[29] The power to correct errors applies to preliminary decisions as well. In *Vatanabadi* v. *Canada (Minister of Employment and Immigration)*, the Appeal Division of the Federal Court found that the tribunal hearing an immigration matter had the authority to change a decision even though it was not finalized. The Court stated:

> "… not only had the tribunal not reached a final decision in respect of the matter before it, but a policy which favours finality of proceedings would require that the tribunal, having only just started its inquiry, be allowed to correct its obvious mistake. Such policy would not be advanced by insisting on a time wasting and quite unnecessary continuation down a path which all concerned knew and admitted was fatally flawed. The tribunal's ultimate decision was only subject to review on a point of law and, since it was manifest that such decision would be wrong in law if the error were not at once corrected, a flexible and pragmatic approach required that such correction be effected forthwith."[21]

The Court found that the importance of finality would be undermined if the tribunal did not have the authority to correct errors to a preliminary decision.

[30] The Board finds it logical that the power to correct errors would apply to preliminary decisions made at any point in the appeal process. It would be absurd for the Board not to have the power to rehear or reconsider its interim or preliminary decisions if an error had

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19 *Watson* v. *Alberta (Worker*'s *Compensation Board)*, 2011 ABCA 127.

20 *Watson* v. *Alberta (Worker*'s *Compensation Board)*, 2011 ABCA 127, at paragraph 33.

21 *Vatanabadi* v. *Canada (Minister of Employment and Immigration)* [1993] 2 F.C. 492.

been made. The Board finds it has the power to modify or correct its decisions during the appeal process if an error material to the decision is discovered.

[31] It is important that the Board exercise the power to make changes to its decisions with the principles of procedural fairness in mind. In this appeal, the Parties have the opportunity to provide submissions and arguments on the question of whether the Board can add the Variation Question to the list of issues to be considered at the hearing. Therefore, the Board is satisfied that this matter has been considered fairly and that neither the Director nor Syncrude are prejudiced by the Board's decision.

B. Is the Panel the appropriate decision-maker to determine the issues for the hearing?

(i) Submissions

[32] Syncrude submitted that the findings of the Appeals Co-ordinator in the Jurisdiction Decision were final and Syncrude would suffer prejudice if the Board permitted the Director to reopen the issue.

[33] Syncrude noted the Board, in *Colette Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks* the Panel, found that a panel cannot reconsider findings made by the Appeals Co-ordinator. Syncrude quoted the Board as follows:

> "Looking at the functions assigned to the Board it does not include the authority to review the decision of the Appeals Co-ordinator. Administrative tribunals, like the Board, only have the authority to decide those matters assigned to them by their enabling statute. The Board is authorized to hear appeals of the decision of director and officers of the AEP listed in section 211 of PLAR. This list of appealable decisions does not include section 236 of PLAR. As a result, the Board in the hearing of the appeals does not have the jurisdiction to review the decision of the Appeal Co-ordinator. The correct course of action is to file a judicial review."[22]

[22] *Colette Benson and CRC Open Camp & Catering Ltd.* v. *Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2020 ABPLAB 14, at paragraph 372.

[34] The Director submitted that, "the panel hearing the Appeal, and not the Appeals Co-ordinator alone, has the authority to set the matters to be heard in the Appeal."[23] The Director referred to section 228(c) of PLAR, which states: "A panel hearing an appeal may determine the matters to be included under section 123(2) of the Act in the hearing of the appeal."

[35] The Director submitted that the Appeals Co-ordinator acted beyond the authority provided in PLAR when he set the issues for the hearing.

(ii) Analysis

[36] The Board's standard practice is to appoint the Appeals Co-ordinator to each panel as per sections 221(1)(a) and 223(1) of PLAR, and then to appoint other panel members as needed. Until it is determined whether other panel members are required, the Appeals Co-ordinator is the sole member of the Panel, and if other panel members are appointed, the Board's practice is that the Appeals Co-ordinator becomes the chair of the Panel, unless otherwise noted.[24]

[37] As the sole member of the Panel, the Appeals Co-ordinator had authority to determine which issues would be appropriate for the hearing. Although the issues decision was announced in the February 23, 2022 letter from the Board, the Appeals Co-ordinator made the decision before the letter was sent and before the other Panel members were appointed. The February 23, 2020 letter reflects this by placing the decision on the issues to be heard at the hearing ahead of information on the appointment of the two other Panel members.

[38] However, the additional Panel members had been appointed and announced to the Parties when the Appeals Co-ordinator decided to add the Variation Question to the list of issues for the hearing. As there were now two other members of the Panel, the decision to include the

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[23] Director's Response Submission, May 25, 2022, at page 4.

[24] Section 223 of PLAR states:

"(1) The appeals co-ordinator may act as a panel or a member of a panel rather than appointing another Board member under section 221(1)(a) or (b).

(2) Where a panel consists of 3 persons other than the appeals co-ordinator,

(a) appeals co-ordinator must designate one of the panel members as the panel chair, and

(b) the panel chair and one other panel member constitute a quorum."

Variation Question should have been decided by the Panel as a whole, rather than by the Appeals Co-ordinator as the Panel Chair. While this was an error, it was an error that can be rectified without prejudice to the Parties by having the full Panel consider anew the question of whether the Variation Question should be included in the hearing. As noted by Blake in *Administrative Law in Canada*: "The tribunal may cure its procedural defaults."[25]

[39] As the Panel is the proper body to make the decision on the issues for the hearing, the Board finds the Appeals Co-ordinator's decision to add the Variation Question to the list of issues to be heard at the hearing is void.[26] The full Panel has considered the Parties' submissions and made the decision on whether to add the Variation Question. The Panel's decision is below.

C. Is the Director's request to add the Variation Question to the issues for the hearing appropriate?

(i) Submissions

[40] Syncrude submitted the Director's efforts to have the Board add the Variation Question to the list of issues to be considered at the hearing was the same as seeking a reconsideration of the Board's decision and a re-litigation of the Jurisdiction Motion. Syncrude argued including the Variation Question was contrary to the principle of finality and was an abuse of the Board's process, which significantly prejudiced Syncrude's case. Syncrude quoted from the Supreme Court of Canada decision in *Danyluk* v. *Ainsworth Technologies Inc*.:

> "The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry."[27]

[41] Syncrude stated that whether the substance and effect of the Director's Decision amended or varied the terms of Syncrude's dispositions was a fundamental question of fact for the Board. Syncrude said it expressly set out an analytical framework in its initial submission on the Jurisdiction Motion which suggested the Board first needed to understand Syncrude's rights

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25 Blake, Sara, *Administrative Law in Canada*, 6th edition (Toronto: Lexis Nexis Canada, 2017), at 2.58.

26 McCauley, Robert W., James L.H. Sprague, and Lorne Sossin, *Practice and Procedure before Administrative Tribunals* (Toronto: Thompson Reuters Canada Ltd., 2022), § 7:1.

27 *Danyluk* v. *Ainsworth Technologies Inc*., 2001 SCC 44, at paragraph 19.

prior to the Director's Decision, and then understand how Syncrude's legal position changed after the Director's Decision. Syncrude noted the Director supported this analytical approach.

[42] Syncrude submitted it would suffer prejudice from re-litigating the Jurisdiction Motion in the time and cost devoted to addressing the re-litigation, and that the re-litigation was duplicative and a waste of valuable resources for all parties.

[43] Syncrude noted the Director did not submit a reconsideration request according to the timelines required by section 26.3 of the Board's Interim Appeals Procedure Rules for Complex Appeals ("Rules"), which state: "Requests following the decision must be made within 30 days of the date of the decision." Syncrude stated that the Director's second request to add the Variation Question was made 43 days after the Board set the issues for the hearing, and 98 days after the Jurisdiction Decision was issued.

[44] Syncrude submitted that the Director failed to meet the Board's threshold test for reconsidering a prior decision, as set out in section 26.3 of the Rules:

> "The Board will not exercise its power under section 125 of the Public Lands Act in the absence of the following:
>
> (a) New facts, evidence or case-law that was not reasonably available at the time of the hearing. The new facts, evidence or case-law must be significant enough to have a bearing on the outcome of the decision,
>
> (b) A procedural defect during the hearing which prejudiced one or both of the parties,
>
> (c) Material errors that could reasonably change the outcome of the decision,
>
> (d) Any other circumstance the Board considers reasonable and substantive."

Syncrude argued that as the party requesting the Board reconsider its findings, the onus was on the Director to meet one or more the criteria in section 26.5 of the Rules, but the Director failed satisfy that onus.

[45] Syncrude also noted that section 26.6 of the Rules states that the Board will not review a matter simply because a party disagrees with a decision, failed to provide case authority, or failed to present relevant evidence.[28]

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[28] Section 26.6 of the Board's *Interim Appeals Procedure Rules for Complex Appeals*, states:

[46] Syncrude submitted the Director's statement that he would not reargue the Board's decision regarding the Board's jurisdiction at the hearing was fundamentally the same as the Director's statement that the Director must be allowed to argue the question of whether Syncrude's SMLs were varied by the Director's Decision. Syncrude noted the Board's jurisdiction to hear the appeal is contingent on whether the Director's Decision is a "prescribed decision" under section 211 of PLAR. In order to make that determination, the Board had to make a factual finding about whether the substance and effect of the Director's Decision was to amend or vary the terms of Syncrude's dispositions. Syncrude stated that it was not possible for the Director to make submissions on whether the Director's Decision varied Syncrude's SMLs without simultaneously rearguing the Board's finding in the Jurisdiction Decision that the SMLs had been varied by the Director's Decision.

[47] The Director submitted that the Jurisdiction Decision was not a final decision, but in the alternative, if it could be considered a final decision, the Director stated that the Variation Question was not a request for a reconsideration of the Jurisdiction Decision. The Director stated that the Director accepts the Board's jurisdiction to hear the appeal as it relates to the SMLs, and that the Director was not asking the Panel to reconsider the issue of the Board's jurisdiction.

[48] The Director argued that the Appeals Co-ordinator's finding in the Jurisdiction Decision that the Director's Decision varied the SMLs was premature because "… the Appeals Co-ordinator did not have the evidence and other materials necessary to make a conclusive finding regarding whether the terms of the SMLs were varied by the Director's Decision."[29] The Director stated that because the director's file had not been provided to the Board it was not appropriate for the Director to make submissions regarding the merits of the Appeal.

"The following are not sufficient grounds for a review:

(a) disagreement with a decision;

(b) failure to provide related case authority; or

(c) present available evidence."

[29] Director's Letter, April 22, 2022, at page 2.

[49] The Director stated:

> "… at no time has the Director had the opportunity to make submissions on or conceded that his decision amended or varied either the MSL's or the SMLs. The Director did not make substantive submission on this issue in the jurisdiction Motion, as this issue goes to the merits of the Appeal, not to the question of the Board's jurisdiction."[30]

The Director submitted it would not be appropriate to argue the merits of the appeal when the Jurisdiction Motion was made because the Director's file had not been provided. The Director noted he did not make submissions on current status of the royalty exemptions, the effect of subsequent issuances, renewals, and amendments to the MSL's and the SMLs, and other issues the Director stated were critical regarding the status of the SMLs.[31]

[50] The Director submitted the Panel is the appropriate body to determine the issues for the hearing, and that the Appeals Co-ordinator's finding in the Jurisdictional Decision that the Director's Decision varied the SMLs "does not and should not preclude the panel as a whole from considering the [Variation Question] since… this finding was premature and not necessary to determine the central question of whether the Board had jurisdiction."[32]

[51] The Director submitted that the Variation Question was the most fundamental issue to be determined in the appeal, and has such, it should be an issue at the hearing.

(ii) Analysis

[52] Syncrude submitted that the Director's request to add the Variation Question is a reconsideration application and, according to the Board's Rules, the Director's application is late. The Director argued his request was not a reconsideration application but rather a request to add an issue prompted by the Board missing an issue the Director considered to be fundamental to the appeal.

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30 Director's Letter, February 28, 2022, at pages 1 to 2.
31 Director's Letter, April 22, 2022, at page 2.
32 Director's Letter May 25, 2022, at page 3.

[53] If the request to add the Variation Question was a reconsideration application it would not comply with the Board's Rules. Rule 26.1 states: "A party or intervener may request the Board rehear, review, vary or rescind any matter or decision under section 125 of the Act." As noted previously in this decision, section 125 of the Act refers to the Board's authority to "reconsider, vary or revoke any report made by it." The Board has already established that "report" refers to the recommendations and report the Board provides to the Minister at the conclusion of an appeal. The Board's Jurisdiction Decision and its letter setting the issues for the hearing are not covered under section 125 of the Act, therefore, Rule 26.1 and the Rules related to it are not applicable.

[54] As previously established in this decision, the Board has the authority to rehear or reconsider preliminary decisions where the Board has made an error. It is clear from the Director's submissions that the Director considered the Board had made an error in not including the Variation Question as an issue for the hearing. The Panel has reviewed the Parties' submissions and the Department's Record to determine if the Board erred when it set the issues.

[55] The Board respectfully disagrees with the Director's statement that the Appeals Co-ordinator should not have considered the merits of the Director's Decision in reaching his conclusions regarding the Variation Question. A question of jurisdiction is a preliminary matter that is best determined before a hearing is held. The Board finds there is a correlation between the determination of jurisdiction and the determination of standing to file an appeal. In *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, the Alberta Court of Appeal found that a consideration of the merits may be necessary to determine a matter of standing. The Court stated:

> "The issue of whether an appellant is directly affected by a proposed activity necessarily requires a consideration of the nature and merits of the appellant's objection (i.e. the substantive issues), especially if the basis of the appellant's objection is the "adverse effect" (defined as impairment of or danger to environment, human health, safety or property) of the Director's decision on it."[33]

[33] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, 2020 ABCA 456, at paragraph 135.

[56] As with a determination of standing, the Appeals Co-ordinator had to consider the merits of the appeal sufficiently to make a determination on whether the decision being appealed was a prescribed decision under PLAR and, therefore, an appeal within the Board's jurisdiction to hear. Specifically, the Appeals Co-ordinator had to determine if there was sufficient merit to Syncrude's claim that the Director's Decision varied the terms and conditions of Syncrude's dispositions. As the SMLs were the only dispositions under the Board's jurisdiction, the Appeals Co-ordinator reviewed the Director's Decision impact on the terms and conditions of the SMLs, and found that by requiring Syncrude to pay royalties on all surface materials extracted from the SMLs, the Director's Decision had the effect of varying the terms of the SMLs, which is a prescribed decision under section 211(d).[34] If the SMLs were not varied by the Director's Decision, then the Board would not have jurisdiction to hear the Appeal. The Panel finds the Appeals Co-ordinator was correct to review the merits only to the extent necessary to make a jurisdiction decision.

[57] The Director stated the Jurisdiction Decision and the decision on the issues were premature because the Appeals Co-ordinator did not have the full Department's Record before him when making the decisions.

[58] It is standard practice for the Board to request the Department's Record at the onset of an appeal, which the Board did in its first letter to the Parties on June 16, 2021. In the letter the Board requested the Director provide:

> "… a copy of the Department's Record that the Director reviewed and were available to him when making his decision to issue the May 26, 2021 letter to Syncrude. This includes all records (and electronic media) in the Department's possession in relation to Surface Material Leases 000002 and 000033 and Mineral Surface Leases 352 and 973220, including policy documents, guidelines, and directives, along with an index."[35]

The Board also wrote "that on the face of it the appeal appears to be a valid appeal and accepts the appeal. However, the Board may review its decision once the Department's record has been reviewed."

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[34] Section 211(d) of PLAR states:

"The following decisions are prescribed as decisions from which an appeal is available…

[59] Instead of providing the Department's Record, the Director filed a motion to dismiss the Syncrude's Notice of Appeal, alleging it was filed late. The Director did not mention a date by which the Department's Record would be provided to the Board, and raised no objections to the Board making a decision regarding the alleged lateness of the Notice of Appeal without the benefit of the full Department's Record.

[60] The Director also did not mention the Department's Record when submitting that the Board not have jurisdiction to hear the appeal. The Director gave the following reasons in support of his arguments that the Board lacked jurisdiction:

> (a) Syncrude alleged the decision amended or varied the MSL's, and was therefore, outside the Board's jurisdiction;
>
> (b) the Director had not made a decision regarding the MSL's that could be appealed under section 211 of PLAR; and
>
> (c) "even if the Appeal should have been about the SMLs, since the Royalty Decision was to inform [Syncrude] that [AEP] was going to start properly applying section 214 of [PLAR] and the SML Royalty Terms, it is not a prescribed decision under section 211 of [PLAR] and, therefore, not appealable to the Board."[36]

The Director's reasons for challenging the Board's jurisdiction required the Board to make determinations based on the limited documentation before it, most of which had been provided by Syncrude in its Notice of Appeal.

[61] The Director, who had care and control of the Department's Records for the appeal, made submissions on the lateness and jurisdiction issues and did not raise any objections to the Appeals Co-ordinator making decisions without the benefit of the Department's Record. It was only after the Jurisdiction Decision was made that the Director stated the Appeals Co-ordinator should have had the full record in front of him when making the decision.

[62] The Board had advised the Director in its initial letter requesting the Department's Record that its decision to accept the Notice of Appeal was based on the face of the Notice of Appeal, and that the Board may reconsider that decision after reviewing the Department's

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(d) the imposition or variation under the Act of a term or condition of a disposition…"

35 Public Lands Appeal Board's Letter, July 16, 2021, at page 1.

36 Director's Submissions, July 29, 2021, at paragraph 23.

Record. The only reason the Appeals Co-ordinator did not have the Department's Record before him when making the Jurisdiction Decision was that the Director chose not to provide it. If the Director believed the full Department's Record was required for the Appeals Co-ordinator to make the Jurisdiction Decision the Director could have delayed making the Jurisdiction Motion or provided the Department's Record in a timelier manner.

[63] The Panel notes that the Department's Record was not provided until April 8, 2022. While the Panel acknowledges the Department's Record is large compared to other records for appeals before the Board, and appreciates the Director's efforts to provide the Department's Record, it is inappropriate for the Director to ignore the Board's request for the Record and then raise concerns when the Appeals Co-ordinator makes decisions on the Director's preliminary motions without the Department's Record.

[64] The Director alleged he did not have the opportunity to respond to the Variation Question before the Appeals Co-ordinator set the issues for the hearing. The Panel, after reviewing the Parties' submissions and correspondence finds that the Director had sufficient opportunity to make argument regarding the Variation Question, but chose to focus his submissions and comments on other areas related to the appeal.

[65] The Director should have anticipated the Appeals Co-ordinator would consider such a fundamental issue as to whether the SMLs were varied by the Director's Decision when determining the Board's jurisdiction. The Board had already identified that decision being appealed was the Director's May, 2021 Letter that confirmed Syncrude was required to pay royalties for the sand and gravel removed from the SMLs. The Director would have known that any jurisdictional decision by the Board would be based on section 211 of PLAR which sets out which decisions by the Director are appealable to the Board. The Director turned his mind to the question of whether the Director's Decision amended, varied or changed the SMLs, as indicated in the Director's July 29, 2021 submissions, where the Director stated:

> "The crux of the Royalty Decision was for the Department to properly apply section 114 of the Regulation and did not in any way amend, or vary or otherwise change any aspect of the SMLs, and in fact the Royalty Decision (as set out in the Royalty Letter) is materially the same as the requirements in section 114 of the Regulation and the SML Royalty Terms."[37] [Emphasis is the Board's.]

[66] The Panel finds that the Director had sufficient opportunity to present arguments regarding the Variation Question.

V. DECISION

[67] The Panel finds the Board has the authority to reconsider its preliminary decisions when an error has been committed.

[68] The Panel finds the Appeals Co-ordinator had initial authority to set the issues in the February 23, 2022 letter, but, after a full panel had been appointed, the Panel was the appropriate body to make any decision on the Variation Question. The Appeals Co-ordinator erred in making the May 4, 2022, decision to add the Variation Question. Therefore, the decision to add the Variation Question as an issue to the hearing is void.

[69] The Panel finds the Director was not seeking a reconsideration of the Jurisdiction Decision or the setting of the issues, but was alleging an error was made by the Appeals Co-ordinator, which is a valid reason for the Panel to review the Jurisdiction Decision and the issues to determine if an error had been made.

[70] After reviewing the Department's Record, the Jurisdiction Decision and the submissions of the Parties, the Panel confirms the Jurisdiction Decision and finds no error in the February 23, 2022 decision setting the issues.

[71] Therefore, the Panel finds that the issues for the hearing of the appeal will be as initially stated by the Board's letter dated February 23, 2022, which are:

1. Did the Director have the jurisdiction to make the decision that varied the SMLs? As questions of jurisdiction can be a broad matter, the grounds of appeal may include whether the Director made a material error of fact on

[37] Director's Submissions, July 29, 2021, at paragraph 42.

the face of the record, made an error of law, and whether the Director exceeded his jurisdiction or authority, however, each ground of appeal must be relevant to the issue of the Director's jurisdiction.

2. If the Board were to find the Director had jurisdiction to make the decision, is the Director's jurisdiction impacted by how the decision was implemented? Specifically, the Board would like the parties to comment whether *Canada* v. *Honey Fashions*, 2020 FCA 64, may be applicable in this case.

Dated on July 27, 2022, at Edmonton, Alberta.

Gordon McClure
Appeals Co-ordinator and Chair

Dr. Nick Tywoniuk
Board Member

Barbara Johnston
Board Member