

Court of King's Bench of Alberta

**Citation: Smoking Diesel Contracting Ltd v Alberta (Minister of Environment and Parks),
2026 ABKB 162**

Date: 20260306
Docket: 2203 08265
Registry: Edmonton

Between:

**Smoking Diesel Contracting Ltd.
and Trent Zelman**

Applicants

- and -

**Minister of Alberta Environment and Parks, Director of Alberta
Environment and Parks, Public Lands Appeal Board**

Respondents

**Reasons for Judgment
of the
Honourable Justice N.E. Devlin**

Overview

[1] Trent Zelman (Mr. Zelman) and his company Smoking Diesel Contracting (Smoking Diesel) (together the Applicants) took out a ten-year land lease on a bush lot south of Fort McMurray in 2013, for the purposes of building and running a work camp. They partnered with a company called Northgate Industries Ltd. (Northgate), which appears to have had the experience and infrastructure to establish and run such an operation. The camp was built, running briefly and relatively unremuneratively, from December 2014 to April 2015.

[2] In November 2020, the Applicants received notice that they were being assessed a near-million-dollar administrative penalty for having structured their corporate relationship with Northgate as an impermissible sub-lease. They challenged this ruinous ghost of ventures past and succeeded in having the penalty reduced to just over \$250,000 on a statutory appeal. The Minister of Environment and Parks (the Minister) confirmed that amount, against which Smoking Diesel now seeks judicial review on numerous grounds.

[3] For the reasons that follow, the application for judicial review is allowed, the Minister's decision is quashed, and the contravention process is declared to be time-barred.

Facts

[4] The following salient facts emerge from the record.

Smoking Diesel's Land Lease

[5] On January 29, 2013, Alberta Environment and Parks (AEP) issued a Departmental Miscellaneous lease for a ten-year term (the Lease) to Smoking Diesel for public lands in the Regional Municipality of Wood Buffalo, Alberta (the Leased Land). The Lease was for an Industrial Campsite and Storage Yard. Section 43 of the *Public Lands Act*, RSA 2000, c P-40 (the *Act*) provides that the holder of a public lands lease cannot "mortgage, assign, transfer or sublet" leased land without the written consent of the director: see also s 54.01(5) of the *Act*.

[6] Smoking Diesel subsequently entered into an agreement with Northgate to operate a work camp on the Leased Land. The agreement between them stipulated that Smoking Diesel would pay for site preparation, maintenance, reclamation, and some administrative work. Northgate would pay Smoking Diesel for using the lands to operate a work camp and was responsible for infrastructure and costs associated with running it.

[7] In November 2013, two signs were installed on the Leased Land: a reefer van trailer emblazoned with a large sign reading "Northgate Industries Ltd. Waddell Open Camp" and "Smoking Diesel/Northgate Industries Partnership" was parked on the Leased Land facing the main road. A sign reading "Northgate Waddell Camp" was installed at the main intersection near the Leased Land (together the Signage). The reefer trailer was clearly visible from the roadway (and by extension clearly visible to the public).

[8] The camp closed permanently in April 2015, but Northgate's camp equipment remained in place until they removed it in January 2020. The Signage similarly remained in place until that time.

[9] The Applicants have conceded that the structure of their relationship with Northgate amounted in law to a sublease, putting them in contravention of ss 43(1) and 54.01(5) of the *Act*.

The Inspections

[10] On July 22, 2016, and July 25, 2017, Public Land Officers (PLOs) from AEP inspected the Leased Land. They noted concerns about erosion and weed control in 2016, and recommended follow-up for weed control in 2017. No further action was taken. Neither PLO made note of any other apparent contraventions, or evidence of any contraventions.

The Investigation

[11] On January 24, 2019, the staff of the Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks (the Director) conducted an interview with Northgate about a different matter. In the course of this interview, the Director "obtained information" indicating that Smoking Diesel had allegedly sublet the Leased Land.

[12] On January 29, 2019, an unnamed Environmental Protection Officer (EPO) conducted a public online search of Northgate, leading them to suspect that Northgate had operated a camp on the Leased Land. Northgate's website referred to it as "Waddell Lodge". This was information identical to what anyone attending at the site would have learned immediately from the Signage. Indeed, the next day, that same EPO and a PLO confirmed the presence of the Waddell Lodge within the Leased Land "with a sign visible from the road that stated, 'Smoking Diesel and Northgate Partnership'."

[13] On September 15, 2020, the Applicants were served with a notice of investigation and request for information with respect to their relationship with Northgate. The Director then sent a preliminary assessment of administrative penalty to the Applicants on November 27, 2020. The Applicants were thereafter afforded an opportunity to provide additional information.

The Administrative Penalty

[14] On January 15, 2021, the Director issued a Notice of Administrative Penalty. The Notice included an administrative penalty of \$15,000.00 (Administrative Penalty), and a proceeds payment of \$890,533.34 (the Proceeds).

[15] The Administrative Penalty was levied for two counts of contravening section 43(1) of the *Act* (subletting without consent) and one count of contravening section 54.01(5) of the *Act* (receiving money for access to public land), with each count carrying a \$5,000 penalty for a total of \$15,000.00.

[16] The Proceeds were assessed as follows:

- \$312,499.95 in rent from Northgate to Smoking Diesel;
- \$413,236.69 reimbursement by Northgate for tax payments made on behalf of Smoking Diesel to the Regional District of Wood Buffalo;
- \$103,306.38 for out-of-scope yard maintenance payments from Northgate to Smoking Diesel;
- \$13,900.00 for Stat Oil road use agreement fees paid by Northgate to Stat Oil on behalf of Smoking Diesel; and
- \$46,548.60 for CRC Open Camp & Catering Ltd. overpayment

[17] The total penalty levied against the Applicants was \$905,533.34. This represented every penny Smoking Diesel has received from its operations to do with the Lease, together with the fines assessed as above.

Appeal to the Board

[18] On January 27, 2021, Smoking Diesel exercised its right to appeal the Notice of Administrative Penalty to the Public Lands Appeal Board (the Board), pursuant to ss 121 and 122 of the *Act*. The Applicants, in their Notice of Appeal, alleged that the Director erred in the determination of a material fact on the face of the record, erred in law, or exceeded the Director's or Officers' jurisdiction or authority and sought to have the Administrative Penalty and Proceeds set aside in their entirety.

[19] On May 17, 2021, the Applicants requested that the Board admit further evidence to assist in determining the appeal.

[20] On June 30, 2021, the Board decided to admit the Affidavit of Trent Zelman and photographs related to the Signage. However, the Board determined that the Affidavits of David Lind, Angela Clarke, Andrew Bibo, Everett Normandeau, Victor Toutant, and Dennis Crowe (together the “Witness Affidavits”) were inadmissible. The Applicants proffered that the Witness Affidavits would show that they had a legitimate expectation they would not be subject to a fine because of the structure of their relationship with Northgate, that it was common practice for such camp-development relationships to be structured as subleases, and that AEP tacitly permitted this to facilitate rapid economic development.

[21] On September 8, 2021, the Board held a hearing by written submissions and sent questions to the parties on September 15, 2021.

[22] The Board issued its Report and Recommendations to the Minister on November 12, 2021, making the following findings that are relevant to this appeal:

- i. The Director first became aware of the contraventions on January 24, 2019. The Notice of Administrative Penalty was issued on January 15, 2021, within the two-year limitation period specified by the *Act*.
- ii. There was no evidence that the Department of Parks and Recreation made any clear, unambiguous, or unqualified representations to the Applicants that the rule against unauthorized subleasing would not be enforced.
- iii. The Proceeds should have been assessed on a net basis, not a gross basis.
- iv. The Applicants’ right to procedural fairness was not breached in the service of the Notice of Administrative Penalty or the process before the Board.

[23] The Board ultimately found that the total Administrative Penalty would have the adjustment factors varied but remain at \$15,000, and the Proceeds would be reduced from \$890,533.34 to \$240,782.57 (the Proceeds Re-Assessment).

[24] The Board is not a final decision-maker. Rather, under s 124 of the *Act*, the Board is mandated to issue a report and recommendation to the Minister within 30 days of hearing an appeal, who may then confirm, reverse, or vary the Board’s conclusion (or make “any decision that the person whose decision was appealed could have made” and make “any further order” the Minister deems necessary). The Minister thereby becomes the statutory appeal decision maker.

[25] On November 15, 2021, the Board sent a package to the Minister. It included the Report and Recommendation of the Board in the form of the following decision: ***Smoking Diesel Contracting Ltd and Zelman v Director, Environmental Investigations, Environmental Enforcement Branch, Regulatory Assurance Division, Alberta Environment and Parks***, 2021 ABPLAB 23 (CanLII) [***Smoking Diesel Decision***]. It also included a briefing note which was written by counsel for the Board summarizing the Report and setting out the Minister’s options (the Briefing Note), and a Memorandum from the Board’s chair (the Memorandum).

[26] On December 1, 2021, the Minister accepted the Board’s reasons and adopted the ***Smoking Diesel Decision***. It is against that action that this judicial review is advanced.

Issues

[27] The Applicants allege the following defects in the Minister’s Decision:

- i. the Minister exceeded his jurisdiction and erred in law by considering materials not authorized by the *Act* or Regulations when making his decision (ie: the Briefing Note);
- ii. the Minister breached his duty of procedural fairness to the Applicants by considering factors which were not disclosed to the Applicants, thereby depriving the Applicants of an opportunity to respond to those factors;
- iii. the Board erred in law by deciding that the Administrative Penalty was issued by the Director within the two-year limitation period prescribed by section 59.7 of the *Act*;
- iv. the Board erred or breached the Applicants’ right to procedural fairness by failing to provide reasons for its exclusion of certain expenses and costs incurred by Smoking Diesel in its assessment of the Proceeds; and
- v. the Board erred in law, or alternatively acted unreasonably by fettering its discretion in failing to consider relevant evidence of AEP’s historical internal policies or practices with respect to unauthorized subleases.

Standard of review

[28] The standard of review of an administrative decision is presumed to be reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [Vavilov]. At its core, a reasonableness review involves determining whether the decision is “transparent, intelligible and justified”: *Vavilov* at para 15.

[29] All parties have agreed that the standard of review of reasonableness applies to the merits of the Minister’s decision, and by implication the Board’s detailed reasons he adopted.

[30] This Court notes that the *Act* contains a privative clause at s 126:

Where this Act empowers or compels the Minister to do anything respecting an appeal, the Minister has exclusive and final jurisdiction to do that thing, and no decision, order, direction, ruling, proceeding, report or recommendation of the Minister or the appeal body shall be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to question, review, prohibit or restrain the Minister or the appeal body or any of its proceedings.

[31] The Supreme Court in *Vavilov*, and subsequent case law, affirm that privative clauses do not (and cannot) oust the Court’s authority to conduct a judicial review as this judicial power is protected by s 96 of the *Constitution Act*, 1867, 30 & 31 Vict, c 3. Privative clauses also serve no independent function in identifying the standard of review; reasonableness is and remains the default standard: *Vavilov* at para 49. However, where a legislature does not explicitly involve the Courts in the review process, as is the case with the privative clause in s 126 of the *Act*, the Court must adopt a “posture of restraint” on review: *Vavilov* at para 24.

[32] All parties also agree that the standard of review for procedural fairness is correctness.

[33] The correctness standard requires reviewing courts to determine whether the Appellant received the level of “fairness” and “due process” that is required by statute or common law: *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at para 11 [Borgel], citing *Vavilov* at para 77. The question on reviewing a decision for procedural fairness is not an inquiry into whether the merits of the decision are correct, but rather, whether the procedure the Board chose was fair in the circumstances: *Borgel* at para 11, citing *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 CanLII 699 at para 21.

Issue 1: Did the Minister exceed his jurisdiction and err in law by considering materials not authorized by the Act or Regulations when making his decision?

[34] The decision-making process under the *Act* is bifurcated, mandating the Board to conduct most of the proceeding, but then vesting the Minister with the role of ultimate decision-maker. This structure is not uncommon in regulatory regimes, where the Minister himself cannot be reasonably expected to do the daily legwork of conducting hearings and writing reasons, but retains the politically informed public interest discretion to ‘make’ decisions, on the advice of the subordinate ‘tribunal’, which shape public policy within their portfolio. While practical, this structure is self-evidently ripe for procedural fairness problems.

[35] Pursuant to s 124 of the *Act*, the “appeal body” is required to submit “a report” to the Minister within 30 days after hearing an appeal. The appeal body is in this case the Board: s 209(a) of the *Public Lands Administration Regulation*, Alta Reg 187/2011 (the *Regulation*). The Minister, upon receiving the report, is to then confirm, reverse, or vary the Board’s decision: *Act*, s 124(3). In short, the Board handles the process, while the Minister makes the final decision.

[36] A report of the appeal body must contain a summary of the evidence, a statement of the issue to be decided, the reasons for the appeal body’s recommendation, and the reasons for any dissent (if applicable): *Regulation*, s 235. The Board must also provide “the appeal body’s report or a summary of it” to the parties when the Minister’s decision is released: *Act*, s 124(5).

[37] The appeal body is expected to prepare only one report to the Minister. The only body authorized to make recommendations to the Minister is the three-person appeal panel, not the Board’s legal counsel. This follows as a matter of common-sense fairness. Since the Minister is making the decision, the record before him or her must be open and visible to all the impacted parties.

[38] The Alberta Court of Appeal has confirmed that the Board does not have the statutory authority to produce a report that is sent to the parties and then prepare a second, confidential briefing which is not produced: *Normko Resources Inc v Alberta (Minister of Environment and Parks)*, 2022 ABQB 474 at para 5 [Normko].

[39] By providing the Briefing Note to the Minister, the Board in this case did exactly that. That is a procedural problem on its face, and the practice, I trust, has ended with the Court of Appeal’s subsequent guidance in *Normko*.

[40] The real question for the Court on this facet of the case is whether any intervention is warranted on this ground. It is not clear on the record if the Minister relied on the Briefing Note in making their decision. In fact, the record suggests quite the opposite: that the Minister simply adopted the reasons and recommendations of the Board as their own. If the Minister clearly

relied on the Briefing Note, that would be impermissible. However, that is not the case here. The Minister did not clearly consider, or rely upon, materials they were not authorized to.

[41] Even if this Court is wrong and the Minister did consider the Briefing Note, the Applicants suffered no prejudice as a result, as the ultimate decision remained exactly what the Board had openly decided. On this basis, I would decline to grant a remedy in any event.

[42] This aspect of the appeal is dismissed.

Issue 2: Did the Minister breach his duty of procedural fairness to the Applicants by considering factors which were not disclosed to the Applicants, thereby depriving the Applicants of an opportunity to respond to those factors?

[43] The Board, through the Briefing Note prepared by its legal counsel, presented alternative options and factors to the Minister that were not previously discussed. The Applicants complain that the Board provided the Minister with the Briefing Note, and they were unable to respond to the factors raised in the note prior to the Minister making a decision.

[44] The Board is not permitted to give unreported, confidential advice to the Minister: *Normko* at para 7. Should the Minister intend (or at least have the opportunity to) address matters beyond those raised on appeal, as they did here, natural justice demands that reasonable notice be given to interested parties, so they have an opportunity to address those matters: *Landry v Rocky View County (Subdivision and Development Appeal Board)*, 2025 ABCA 34 at para 7.

[45] The Board should have provided the Briefing Note and the Memorandum to the Applicants as part of the report pursuant to s 124(5) of the *Act*. It did not. This was a breach of procedural fairness and natural justice. The Applicants had to wait until they received the Minister's Certified Record of Proceedings in contemplation of this litigation to receive the additional documents. They should not have had to.

Having found a breach, what is the appropriate remedy?

[46] This Court adopts the reasons of Dunlop J in *Menard v Alberta (Minister of Environment and Parks)*, 2024 ABKB 412. There, Dunlop J held at para 13 that:

In this case, of course, the Applicants did apply for judicial review and through the interlocutory application granted by Yungwirth, J and upheld on appeal, they obtained the briefing note. If they had received the briefing note with [the] Order and the Report, as they should have, they would be in the same position as they are now. While some of the content of the briefing note is irrelevant to the appeal of the Decision, the Applicants make only minimal reference to the content of the briefing note in support of any of their submissions on this judicial review. Their objections are focused on its existence and non-disclosure. The Applicants received the briefing note late. This is still a breach of procedural fairness, but not one which, in this context, warrants a remedy.

[47] The Applicants' main objection in this case pertained to being deprived of an opportunity to respond to the materials presented to the Minister. However, the circumstances are not distinguishable from *Menard* as the Minister simply adopted the reasons of the Board. Even had

the Applicants been given a chance to respond, the Minister’s decision would not have changed. As such, they were not prejudiced by it, so no remedy is warranted in this case.

[48] Again, the Court trusts that the Board and other administrative bodies with similar decisional structures will implement practices responsive to the now-repeated guidance given by the Courts as to the requirements of procedural fairness in these circumstances.

Issue 3: Did the Board err in finding that the Director issued the administrative penalty within the limitation period prescribed by section 59.7 of the Act?

[49] The power to levy administrative penalties is subject to a two-year limitation period within the *Act*. The Board found that the final payment from Northgate to Smoking Diesel was on March 31, 2015, making this the final day of the contraventions. This is a correct, and thus reasonable, setting of the endpoint of the contravention and starting of the limitations clock. That date is well over two years before the Notice of Administrative Penalty was issued, bringing the limitation squarely into play.

[50] The wording and operation of the limitation is thus central to this case. Found in s 59.7 of the *Act*, it reads as follows:

59.7 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.

[emphasis added]

[51] Two hinge points of interpretation and dispute present themselves on this language. The first is the meaning of “notice of the director” and whether this means the actual personal knowledge of a specific bureaucratic official or imports the concepts of constructive organizational knowledge. The second is the meaning and scope of “evidence of a contravention”.

[52] In this case, it is common ground that the relevant “Director” did not have actual, personal knowledge of the impugned Smoking Diesel-Northgate lease relationship until January 24, 2019, after an interview with Northgate related to a separate AEP investigation. However, it is equally indisputable that his enforcement agents had knowledge of the Signage as far back as 2016. These facts bring both of the interpretive issues to determinative prominence.

The Board’s Interpretation of s 59.7(b)

a) *Who is a “Director”*

[53] The employees that are considered “directors” for the purposes of s 59.3 of the *Act* are designated by Ministerial Order 44/2019 [Environment and Parks], “Designation of Directors under the Public Lands Act, Forest Land Use and Management Regulations and Public Lands

Administration Regulation” (the Designation Ministerial Order). These employees include the Assistant Deputy Minister, Executive Director, Regional Compliance Manager, Provincial Compliance Manager, Compliance Manager, and District Compliance Manager (Designated Directors).

[54] The Designation Ministerial Order does not specify who a director is for the purposes of s 59.7 of the *Act*. The Board found that a “director” for the purposes of s 59.7 is a Designated Director. It reasoned that, since s 59.7 “relates to limitation periods for issuing administrative penalties [under s 59.3]”, it followed that the cast of directors for both sections should be co-extensive: see *Smoking Diesel Decision* at para 47. This was a reasonable determination.

b) *What is “notice”*

[55] More controversially, the Board agreed with the Respondents that “notice” meant that the relevant Director must *personally* become aware of the evidence of a contravention to trigger the limitation, as evident from this passage at para 46 of the *Smoking Diesel Decision*:

[t]he 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 [emphasis added] 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” [original emphasis].

[56] This wording is somewhat confusing because constructive knowledge comes into play at two points in the relevant interpretation. The first and operative sense in this passage refers to whether knowledge of information that amounts to “evidence of a contravention” within relevant, responsible parts of the Director’s department/reporting chain *constructively* vests him or her with that knowledge. Namely, whether institutional knowledge is a sufficient kind of knowledge.

[57] The Applicants have contended throughout that institutional knowledge of a potential contravention, in the hands of a responsible employee or delegate of the relevant Director, should fix that Director with the knowledge to trigger running of the limitation.

c) *Defining “evidence of a contravention”*

[58] The second relevant form of constructive knowledge relates to extent information must spell out the existence of a contravention. The Board correctly noted that the law recognizes “knowledge of circumstances which would [inferentially] indicate the [inculpatory] facts to an honest person, or knowledge of facts which would put an honest person on inquiry” as a species of legal knowledge, per *Air Canada v M & L Travel Ltd*, 1993 CanLII 33, [1993] 3 SCR 787 at 812 [*Air Canada*], but held that this type of awareness was inapplicable to s 59.7(b): *Smoking Diesel Decision* at paras 44 and 45.

[59] Rather, the Board reasoned as follows at para 45:

...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. 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.” 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. [emphasis added]

[60] Two problematic interpretations are intrinsic to this reasoning. The first is that whether something constitutes “evidence” is a question within the mind of the beholder. The Board’s subjectivization of the meaning of “evidence” follows inescapably from its focus of the fact that the PLO in this case *personally* failed to “recognize” the Signage as potential evidence of a contravention.

[61] Effectively, the Board’s reasons disclose that it proceeded on the basis that something is only “evidence” for the purposes of s 59.7(b) if the individual perceiving it understands it to be so. It doubled-down on this subjective interpretation of “evidence” by placing weight on whether the specific PLO saw a reason to be concerned by the existence of the Signage.

[62] An enforcement officer’s experience-informed chain of reasoning as to whether an inference of illegality arises from certain observations is relevant to whether those facts give rise to an *objective* suspicion: ***R v Whyte***, 2011 ONCA 24 at para 31, affirmed 2011 SCC 49. Here, however, the PLOs were never asked *why* the Signage would, or would not, make them wonder about a sublease. Rather, the Board treated the absence of an indication that the PLOs were (or would have been) concerned by the Signage as co-extensive with it not being “evidence”. Respectfully, this was unreasonable.

[63] Second, consistent with its subjective interpretation, the Board applied a narrow conception of “evidence”, excluding information inferentially suggestive of a contravention, as described in ***Air Canada***. This too was unreasonable.

d) Outcome of the Board’s interpretation

[64] In light of its understanding of evidence and notice, the Board concluded that the Director only became aware of the Applicants’ unlawful lease relationship when it got information about the lease in a separate investigation, on January 24, 2019. The Administrative Penalty, issued on January 15, 2021, was therefore within the limitation period, albeit narrowly.

Principles governing reviews of statutory interpretation by a delegated decision maker

[65] When an administrative decision maker interprets its enabling statute, the presumption of reasonableness applies: ***Vavilov*** at para 7. In ***Mason v Canada (Citizenship and Immigration)***, 2023 SCC 21 [***Mason***], the Supreme Court of Canada provided a guide on how a Court should approach its review of an administrative body’s interpretation of their governing statutory scheme:

- The reasonableness of an administrative decision maker’s interpretation of its enabling statute depends on the statutory context and language chosen by the legislature: ***Vavilov*** at para 110; ***Mason*** at para 67.

- Generally, narrow language constrains discretion while broader language affords it, but the key is determining if the decision is “properly justified” considering the statute and surrounding context: *Vavilov* at para 110; *Mason* at para 67.
- A reviewing court must examine the administrative decision as a whole, which includes both the reasons given *and* the outcome of the decision: *Vavilov* at para 116; *Mason* at para 68.
- The administrative decision maker’s interpretation must be consistent with the modern principle of statutory interpretation (outlined below): *Vavilov* at para 120; *Mason* at para 69.
- A reviewing court must determine if an “omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker” – for example, if the administrative decision maker fails to consider harsh consequences of its interpretation for a large class of individuals: *Vavilov* at paras 122, 191–192; *Mason* at para 69.
- An administrative decision maker’s statutory interpretation could draw on their institutional expertise and experience; courts should be receptive to input from these decision makers that are beyond the usual techniques that courts use – a reviewing court should pay respect to the reasons of an administrative body that reflect their expertise: *Vavilov* at paras 93, 108, 119; *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para 43; *Mason* at para 70.

[66] The following passage from *Mason* at para 71 is particularly relevant here:

A court may conclude during a reasonableness review that “the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision” (*Vavilov*, at para. 124, citing *Dunsmuir*, at paras. 72-76, and *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52). In such a case, although a court should “generally pause before definitively pronouncing upon the interpretation” of a statutory provision, the court may conclude that remitting the question to the administrative decision maker may serve no useful purpose (*Vavilov*, at para. 124). It must be stressed that the possibility of a single reasonable interpretation is not a starting point of reasonableness review, as this would be contrary to a “reasons first” approach. Rather, it is a conclusion that a reviewing court may draw as a result of a proper reasonableness review, as part of the court’s consideration of the appropriate remedy.

[emphasis added]

[67] The modern principle of statutory interpretation governs, which is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Rizzo & Rizzo Shoes Ltd (Re)*, 1998 CanLII 837 at para 21 [*Rizzo*]; *Equus Rea Ltd v Alberta (Utilities Commission)*, 2023 ABCA 142 [*Equus Rea*].

[68] First, a Court must read the entire statute and related statutes, allowing the Court to detect one or more purposes that account for the legislation: *Equus Rea* at paras 62–63. The plain and

ordinary meaning of the text must then be determined, and if there is only one plausible meaning, the inquiry ends: *Equs Rea* at paras 68–69. If there is more than one plausible meaning, the meaning that is most faithful to the legislation’s purpose must be adopted: *Equs Rea* at para 70.

[69] The Board has previously stated that the purpose of the *Act* is to ensure that public lands are responsibly managed throughout the province, the Director has the required regulatory tools to ensure compliance with the legislation, and the competing interests in the use of public lands are effectively balanced: *Scott and Running Reins Ranch v Director, Agriculture, Approvals, and Sales Unit, Forestry and Parks*, 2023 ABPLAB 17 (CanLII) at para 27; see also *Koch v Director, Public Lands Disposition Management, Forestry and Parks, re: Summer Village of Burnstick Lake*, 2023 ABPLAB 18 (CanLII) at para 48.

[70] In this Court’s view, responsibly managing public lands means managing them efficiently, sensibly, and in a trustworthy manner.

[71] In this case, the nature and role of the provisions being interpreted dictate the approach taken to reviewing the Board’s interpretation. First, the words at issue define when a limitation period is triggered. Limitations uphold general legal principles, because they allow for repose from the threat of litigation, salve against the risk of evidence-loss and degradation over time, encourage diligence, and, where discoverability is in play, permit account to be taken of the plaintiff’s own circumstances (assessed through a subjective/objective lens): *Novak v Bond*, 1999 CanLII 685, [1999] 1 SCR 808 at para 67; see also *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 61. Logically, reviewing courts will apply a less indulgent conception of reasonableness in the interpretation and application of such an important concept: *Vavilov* at para 110, 133; *Mason* at para 67.

[72] Additionally, this specific limitation period concerns the imposition of quasi-penal sanctions. Even though the Administrative Penalty and Proceeds are not meant to be expressly punitive, the consequences are, as this case demonstrates, potentially severe. This narrows the band of reasonable interpretations to ones which robustly protect the limitation’s purposes.

[73] Thus, a reasonable interpretation in this context is one that balances the need for functional operation of the enforcement scheme protecting the use of public lands with fairness to the regulated parties. Directors must be given a fair chance to discover concealed infringements without having to be in a constant posture of suspicion and investigation. On the other hand, land leasers should have the comfort of knowing that the AEP cannot impose never-ending liability by turning a blind eye towards or strategically choosing to not inquire into facts that ought to have prompted timely investigations of alleged infringements.

The Board’s interpretation of “notice” is unreasonable

[74] It would be perverse, and contrary to the principles underlying the limitation period being interpreted, if agents of the Director, with the legal obligation to bring potential contraventions to the Director’s attention, could fail to do so for reasons of sloth, incompetence, negligence, or even malice, without consequence to the limitation.

[75] For instance, under the Board’s interpretation, a PLO could witness a contravention, inform every employee of AEP that the contravention was occurring *except* the Designated Directors who are able to issue an administrative penalty, and the limitation would never run.

[76] This would permit evidence to degrade, memories to fade, and the ability of affected individuals to answer and defend an allegation to be compromised, to say nothing of the damage wrought on public confidence in the operation of government. Such results would undermine the principles of fundamental justice animating the limitation provision, namely fairness, diligence, and finality: *Amstel v Stren*, 2023 ONSC 1482 at para 1; *Boyd v Cook*, 2013 ABCA 27 at para 4 [“*Boyd*”].

[77] That, however, is the predictable consequence of the Board’s insistence on personal knowledge in the hands of the Director themselves. Their interpretation would guarantee absurd and unjust results, frustrating the very purpose of the provision at hand. Thus, with due respect to the Board and its expertise, their interpretation of what constitutes “notice” must be rejected as unreasonable.

[78] By contrast, a reasonable interpretation will be one that assumes public servants do their jobs properly. That accords with both principles of public policy and of discoverability: *Rooney v Galloway*, 2024 BCCA 8 at para 199; *Freshair Enterprises Ltd. v. Pusch*, 2007 SKCA 60 at para 83; *R v Wright*, 1982 CanLII 3774 at 35 (BCSC); *R v Miller*, 2019 ONCJ 480 at para 112.

[79] Equally, where corporate respondents are commonplace, such as the context of the public lands leasing scheme governed by the *Act*, allowing the limitation period to linger untriggered also presents heightened risks of penalties going unsatisfied, or penalties falling unjustly on those parties who still exist when others have passed out of legal existence. Moreover, it is an unrealistic burden to force parties to keep records in perpetuity and “[a]llowing large potential threats to hang over heads for a generation sterilizes capital and impoverishes businesses”: *Boyd* at para 4. This too would be contrary to the purposes animating the limitation.

[80] Knowledge of evidence of a contravention in the hands of employees within the relevant Director’s reporting chain, who have responsibility to deal with that information, must constructively extend to the Director for the limitation provision to properly serve its purposes. The strength of legal principle underlying this position makes it the only reasonable interpretation of the provision.

[81] In application, it will be for the Minister, aided by the Board’s inquiries and expertise, to determine if the individual vested with knowledge in any particular case is sufficiently proximate to the Director and to the AEP’s enforcement function to yield a finding of constructive, institutional knowledge. That is a matter on which deference would properly be extended, in light of the Board and the Minister’s expertise in the structure and operation of the AEP.

[82] In this case, however, the question of whether the knowledge-holders would fall within that class has already been answered. The Board itself has held that, “if a [PLO] had knowledge of an unauthorized sublet, the officer would be duty-bound to raise the matter to the Director”: *Jason King and Kingdom Properties Ltd v Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2020 ABPLAB 12 (CanLII) at para 184. This must be right, as the very *raison d’être* of PLOs is to uphold the statutory scheme governing public land use, including leases of public land under the *Act*.

[83] Therefore, the question in this case is whether what the PLOs would have seen on the site amounted to evidence of a contravention.

The Board’s interpretation of “evidence of a contravention” is unreasonable

[84] In the context of a limitation period, the concept of “evidence of a contravention” needs to align with the states of knowledge that would properly trigger action on the part of a party on whose rights the clock begins to run. Logically and literally, this means that the definition of “evidence” must include information which gives rise to an *objectively* reasonable *inference* that a contravention *may* be occurring.

[85] This is consonant with the ordinary meaning of the word “evidence”. For instance, Black’s Law Dictionary defines “evidence” as “[s]omething ... that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or nonexistence of a fact”: Bryan A. Garner, ed, 12th ed (St. Paul, MN: Thomson Reuters, 2024) [emphasis added].

[86] This ordinary meaning, which applies in both law and life, highlights that evidence is not co-extensive with proof. Rather, things that are evidence are *indicia* of another state or condition. They need give rise to an *inference* that the other state may exist and no more.

[87] In line with this, Canadian courts have defined “relevant evidence” as any information “that has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would be in the absence of that evidence”: *R v Calnen*, 2019 SCC 6 at para 108 [emphasis added]; *R v White*, 2011 SCC 13 at para 36.

[88] While this definition speaks to the low threshold for admissibility of evidence as relevant, it nonetheless reinforces the principle that the condition of ‘being evidence’ involves making the question at issue more probable. It also reinforces that whether condition “A” is evidence of contravention “B” is an *objective* concept, judged by contextually informed but universal standards, not by the instant thoughts or perceptions of any individual.

[89] The concept of evidence about an offence was also considered by the Supreme Court in *CanadianOxy Chemicals Ltd v Canada (Attorney General)*, 1999 CanLII 680 (SCC), [1999] 1 SCR 743 [*CanadianOxy*]. While interpreting the broader wording of s 487(1)(b) of the *Criminal Code*, which allows search warrants to be issued for locations where it is reasonably believed that “evidence in relation to” an offence will be found, the Court nevertheless provided further common-sense context on the meaning of “evidence”, holding at para 15 that:

On a plain reading, the phrase “evidence with respect to the commission of an offence” is a broad statement, encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence. The natural and ordinary meaning of this phrase is that anything relevant or rationally connected to the incident under investigation, the parties involved, and their potential culpability falls within the scope of the warrant. [emphasis added]

[90] The Supreme Court of Canada also adopted the words of Southin JA in the court below, interpreting the phrase as meaning materials “touching upon whether a breach of the law involving a penal sanction has occurred”: *CanadianOxy* at para 26.

[91] Both of these readings highlight that, to be evidence, the information or item in question need only (i) speak to a *potential* contravention of law; (ii) in a way that increases its probability.

[92] As here, the Supreme Court of Canada’s interpretation was strongly guided by the purpose of the provisions being read. In this case, that purpose is to ensure fairness and finality

in potentially severe enforcement proceedings. This supports and compels an interpretation of “evidence of a contravention” broad enough that a reasonable person, fixed with knowledge of the relevant regulatory regime, who took in or observed the information or item, would know that it was consistent with an offence-state and that more questions had to be asked to determine if, in fact, a contravention was occurring.

[93] For these reasons, s 59.7(b) cannot be interpreted in a way that the subjective failure of specific enforcement agents to apprehend evidence of a contravention — where a reasonable person in their shoes would see it — gives the AEP a pass on the running of the limitation period. This renders the Board’s focus on the subjective experience of the PLOs at the Site unreasonable.

[94] Indeed, the Board itself recognized that excluding information which would give rise to a suspicion that a contravention may be afoot was a setup for unreasonable results. In its decision, it noted at para 49 that:

[t]he 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.

[95] The mere possibility that the Board’s interpretation invites an untenable outcome, that the legislature could not have intended, renders it unreasonable. A canon of statutory interpretation is that the legislature does not intend to produce untenable consequences: *Rizzo* at para 27.

[96] The core problem with the Board’s subjective reading of “evidence” is that the running of the limitation period would vary, in otherwise identical circumstances, based on the diligence, and deductive sophistication of the AEP agent inspecting the site. With one who may not even know of the subleasing prohibition or is unable to connect the (rather obvious) dots presented by the prominent naming of a non-party to the lease as the camp operator, the limitation period would never run. On the other hand, with a sharp and competent inspector who sees the sign and immediately thinks: “Hmm, how curious, that is not the company leasing the land, I wonder how this came about?”, the limitation would be triggered immediately.

[97] That would be an absurd state of affairs, and obviously not what the legislation intended.

[98] Finally, it is noteworthy that the ultimate investigation leading to the penalty in this case comprised online searches that turned up exactly the same information that the PLOs would have seen at the Site: namely that Northgate ran Waddell camp. This was, apparently, confirmed by a Site visit yielding the exact same information. Tellingly, the AEP’s own investigative response confirms what ‘evidence of a contravention’ was in this case – the signs that had been there all along.

Common Law Discoverability and Limitation Periods

[99] While the foregoing provides a complete interpretative container, its conclusion is buttressed by the law’s approach to discoverability generally. Section 59.7(b) effectively incorporates a similar device by triggering the limitation at the point where the Director expressly knows, or ought to have been informed, about a contravention of the *Act*. That is why

the section refers to discovery of “evidence” of a contravention, which definitively implies something indicative of, as opposed to conclusively establishing, a contravention.

[100] The Supreme Court of Canada has recently reviewed the common law rule of discoverability in *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 [*Grant Thornton*]. This well-established common law rule holds that a cause of action arises, for the purposes of limitations periods, when the “material facts” upon which a cause of action is based “have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence”: *Grant Thornton* at para 29 citing *Central Trust Co v Rafuse*, 1986 CanLII 29 at para 77 (SCC); see also *Kamloops v Nielsen* 1984 CanLII 21 (SCC), [1984] 2 SCR 2; *Ryan v Moore*, 2005 SCC 38 at paras 2, 22 [*Moore*].

[101] Discoverability at common law originated in the court of equity, and seeks to balance limitation periods’ rationales (namely the guarantee of repose, desire to foreclose claims based on stale evidence, and expectation that plaintiffs act diligently in bringing claims) with the need to avoid the injustice of foreclosing the possibility of a claim before a plaintiff knows it exists: *Grant Thornton* at para 29 citing *M(K) v M(H)*, [1992] 3 S.C.R. 6 at 29-30, 1992 CanLII 31 (SCC); *Peixeiro v Haberman*, 1997 CanLII 325 at para 36 (SCC).

[102] Properly understood, discoverability is an objective concept that permits some sensitivity to a party’s particular circumstances. It is thus situationally and context dependent. At core, however, discoverability derives from what the so-called reasonable person *would* have recognized as mandating further inquiry into whether a wrong or injury has taken place.

[103] The common law discovery rule does not necessarily apply to every statutory limitation period. Rather, it is an interpretive tool for construing limitations statutes: *Grant Thornton* at para 30 citing *Moore* at para 23. Enactment of the phrase: “The date on which evidence first came to the notice of the director” qualifies, and arguably supplants, common law discoverability principles. However, the language chosen by the Legislature shows an attempt to balance the rationale of limitations periods to allow litigants like Smoking Diesel repose from the spectre of claims hanging over their heads indefinitely with the ability for AEP to bring claims and effect their (and the *Act*’s) mandate for responsibly managing public lands.

[104] Thus, common law rule of discovery thus frames the view through which this Court must interpret s 59.7(b) of the *Act*. Specifically, the law has a default inclination to trigger limitation periods where indicia of a cause of action come into view. This is very much consonant with the wording of s 59(7)(b). Read in that light, an interpretation that makes the running of this limitation period contingent on whether the Director *themselves* had knowledge or notice of a contravention is, again, untenable, contrary to the prevailing motifs of the common law, and inconsistent with the legislature’s choice of language. It would defeat the limitation’s function, upsets the balance intended to be brought by limitation periods in favour of the AEP, the Board, and the Minister, and introduces a subjectivity in a manner that undermines the very purposes the limitations period was meant to serve (and in a way that could not possibly have been intended by the Legislature).

[105] This further strengthens the conclusion that “evidence of a contravention” includes information which indicates that a contravention may have occurred.

The single, correct legal understanding of s 59.7(b)

[106] The legal component of “evidence of a contravention” has but one reasonable definition. Specifically, in this case, the limitation begins to run when a reasonable person, with particularized knowledge of the public lands leasing scheme under the *Act* and its offence provisions (such as the PLO’s who visited the Leased Land), learns of facts, or makes observations, that would give rise to an inference that a contravention may have occurred.

[107] The Board’s treatment of the specific PLOs’ apparent failure to draw such an inference was erroneous and flowed from a flawed understanding of the purpose and meaning of s 59.7(b).

The Signage was evidence of a contravention

[108] It was for the Board to determine whether the Signage was, objectively, evidence of a contravention or not. However, when answered through the lens of the right legal understanding of s 59.7(b), this too was a question that enjoyed only one reasonable answer on the unique facts of this case.

[109] As described above, the delict here lay in the language of the corporate agreements between Smoking Diesel and Northgate. The contravention existed only in words, and the concepts of entitlement and liability flowing from them. Its existence was only determinable through legal interpretation and analysis of those words and the documents containing them.

[110] Consequently, there existed only two possible forms of ‘evidence’ that this contravention was or had occurred. The first was information about the relevant legal structures, gained either by direct examination of them or second-hand descriptions of their contents. This is what appears to have triggered the investigation in this case. The only other possible evidence that this contravention was potentially occurring were signs (meaning indicia in general) that someone other than the lessee was using or occupying the Leased Land. This is exactly what the AEP looked for after as evidence after receiving information in 2019.

[111] If the prominent announcement that an entity other than the lessee was operating Waddell Camp did not raise an inference that the land may have been sublet, and that further questions needed to be asked, then nothing would. Indeed, this would be the only overt ‘sign’ of this contravention. On the correct legal understanding of “evidence of a contravention”, the Signage was such evidence. No other conclusion was reasonable.

An overriding factual problem with what the PLOs saw

[112] Mr. Zelman’s affidavit made it clear that the Signage would have been seen by anyone coming to the site. Specifically, he states that the Signage had “immense decals on its side announcing “Northgate Industries Ltd. Waddell Open Camp” and “Smoking Diesel/Northgate Industries Partnership” and is clearly visible to anyone passing by the Leased Land”. This evidence was neither challenged through cross-examination nor countermanded by other evidence in the Record.

[113] This makes the Board’s conclusions that there is “no evidence the PLO observed the signs” unsustainable. The only evidence was that they would have. The Board’s conclusion on the triggering of the limitation period is also unreasonable on this basis.

A further fairness problem related to the Signage

[114] The Board relied heavily on the absence of mention of the Signage, or any “concern” on the part of the PLOs arising from it in their Industrial Inspection Reports filed for each inspection in determining that the Signage was not “evidence”. The difficulty with this position is that the Board also (reasonably) refused to admit evidence from numerous proposed witnesses that the AEP simply did not care about, and in fact tacitly condoned, sublease arrangements for “decades”, based on a desire to service burgeoning resource extraction industries. While reasonable, the exclusion of this evidence carried corollary consequences.

[115] By denying the Applicants the chance to present evidence of an allegedly exculpatory condition – namely notorious Ministerial disinterest in the legal structure of lease-development partnerships – the Board was, as a matter of basic fairness, conversely precluded from implicitly relying on the very condition that evidence sought to disprove.

[116] Specifically, the excluded evidence would have explained why the PLOs did not remark on the Signage or perceive it as indicative of a potential contravention. Having excluded that evidence, it was unfair for the Board to then use the PLOs’ lack of advertence to the Signage as a basis to find that it was not evidence of a contravention.

[117] This point operates subtly, because the Ministry obviously did not rely on the premise that PLOs would have paid no heed to the prominence of Northgate’s name on the property because the Ministry’s position at the time was tacit acceptance of subleases. Rather, this problem worms its way into the decision through the idea that there is “no evidence” that the Signage meant anything to the PLOs at the time.

[118] If the fact that the PLOs were utterly unconcerned about the Signage, and saw nothing of evidentiary interest in it, was going to be used as a basis to conclude the Signage was not “evidence of a contravention”, fairness dictated that the Applicants be allowed to provide an alternate, exculpatory explanation for that disinterest.

[119] Indicia that a non-lessee was doing business on the lease were either a concern at the time or they weren’t. If they weren’t, then the Applicants ought to have been allowed to lead evidence in their defence that this was because of a widely known departmental policy to forego sub-leasing enforcement. Conversely, if the premise that the AEP condoned subleasing was verboten from evidence, it followed that a reasonable PLO, confronted with the Signage, ought to have known that more questions needed to be asked.

[120] If a factual condition cuts both ways in a case, the most basic principles of fairness and the right to be heard dictate that either both parties get the benefit of it, or neither does. This is true irrespective of whether the point on which a party wanted to use the fact would have been successful or not.

[121] Put more simply, it was unfair for the Board to rely on the fact that the Signage triggered no concern on the part of the PLOs without allowing the Applicant to lead evidence as to why this may have been the case, where those facts could have advanced another facet of their defence.

Remedy

[122] When a court finds that a decision of an administrative tribunal is unreasonable, it is generally most appropriate to remit the decision back to the decision maker. This gives effect to the rationale that the legislature has entrusted the matter to the decision maker, not the court. The Board will also have the benefit of the reviewing Court's reasons on its reconsideration: *Vavilov* at paras 140–141.

[123] There are exceptions to the above. Sometimes, it can become clear to the Court that a particular outcome is inevitable, and remitting a case back to the administrative tribunal would serve no useful purpose. Additionally, delay, fairness, urgency, costs, or efficiency may weigh against sending it back: *Vavilov* at para 142.

[124] Here, there was strong, uncontradicted evidence that the PLOs would have seen the Signage which, in turn, met the correct legal definition of “evidence of a contravention” on the \ unique facts of the case. By the time this matter would be reconsidered, close to a decade will have passed since the PLOs' site visits. There is thus no material prospect that AEP will be able to elicit different or better evidence on the PLOs' state of knowledge on a rehearing of this matter.

[125] The question of remedy, therefore, reduces to whether the Board within its broad sphere of responsibility, could reach more than one reasonable conclusion on a reconsideration. Respectfully, the Court concludes that it could not.

[126] Having concluded that there is a single operative legal meaning of “evidence of a contravention” in s 59.7(b), and that the Signage necessarily fell within that definition on the evidence in the Record, there is only one reasonable conclusion in this matter. That is, that the PLOs would have seen the Signage, as per the only evidence on point. In turn, that the Signage – prominently naming a non-lessee as the operator of the camp – raised a clear inference that a sub-lease may have occurred, and any PLO seeing it would be duty-bound to raise the matter within the Director's reporting chain. This institutional knowledge would, in turn, trigger the limitation period.

[127] Consequently, had it applied the correct definition to the uncontested record, the Board would have found that the limitation period was triggered by July 25, 2017 (the date of the second PLO inspection) at the latest, and that the Director's enforcement action was limitation barred. For this reason, the Administrative Penalty totalling \$240,782.57 is quashed and the matter concluded.

[128] For the sake of completeness, however, the Court will consider the Applicants' remaining grounds for review.

Issue 4: Did the Board err or breach the Applicants' right to procedural fairness by failing to provide reasons for its exclusion of certain expenses and costs incurred by Smoking Diesel in its assessment of the Proceeds?

Net Versus Gross Proceeds

[129] Before delving into the substance of the decision, this Court must set out how the Proceeds were originally calculated by the Director and then reduced by the Board.

[130] The *Act* and the *Regulation* provide no guidance for calculating the Proceeds and do not specify whether it should be calculated on a gross (total revenue generated) or net (total revenue generated less reasonable costs associated with the activity) basis: *Smoking Diesel Decision* at para 65.

[131] The purpose of calculating and collecting “proceeds” from a party who has contravened the *Act* is to ensure that the contravener receives no economic benefit from their wrongdoing. Essentially, it is to prevent contraveners from viewing the penalty under s 59.3 of the *Act* as a tolerable business expense, leaving it with little deterrent effect: *Gionet v Director, Lower Athabasca Region, Alberta Environment and Parks*, 2018 ABPLAB 27 (CanLII) at para 32.

[132] Critically, however, the calculation of proceeds is not intended to be punitive and is instead intended to prevent the offender from profiting and deterring potential contraventions: see *Smoking Diesel Decision* at para 79.

[133] The *Act* states that:

59.4(4) A notice of administrative penalty under this section may require one or more of the following:

- (a) payment of the penalty determined by the director under section 59.3;
- (b) any person who in the director’s opinion is in receipt of proceeds derived directly or indirectly from any use of public land in contravention of this *Act* or the regulations to provide an accounting of the proceeds believed by the director to have been received by that person;
- (c) payment by a person referred to in clause (b) of any proceeds referred to in that clause, or an amount equivalent to the value of the proceeds if the person has converted the proceeds.

[emphasis added]

[134] The Board has previously held that if the activity in question could never be carried out lawfully, then a gross proceeds calculation is appropriate. However, if the activity in question was unlawful at the time where revenue was generated, but could have been made lawful if certain requirements were met, or it was authorized by the correct authority, then a net proceeds calculation is appropriate: see *Colette Benson and CRC Open Camp & Catering Ltd v Director, Regional Compliance, Lower Athabasca Region, Alberta Environment and Parks*, 2020 ABPLAB 14 (CanLII) at paras 426–428, citing *Alberta Recycling Company Inc v Director, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 15-025-027-D, 2016 ABEAB 16 (CanLII) at paras 95–97.

[135] All parties agree that a net proceeds calculation is appropriate in these circumstances.

[136] But, then, what costs can reasonably be deducted in a net proceeds calculation? By the Board’s logic in the *Smoking Diesel Decision* at paras 76–95, an expense is deductible in this case if:

- It would not have been incurred but for the leasing arrangement with Northgate;
- It is a real and tangible (i.e. calculable) out-of-pocket payment to a third-party;

- It reduced Smoking Diesel’s retained economic benefit (i.e. it is not returned to Smoking Diesel).

The Board’s Proceeds Assessment

[137] The Director assessed the Proceeds to be \$890,533.34, calculating them on a gross basis and including:

- \$312,499.95 in rent from Northgate to Smoking Diesel;
- \$413,236.69 reimbursement by Northgate for tax payments made on behalf of Smoking Diesel to the Regional District of Wood Buffalo;
- \$103,306.38 for out-of-scope yard maintenance payments from Northgate to Smoking Diesel;
- \$13,900.00 for Stat Oil road use agreement fees paid by Northgate to Stat Oil on behalf of Smoking Diesel; and
- \$46,548.60 for CRC Open Camp & Catering Ltd. overpayment

[138] The Board reduced the Proceeds by \$649,750.77 to \$240,782.57, by netting-out the Applicants’ “costs and expenses which should have been deducted in determining net proceeds”. The Board provided detailed calculations explaining why certain costs and expenses should have been deducted: see *Smoking Diesel Decision* at paras 83–94.

[139] The deducted costs included \$407,178.37 in municipal taxes, \$50,266.64 in corporate taxes, \$17,952.42 in GST, \$103,306.88 in “out of scope maintenance costs paid by Northgate to Smoking Diesel”, and the following reasonable “preparation costs”:

- The logging costs for the site: \$31,500.00
- Signage costs for the campsite: \$1,641.82
- Environmental inspection costs: \$37,904.64

[140] The issue here arises in the absence of reasons for excluding certain other input costs.

[141] In Zelman’s Affidavit, he listed the following further expenses he contends should have been deducted on the same basis, as preparation costs (the bolded costs were not allowed by the Board):

- Landsman (Land Agent) Fees: \$7,531.62
- Timber Damage Fees: \$6,805.11
- Survey Fees: \$5,976.29
- Miscellaneous Land Lease Application Costs: \$22,445.63
- Logging costs for site: \$31,500.00
- Site Development Supervision: \$36,900.00
- Signage for campsite: \$1,641.82
- Environmental inspections: \$37,904.64

- Tenants Insurance: \$2,493.00
- Yearly Lease Payments to AEP: \$5,203.23
- Bilsky Contracting (Lowbed): \$3,969.00

(the Preparation Costs)

[142] The Board did not address eight of the eleven Preparation Costs, nor did they explain why they were not deducted in the Board’s net proceeds calculation. Documents reflecting these costs were included in the director’s record.

[143] Additionally, in his affidavit, Mr. Zelman listed “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 administrative support” (the Additional Costs) as expenses which could have been deducted: see *Smoking Diesel Decision* at para 67. Ultimately, the Board did not deduct these, but did not explain why.

The Reasons Were Insufficient

[144] Where procedural fairness or the applicable legislative scheme requires reasons be given to the affected party, but none are, that failure generally requires that a decision be set aside: *Vavilov* at para 136. Relatedly, a duty to provide reasons is also contained in the legislative scheme itself, which states that the Board’s Report must contain a summary of the evidence, a statement of the issue to be decided, and the reasons for the Board’s recommendations: *Regulation*, s 235.

[145] An unreasonable decision in this context is one “where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker’s reasoning on a critical point”: *Vavilov* at para 103. Where an administrative decision contains a “fundamental gap” or is “based on an unreasonable chain of analysis,” a reviewing Court cannot fashion its own reasons to buttress the administrative decision: *Vavilov* at para 96.

[146] The Director argues that it could be inferred from the Board’s reasons that the Preparation Costs and Additional Costs (which the Board did not address) would have been incurred regardless of the sublease. The Director argues that the Board was consistent in their analysis: where an expense contributed or pertained to the development of the work camp, they deducted those costs. Essentially, the argument is that the Board gave reasons by omission; in discussing three costs and then not discussing these other eight preparation costs, they were in fact accepting the Director’s decision that those costs would have been incurred regardless of the sublease.

[147] Unfortunately, the Director’s argument clashes with the obligation incumbent on the Board to provide transparent and intelligible reasons for not including the Additional Costs or Preparation Costs in the net calculation. At the very least, the reasons in conjunction with the record and the AEP regime must be intelligible *enough* for the Applicants to understand why the Additional Costs and Preparation Costs were excluded from the calculation. The Board did not meet this minimum requirement.

[148] The Applicants should not have to go on a scavenger hunt for possible explanations as to why the Board decided to exclude these amounts. This omission creates a fundamental gap in the reasons and would inevitably prevent the Applicants – as it has prevented this Court – from finding a transparent and intelligible justification for how the Board’s conclusion was reached. The Director’s suggestion that the Board turned its mind to the distinction between costs is untenable as this Court would inevitably have to supply its own rationale to cure a fatal defect (or at the very least make a tenuous inference that the Board considered the expenses where multiple other explanations are equally (or more) likely).

[149] Accordingly, the Board’s failure to address the Additional Costs in its reasons was unreasonable, and therefore the Minister’s decision adopting those reasons on this point was equally unreasonable.

Remedy

[150] Both the Applicants and the Director agree that due to the limited evidentiary scope of this issue, this Court can do its own analysis of the Proceeds Re-Assessment and does not need to remit this matter back to the Board. The Minister took no position on this matter.

[151] The agreement of the parties and the potential for delay, fairness concerns, additional costs, and efficiency weigh against sending this back to the Board. The exception outlined by the Court in *Vavilov* for a Court to reconsider a substantive issue without sending it back to the administrative decision maker is met for this issue.

[152] The Additional Costs cannot be quantified. The Applicants explained that these were “internal costs”. The Applicants did not keep records of the Additional Costs (or that those records were destroyed as the camp had been shut down since 2015) as there was no need to substantiate those expenses. They ask that this Court allocate a “reasonable amount” to the Additional Costs when determining the overall proceeds.

[153] In this Court’s view, this is overstepping its role on judicial review. While the Applicants are entitled to a further explanation from the Board, they submitted no materials to this Court to even assist in beginning to estimate these Additional Costs. It is not this Court’s role to quantify general costs like snow removal, yard maintenance, operating expenses for equipment and personnel, erosion control, environmental assessments, and administrative support, especially when there is no estimate for how much or how often the Applicants completed these tasks. Moreover, the market rates for those expenses would vary widely depending on location, scope, market conditions, and a plethora of other factors. Additionally, it is unclear how the Board would (or could) have quantified these costs even if they did turn their mind to them. The Applicants were entitled to reasons but are not entitled to a remedy.

[154] Some of the Preparation Costs, however, ought to have been deducted. The Preparation Costs that Smoking Diesel argues should be deducted include:

- Landsman (Land Agent) Fees: \$7,531.62
- Timber Damage Fees: \$6,805.11
- Survey Fees: \$5,976.29
- Miscellaneous Land Lease Application Costs: \$22,445.63

- Site Development Supervision: \$36,900.00
- Tenants Insurance: \$2,493.00
- Yearly Lease Payments to AEP: \$5,203.23
- Bilsky Contracting (Lowbed): \$3,969.00

[155] The Board argues the Preparation Costs the Applicant seeks to deduct were incurred before or after the work camp was operational and thus cannot be deducted. For reference, the dates are:

- Land Agent Fee occurred in 2009
- Timber Damage Fees occurred in 2012
- Survey Fees occurred in 2012
- Miscellaneous Land Lease Application Costs occurred in 2012
- Site Development Supervision occurred in 2013
- Tenants Insurance was paid from 2015 to 2017
- Yearly Lease Payments to AEP were paid from 2012 to 2022
- Bilsky Contracting (Lowbed) occurred in 2015

[156] In his affidavit, Mr. Zelman admits that he first came into contact with Northgate in 2013 after being introduced to their President of Sales. As a result, the Land Agent Fee, Timber Damage Fees, Survey Fees, and Miscellaneous Land Lease Application Costs all occurred before the relationship with Northgate was even contemplated. In short, the Applicants would have incurred these costs as a disposition holder of the Leased Land in any event, and thus they cannot be deducted from the proceeds calculation.

[157] Conversely, based on a review of Mr. Zelman's affidavit and the Director's records, the Site Development Supervision costs in 2013 were incurred in preparing the Leased Land for the work camp. These are costs that, properly, should be deducted in the net proceeds calculation.

[158] Similarly, the Tenants Insurance, purchased between 2015–2017, was paid to a third party and would not have been purchased but for the relationship with Northgate. This is a valid expense and should have been deducted.

[159] The Yearly Lease Payments were a precondition of being a disposition holder of the Leased Land, and the leasing relationship with Northgate and the work camp did not lead to increased costs (like it did for the Municipal taxes, for example). This is a cost that should not be deducted.

[160] Finally, the Bilsky Contracting (Lowbed) expense occurred in 2015 and (based on a review of the Director's Records) appears related to the operation of the workcamp. It was incurred during the period in which the Camp was active and constitutes a third-party, out-of-pocket expense that would not have been incurred but for the relationship with Northgate.

[161] Based on a review of the expenses, the following would have been deductible in an adjusted proceeds assessment, as it better reflects the economic benefit to the Applicants:

- Tenants Insurance: \$2,493.00
- Site Development Supervision: \$36,900.00
- Bilsky Contracting (Lowbed): \$3,969.00

[162] This would lead to an additional **\$43,362.00** reduction, reducing the total Administrative Penalty to **\$197,420.57**. Had the decision not been quashed on the limitations issue, this would have been the proper net Administrative Penalty.

Issue 5: Did the Board err in law, or alternatively unreasonably fetter its discretion by failing to consider relevant evidence of AEP’s historical internal policies or practices with respect to unauthorized subleases?

[163] The Applicants allege that the Board breached their right to procedural fairness by not admitting the Witness Affidavits on appeal or considering arguments related to a historical lack of strict enforcement of unauthorized subleases on DMLs. They argue that those affiants’ evidence were foundational pieces of their argument that the AEP’s historical internal policies and practices militated against enforcement on subletting DMLs.

[164] Appeals before the Board are not hearings *de novo*. Any appeal under the Act must be based on the decision and the record before the decision maker: Act, s 120. The Board may also “require the submission of additional information”: Act, s 123(4). The Board is empowered by the Act to establish its own rules and procedures for dealing with matters before it, subject to the regulations: s 123(9).

[165] The Board’s decision, both on not admitting the Additional Affidavits and its consideration of any evidence on the record of AEP’s historical enforcement (or, allegedly, lack of enforcement) of subleases was transparent and intelligible.

[166] The Board explained that the Applicants should have raised the matter before the Director before the Administrative Penalty was issued. If they had, the Board would have considered evidence if it was in, or rationally connected to, the Director’s record. Considering that the Board is empowered by s 123(4) of the Act to establish its own rules and procedures, its decision to not admit the Additional Affidavits based on the “rationally connected test” was consistent with its statutory authority and procedural framework. The Applicants ought to have been aware that if they did not raise this argument at the first instance when, based on the record, they clearly had the opportunity to, that the opportunity to do so would have been foreclosed to them.

[167] This Court also finds that the Board did consider the evidence of AEP’s historical policies that were on the record:

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.

Smoking Diesel Decision at para 64.

[168] These reasons are transparent, intelligible, and based on a reasonable chain of analysis. There is no fundamental gap. The Board’s decision on this point was reasonable, and therefore the Minister’s was as well.

CONCLUSION

[169] This Court finds that the Minister exceeded its jurisdiction by considering the Briefing Note, but no remedy is warranted due to the lack of prejudice to the Applicants. Similarly, the Applicants’ right to procedural fairness and natural justice was breached as they were not able to respond to the Briefing Note and additional information, but again no remedy is warranted for the same reason.

[170] The Board erred in its interpretation of s 59.7(b). There is only one reasonable interpretation of this provision; remitting this issue for reconsideration would serve no useful purpose. This Court’s interpretation shall govern.

[171] On the Record before the Board, the substantive determination of whether the Administrative Penalty was issued within the 2-year limitation has but one reasonable answer once the interpretation of “evidence” is clarified. There is no reason to remit the matter.

[172] This Court grants the application for judicial review. The Minister’s decision, Ministerial Order 89/2021, is quashed. The matter is at an end.

[173] In the event that I erred on the limitations issue, I would have found that the Applicants rights to procedural fairness was breached by the Board’s failure to provide reasons for not deducting some of the listed Preparation Costs and Additional Costs.

[174] As the parties requested this Court complete its own proceeds assessments rather than remitting it back to the Board, I would have found that the Tenants Insurance, Site Development Supervision, and Bilsky Contracting (Lowbed) were expenses that should have been deducted in the proceeds assessment. The Administrative Penalty would have been reduced by \$43,362.00 to \$197,420.57.

[175] The Court extends its gratitude to all counsel involved for their helpful presentation of the issues in this case.

COSTS

[176] If the parties are unable to agree on costs, the Applicant may provide submissions on costs within 30 days of the date of this decision, of no more than 3 pages in length. The Respondents may reply with a submission of equal maximum length within 30 days thereafter.

Heard on the 29th day of October 2025

Dated at the City of Calgary, Alberta this 6th day of March 2026.

N.E. Devlin, JCKBA

Appearances:

Tara Hamelin and Torey Lauber
For the Applicants

Janet Hutchison
For the Public Lands Appeal Board

Brendan Dzioba
For the Minister

Andrea Simmonds
For the Director