

ALBERTA PUBLIC LANDS APPEAL BOARD

Decision

Date of Decision –December 13, 2023

IN THE MATTER OF sections 119, 120, 121, and 123 of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 211, 212, and 213, of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

-and-

IN THE MATTER OF an appeal filed by Janice Scott, Terrance Scott, and Running Reins Ranch, with respect to the April 20, 2023 decision of the Director, Agriculture, Approvals and Sales Unit, Forestry and Parks, to refuse to cancel, withdraw, suspend, or revoke GRL 39668, held by Ray Herbert, or issue administrative penalties or enforcement orders to Ray Herbert.

Cite as: *Scott and Running Reins Ranch v. Director, Agriculture, Approvals, and Sales Unit, Forestry and Parks, re: Ray Herbert* (13 December 2023), Appeal No. 23-0001-ID1 (A.P.L.A.B.), 2023 ABPLAB 17.

BEFORE:

Ms. Line Lacasse, Panel Chair and Board Member, Kurtis Averill, Panel Member, and Ms. Angela Aalbers, Panel Member.

SUBMISSIONS BY:

Appellants:

Ms. Janice Scott, Mr. Terrance Scott, and Running Reins Ranch, represented by Ms. Bath-Sheba van den Berg, Loberg Ector LLP.

Director:

Ms. Donna-Jean Zubko, Director, Agriculture, Approvals and Sales Unit, Forestry and Parks, Represented by Mr. Larry Nelson, Environmental Law Section, Alberta Justice.

Disposition Holder:

Mr. Ray Herbert, represented by Mr. Kim Wakefield, Dentons Canada LLP.

EXECUTIVE SUMMARY

Grazing lease 39668 (the GRL) is located on public lands along the west side of the Red Deer River in Kneehill County and is held by Mr. Ray Herbert (the GRL Holder). Ms. Janice Scott, Mr. Terrence Scott, owners of Running Reins Ranch (the Appellants) own property adjacent to the GRL. The GRL was renewed by Alberta Forestry and Parks (the Department) in May 2022.

On July 14, 2022, the Appellants requested the Department cancel the GRL, sever lands from the GRL that border the Appellant's property, and assess administrative penalties against the GRL Holder for various alleged contraventions of the lease, the *Public Lands Act*, and the *Public Lands Administration Regulation* (PLAR).

On April 20, 2023, the Department's Director, Agriculture, Approvals, and Sales, advised the Appellants their request had been refused.

On May 9, 2023, the Appellants filed a Notice of Appeal with the Public Lands Appeal Board (Board), requesting the Board:

1. cancel, withdraw, suspend or revoke the GRL from the GRL Holder;
2. sever or amend part of the GRL, in particular those parts of the GRL bordering the Appellants' lands;
3. issue administrative penalties and enforcement orders against the GRL Holder for breaches of the GRL lease agreement, the Public Lands Act, and PLAR; and
4. find that the Director and some of the Department's employees fettered their discretion.

On June 2, 2023, the Director requested the Board strike from the appeal issues related to cancellation, withdrawal, or revocation of the GRL. The Director submitted those issues were not appealable matters under the *Public Lands Act* and PLAR.

The Board requested and received written submissions from the Appellants, the GRL Holder, and the Director (the Parties) on the Director's motion to strike the issues from the appeal. After receiving the written submissions from the Parties, the Board addressed the Director's motion by considering whether the Board has the jurisdiction under:

- A. the *Public Lands Act* and PLAR; or
- B. the principles of procedural fairness and the rule of law;

to hear matters in this appeal related to cancellations, revocations, and withdrawals from the GRL.

In making its decision, the Board reviewed the Parties' submissions, relevant caselaw, and legislation. The Board determined as follows:

1. The Board has jurisdiction under the *Public Lands Act* and PLAR to hear appeals related to the Director's decision to refuse the Appellants' request to withdraw land from the GRL.
2. The Board does not have jurisdiction under the *Public Lands Act* and PLAR to hear appeals related to the Director's decision to refuse the Appellants' request to cancel or revoke the GRL.
3. The Board does not have the jurisdiction under the principles of procedural fairness and the rule of law to hear appeals related to the Director's decision to refuse the Appellants' request to cancel or revoke the GRL. There is no legitimate expectation that the Appellants can appeal cancellations of dispositions under the rule of law.

The Board decided the issues related to cancellation or revocation of the GRL are not appealable matters and, therefore, are not properly before the Board. Issues related to cancellation or revocation of the GRL will not be included in the hearing of the appeal and the Board will not accept any representation on those issues.

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	BACKGROUND	1
III.	ISSUES	3
IV.	ANALYSIS.....	4
A.	Whether the Board has jurisdiction under the <i>Public Lands Act</i> and PLAR	4
(i)	Submissions	4
(ii)	Analysis	8
B.	Whether the Board has jurisdiction under the principles of procedural fairness and the rule of law	11
(i)	Submissions	11
(ii)	Analysis	13
V.	DECISION	16

I. INTRODUCTION

[1] This is the Public Lands Appeal Board's (the "Board") decision regarding a motion by the Director, Agriculture, Approvals and Sales Unit, Forestry and Parks (the "Director"), in the appeal filed by Ms. Janice Scott, Mr. Terrence Scott, and Running Reins Ranch (the "Appellants"). The Appellants requested the Director take specific actions against the holder of Grazing Lease GRL39668 (the "GRL") held by Mr. Ray Herbert (the "GRL Holder"). The Director refused the Appellants' request, and the Appellants filed a Notice of Appeal with the Board appealing the Director's decision refusing to proceed with the requested actions. The Director filed a motion with the Board to have issues related to the cancellation or revocation of the GRL and withdrawal of land from the GRL struck from the hearing of the appeal.

II. BACKGROUND

[2] The GRL consists of two parcels of public land located on the west side of the Red Deer River, near the Tolman Bridge, east of the Town of Trochu and north of the Town of Drumheller, in Kneehill County. The northern parcel of 157.6 acres is located at W4-22-036-24-SW and W4-22-036-24NW. The southern parcel of 456.8 acres is located at W4-21-036-06-SE, W4-21-036-06-NW, and W4-21-036-06-NE. The predecessor of Alberta Forestry and Parks (the "Department") renewed the GRL for ten years on December 12, 2013, effective January 1, 2012. On May 11, 2022, the GRL was renewed again for another 10 years.

[3] On July 14, 2022, the Appellants wrote to the Director and requested the Director take action against the GRL Holder by:

- cancelling the GRL;
- severing land from the GRL that is adjacent to the Appellants' property; and
- assessing administrative penalties against the GRL Holder.

[4] The Appellants provided the following reasons for their request:

- the GRL Holder had not been using section 6 of the GRL since 2006;

- section 6 of the GRL has limited pasture;
- the GRL holder failed to complete perimeter fencing on section 6;
- the GRL Holder has been under grazing the GRL;
- in 2017 the GRL Holder unlawfully caused damage and loss to section 6 of the GRL by excavating, bulldozing, tearing up trees, and destroying vegetation, while building a fence;
- the GRL Holder provided fraudulent or incomplete annual stock returns;
- the GRL holder unreasonably denied recreational access to section 6 of the GRL; and
- the GRL Holder built a fence with no gates making traditional access to section 6 impossible.

[5] On April 20, 2023, the Director wrote to the Appellants and advised their request had been refused (the “Decision”). In the Director’s Decision, the Director noted the following:

- A disposition does not have to be completely fenced as natural features can be used for containment of livestock. The Department determined that the fencing had been completed as required.
- Fencing was authorized under a Temporary Field Authorization (“TFA”) on May 12, 2017. The TFA authorized both fence line clearing and fence line construction. The GRL Holder did not have authorization for the south boundary of section NW6, however had the GRL Holder requested an amendment to the TFA to include fence line clearing and construction for the south side of section NW6, the request would have been approved to ensure livestock containment.
- Department field staff inspected the fencing done in 2017 on the west boundary of section SE6 and the south boundary of section NW6. The fence is in good shape and meets the Department’s expectations. Field staff have directed the GRL Holder to remove old fencing, fencing using affixed trees, and remedy any ground disturbance resulting from the fence clearing and construction.
- A TFA and a GRL are separate statutory instruments, and noncompliance with one does not result in cancellation or amendment to the other.
- Access to the GRL is addressed under the Recreation Access Regulation, A.R. 228/2003.
- An inspection of the GRL was planned for the 2023 field season.

[6] On May 9, 2023, the Appellants filed a Notice of Appeal, requesting the Board:

- cancel, withdraw, suspend or revoke the GRL from the GRL Holder;
- sever or amend part of the GRL, in particular those parts of the GRL bordering the Appellants' lands;
- issue administrative penalties and enforcement orders against the GRL Holder for breaches of the GRL lease agreement, the Public Lands Act, and PLAR; and
- find that the Director, and certain Department employees, fettered their discretion.

[7] On June 2, 2023, the Director applied to the Board to have the issues relating to the cancellation, withdrawal, or revocation of the GRL struck from the hearing of the appeal. The Board requested and received written submissions from the Appellants, the GRL Holder and the Director, regarding the Director's preliminary motion.

III. ISSUES

[8] The Appellants presented two issues in their written submission:

1. meaning of "prescribed decisions" and legislative intent underpinning a right to appeal; and
2. procedural fairness and rule of law.

[9] The Director focused on whether cancellation, withdrawal and revocations are appealable decisions.

[10] The Board's decision will address the issues as follows:

Whether the Board has the jurisdiction under:

- A. the Public *Lands Act* and PLAR; or
- B. the principles of procedural fairness and the rule of law;

to hear matters in this appeal related to cancelations, revocations, and withdrawals from the GRL.

IV. ANALYSIS

A. Whether the Board has jurisdiction under the *Public Lands Act* and PLAR

[11] The Board finds that cancellation and revocation of the GRL are the same issue as both would result in the termination of the GRL.

(i) *Submissions*

[12] The Board reviewed the written submissions from the Parties and summarized them below.

[13] The Appellants submitted that section 211 of PLAR does not contain a definitive list of decisions that are appealable to the Board. The Appellants stated, “the meaning and intent of the text ‘prescribed’ is to set down the list of decisions as a guide and does not outrightly exclude the appeal of Director’s Decision from being before the Board for hearing.”¹ Section 119 of the *Public Lands Act* states:

“The Lieutenant Governor in Council may make regulations respecting appeals from decisions made under this Act or the regulations, including, without limitation, regulations...

(m) generally for the carrying out of appeals according to the intent of this Act.”

The Appellants submitted that when read together, the legislation grants the Board the discretion to allow the appeal based on the intent of the *Public Lands Act*.

[14] The Appellants referred to section 120 of the *Public Lands Act*, which states: “An appeal under this Act must be based on the decision and the record of the decision-maker.” The Appellants submitted that their Notice of Appeal, supported by a letter outlining the grounds for appeal and additional documentation, fulfils the criteria for the Board to consider whether the appeal is properly before it.

¹ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 2.

[15] The Appellants stated that section 121 of the *Public Lands Act*² permits appeals other than appeals that are prescribed. The Appellant stated, “Subsection 3 referring to subsection 2 does not make mention of a ‘prescribed decision’ and instead simply refers to ‘notice of appeal’ and ‘initiates an appeal of the decision objected to.’”³

[16] The Appellants noted section 213 of PLAR does not mention “prescribed decision” and instead states a decision is appealable on “several available grounds.”⁴

[17] Alternatively, the Appellants argued their appeal should be allowed under sections 211(c), (d) or (h).⁵

[18] The Director submitted “questions regarding the cancellation, withdrawal (including severing parts of the GRL) and revocation of the GRL are not properly before the Board as they are not decisions that are appealable under section 211 of [PLAR].”⁶

[19] The Director noted section 119 of the *Public Lands Act* provides authority for the making of regulations regarding appeals to the Board, and that section 119(d) provides authority for “prescribing decisions under the Act or regulations from which an appeal is available.” The Director stated:

² Section 121(1), (2) and (3) of the *Public Lands Act* states:
“(1) A notice of appeal of a prescribed decision may be submitted to an appeal body by a prescribed person in accordance with the regulations.
(2) A notice of appeal must contain the information, and be submitted, in a form and manner in accordance with the regulations.
(3) A notice of appeal submitted under subsection (2) initiates an appeal of the decision objected to.”

³ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 2.

⁴ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 3.

⁵ Section 211 (c), (d) and (h) of PLAR states:
“The following decisions are prescribed as decisions from which an appeal is available: ...
(c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act;
(d) the imposition or variation under the Act of a term or condition of a disposition; ...
(h) an enforcement order, a stop order or an administrative penalty.”

⁶ Director’s Response Submission on the Director’s Motion, July 12, 2023, at page 1.

“In other words, unless a decision is prescribed by regulation (i.e., set out in section 211 of the Regulation), there is no appeal to the Board available. Since cancellation, withdrawal and revocation of a disposition are not ‘prescribed decisions’ under section 211 of the Regulation, they are not appealable.”⁷

[20] The Director submitted the Appellants’ request to sever or amend the GRL is really a withdrawal of lands from the GRL and not an amendment or variation of the GRL’s terms and conditions. The Director argued the withdrawal of land from the GRL is not appealable to the Board.

[21] The Director stated:

“... the Board must exercise its authority under section 123(2) of the *Public Lands Act* and determine that issues regarding the cancellation, withdrawal (including severing parts of the GRL) and revocation of the GRL are not to be included in the hearing of the Appeal.”⁸

[22] The GRL Holder stated, “We have no submissions to add to the submissions of [the Director] ... we hereby adopt [the Director’s] submissions.”⁹

[23] In their rebuttal submission, the Appellants submitted that just because an administrative tribunal operates under a statute does not imply that the legislation exists in a vacuum, nor does it permit disregarding fundamental principles of administrative law that govern such tribunals. The Appellants stated that when legislation is silent on an issue, an administrative tribunal may rely on administrative law principles and statutory interpretation to assist in its decision-making.

[24] The Appellants quoted from the Supreme Court of Canada decision in *Baker v. Canada* (Minister of Citizenship and Immigration):

“Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.

⁷ Director’s Response Submission on the Director’s Motion, July 12, 2023, at page 2.

⁸ Director’s Response Submission on the Director’s Motion, July 12, 2023, at page 2.

⁹ GRL Holder’s Response Submission on the Director’s Motion, July 19, 2023, at page 1.

I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully.”¹⁰

[Emphasis is the Appellants’.]

[25] The Appellants submitted that section 119 of the *Public Lands Act* and section 211 of PLAR should be considered within the broader administrative framework, taking into account the governing principles of jurisprudence and practical statutory interpretation. These principles help reveal the Legislature’s intent and uncover the objective of both the *Public Lands Act* and PLAR.

[26] The Appellants stated that section 102 of the *Public Lands Act*¹¹ indicates that the intent underlying the use of public lands for grazing leases is to graze livestock, and section 63(d) requires a disposition holder to “use the land in a manner that promotes and implements conservation.”¹²

[27] The Appellants noted the Board’s decision in *Gionet Holdings v. Director, Provincial Approval Section, Alberta Environment and Parks*, stated that the purpose of the *Public Lands Act* and PLAR was to ensure public lands are responsibly managed throughout the province, and that the Director has statutory regulatory tools that can be used to ensure compliance with the legislation. The Appellants submitted that the Director’s Decision refused to enforce the legislation, and in so doing appeared to condone unlawful conduct.

¹⁰ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999], 2 SCR 817, at paragraph 22.

¹¹ Section 102(1) of the *Public Lands Act* states: “The director may in accordance with this Part lease public land for a term not exceeding 20 years for the purpose of grazing livestock when, in the director’s opinion, the best use that may be made of the land is the grazing of livestock.”

¹² Section 63(d) of the *Public Lands Act* states:

“A holder of a disposition shall with respect to the land contained in the holder’s disposition...
(d) use the land in a manner that promotes and implements conservation.”

[28] The Appellants stated:

“All of the Appellants’ grounds, issues and reasons for appeal must be heard before the Board in order to safeguard the GRL from future irreparable damage, to hold to account those who damaged the land and failed to act according to their public duties. This will give effect to the will and intent of the legislature and uphold compliance with the Act and Regulations which is in the public interest.”¹³

(ii) *Analysis*

[29] The Public Lands Appeal Board, like other administrative tribunals, has its jurisdiction established by legislation. The Supreme Court of Canada in *ATCO Gas Pipelines Ltd. v Alberta (Energy & Utilities Board)*, confirmed that, “Administrative tribunals or agencies are statutory creations: they cannot exceed the powers that were granted to them by their enabling statute.”¹⁴

[30] The Board’s authority is defined by the *Public Lands Act* and PLAR. The Board follows the Supreme Court of Canada’s approach to statutory interpretation as outlined in *Rizzo and Rizzo Shoes Ltd. (Re)*,¹⁵ which has been summarized as, “... the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”¹⁶ The Board also considers the *Interpretation Act*, R.S.A. 2000, c. I-8, which provides direction on interpreting legislation. Section 10 of the *Interpretation Act* states, “An enactment shall be construed as being remedial and shall be given the fair, large, and liberal construction and interpretation that best ensures the attainment of its objects.”

¹³ Appellants’ Rebuttal Submission on the Director’s Motion, August 11, 2023, at page 3.

¹⁴ *ATCO Gas Pipelines Ltd. v Alberta (Energy & Utilities Board)*, 2006 SCC 4, at paragraph 35.

¹⁵ *Rizzo and Rizzo Shoes Ltd. (Re)*, [1988] 1 S.C.R. 27.

¹⁶ Ruth Sullivan & Elmer A. Driedger, Sullivan and Driedger, *On the Construction of Statutes*, 4th ed. (Markham, ON: Butterworths, 2002) at page 1.

[31] In a previous decision on the Board’s jurisdiction, *Normandeau v. Director, Alberta Environment and Parks* (“*Normandeau*”),¹⁷ the Board found:

“While the *Interpretation Act* should not be used to create appeal rights where the Legislature intended none, it does provide guidance where the legislation is silent or vague. A “fair, large, and liberal construction and interpretation” of the broad wording of the Act and PLAR suggests that a decision is appealable if it fits within one of the prescribed categories in section 211.”¹⁸

[32] The Board also found that when assessing whether a decision is appealable it is essential to consider the decision’s substance or effect. A decision that possesses a substance or effect that aligns with the prescribed decisions in section 211 may be eligible to be appealed to the Board.¹⁹ As noted by the respected authors of *Practice and Procedures Before Administrative Tribunals*:

“Every time an agency elects to do something (or to do nothing) it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing... It is not the name of a document which determines what it is. It is what the document does that determines its nature.”²⁰

[Emphasis is the Board’s.]

[33] The Appellants have requested the Director withdraw land from the GRL or cancel it. Withdrawal of land from a disposition is not listed as a prescribed decision in section 211 of PLAR, but the Board found in *Normandeau* that the withdrawal of land from a disposition was in substance and effect the same as amending the disposition. When land is withdrawn from a disposition the leaseholder’s rights are altered, not extinguished. The disposition is still in the

¹⁷ Jurisdiction Decision: *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks*, re: Stanley Jensen (23 March 2022), Appeal No. 21-0008-ID1 (A.P.L.A.B.), 2021 ABPLAB 3.

¹⁸ Jurisdiction Decision: *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks*, re: Stanley Jensen (23 March 2022), Appeal No. 21-0008-ID1 (A.P.L.A.B.), 2021 ABPLAB 3, at paragraph 34.

¹⁹ Jurisdiction Decision: *Normandeau v. Director, Lands Delivery & Coordination South Branch, Lands Division, Alberta Environment and Parks*, re: Stanley Jensen (23 March 2022), Appeal No. 21-0008-ID1 (A.P.L.A.B.), 2021 ABPLAB 3, at paragraph 35.

²⁰ Robert Macaulay, James Sprague & Lorne Sossin, *Practice and Procedure Before Administrative Tribunals* (Toronto: Thomson Reuters Canada Ltd., 2021), at §28.1.

leaseholder's name and the leaseholder's responsibilities remain the same, with the exception that the amount of land covered by the disposition has been modified. The lease will have to be amended to accommodate the withdrawal of land.

[34] Under PLAR, amendments to dispositions are appealable decisions. Sections 211(a) and (c) of PLAR state:

“The following decisions are prescribed as decisions from which an appeal is available:

- (a) the issuance, renewal, amendment or suspension of a disposition issued under the Act...
- (c) a refusal to issue a disposition or to renew or amend a disposition applied for under the Act...”

[35] The Board finds that a decision to withdraw land from a grazing lease, or the refusal to withdraw land from a grazing lease, is appealable to the Board.

[36] Cancellation of a public lands lease does not have the same substance or effect as a withdrawal of land. Cancellation is a severe action that extinguishes the leaseholder's rights to the disposition. Section 26 of the *Public Lands Act* provides the circumstances under which the Director may cancel a disposition. The Appellants alleged the GRL Holder failed to comply with the disposition and the legislation, which is a circumstance listed in section 26(1)(a):

“The director may cancel, suspend or amend a disposition when

- (a) the holder of the disposition fails to comply with the disposition, this Act or the regulations, or fails to comply with a notice given under this Act or the regulations...”

[37] The *Public Lands Act* and PLAR detail the procedures for cancelling a disposition:

- section 27 of the Public Lands Act sets the process for cancelling a disposition, which includes an opportunity for the disposition holder to provide reasons in objection to the cancellation;
- section 28 provides procedures for reinstatement of a cancelled disposition;

- section 81 of PLAR states that a Director may cancel a grazing disposition instead of issuing an enforcement order;
- section 162 of PLAR requires the Director to convene a panel to hold a reinstatement hearing on why a disposition was cancelled and make a report to the director; and
- section 163 empowers the Director to issue an order reinstating a cancelled disposition.

[38] The Board finds the reinstatement hearing process, where an appellant may present its case and have a decision made by the Director, is a clear indication the legislation did not intend for cancellation of a disposition to be an appealable matter to the Board. The Board also finds none of the prescribed decisions in section 211 of PLAR are equivalent in substance and effect to a cancellation of a disposition.

The Board finds cancellation of a disposition is not appealable to the Board.

B. Whether the Board has jurisdiction under the principles of procedural fairness and the rule of law

(i) Submissions

[39] The Appellants submitted that procedural fairness and the opportunity for the Appellants to hold the Director accountable for failure and refusal to act is an essential part of the administrative process. The Appellants stated they had “a legitimate expectation that the rule of law will be upheld and that the Director and Officer(s) will be held accountable by way of the Appeal of the Director’s Decision.”²¹

[40] The Appellants referred to the Alberta court’s decision in *MacDonald v. Alberta Health Services*, where the Court stated:

“[t]he principle of legitimate expectations is part of natural justice and procedural fairness and affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity [...] The principles developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public

²¹ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 4.

official an opportunity to make representations in circumstances in which there would otherwise would be no such opportunity.”²²

[41] The Appellants stated the Director’s Decision, “demonstrates an omission of adherence to failure and refusal to act, and arbitrariness.”²³ Denying the Appellants the chance to hold the Director or Officer accountable would indicate a breakdown of the rule of law.

[42] The Appellants noted the Decision was silent on the Appellants’ request for the Director to issue administrative penalties and take enforcement actions against the GRL Holder. The Appellants stated, “the Director’s discretion to act and to use the enforcement tools must be exercised with the purposes of the [*Public Lands Act*] and PLAR and cannot be arbitrary.”²⁴

[43] The Appellants noted the *Public Lands Act*, “stated the Board ‘may determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal’ and ‘may establish its own rules and procedures for dealing with matters before it.’”²⁵

[44] The Appellants submitted that the Director’s motion should be dismissed because of the Director’s failure to respond to the issues raised in the Appellants’ July 14, 2022 letter, including:

- overlooking the issue of permanent unauthorized damage to the GRL;
- the breach of procedural fairness;
- the inaction on issues of the GRL Holder’s noncompliance; and
- the fettering of discretion of the Department’s officers.

²² *MacDonald v. Alberta Health Services*, [2013] ABQB 404, at paragraph 68.

²³ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 5.

²⁴ Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 5.

²⁵ Appellants’ Initial Submissions on the Director’s Motion, July 6, 2023, at page 4. The Board notes the sections referred to are section 121(2) and (9), which state:

“(2) Prior to conducting a hearing of an appeal, the appeal body may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal...

(9) Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it.”

[45] The Director submitted the Appellant is incorrect to claim that the rule of law mandates that an appeal to the Board be available. The Director stated:

“Such an interpretation of the rule of law would override the statutory intent of the Legislature and lead to the absurd conclusion that every decision that a director makes is appealable to the Board, which clearly is not the case.”²⁶

[46] The Director argued that the Legislature clearly determined that the only decisions appealable to the Board are those prescribed by section 211 of PLAR. The Legislature decided not to include cancellation, withdrawal, or revocation of a disposition in the list of prescribed decisions that are appealable.

(ii) *Analysis*

[47] The rule of law has been defined as: “The supremacy of regular as opposed to arbitrary power; the absence of any arbitrary power on the part of the government.”²⁷ The Supreme Court of Canada described the rule of law as follows:

“[A] fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.”²⁸

[48] The purpose of the rule of law is to protect citizens against arbitrary use of power by the government. In a democratic society, such protection is achieved by the government and society adhering to statutory law, which defines our collective and individual rights. The nature of a democratic society is that practically all government decisions infringe to some extent on collective and individual rights. Provided those decisions that are made within the statutory bounds as set by the Legislature, they are deemed acceptable in a democratic society and are not considered arbitrary exercises of power.

²⁶ Director’s Response Submission on the Director’s Motion, July 12, 2023, at page 2.

²⁷ *Black’s Law Dictionary* (11th ed. 2019), rule of law.

²⁸ *Reference re Language Rights Under s. 23 of Manitoba Act 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 SCR 721, at pages 748-9.

[49] To ensure administrative decisions made by government do not unduly infringe on individual rights, the courts have adopted the doctrine of procedural fairness. Procedural fairness, often referred to as the duty to act fairly, is a fundamental principle of administrative law. It includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision-maker. The focus of procedural fairness is not whether the outcome of the process was fair, but rather whether the process itself was fair.²⁹

[50] The doctrine of legitimate expectations is an aspect of procedural fairness. The doctrine is based on the principle that that procedural fairness must consider the promises or regular practices of government agents and that it would be unfair for the government to act contrary to those promises or regular practices.

[51] The courts have established the following test to determine what constitutes a legitimate expectation:

1. a public authority [such as the Director or Department] makes a promise;
2. the promise is to follow a certain procedure;
3. the promise is made concerning an interested person; and
4. the person relied and acted on that promise.³⁰

The courts have clarified that legitimate expectations only apply to procedural rights, require a clear, unambiguous and unqualified representation as to a procedure that will be followed, and cannot be contrary to statute.³¹

[52] The Appellants made two arguments regarding rule of law and legitimate expectations:

1. limiting the Appellants from appealing any decision by the Director is a breach of the rule of law; and

²⁹ *0896022 B.C. Ltd. (Fuji Japan) (Re)*, 2016 CanLII 153646 (BC EST), at paragraph 19.

³⁰ See: *Old St. Boniface Residents Association Inc. v. Winnipeg (City of)*, [1990] 3 SCR 1170.

³¹ See: *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 SCR 539, at paragraph 131, and *Canada (Attorney General) v. Honey Fashions Ltd.*, 2020 FCA 64, and *Crommer v. Mesbur*, 1992 CarswellSask 551, at paragraph 28.

2. the Appellants had a “legitimate expectation that the rule of law will be upheld and that the Director and Officer(s) will be held accountable by way of the Appeal of the Director’s Decision.”³²

[53] The rule of law is intended to protect against the arbitrary use of governmental power, but when the Legislature chooses a particular course of action and codifies it in statute, decisions made within the bounds set by legislation are not arbitrary. The Legislature chose in the *Public Lands Act* and PLAR to not include cancellations of public lands dispositions as matters the Board is authorized to hear. The fact that the Appellants are unable to appeal cancellations to the Board does not indicate an arbitrary use of power, but rather a considered procedural decision by the Legislature on the management of public lands dispositions. The Appellants may disagree with the Legislature’s choice, but in the Board’s view, it is not a breach of the rule of law. If the Board were to permit an appeal of a cancellation when the legislation indicates otherwise, the Board would be making an arbitrary decision contrary to the rule of law.³³

[54] As noted by the Appellants, procedural fairness (which includes the doctrine of legitimate expectations) may be applied only when the legislation is silent as to the procedure to be followed.³⁴ The Board finds the legislation is not silent on which decisions by the Director may be appealed. The Appellants’ reference to section 123(2) and (9) of the *Public Lands Act* neglected to quote the full wording, which is provided below:

- “(2) Prior to conducting a hearing of an appeal, the appeal body may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal...
- (9) Subject to the regulations, the appeal body may establish its own rules and procedures for dealing with matters before it.”

[Emphasis is the Board’s.]

Both sections are clear that the Board is subject to “the regulations” when determining which matters in the notice of appeal are properly before it and establishing its rules and procedures.

³² Appellants’ Initial Submission on the Director’s Motion, July 6, 2023, at page 4.

³³ An exception may exist when a breach of procedural fairness occurs, which includes circumstances where the cancellation process did not follow the procedures prescribed by the legislation. See: *Greene v. Alberta (Environment and Sustainable Resource Development)*, 2014 ABPLAB 14-0006, Interim Decision #1.

[55] As noted already, legitimate expectations cannot be contrary to statute. The Board has already found that the *Public Lands Act* and PLAR prescribe which decisions by the Director can be appealed, and that cancellations of a disposition are not appealable matters to the Board under the legislation. The Board finds there is no legitimate expectation that the Appellants can appeal cancellations of dispositions under the rule of law.

V. DECISION

[56] The Board finds it has jurisdiction under the *Public Lands Act* and PLAR to hear appeals related to the Director's decision to refuse the Appellants' request to withdraw land from the GRL.

[57] The Board finds it does not have jurisdiction under the *Public Lands Act* and PLAR to hear appeals related to the Director's decision to refuse the Appellants' request to cancel or revoke the GRL.

[58] The Board finds it does not have the jurisdiction under principles of procedural fairness and the rule of law to hear appeals related to the Director's decision to refuse the Appellants' request to cancel or revoke the GRL. There is no legitimate expectation that the Appellants can appeal cancellations of dispositions under the rule of law.

[59] Under sections 123(2) and (3) of the *Public Lands Act*,³⁵ the Board finds matters in the Appellants' Notice of Appeal related to the cancellation or revocation of the GRL are not properly before the Board, and therefore, such matters will not be included in the hearing of the appeal and the Board will not accept any representations on those matters.

³⁴ Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2017), at § 2.38.

³⁵ Sections (2) and (3) of the *Public Lands Act* state:

- “(2) Prior to conducting a hearing of an appeal, the appeal body may, in accordance with the regulations, determine which matters included in notices of appeal properly before it will be included in the hearing of the appeal.
- (3) Where the appeal body determines that a matter will not be included in the hearing of an appeal, no representations may be made on that matter at the hearing.”

[60] The Board notes this decision does not preclude the Appellants from presenting arguments related to procedural fairness and legitimate expectation on other issues being heard in the appeal.

Dated on December 13, 2023, at Edmonton, Alberta.

original signed by _____
Line Lacasse
Panel Chair and Board Member

original signed by _____
Kurtis Averill
Board Member

original signed by _____
Angela Aalbers
Board Member