ALBERTA
ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – May 31, 2022

IN THE MATTER OF sections 91, 92, 95, and 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, and section 115 of the *Water Act*, R.S.A. 2000, c. W-3;

-and-

IN THE MATTER OF appeals filed with respect to the decision of the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, to issue *Water Act* Approval No. 00406489-00-00 to Badlands Recreation Development Corp.

Cite as: *McMillan et al.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp* (31 May 2022), Appeal Nos. 19-066 to 071, 074, 081, and 083-085-ID4 (A.E.A.B.), 2022 ABEAB 22.

BEFORE:		Ms. Meg Barker, Panel Chair; Ms. Tamara Bews, Board Member; and Mr. Chris Powter, Board Member.
SUBMISSIONS BY:		
	Appellants:	Mr. Derek McMillan, Ms. Linda Skibsted, Mr. Rick Skibsted, Spruce Coulee Farms Ltd., Mr. Richard Clark, Ms. Wendy Clark, and Half-Diamond HD Limited, represented by Mr. Richard Harrison, Wilson Laycraft LLP.
	Applicants:	Ms. Ruth Bellamy, Will Farms Ltd., Mr. Jon Groves, Ms. Shauna Kenworthy, Ms. Shauna Murphy, Mr. Harvey Poulsen, Ms. Della Poulsen, Cactus Coulee Farms Inc., and Mr. Stanley Riegel, represented by Mr. Richard Harrison, Wilson Laycraft LLP.
	Approval Holder:	Badlands Recreation Development Corp. represented by Mr. James Zelazo, Badlands Recreation Development Corp., and Mr. R. Bruce Brander, Brander Law.
	Director:	Mr. Todd Aasen, Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, represented by Ms. Nicole Hartman and Mr. Paul Maas, Alberta Justice and Solicitor General.

EXECUTIVE SUMMARY

Alberta Environment and Parks ("AEP") issued an Approval under the *Water Act*, R.S.A. 2000, c. W-3, to Badlands Recreation Development Corp. (the "Approval Holder") allowing for the infilling of two wetlands, modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system near Rosebud, Alberta. The Environmental Appeals Board (the "Board") received 27 Notices of Appeal. Nine of the appellants who were previously dismissed for not directly affected (the "Applicants") filed a reconsideration motion because of the Alberta Court of Appeal's decision in *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, 2020 ABCA 456 ("*Normtek"*), which changed the Board's interpretation of its standing rules. The reconsideration motion was made under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12.

The Board considered three preliminary motions, which request the following relief:

1. reconsideration of the Board's decision dated April 1, 2020, where the Applicants were denied "directly affected" status;
2. striking out a portion of AEP's written submissions on the basis that the role of AEP in an appeal should be limited; and
3. requiring further and better information as to what the witnesses of the Approval Holder and AEP would testify.

By letter dated February 10, 2021, the Board advised the *Normtek* decision provided the *prima facie* basis for the Board to undertake a reconsideration of its April 1, 2020 decision, which dismissed the notices of appeal of the Applicants for not being directly affected. As a result, the Board proceeded to conduct the reconsideration motion on its merits.

After reviewing the written submissions, legislation, and relevant case law, the Board granted the reconsideration motion of the Applicants (in part). The Board granted standing to Mr. Jon Groves and Ms. Shauna Kenworthy. The Board denied standing to Ms. Ruth Bellamy, Will Farms Ltd., Ms. Shauna Murphy, Ms. Della Poulsen, Cactus Coulee Farms Inc., and Mr. Stanley Riegel. Mr. Harvey Poulsen was not identified as a party to the April 1, 2020 Board Decision

because he did not originally file a Notice of Appeal to the Board. Accordingly, the Board found Mr. Poulsen did not have status and was not considered in this proceeding.

The Board denied the second motion limiting AEP's participation in the appeals. AEP is considered a full party to an appeal pursuant to section 1(f) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993.

The Board denied the third motion being a requested further and better information as to what the witnesses of the Approval Holder and AEP would testify. The Board found that the submissions provided met the requirements of the Board's *Rules of Practice*.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

III. ISSUES 3

Motion 1: Reconsideration of the Applicants' Directly Affected Status 3

Motion 2: Director's Participation in the Appeal 4

Motion 3: Further and Better Written Submissions 4

IV. MOTION 1: RECONSIDERATION OF DIRECTLY AFFECTED STATUS 5

A. Submissions 7

1. Applicants 7
2. Approval Holder 10
3. Director 11
4. Applicants Rebuttal 13

B. Board's Analysis 15

1. Ms. Elaine Bellamy and Will Farms Ltd. 24
2. Ms. Della Poulsen and Cactus Coulee Farms Inc. 28
3. Mr. Jon Groves 30
4. Ms. Shauna Kenworthy 33
6. Mr. Stanley Riegel 41

C. Summary 45

V. MOTION 2: DIRECTOR'S PARTICIPATION IN THE APPEALS 45

A. Submissions 45

1. Appellants 45
2. Director 52
3. Approval Holder 58
4. Appellants' Rebuttal 59

B. Board's Analysis 64

VI. MOTION 3: FURTHER AND BETTER WRITTEN SUBMISSIONS 76
A. Submissions 76
1. Appellants 76
2. Approval Holder 77
3. Director 77
4. Appellants' Rebuttal 78
B. Board's Analysis 79
VII. ADDITIONAL MATTERS 80
VIII. DECISION 81
LEGISLATION 82

I. INTRODUCTION

[1] These appeals concern Approval No. 00406489-00-00 (the "Approval"), which was issued on January 8, 2020, by the Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks (the "Director") under the *Water Act*, R.S.A. 2000, c. W-3, to Badlands Recreation Development Corp. (the "Approval Holder"). The Approval allows for the infilling of two wetlands, modification of three wetlands, and construction, operation, and maintenance of a stormwater management system at 22-27-21-W4M (the "Activity"), near Rosebud, Alberta. The Activity is the only matter before the Environmental Appeals Board (the "Board").

[2] The Board received 27 Notices of Appeal.[1] Nine appellants previously dismissed for being found not directly affected (the "Applicants") filed a reconsideration motion because of the Alberta Court of Appeal's decision in *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, 2020 ABCA 456 ("*Normtek*"), which changed the Board's interpretation of its standing rules . The reconsideration motion was made under section 101 of the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("EPEA"). Section 101 of EPEA provides: "Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it."

[3] This decision of the Board considers three preliminary motions, which request the following relief:

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[1] In *Andrew Reiffenstein et al.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks* (28 April 2020), Appeal Nos. 19-059-085-IDl (A.E.A.B.), 2020 ABEAB 16 ("*Reiffenstein*"), the Board found the following appellants were directly affected: Mr. Derek McMillan; Ms. Linda Skibsted and Spruce Coulee Farms Ltd.; Mr. Rick Skibsted and Spruce Coulee Farms Ltd.; Mr. Richard Clark and Half Diamond HD Limited; and Ms. Wendy Clark and Half-Diamond HD Limited (collectively, the "Appellants").

Further, the Board found the following appellants were not directly affected and their appeals were dismissed: Ms. Ruth Bellamy and Will Farms Ltd.; Mr. Jonathon Groves; Ms. Shauna Kenworthy; Ms. Shauna Murphy; Ms. Della Poulsen and Cactus Coulee Farms Inc.; and Mr. Stanley Riegel (collectively, the "Applicants").

Finally, the Board also dismissed the appeals of Mr. Andrew Reiffenstein, Ms. Joan Reiffenstein, Ms. Angela Chevrier, Ms. Ann Gray-Elton, Mr. John Elton, Ms. Debbie Schwartz, Mr. Miles Shwartz, Ms. Samantha Andersen and H&A Andersen Farms Ltd., Mr. Vincent Andersen and H&A Andersen Farms Ltd., Mr. Barry Pallesen and Dalbey Farms Ltd.; Ms. Pauline Pallesen and Dalbey Farms Ltd.; Mr. George Constock; Ms. Jacqueline Skytt and 1688732 Alberta Ltd., Mr. Jim Eskeland, Ms. Julie Eskeland, and Mr. Patrick Murphy. These individuals and corporations did not participate in the motions before the Board.

1. reconsideration of the Board's decision dated April 1, 2020,[2] where the Applicants were denied "directly affected" status;
2. striking out portions of the Director's written submissions on the basis that the role of the Director in an appeal should be limited; and
3. requiring further and better information as to what the witnesses of the Approval Holder and Director will testify.

The Board's decision also addresses the Director's request that, if the third motion is granted, then the Appellants should also be required to submit detailed summaries of the evidence each of their witnesses, including their experts, intend to present.

II. BACKGROUND

[4] On April 1, 2020, the Board issued a decision letter in which the Board denied directly affected status to the following persons:

- Mr. Jonathon Groves;
- Ms. Angela Chevrier;
- Ms. Shauna Kenworthy;
- Ms. Ruth Bellamy and Will Farms Ltd.;
- Mr. Vincent Andersen, Ms. Samantha Andersen, and H&A Andersen Farms Ltd.;
- Mr. Miles and Ms. Debbie Schwartz;
- Mr. Stanley Riegel;
- Ms. Jacqueline Skytt and 1688732 Alberta Ltd.;
- Mr. George Comstock;
- Ms. Della Poulsen and Cactus Coulee Farms Inc.;
- Mr. John Elton and Ms. Ann Gray Elton;
- Ms. Andrew Reiffenstein and Ms. Joan Reiffenstein;
- Mr. Patrick Murphy and Ms. Shauna Murphy;
- Mr. Jim Eskeland and Ms. Julie Eskeland; and
- Ms. Pauline Pallesen, Mr. Barry Pallesen, and Delbey Farms.

[5] On July 8, 2020, the Board denied a previous reconsideration application dated May 25, 2020, which included the Applicants.[3]

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[2] The Board issued its decision in a letter dated April 1, 2020, and provided its reasons in *Andrew Reiffenstein et. al.* v. *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks* (28 April 2020), Appeal Nos. 19-059-085-IDl (A.E.A.B.), 2020 ABEAB 16.

[6] On March 3, 2021, the Applicants filed an amended reconsideration request of the Board's April 1, 2020 decision.

[7] In the March 3, 2021 reconsideration request, Mr. Harvey Poulsen was listed as seeking a reconsideration of the Board's previous decision. However, the Board notes that Mr. Poulsen did not file a Notice of Appeal with the Board. The first time Mr. Poulsen appeared in the Board's process was as one of the Applicants applying for reconsideration. As such, Mr. Poulsen did not have a valid appeal before the Board and, therefore, was not considered by the Board in these reasons.

[8] The Applicants based their reconsideration motion on the decision of the Alberta Court of Appeal in *Normtek*. They argued the *Normtek* decision provided the legal basis to find the Board made an error in law in its April 1, 2020 decision by misinterpreting the definition of who is directly affected.

[9] In support of their reconsideration motion, the Applicants filed letters of concern dated between April 27, 2018 and May 1, 2020.

[10] The Board requested and received the Approval Holder's response submission dated March 23, 2021, and the Director's response submission dated March 24, 2021, regarding the motions, and the Applicants and Appellants submitted a rebuttal submission dated April 15, 2021.

[11] The Director took no position on the Applicants' application for the reconsideration of their directly affected status.

III. ISSUES

Motion 1: Reconsideration of the Applicants' Directly Affected Status

[12] With respect to the first motion, the primary issue to be determined on reconsideration was whether some or all the Applicants should be granted standing under

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[3] The first reconsideration request predated the Alberta Court of Appeal decision in *Normtek*. The Applicants did not ask for a reconsideration of the Board's July 8, 2020 decision denying the first reconsideration request.

section 115(1)(a)(i) of the *Water Act* to appeal the Director's decision to issue the Approval based on the Court of Appeal's decision in *Normtek*.[4]

[13] To have standing, the Applicants must be directly affected by the Director's decision to issue the Approval or the Activity authorized by the Director's decision. The Board examined the submissions provided by the Applicants, Appellants, Approval Holder, and Director (collectively, the "Parties") and identified the following questions raised in their submissions:

1. What is the test to determine if a person is directly affected and has standing to bring an appeal considering the *Normtek* decision?
2. How should the Director's decision on directly affected be considered in the Board's decision-making on directly affected?
3. Are the Applicants directly affected by the Director's decision to issue the Approval or the Activity authorized by the Director's decision, given the guidance set out in *Normtek*?

Motion 2: Director's Participation in the Appeal

[14] With respect to the second motion, the issues are:

1. Should the Board limit the Director's participation in these appeals to submissions relating to the statutory scheme and the standard of review?
2. If yes, should portions of the Director's submissions be struck?

Motion 3: Further and Better Written Submissions

[15] With respect to the third motion, the issues are:

1. Should the Director and the Approval Holder be required to provide further written submissions as to their intended testimony, including a list of witnesses and a summary of each witness' testimony, pursuant to Rule 19 of the Board's *Rules of Practice*?

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[4] This decision addresses three different provisions that relate to directly affected. The first is section 115(1)(a)(i) under the *Water* Act, which is the provision governing the decision regarding directly affected in these appeals. The second is section 91(1)(a)(i) of EPEA, which is the provision under which the *Normtek* decision was made. It is effectively the same as section 115(1)(a)(i) of the *Water Act*, but deals with approvals issued under EPEA. The third is section 95(5)(a)(ii) of EPEA, which authorizes the Board to dismiss an appeal under section 115(1)(a)(i) of the *Water Act* or section 91(1)(a)(i) of EPEA where the Board determines the person filing the appeal is not directly affected.

2. If yes, should the Appellants be required to provide detailed summaries of the evidence each of their witnesses, including their three experts, intend to present?

IV. Motion 1: Reconsideration of Directly Affected Status

[16] The Applicants' motion for the reconsideration of the Board's April 1, 2020 decision was made pursuant to section 101 of EPEA and was based on the Court of Appeal's decision in *Normtek*. With respect to its reconsideration process, the Board has developed a two-part test, which was detailed in the Board's letter dated February 10, 2021:

> "The first step determines whether the person asking for the reconsideration has met the legal requirement for the Board to undertake the reconsideration. The legal requirement to undertake the reconsideration is (a) the Board has made an error in interpreting the law that was the basis of the original decision, or (b) new information that was not available at the time of the original decision has become available. …
>
> The second step is only undertaken if the legal requirement of the first step has been met. The second step is the actual reconsideration itself – the review of the law or the review of the new information, and the making of a new decision."

The Board discussed the two-part test in Whitefish Lake First Nation Request for Reconsideration, *Whitefish Lake First Nation* v. *Director, Northwest Boreal Region, Alberta Environment*, re: *Tri-Link Resources Ltd*. (28 September 2000) Appeal No. 99-009-RD (A.E.A.B.).

[17] In *Normtek*, the Court of Appeal overturned *Normtek Radiation Services Ltd* v. *Alberta (Environmental Appeals Board)*, 2018 ABQB 911 ("*Normtek QB*"), where the Board had refused standing to the appellant by finding the appellant was not directly affected as required by EPEA. In its decision, the Court of Appeal considered the meaning and application of the phrase "directly affected" in section 91(1)(a)(i) of EPEA. The Court of Appeal modified the Board's directly affected test to require considerations beyond an appellant's use of a natural resource near the approved activity. The Board's previous test was based on *Court* v. *Alberta Environmental Appeal Board*, 2003 ABQB 456 ("Court"). These additional considerations

include adverse effects on the environment, safety, human health, or property,[5] and any social, economic, and cultural impacts of the activity[6] if those impacts directly affect the appellant's identified interest.

[18] By a letter dated February 10, 2021, the Board advised the Parties that the *Normtek* decision provided the *prima facie* basis for the Board to undertake a reconsideration of its April 1, 2020 decision, which dismissed the Notices of Appeal of the Applicants for not being directly affected. The first part of the reconsideration test had been met, and the Board proceeded to the second part of the test and conducted the reconsideration on its merits.

[19] The Board must first assess: "What is the test to determine if a person is directly affected and has standing to bring an appeal, in light of the *Normtek* decision?"

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[5] See *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, 2020 ABCA 456, where is states:

> "[83] What is defined and employed is the term 'adverse effect'. It is defined in s 1(b) of [EPEA] as the impairment of or damage to the environment, human health, safety or property. In other words, if one's health, safety or property is potentially impaired by the decision of the Director's approving an activity, that person may be directly affected and therefore have standing to appeal the Director's decision, regardless of whether that person's use or enjoyment of the environment or a natural resource is likely to be impacted.
>
> [84] Another indication of the kinds of effects which were intended by the legislature's use of the phrase 'directly affected' is found in the Director's power to amend a term or condition of an approval. Section 70(3)(a)(i) of [EPEA] states that the Director may amend an approval if, in his or her opinion, an adverse effect (an impairment of or danger to the environment, human health, safety or property) is occurring or may occur. It would be incongruous for the Director to be conferred with jurisdiction to interpret the phrase 'directly affected' in section 73(1) of [EPEA] more broadly than the Board in section 95(5)(a)(ii)." (Emphasis added by the Board.)

[6] See *Normtek Radiation Services Ltd*. v. *Alberta Environmental Appeal Board*, 2020 ABCA 456, where it states:

> "[85] Section 40 of [EPEA] also provides some indication of what effects might have been contemplated as causing a person to be directly affected. Section 40 states that the purpose of environmental assessment, among other things, is to predict the environmental, social, economic and even cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the activity. While the proposed activity in this case was not deemed to have warranted consideration under the formal environmental impact assessment process established under Division 1 of the Act (ss 40-59), the Director is nevertheless obliged by the Act to consider the environmental, social, economic and cultural consequences, if any, resulting from the proposed activity, as well as issues related to human health…." (Emphasis added by the Board.)

A. Submissions

1. Applicants

[20] The Applicants noted that the Court of Appeal in *Normtek* began its interpretation of the term directly affected with an analysis of the proper approach to statutory interpretation:

> "[75] At the heart of this appeal is an issue of statutory interpretation: the interpretation of what 'directly affected' means. The so-called modern approach to statutory interpretation can be found in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para[graph] 21, 154 DLR (4th) 193, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Buttersworth, 1983) at [page] 87:
>
> > Today there is only one principle or approach, namely, 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.
>
> As Iacobucci J observed in *Rizzo*, this means statutory interpretation is not simply an exercise in reviewing the words of the legislation in isolation. Instead, a court must ask what is the purpose of this legislation, and in light of that purpose, what must the words mean? If a possible meaning runs counter to the scheme of the legislation, then that potential interpretation may be suspect.
>
> [76] Ruth Sullivan, in *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) suggested the central principle articulated by Driedger and the courts has three elements. A valid interpretation of legislation must be:
>
> 1. plausible in that it complies with the legislative text,
> 2. efficacious in that it promotes the legislative intent, and
> 3. matches accepted legal norms in that the interpretation is reasonable and just."

[21] The Applicants noted that, given the modern approach to statutory interpretation, the Court of Appeal in *Normtek* held the proper interpretation of directly affected is as follows:

> "[82] It can be seen from the forgoing that limiting 'directly affected' to impacts on the appellant's use of natural resources affected by the activity approved by the Director is not supported by a plain reading of s 91(1)(a)(i) of [EPEA] which requires only that the appellant be 'directly affected by the Director's decision', however that direct effect manifests itself.

[83] Nor does [EPEA] itself support a limitation based on a person's use of a 'natural resource' in the vicinity of the approved activity. Nowhere in [EPEA] are the impacts on natural resources inextricably linked to standing. The term 'natural resource' is rarely, if ever, employed in [EPEA]. What is defined and employed is the term 'adverse effect'. It is defined in s 1(b) of [EPEA] as the impairment of or damage to the environment, human health, safety or property. In other words, if one's health, safety or property is potentially impaired by the decision of the Director's approving an activity, that person may be directly affected and therefore have standing to appeal the Director's decision, regardless of whether that person's use or enjoyment of the environment or a natural resource is likely to be impacted.

[84] Another indication of the kinds of effects which were intended by the legislature's use of the phrase 'directly affected' is found in the Director's power to amend a term or condition of an approval. Section 70(3)(a)(i) of [EPEA] states that the Director may amend an approval if, in his or her opinion, an adverse effect (an impairment of or danger to the environment, human health, safety or property) is occurring or may occur. It would be incongruous for the Director to be conferred with jurisdiction to interpret the phrase 'directly affected' in section 73(1) of [EPEA] more broadly than the Board in section 95(5)(a)(ii).

[85] Section 40 of [EPEA] also provides some indication of what effects might have been contemplated as causing a person to be directly affected. Section 40 states that the purpose of environmental assessment, among other things, is to predict the environmental, social, economic and even cultural consequences of a proposed activity and to assess plans to mitigate any adverse impacts resulting from the activity. While the proposed activity in this case was not deemed to have warranted consideration under the formal environmental impact assessment process established under Division 1 of [EPEA] (ss 40-59), the Director is nevertheless obliged by [EPEA] to consider the environmental, social, economic and cultural consequences, if any, resulting from the proposed activity, as well as issues related to human health. Considerations relevant to the granting of an approval for a designated activity are not confined to impacts on natural resources. Nor are they even confined to impacts on the environment. And so the phrase 'directly affected' could not be limited to impacts on one's use of natural resources. Social, economic, cultural, safety, human health effects, if established, could also ground standing, as could adverse effects on property rights. They are all specifically mentioned in [EPEA]. If the direct effect on the person seeking to appeal a Director's decision is economic, cultural, safety or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource proximate to the site of the approval as suggested by the Board and the reviewing court. ...

[101] In *Court*, Justice McIntyre, citing *Bildson*, might unwittingly have been perceived to have elevated the proposition that an appellant may show that the approved activity will harm a natural resource in order to be accorded standing to

> the proposition that an appellant must show that it will do so. The Board in *Normtek*, relying on *Court*, certainly appears to have considered this the test which must be met in order to be accorded standing. (Emphasis made by the Court). …
>
> [105] In short, we are of the view that the Board and the chambers judge were unreasonable in concluding that an adverse impact cannot qualify a person as being 'directly affected' unless the adverse impact is on the appellant's actual use of a natural resource near the activity which the Director has approved. The Board's view is not supported by [EPEA] or its own jurisprudence. Nor does Justice McIntyre's decision in *Court* justify the adoption of such a test for standing. ...
>
> [140] As indicated above, the Board pointed to Rule 29 of its *Rules of Practice*, suggesting that it is clear that the onus is on the appellant to prove that it is directly affected. Strictly speaking, that is not correct. What the Rule states is this:
>
> > In cases which the Board accepts evidence, any Party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.
>
> The only onus this Rule imposes is to adduce evidence in support of one's position. The appellant did that. The approval-holder and the Director submitted little, if any evidence which conflicted with the evidence of Normtek. Indeed, both the Director and the approval holder expressly declined to engage the appellant on the merits of its objection. By way of example, Normtek argued that the Director's decision approving the landfilling of certain high level naturally occurring radioactive wastes would adversely affect its business of decontaminating equipment of those wastes and disposing of them in subterranean geological formations. In support of this submission, Normtek supplied the Board with the relative costs of the two disposal methods. That evidence was not contradicted by any evidence adduced by the approval-holder or the Director."[7] (Emphasis added by Applicants)

[22] In the Applicants' Initial Submission, dated March 3, 2021, at paragraph 23, they argued that

> "... the 'directly affected' test following *Normtek* is whether they are potentially subject to an adverse impact. That impact may be socio, cultural, economic or environmental. It may be to their property rights and there the Court was careful

[7] See also *Court* v. *Alberta Environmental Appeal Board*, 2003 ABQB 456, and *Bildson* v. *Alberta (Acting Director, North Eastern Slopes Region)*, (19 October 1998) Appeal No. 98-230-D (A.B.E.A.B.), 1998 ABEAB 42.

> not to put a limit on the types of impacts that would qualify an Appellant from obtaining directly affected status."

[23] In the Applicants' Initial Submission, dated March 3, 2021, at paragraph 24, they argued that the Court of Appeal in *Normtek* applied a purposive approach to interpreting directly affected and interpreting the term in the context of the entirety of EPEA. The intent behind EPEA was to provide a forum where a party subject to a wide array of effects may test the findings and conclusions of the Director in a *de novo* hearing conducted by the Board. Further, the Board ought to consider whom the Director found was directly affected. The Board should not be applying an interpretation of directly affected more limited than the Director.

2. Approval Holder

[24] In the Approval Holder's Submission, dated March 23, 2021, at page 2, they submitted that in *Normtek*, at paragraph 141, the Court of Appeal observed: "… the onus is on the appellant to establish a reasonable possibility that it will be directly affected by the Director's decision." The Approval Holder argued this was a case where the concerns raised in *Normtek* should apply. The Board should give the Applicants the opportunity to participate in the hearing so they can file evidence to support their claims for directly affected status, be challenged on that evidence by way of cross-examination, and address the "merits" of the appeals which they believed might be relevant to their claims for standing. At the end of the hearing, the Parties can then make submissions on standing to the Board.

[25] In addition, in the Approval Holder Submissions, at page 2, citing paragraphs 135 and 136 of the *Normtek* decision, they submitted:

> "While it appears from the case law summarized in Normtek that there has sometimes been a reluctance in the past to deal with the 'merits' of the appeal as part of the preliminary issue of 'directly affected', the Court of Appeal is clear in Normtek that, at times, it will be necessary to do so, and it could be necessary to go through the hearing process to properly determine the standing issue."

The Approval Holder argued these appeals were the type of cases where it might be necessary to hear the full merits of the appeals to determine if the Applicants were directly affected.

[26] The Approval Holder submitted allowing the Applicants to be granted provisional standing was an efficient way to deal with whether they were directly affected by the Approval.

3. Director

[27] The Director took no position as to whether the Applicants were directly affected by the Director's decision to issue the Approval. However, according to the Director, he had an interest in the reasonable application of the test for determining an appellant's directly affected status.

[28] The Director provided comments on the impact of the *Normtek* decision to assist the Board but was mindful of comments of the Court of Appeal regarding the Director's role in making submissions on whether an appellant is directly affected. Specifically, in *Normtek*, at paragraph 47, it stated: "But here, the Director, who had already ruled that Normtek was not directly affected by Secure Energy's landfill approval application, took a position on Normtek's directly affected status. Whether that is appropriate, we will leave for another day…."

[29] The Director noted that in *Normtek,* the Court of Appeal considered the meaning of directly affected under EPEA. When a person appeals certain decisions of a director under EPEA, that person must demonstrate to the Board that they are directly affected before the appeal can proceed. The Director confirmed directly affected is another way of referring to an appellant as having standing or the right to appeal.

[30] The Director stated the *Water Act* uses the same language as EPEA in terms of being directly affected to appeal certain decisions of the Director to the Board. As such, the Director believed the general principles from *Normtek* would apply to persons, such as the Applicants, appealing a Director's decision under the *Water Act.*

[31] The Director stated the Court of Appeal in *Normtek* modified the Board's directly affected test to include considerations beyond an appellant's use of a natural resource near the approved activity. These additional considerations, as found in the *Normtek* decision at paragraphs 83, 85, and 135, include adverse effects on safety, human health, or property rights, and any environmental, social, economic, and cultural impacts of the Activity, if those impacts directly affect the potential appellant.

[32] The Director argued the Court of Appeal in *Normtek* modified the Board's previous directly affected test from another decision, *Court* in two key ways:

1. The appellant no longer needs to show the Director's decision causes harm to a natural resource the appellant uses, as required by *Court*. Evidence of harm to a natural resource the appellant uses may be good evidence an appellant is directly affected, but it is not a pre-requisite to establish standing before the Board.[8]
2. If the direct effect on the person seeking to appeal a Director's decision is economic, cultural, safety, or health-related or is on a property right, then standing to appeal may be available whether or not there is any connection to an environmental impact to a natural resource proximate to the site of the approval.[9]

[33] The Director submitted the general principles on standing from previous cases (including *Court*), can be summarized as follows:

1. the onus is on the appellant to demonstrate to the Board there is a reasonable possibility they will be directly affected by the Director's decision;[10]
2. in deciding whether someone is directly affected, the Board may examine social, economic, cultural, safety, human health adverse effects, or adverse effects on property rights along with evidence of harm to a natural resource the appellant uses;[11] and
3. the effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected; they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find a person directly affected.[12]

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[8] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraphs 82 to 83, and 96.

[9] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 85.

[10] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 141.

[11] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 85.

[12] *Kostuch* v. *Alberta (Director, Air & Water Approvals Division*, Environmental Protection) (1996), 182 AR 384, 35 Admin LR (2d) 160 ABQB at paragraphs 25 and 26.

4. Applicants Rebuttal

[34] In their rebuttal, the Applicants submitted they only took issue with paragraphs 15 and 17 of the Director's submissions with respect to directly affected. Citing *Normtek* at paragraph 141 and *Kostuch* at paragraphs 25 and 26, the Applicants argued:

> "15. The onus is on the appellant to demonstrate to the Board that there is a reasonable possibility that they will be directly affected by the Director's decision. …
>
> 17. The effect must be reasonable and possible. It is not sufficient to show an appellant is possibly affected, they must also show the possibility is reasonable. An affect that is too remote, speculative, or is not likely to impact the appellant's interests will not form the basis to find a person is directly affected."

[35] With respect to the paragraph 17, the Applicants, in paragraph 20 of their Submission, dated April 15, 2021, noted the Court of Appeal in *Normtek* discussed remoteness as follows:

> "[81] The adverb, 'directly' also restricts or limits the effects which can give rise to standing. *The Concise Oxford Dictionary* defines 'directly' as meaning 'in a direct manner'. It defines 'direct' as 'straight, not crooked or roundabout, following an uninterrupted chain of causes and effect'. There also appears to be a temporal aspect to 'direct' and 'directly'. 'Direct' is defined as 'immediate'. And 'directly' is defined as 'at once, without delay.' <u>It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be</u>." (Emphasis added by Applicants.)

[36] According to the Applicants, the test as outlined in *Normtek* permits prospective harm.

[37] Concerning the Approval Holder's submissions on provisional standing, the Applicants responded the Board may not have the authority to grant it because of the operation of section 95(6) of EPEA.

[38] The Applicants noted they were denied directly affected status pursuant to section 95(5)(a)(ii) of EPEA. They submitted section 95(5)(a)(ii) of EPEA gives the Board the authority to consider a party's affected status on its own initiative.

[39] The Applicants submitted that if the Board does not dismiss an appeal under section 95(5), it is required, pursuant to section 95(6), to "give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations."

[40] Finally, the Applicants argued it would be an inefficient use of resources to require the parties to participate in an entire hearing, only to find they were not directly affected.

[41] Concerning the Approval Holder's submissions on evidence and burden, the Applicants, in their Submission, dated April 15, 2021, at paragraph 7, citing *Normtek* stating:

> "[139] …That legislative scheme may call for some caution in summarily dismissing an appeal where there is a possibility that the person appealing may be directly and adversely affected. The opportunities to mitigate direct adverse effects once the designated activity has been approved and undertaken may be limited. As the Board pointed out in its decision, when an appeal is dismissed because the Board is of the opinion that the appellant is not directly affected by the Director's decision, the Director's decision is then final. It does not go to the Minister for his consideration. The Minister is deprived of the appellant's input and the Board's recommendation.
>
> [140] As indicated above, the Board pointed to Rule 29 of its *Rules of Practice*, suggesting that it is clear that the onus is on the appellant to prove that it is directly affected. Strictly speaking, that is not correct. What the Rule states is this:
>
> > In cases which the Board accepts evidence, any Party offering such evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.
>
> The only onus this Rule imposes is to adduce evidence in support of one's position. The appellant did that. <u>The approval holder and the Director submitted little, if any evidence which conflicted with the evidence of Normtek. Indeed, both the Director and the approval holder expressly declined to engage the appellant on the merits of its objection</u>. By way of example, Normtek argued that the Director's decision approving the landfilling of certain high level naturally occurring radioactive wastes would adversely affect its business of decontaminating equipment of those wastes and disposing of them in subterranean geological formations. In support of this submission, Normtek supplied the Board with the relative costs of the two disposal methods. That evidence was not contradicted by any evidence adduced by the approval-holder or the Director.

> [141] As indicated above, the merits of Normtek's objection were relevant to its directly affected status. The approval holder and the Director expressly declined to get into the merits and so there was very little, if any, 'conflicting evidence' which would engage the second part of the Rule. Furthermore, the onus on the appellant, when its standing is challenged, is not to prove conclusively that it is directly affected. As the Board stated in *Mizera* v *Director* at paragraphs 24 and 26, relying on this Court's decision in *Leduc (County No 25)*, the onus is on the appellant to establish a reasonable possibility that it will be directly affected by the Director's decision."[13] (Emphasis added by the Applicants).

[42] According to the Applicants, *Normtek* contained two holdings: first, appellants are only required to show a reasonable possibility they will be directly affected, and second, each party is required to adduce evidence to support its position.

[43] The Applicants argued that if the Approval Holder had evidence the Applicants were not truthful or evidence contradicting the Applicants' evidence, the Approval Holder should put that evidence forward.

[44] The Applicants submitted they provided evidence and the Approval Holder did not. Therefore, pursuant to Rule 29 of the Board's *Rules of Practice*, the Approval Holder did not put forward any basis to substantiate its position that the Applicants ought not to be granted directly affected status.

[45] The Applicants submitted that, since the Approval Holder and Director did not provide evidence on why the Applicants were not directly affected, the Board must consider the Applicants' evidence, in isolation, against the standard of whether there was a reasonable possibility they would be directly affected by the Director's decision.

B. Board's Analysis

[46] In this reconsideration motion, the Board must consider whether the Applicants are directly affected by the Director's decision or the Activity authorized by the Director's decision, considering the *Normtek* decision.

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[13] See also *Mizera et al* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection, re: Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal No. 98-231-98-234-D; and *Leduc (No 25)* v. *Local Authorities Board* (1987), 84 AR 361, Alta LR (2d) 396 (ABCA).

[47] When the Board considered the question of directly affected in *Reiffenstein*, the Board wrote:

> "[99] The Board relies on the principles articulated in the *Court* decision when determining whether or not a person has standing to bring an appeal. The onus is on the appellant to demonstrate to the Board that there is a reasonable possibility that they will be directly affected by the decision of the Director. The effect must be plausible and relevant to the jurisdiction of the Board in order for the Board to consider it sufficient to grant standing. The Board will examine how the appellant uses the environment where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the appellant's use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. The onus is on the appellant to present a *prima facie* case that he or she is directly affected."[14]

[48] When the Board decided who was directly affected in *Reiffenstein*, the Board wrote:

> "[121] The Board finds that the following Appellants: Mr. Richard Clark, Ms. Wendy Clark, Half-Diamond HC Limited, Mr. Rick Skibsted, Ms. Linda Skibsted, Spruce Coulee Farms Ltd., and Derek McMillan, have demonstrated, on a *prima facie* basis, that they are directly affected by the Director's decision to issue the Approval. The proposed stormwater management system may interfere with the flow of surface water from their lands, which may have an impact on the lands of these Appellants.
>
> [122] The remaining Appellants have based their position on the question of whether they are directly affected on the potential impacts to the intrinsic value and enjoyment of the Rosebud River valley. Respectfully, these concerns relate to the impact the race track will have on their use [and] enjoyment of the river valley, and not the impact of the work authorized under the Approval. The Board finds that [these] Appellants have failed to show that they are personally directly affected by the decision to issue the Approval that is being appealed."

[49] In the Board's view, those portions of the *Reiffenstein* decision that solely considered whether the Applicants were directly affected based on their use of the natural environment (i.e., how the appellant uses the environment where the project will be located and how the effect on the environment will affect the appellant's use and enjoyment of the area) are

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[14] See also *Westridge Utilities Inc.* v. *Director, Southern Region, Environmental Management, Alberta Environment*, re: *Rocky View County* (30 November 2011), Appeal No. 10-032-D (A.E.A.B.) at paragraph 60; *Court* v. *Alberta (Director, Bow Region, Regional Services, Alberta Environment)* (2003), 1 C.E.L.R. (3d) 134, 2 Admin. L.R. (4d) 71 (Alta. Q.B.) at paragraph 75.

no longer sufficient after the *Normtek* decision. In *Normtek*, the Alberta Court of Appeal found the Board's test for determining if an appellant was directly affected was too restrictive. The Court of Appeal was concerned with the Board's interpretation of directly affected, which required the appellant to establish the director's decision would harm the appellant's use of a natural resource near the approved activity.

[50] The Court of Appeal in *Normtek* reviewed section 91(1)(a)(i) of EPEA and stated:

> "[82] It can be seen from the forgoing that limiting 'directly affected' to impacts on the appellant's use of natural resources affected by the activity approved by the Director is not supported by a plain reading of s 91(1)(a)(i) of [EPEA] which requires only that the appellant be 'directly affected by the Director's decision', however that direct effect manifests itself."

[51] Further, the Court of Appeal stated:

> "[96] We do not suggest that harm to a natural resource which an appellant uses or harm to an appellant's use of natural resource would not be sufficient to establish directly affected status. It is simply not a necessary prerequisite to establishing standing where other adverse effects are alleged."

[52] The Board sees similarities between the decision in *Reiffenstein,* which examined the Appellants' and Applicants' use of the environment or use of the area, and the Board's decision in *Normtek,* where the Board rejected Normtek's standing because it was not using a natural resource near the proposed activity. In *Normtek,* in paragraphs 83, 84, 85, and 135, the Court of Appeal was clear other interests may result in a person getting standing.

[53] In *Normtek*, the Court of Appeal approved the Board's interpretation of "affected" as stated by the Board in *Bildson* v. *Alberta (Acting Director, North Eastern Slopes Region)*, (19 October 1998) Appeal No. 98-230-D (A.E.A.B.), 1998 ABEAB 42:

> "[79] The dictionary employed by the Board yielded 'harmed or impaired' as one meaning for 'affected'. On that basis, the Board concluded that an appellant must be harmed or impaired by the activity authorized by the approval being appealed. In other words, the Board interpreted 'affected' to mean adversely affected. The distinction between directly affected and adversely affected arises when others who are directly benefitted by the approval seek standing to support the Director's decision which is being appealed by a party who is directly and adversely affected. The *Concise Oxford Dictionary* which we consulted similarly defines the adjective 'affected' as 'attacked (as by a disease)' or 'acted upon

> physically'. It defines the verb 'affect' as 'attack (as disease)' and as 'producing a material effect on'. These meanings are not unlike those found by the Board over 20 years ago. And so, we too conclude that, without more, 'directly affected' connotes directly affected in an adverse fashion."

[54] The *Water Act* and EPEA both require an appellant to be directly affected, which the Court of Appeal in *Normtek* found, at paragraph 79, implies adversely affected.

[55] Having considered the *Water Act* and the implications of the *Normtek* decision on the *Reiffenstein* decision, the Board finds its directly affected test should be broadened to consider interests beyond an appellant's use of a natural resource in the vicinity of the approved activity.[15] These additional considerations, as detailed in *Normtek* at paragraphs 83, 84, 85, and 135, include adverse effects on safety, human health, or property rights, and any environmental, social, economic, or cultural impacts of the activity, if those impacts directly affect the potential appellant.

[56] The Board reviewed the Court of Appeal's guidance in *Normtek*, including its consideration and agreement with the reasoning in *Kostuch* and *Leduc No. 25* v. *Local Authorities Board*, as it relates to a party's standing.[16] Based on this review, the Board finds the directly affected test provided in section 115(1) of the *Water Act* and section 91(1) of EPEA has three components:

1. whether there is an interest being asserted by the person consistent with those identified in *Normtek*;[17]

2. whether the person demonstrated on a *prima facie*[18] basis there was an adverse impact on the identified interest; and

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[15] See *Court* v. *Alberta Environmental Appeal Board*, 2003 ABQB 456, at paragraph 70.

[16] See *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board*, 2020 ABCA 456; *Kostuch* v. *Alberta (Director, Air and Water Approvals Division, Environmental Protection)* (1995) 17 C.E.L.R. (N.S.) 246 (A.E.A.B.); and *Leduc No. 25* v. *Local Authorities Board*, 1987 ABCA 172.

[17] The interests identified in *Normtek* include adverse effects on environment, safety, human health, or property, and any social, economic, and cultural interests that are directly affected.

[18] See *Black's Law Dictionary Free Online Legal Dictionary* (*2nd Ed.*), which provides:

> "PRIMA FACIE: [Latin] At first sight; on the face of it; so far as can be judged from the first disclosure; presumably. …

3. whether the person demonstrated on a *prima facie* basis the impact on the identified interest was direct.

For a person to be directly affected, they must meet all three components.

[57] With respect to the interest being asserted that would be directly affected, it is important to remember that in *Kostuch*, at paragraph 28, the Board stated, "…the word 'directly' requires the Appellant establish, where possible to do so, a direct personal or private interest (economic, environmental or otherwise) that will be impacted or proximately caused by the Approval in question." However, as confirmed in *Normtek*, the qualifying interests might come from a number of sources, including the appellant's use of the natural resource in the vicinity of the approved activity and adverse effects on the appellant's economic, cultural, safety, or human health-related interests, or property rights. In *Kostuch*, at paragraph 34, one of the considerations was the interest of a directly affected person had to be greater than "the abstract interest of all Albertans in generalized goals of environmental protection."

[58] Trying to define in advance or limit the circumstances in which an appellant might be found directly affected is to be avoided.[19] The Board will interpret directly affected as limiting the class of persons who can appeal a Director's decision.[20] However, the Board retains broad discretion to determine who is directly affected.[21] *Normtek* and other decisions provide several principles that will guide the Board's application of its directly affected test:

1. The Board will determine the directly affected status of an appellant on a case-by-case basis, considering the varying circumstances and facts of each appeal;
2. The Board will examine the adverse effects alleged by the appellant of the Director's decision or the activity authorized by the Director's decision on (a) the environment, (b) human health, (c) safety, or (d) property interests. The Board may also examine (a) social, (b) economic, and (c) cultural

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PRIMA FACIE EVIDENCE: … [E]vidence that is (1) an established fact but not conclusive, or (2) supportive of a judgement until the presentation of contradictory evidence."

[19] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 78.

[20] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 77.

[21] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 78.

impacts alleged by the appellants of the Director's decision or the activity authorized by the Director's decision if those impacts directly affect the appellant's identified interests;[22]

3. The Board will examine the harm to a natural resource, which an appellant uses, or harm to an appellant's use of a natural resource. This may be sufficient to find an appellant directly affected, but it is not a prerequisite to establishing an appellant is directly affected where other adverse effects are alleged;

4. The Board will interpret "directly" as meaning the Director's decision must have a clear and uninterrupted chain of cause and effect, which links the decision to the appellant's identified interest. The effect must be one that will occur immediately or without delay and not at an undetermined time in the future. Some types of future harm, but not all, may be too remote or speculative to be considered direct;[23]

5. The Board will interpret "affected" as meaning the Director's decision or the activity authorized by the Director's decision will harm or impair the appellant's identified interests.[24] Directly affected connotes an adverse impact;[25]

6. The Board will consider the nature and merits of the appellant's notice of appeal when considering if they are adversely affected by the Director's decision or the activity authorized by the Director's decision.[26] The appellant must provide *prima facie* evidence to support their position they

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[22] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraphs 79, 83, 85, and 135.

[23] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraphs 79 and 81. As discussed in *Normtek*, the adverb "directly" restricts or limits the effects that can give rise to standing. The *Concise Oxford Dictionary* defines "directly" as meaning "in a direct manner." It defines "direct" as "straight, not crooked or roundabout, following an uninterrupted chain of causes and effect." There also appears to be a temporal aspect to "direct" and "directly." "Direct" is defined as "immediate." Further, "directly" is defined as "at once, without delay."

[24] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 79; which cites *Bildson* v. *Acting Director of North Eastern Slopes Region, Alberta Environmental Protection, re: Smoky River Coal Limited* (19 October 1998), Appeal No. 98-230-D, (A.E.A.B.), 1998 ABEAB 42, at paragraph 25. The *Concise Oxford Dictionary* defines the adjective "affected" as "acting on physically" or "producing a material effect on." The Court in *Normtek* agreed with the Board previously defining "affected" as meaning "harmed or impaired."

[25] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 79.

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

are directly affected.[27] This evidence need only establish a reasonable possibility they will be directly affected;[28] and

7. The Board may summarily dismiss a notice of appeal where it determines the appellant is not directly affected, but such summary dismissal can only be made after there has been some consideration of the merits of the appellant's appeal.[29]

[59] The Board will apply these principles to its reconsideration of the directly affected status of each of the Applicants.

[60] The Board finds it must determine the issue of standing of the Applicants as a preliminary matter in this proceeding, given this issue is core to the motion before it. In the Board's view, it has no authority under EPEA to grant provisional standing to the Applicants. The case law is clear. The issue of standing must be decided first before the merits can be decided.

[61] The Board must also address: "How should the Director's decision on directly affected be considered in the Board's decision-making on directly affected?"

[62] The Applicants argued the Board should not be applying an interpretation of directly affected that is more limited than the Director's interpretation. They submitted only Ms. Shauna Murphy and Mr. Jon Groves were not found to be directly affected by the Director. The Applicants stated the Director held that Ms. Della Poulsen, Ms. Ruth Bellamy, Ms. Shauna Kenworthy, and their corporate entities were each directly affected.

[63] The Approval Holder and Director made no submissions on this issue.

[64] Section 115(1)(a)(i) of the *Water Act* stipulates two requirements to file a valid Notice of Appeal in response to the Director's decision to issue the Approval:

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[27] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 140, and Rule 29 of the Board's *Rules of Practice.*

[28] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 141. This paragraph referred to *Mizera et al.* v. *Director, Northeast Boreal and Parkland Regions, Alberta Environmental Protection,* re: *Beaver Regional Waste Management Services Commission* (21 December 1998), Appeal Nos. 98-231-98-234-D, at paragraphs 24 and 26, and relied on *Leduc (No 25)* v. *Local Authorities Board* (1987), 84 AR 361 at paragraphs 11 and 12, 54 Alta LR (2d) 396 (ABCA).

[29] *Normtek Radiation Services Ltd.* v. *Alberta Environmental Appeal Board,* 2020 ABCA 456, at paragraph 136.

1. the person filing the Notice of Appeal must have filed a Statement of Concern; and
2. the person filing the Notice of Appeal must be directly affected.

[65] The Applicants met the first part of the test under section 115(1)(a)(i) of the *Water Act* – the requirement to file a Statement of Concern under section 109(1)(a). However, before a Statement of Concern is considered valid, the Director determines if the person filing the Statement of Concern is directly affected. Section 109(1)(a) of the *Water Act* reads as follows:

> "If notice is provided
>
> (a) under section 108(1), any person who is directly affected by the application or proposed amendment …
>
> may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment."

[66] The Board notes the Director accepted the Statements of Concern of Ms. Della Poulsen, Ms. Ruth Bellamy, Ms. Shauna Kenworthy, and their corporate entities on the basis that, in his view, they were directly affected. However, the Director did not accept the Statements of Concern of Ms. Shauna Murphy, Mr. Patrick Murphy, and Mr. Jon Groves on the basis that, in his view, they were not directly affected.

[67] The Board has previously noted in *Ouimet et al.* v. *Director, Regional Support, Northeast Boreal Region, Regional Services, Alberta Environment,* re: *Ouellette Packers (2000) Ltd.*, (28 January 2002) Appeal No. 01-076-D, 2002 ABEAB 1:

> "[24] ...the decision-making function of the Director and the appellate function of the Board are different and that in keeping with this, it is appropriate for the Director to apply a more inclusive test with respect to directly affected than is applied by the Board. The purpose of the directly affected test with respect to the Statement of Concern process, and the Director's decision, is to promote good decision-making taking into account a broad range of interests. The process that the Director is engaged in is non-adversarial information collection – he is collecting information regarding the views and concerns of a broad range of parties to assist him in making a decision…."

[68] The Director's more inclusive approach to directly affected, for the purposes of his decisions, was entirely appropriate. In fact, it is to be encouraged and is in keeping with section 2 of the *Water Act*.

[69] The purpose of Statements of Concern and the Director's decision-making process are reflected in the "Administrative Policy: Statements of Concern (2014)," which is found at Tab 22 of the Director's Record. This policy, established by Alberta Environment and Sustainable Resource Development (now Alberta Environment and Parks ("AEP")), states:

> "... The purpose of [a Statement of Concern] is to notify the Director and the project proponent of the person's concerns and to preserve the person's right to file an appeal following the Director's decision on the application or proposed amendment....
>
> To be considered [a Statement of Concern], the submission must relate to the application or proposed amendment and must identify specific concern(s) with the application or proposed amendment.
>
> Specific Considerations
>
> Below is a listing of criteria to determine if [a Statement of Concern] should be considered valid.

Directly Affected	The person must demonstrate: 1. The application or proposed amendment will affect the person 2. The effect will be to the person; 3. The effect will be direct; and 4. There is a reasonable probability of the effect occurring.
...	....

> Considerable judgement needs to be exercised in determining what constitutes a valid [Statement of Concern] and where there is any doubt the submission should be considered [a Statement of Concern]...."

[70] The purpose of the directly affected test *vis-a-vis* the Board is somewhat different. The Board's decision respecting directly affected determines whether a person (or, in this case, the Applicants) has a right to appeal. As a quasi-judicial body, the Board must follow the Court of Appeal's decision in *Normtek*, and other court decisions regarding standing, and not the

Director's decisions, which were made prior to *Normtek*. It is important to note that the Board's appeal proceedings are more adversarial.

[71] The Board made its determination as to whether the Applicants were directly affected after a full submission process. As part of the Board's process, the Applicants provided their Notices of Appeal and an initial submission arguing how they were each directly affected. They had previously submitted Statements of Concern to the Director. Subsequently, the Approval Holder and Director provided their responses to the Applicants' submissions. Finally, the Applicants provided their rebuttal to the Approval Holder's and Director's submissions. As a result, the Board has more information than when the Director made his decisions.

[72] Having regard to the above, the Board's interpretation of the directly affected status for each of the Applicants must be based on the standing test guided by the principles identified in *Normtek* and other court decisions, and not the Director's interpretation.

[73] The Board must determine: "Are the Applicants directly affected by the Director's decision to issue the Approval, given the guidance set out in *Normtek*?"

[74] The Applicants stated the Board decided in *Reiffenstein* that the onus was on them to show they were directly affected. However, they argued the only onus Rule 29 of the Board's *Rules of Practice* imposed on them was to adduce evidence in support of their position that they were directly affected. The Applicant referred to paragraph 140 of *Normtek.*

[75] The Approval Holder did not file any submissions in response to the Applicants' submissions. Further, the Director made no submissions on this issue.

1. <u>Ms. Elaine Bellamy and Will Farms Ltd.</u>

i. Submissions

[76] Ms. Bellamy is the owner of Will Farms Ltd. Ms. Bellamy and Will Farms Ltd. own property in and around the Rosebud River Valley. One parcel of land is diagonally opposite and immediately east of the Approval Holder's property.

[77] By an application dated May 18, 2020, Ms. Bellamy applied to have a conservation easement placed on approximately 3,200 acres of her land in the Rosebud River

Valley. She was concerned the Approval might impact her ability to place a conservation easement on her land. Her understanding was that, when determining whether to accept a conservation easement, one factor considered by the authorities was the ecological integrity of the land itself, as well as the surrounding land. Ms. Bellamy was concerned the Approval would taint the ecological integrity of the Rosebud River Valley and, in doing so, would negatively impact her land, as well as the surrounding land.

[78] Ms. Bellamy also indicated she participated in recreational activities in the Rosebud River Valley. Specifically, Ms. Bellamy stated she hikes throughout the Rosebud River Valley to view wildlife, including wildlife that depends on the habitat found on the Approval Holder's land.

[79] Ms. Bellamy advised she participated in the development of the *South Saskatchewan Regional Plan.* As a result, Ms. Bellamy argued she has a direct interest in ensuring the intent of the *South Saskatchewan Regional Plan* was met.

ii. Discussion

[80] The Board finds Ms. Bellamy and Will Farms Ltd., as the owners of land immediately opposite to the Approval Holder's property, have a property interest, which is one of the interests recognized in *Normtek*. Therefore, Ms. Bellamy and Will Farms Ltd. have met this component of the directly affected test.

[81] The Board also accepts Ms. Bellamy's argument that an interest may arise because of adverse social effects on a person as she uses the Rosebud River Valley for recreational purposes. Again, this is a personal interest that is recognized in Normtek, and as such, Ms. Bellamy has again met this component of the directly affected test.

[82] The second and third components of the "directly affected" test are factual. Have Ms. Bellamy and Will Farms Ltd. provided *prima facie* evidence which shows the Director's decision or the Activity may directly affect their property interests or Ms. Bellamy's social interests to recreate on in the Rosebud River Valley? The evidence provided must show a causal connection between the potential impact on these interests and the Director's decision or the Activity authorized by the Approval.

[83] In the Board's view, Ms. Bellamy and Will Farms Ltd., as a landowner and as an individual exercising various recreation opportunities offered by her land and the Rosebud River Valley, have a property interest and social interest, both recognized in *Normtek.*

[84] Ms. Bellamy and Will Farms Ltd. claim these interests would be negatively impacted by the Activity as follows:

1. the Activity would negatively impact Ms. Bellamy by developing within an otherwise pristine environment on adjacent land;
2. the Activity would adversely affect their property rights, specifically their desire to place a conservation easement on their land, by diminishing the ecological value of their land and reducing the likelihood they would be able to successfully apply for a conservation easement; and
3. the Activity would negatively impact Ms. Bellamy's ability to enjoy the recreational opportunities offered by her land and the Rosebud River Valley.

[85] The Board finds the arguments provided by Ms. Bellamy and Will Farms Ltd. regarding the Activity negatively impacting their property interest are too remote. The evidence presented, even on a *prima facie* basis, did not show a sufficiently close causal connection between the Activity, specifically the infilling of the wetlands and the stormwater management system on the Approval Holder's lands, and its impacts on Ms. Bellamy's and Will Farms Ltd.'s interests, including placing a conservation easement.

[86] The potential impact of the Activity authorized by the Approval on Ms. Bellamy's and Will Farms Ltd.'s property interest is too remote. No evidence was presented to suggest that modifying and infilling wetlands 1, 2, 4, and 5, and the construction, operation, and maintenance of the proposed stormwater management system authorized by the Approval would interfere with the conservation easement. Ms. Bellamy and Will Farms Ltd. did not present any evidence to identify the ecological value of their land and how it would be diminished by the Activity on private lands located across the Rosebud River.

[87] Further, based on the submissions, the Board finds there was minimal or no evidence to conclude Ms. Bellamy's ability to enjoy recreational opportunities on her land would be negatively impacted by the Director's decision to grant the Approval. The Board finds Ms. Bellamy did not show her personal right or interest to recreate in the Rosebud River Valley

was discernable from a general interest of other Albertans who recreate in the Rosebud River Valley, which may be impacted by the Activity. The Board finds the nature of Ms. Bellamy's interest is a general one.

[88] Although Ms. Bellamy submitted there was some connection to a wildlife corridor, she did not provide any evidence or site-specific factual details to support her claim. As a result, the Board finds Ms. Bellamy failed to meet her onus of providing *prima facie* evidence to demonstrate the Activity authorized by the Approval has the potential to adversely impact a wildlife corridor.

[89] Finally, with respect to Ms. Bellamy's arguments regarding her interest as a former panel member in ensuring the aims of the *South Saskatchewan Regional Plan* were complied with, the Board notes Ms. Bellamy did not provide any site-specific compliance concerns regarding the Activity. In the Board's view, the Government of Alberta's existing regulatory framework and processes, under EPEA or the *Water Act*, are the appropriate mechanisms for ensuring compliance, including addressing the legitimate concerns of individual Albertans. However, the Board finds Ms. Bellamy did not identify how the Activity could potentially impact the aims of the *South Saskatchewan Regional Plan*. Furthermore, the Board finds Ms. Bellamy's concerns regarding the regulatory regime are too remote. Ms. Bellamy's history as a former panel member of the *South Saskatchewan Regional Plan* does not, in the Board's view, entitle her to a special status of being "directly affected" for that reason alone.

[90] The Board finds Ms. Bellamy raised concerns regarding the Approval Holder's racetrack development. The Board does not have jurisdiction over the racetrack development. The only matter over which the Board has authority is whether Ms. Bellamy and Will Farms Ltd. are "directly affected" by the Director's decision to issue the Approval authorizing the Activities. Accordingly, all other issues regarding the Approval Holder's racetrack development raised by Ms. Bellamy are outside the Board's jurisdiction.

[91] The Board finds Ms. Bellamy and Will Farms Ltd. are not directly affected by the Approval or the Activity authorized by the Approval. Accordingly, the Board denies Ms. Bellamy and Will Farms Ltd. standing in the appeals.

2. Ms. Della Poulsen and Cactus Coulee Farms Inc.

i. Submissions

[92] Ms. Della Poulsen and Cactus Coulee Farms Inc. own four sections of land four miles from the Activity. The Rosebud River runs through one section of the land downstream from the Activity.

[93] Ms. Della Poulsen explained her family and extended family use the Rosebud River for recreation purposes. They swim, canoe, hike, and camp along the Rosebud River through their property and neighbouring properties. They submitted the Rosebud River, as it currently flows, is pristine, and there are few sources of contaminants for the Rosebud River.

[94] As downstream users, they were concerned with the impact of particulates on the Rosebud River system from the proposed stormwater management system. They noted the system proposed only settles out particles larger than 75 µm, which they believed is insufficient to protect the integrity of the Rosebud River Valley.

[95] As a condition to the Approval, they advocated for the retention of smaller particulates from the stormwater management system, including chemicals like oil and gas. Without retention of those particulates and chemicals, they were concerned their downstream use of the Rosebud River would be impacted, preventing them from making full use of their property rights. They argued more stringent controls in the proposed stormwater plan were needed to ensure the water their family was swimming in or using was not tainted with oil slicks, gasoline, or increased sediment.

ii. Discussion

[96] In the Board's view, the core grounds for Ms. Poulsen's and Cactus Coulee Farms Inc.'s concerns were that, as landowners and as an individual using the Rosebud River for recreation, they have a property interest and social interest, as recognized in *Normtek*, that could be negatively impacted by the Activity as follows:

1. the Activity (the stormwater management system) would negatively impact Ms. Poulsen's and her family's ability to use the Rosebud River for recreational purposes;

2. the Activity and the conditions in the Approval would adversely affect their downstream property rights by preventing them from making full use of their property interest and social interests. Specifically, they advocated for more stringent controls in the Approval with respect to the proposed stormwater management system plan, specifically the retention of smaller particulates and chemicals, including oil and gasoline.
3. the Activity would negatively impact the Rosebud River system. They were concerned about the impacts sedimentation, particulate matter, and chemicals, including hydrocarbons, would have on the Rosebud River from the proposed stormwater management system.

[97] In addition, Ms. Poulsen and Cactus Coulee Farms Inc. raised general concerns regarding potential adverse effects arising from the Approval Holder's racetrack development.

[98] The Board finds Ms. Poulsen and Cactus Coulee Farms Inc., as owners of a section of land through which the Rosebud River runs, four miles downstream from the Approval Holder's property, have a property interest, which is one of the interests recognized in *Normtek*. Therefore, Ms. Poulsen and Cactus Coulee Farms Inc. have met this component of the directly affected test.

[99] The Board also accepts Ms. Poulsen's submission that an interest may arise regarding adverse impacts on a social interest, her recreational use of the land. Again, this is an interest that is recognized in *Normtek*, and as such, Ms. Poulsen has met this component of the directly affected test.

[100] Having found Ms. Poulsen and Cactus Coulee Farms Inc. have met the first component of the test, the Board will consider the second and third components of the "directly affected" test. These two components of the test are factual. Have Ms. Poulsen and Cactus Coulee Farms Inc. provided *prima facie* evidence which shows the Director's decision or the Activity authorized by the Approval may directly affect their property interests or Ms. Poulsen's interests to recreate in the Rosebud River adjacent to her lands? That is, has their evidence shown a reasonable possibility of a sufficiently close causal connection between the potential impact on their interests and the Director's decision or the Activity authorized by the Approval?

[101] The Board finds the concerns raised by Ms. Poulsen and Cactus Coulee Farms Inc. are too remote and speculative. Their concerns were based on the potential discharge of

sedimentation, particulate matter, and chemicals related to the proposed stormwater management system creating an adverse effect on their property interests four miles downstream. The Board finds that no evidence was presented to support the view that the construction, operation, and maintenance of the stormwater management system would impact the Rosebud River four miles downstream in such a way to impact Ms. Poulsen's right to use her land or enjoy recreational opportunities on her land. The Board finds no reasonable possibility there would be any impacts four miles downstream on Ms. Poulsen or Cactus Coulee Farms Inc.

[102] The Board interprets the term "directly" to mean there must be an unbroken chain of causation between the Director's decision or the Activity authorized by the Approval and the harm to Ms. Poulsen and Cactus Coulee Farms Inc. The stronger the links in the chain (i.e., the greater the proof Ms. Poulsen and Cactus Coulee Farms Inc. would be harmed and that harm stems from the Approval or the Activity in question), the more likely the Board will find they have standing.

[103] In the Board's opinion, Ms. Poulsen and Cactus Coulee Farms Inc. have not established a sufficiently close causal connection between the Director's decision or the Activity and the impact on Ms. Poulsen and Cactus Coulee Farms Inc.

[104] Further, the Board finds the Activity on the Approval Holder's private land will not impact Ms. Poulsen's or her family's ability to recreate along the Rosebud River.

[105] Having regard to the above, the Board finds Ms. Poulsen and Cactus Coulee Farms Inc. are not directly affected by the Activity authorized by the Approval. Accordingly, the Board denies Ms. Poulsen and Cactus Coulee Farms Inc. standing in the appeals.

3. Mr. Jon Groves

i. Submissions

[106] Mr. Jon Groves is a professional photographer, naturalist, and ecotourism guide who operates in the Rosebud River Valley. He lives three kilometres east-northeast of the Activity site. Mr. Groves submitted the Activity affects his economic interests in two ways: as a tour group operator and as a wildlife photographer.

[107] Mr. Groves explained he runs three tours through the Rosebud River Valley per year. Each tour consists of three individuals, each of whom pays him $500/day for five days. For example, prior to the pandemic, he had six individuals from the United States confirm their tour bookings for 2020.

[108] Mr. Groves stated he has agreements in place with landowners to run his tours through their properties. Those agreements cover the properties that are directly adjacent to the Approval Holder's property. Mr. Grove's tours often run along the Approval Holder's property line.

[109] Mr. Groves explained the biggest draw for his clients is the birds that inhabit the Rosebud River Valley, particularly the golden eagles that nest roughly one kilometre from the Approval Holder's property. The golden eagles are the principal reason clients will retain him to guide them through the Rosebud River Valley.

[110] Mr. Groves said the principal prey for the golden eagles are ducks that inhabit, forage, and rely upon wetlands 1, 2, 4, and 5 on the Approval Holder's property. According to Mr. Groves, the golden eagles reliably harvest the ducks located on wetlands 1, 2, 4, and 5, providing unique photographs and memories for his clients.

[111] Mr. Groves submitted that by modifying and infilling wetlands 1, 2, 4, and 5, the golden eagles would lose critical foraging habitat, and they may refuse to nest in the Rosebud River Valley going forward. Mr. Groves said if this occurred, it would have a significant impact on his economic interests.

[112] According to Mr. Groves, the bank swallows that nest along the Rosebud River on the Approval Holder's property are also a significant draw for his clients. The bank swallows' principal foraging habitat is wetlands 1, 2, 4, and 5. Infilling and modifying those wetlands would significantly curtail the bank swallows' population and their future ability to nest on the Rosebud River.

[113] In addition to the tour groups he operates, Mr. Groves stated he photographs the wildlife located in the Rosebud River Valley, including the golden eagles and bank swallows.

Photography is a source of income for him. Mr. Groves noted infilling and modifying wetlands 1, 2, 4, and 5 would impact wildlife habitat in the river valley because that habitat would be lost.

[114] According to Mr. Groves, the Rosebud River Valley is unique in Southern Alberta, and there are few areas as untouched and pristine as that valley. It is a consistent draw for Mr. Groves' clients and his photography business. Mr. Groves stated infilling and modifying wetlands 1, 2, 4, and 5 would cause a significant adverse effect to his business by adversely affecting the Rosebud River Valley.

ii. Discussion

[115] In the Board's view, the core grounds for Mr. Groves' concerns are that, as a professional photographer, naturalist, and ecotourism guide that operates in the Rosebud River Valley, he has an economic interest as recognized in *Normtek*, which would be negatively impacted by the Activities authorized by the Approval as follows:

1. the Approval would negatively impact his economic interests as a tour group operator whose clients retain him principally to see the birds inhabiting the Rosebud River Valley. Mr. Groves indicated that by removing critical duck and bank swallows foraging habitat, the golden eagles that nest approximately one kilometre from the Approval Holder's property and the bank swallows that nest along the Rosebud River on the Approval Holder's Property would be particularly impacted; and
2. the Approval would negatively impact his economic interests as a wildlife photographer.

[116] The Board accepts Mr. Groves' submission that a right may arise regarding adverse economic effects on an individual with respect to his work as a photographer and tour guide.

[117] Having found Mr. Groves meets the first component of the test, the Board will consider the second and third components of the "directly affected" test. These components are factual. Has Mr. Groves provided *prima facie* evidence which shows the Director's decision or the Activity authorized by the Approval may directly affect Mr. Groves' economic interests? That is, the evidence provided must show a sufficiently close causal connection between the potential impact on Mr. Groves' economic interests and the Director's decision or the Activity.

[118] The Board finds the Approval, which allows for modifying and infilling of wetlands 1, 2, 4, and 5, may impact Mr. Groves' economic interests as a tour group operator and as a wildlife photographer. Mr. Groves provided evidence the Activity may adversely affect his economic interests as follows:

1. he operates a tour group business on third parties' lands (which he has agreements in place to use) which includes lands that are directly adjacent to the Approval Holder's property;
2. he will lose business because the golden eagles, ducks, and bank swallows that he depends upon to derive an income will no longer be able to use wetlands 1, 2, 4, and 5 as habitat;
3. the Approval will reduce the available habitat for the golden eagles, ducks, and bank swallows by infilling or modifying wetlands 1, 2, 4, and 5; and
4. the golden eagles, which are the principal reason Mr. Groves' clients retain him, nest approximately one kilometre from the Approval Holder's property, and reliably harvest the ducks located on wetlands 1, 2, 4, and 5, providing unique photographs and memories for Mr. Groves' clients.

[119] Having regard to the above, the Board finds Mr. Groves is directly affected by the Activity authorized by the Approval. The Board grants Mr. Groves standing in the appeals.

4. Ms. Shauna Kenworthy

i. Submissions

[120] Ms. Shauna Kenworthy is a licensed real estate agent. She currently lives on a parcel of land owned by Mr. Rick Skibsted and Ms. Linda Skibsted, which is directly adjacent to the Approval Holder's property. Ms. Kenworthy stated she lives on the same property the Board held, made Mr. Skibsted directly affected.

[121] Ms. Kenworthy argued she was directly affected by the Approval in three ways: as a licensed realtor, a photographer, and a recreational user.

[122] As a licensed realtor, Ms. Kenworthy submitted infilling and modifying wetlands and constructing a stormwater management system in the Rosebud River Valley would have economic consequences for surrounding land values. The primary draws for properties in the Rosebud River Valley are residential and recreational properties. She submitted the

consequences associated with the Activity would impact her ability to earn an income because it would diminish the ecological integrity of the Rosebud River Valley. If that integrity was threatened, the attraction of the Rosebud River Valley to prospective buyers would diminish.

[123] As a photographer, Ms. Kenworthy said she primarily photographs the landscape, birds, and flowers in the Rosebud River Valley. She typically sells the photographs or donates them to charity or cultural events. The birds she photographs are situated on or around the Approval Holder's property. Those birds, including bank swallows, golden eagles, and prairie falcons, depend upon the wetlands subject to the Approval. Without those wetlands, Ms. Kenworthy believed the birds she photographs would likely have insufficient habitat to survive and would relocate.

[124] As a recreational user, Ms. Kenworthy explained she uses the Rosebud River Valley, including the lands surrounding the Approval Holder's property, for recreational purposes, including hiking, canoeing, and fossil hunting.

[125] Ms. Kenworthy stated the wetlands on the Approval Holder's property are part of the habitat in the Rosebud River Valley that is ecologically untouched. She submitted infilling or modifying the wetlands would permanently change the valley by removing habitat for wildlife and changing the surrounding properties, including the property upon which she currently resides. She stated the wildlife and ecological integrity of the Rosebud River Valley are part of the reason she was able to derive enjoyment from recreating the valley, but once that is permanently changed, she would no longer be able to enjoy the Rosebud River Valley in the same way as she used to.

ii. Discussion

[126] The core grounds for Ms. Kenworthy's concerns are that, as an occupant residing on Mr. Skibsted's lands located directly adjacent to the Approval site, as a licenced realtor, as a photographer, as a philanthropist, and as a recreational user, she had property, economic, and social interests, as recognized in *Normtek*, which would be negatively impacted by the Activity authorized by the Approval as follows:

1. the Activity authorized by the Approval would negatively impact her economic interests as a realtor;
2. the Activity would negatively impact her economic interests and social interests as a photographer;
3. the Activity would negatively impact her ability to use the Rosebud River Valley, including the property surrounding the Approval site, for recreational purposes; and
4. she believed the Activity authorized by the Approval would change the ecological integrity, wildlife habitat, and wildlife of the Rosebud River Valley, including the property Ms. Kenworthy currently resides, thereby impacting property, social, and economic interests for Ms. Kenworthy.

[127] The Board finds Ms. Kenworthy, as an occupant of land directly adjacent to the Approval site, has a property interest to satisfy the first component of the "directly affected" test.

[128] The Board accepts Ms. Kenworthy's submission that an interest may arise regarding adverse impacts on a social interest, her recreational use of the land. Accordingly, the Board finds the nature of Ms. Kenworthy's interest is a personal one and should be regarded as an interest as recognized in *Normtek.*

[129] The Board accepts Ms. Kenworthy's submission that the Activity could affect her economic interests as a photographer and social interest to recreate on the lands she resides on adjacent to the Approval Holder's property.

[130] Having found Ms. Kenworthy meets the first component of the test, the Board will consider the second and third components of the "directly affected" test. These components are factual. Has Ms. Kenworthy provided *prima facie* evidence which shows the Director's decision or the Activity authorized by the Approval may directly affect her economic, property, or social interests? That is, the evidence provided must show a causal connection between the potential impact on Ms. Kenworthy's interests and the Director's decision or the Activity.

[131] The Board finds the first concern raised by Ms. Kenworthy, arguing the Activity would negatively impact her economic interests as a realtor, is speculative and too remote. Ms. Kenworthy asserted, without any supporting evidence, that the Activity would have economic consequences on surrounding land values and, therefore, would negatively impact her business as a realtor. The specific impact or harm asserted by Ms. Kenworthy must be directly

attributable to the Activity, which is the infilling of two wetlands, the modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system, and not the racetrack being built by the Approval Holder. The Board finds Ms. Kenworthy failed to establish a direct effect on her economic interest as a realtor that is directly attributable to the Activity.

[132] The Board accepts Ms. Kenworthy's concern regarding the Approval having a direct effect on her economic interests as a photographer. Ms. Kenworthy provided evidence the Activity would adversely affect her economic interest as follows:

1. she photographs bank swallows, golden eagles, and prairie falcons which depend on the five wetlands situated on the Approval Holder's property. She sells or donates the photographs to charity or cultural events; and
2. without those wetlands, the colonies of birds she photographs would likely have insufficient habitat to survive and would relocate.

[133] The Board rejects Ms. Kenworthy's argument the Activity would negatively impact her ability to use the Rosebud River Valley, including the property surrounding the Approval site, for recreational purposes. Based on her submissions, the Board finds there was minimal or no evidence to conclude Ms. Kenworthy's ability to enjoy recreational opportunities offered on these lands would be negatively impacted by the Director's decision to grant the Approval. Furthermore, the evidence Ms. Kenworthy provided did not show her use of the Rosebud River Valley was different from that of the ordinary Albertan, as per *Kostuch.* On that basis, the Board concludes Ms. Kenworthy has not shown a causal connection between Ms. Kenworthy's concerns regarding recreational use on surrounding lands and the Approval or the Activity authorized by the Approval.

[134] The Board rejects Ms. Kenworthy's concerns that the Approval would change the ecological integrity, wildlife habitat, and wildlife of the Rosebud River Valley, including the property where Ms. Kenworthy currently resides. Ms. Kenworthy did not provide any evidence to support her claims. As a result, the Board finds Ms. Kenworthy failed to meet her onus of establishing *prima facie* evidence for the purpose of demonstrating the Approval would change the ecological integrity, wildlife habitat, and wildlife of the Rosebud River Valley, including the property where Ms. Kenworthy currently resides.

[135] As noted by the Court of Appeal in *Normtek*, the enabling legislation does not confer discretion to the Board to hear an appeal of an approval by a person who is not directly affected by that approval based on a general public interest standing.

[136] In the Board's view, Ms. Kenworthy cannot base her standing on a general interest or desire to prevent any ecological, wildlife habitat, and wildlife harms resulting from the Approval. Rather, Ms. Kenworthy must show these harms "directly affect" her. This requires Ms. Kenworthy to show a discernible effect, i.e., some interest other than the abstract interest of all Albertans in generalized goals of environmental protection as discussed in *Kostuch*.

[137] The Board notes Ms. Kenworthy now resides on the land owned by Mr. Skibsted, whose land was previously found by the Board as potentially impacted by the proposed stormwater management system. Ms. Kenworthy argued that given Mr. Skibsted was granted standing; she should also be granted standing for residing on his land.

[138] The Board accepts this argument. As an occupant, Ms. Kenworthy has the right to use Mr. Skibsted's land. Her use of Mr. Skibsted's land is a property interest, as identified in *Normtek*, which is not like any other Albertan except for Mr. Skibsted. In making this finding, the Board notes Ms. Kenworthy's use of this land may be different from Mr. Skibsted's use of the land.

[139] Having regard to Ms. Kenworthy's economic interest as a photographer, the Board finds she is directly affected by the Activity authorized by the Approval. Accordingly, the Board grants Ms. Kenworthy standing in the appeals.

5. Ms. Shauna Murphy

i. Submissions

[140] Ms. Shauna Murphy is a professional musician who lives in the Hamlet of Rosebud. She plays the piano for the Rosebud Theatre and teaches piano in and around the Hamlet of Rosebud.

[141] Ms. Murphy submitted she was negatively affected by the Approval in two ways: as a professional musician, and as a recreational user.

[142] As a professional musician, she stated her ability to earn an income was dependent on the success of the Rosebud Theatre. She explained, on average, the theatre welcomes 20,000 to 30,000 patrons per year. In its best year, the theatre exceeded 40,000 patrons. Ms. Murphy submitted the ecological integrity of the Rosebud River Valley was key to sustaining the Rosebud Theatre. Without it, one major draw for patrons would be lost. She submitted those patrons expect the beauty of the Rosebud River Valley, and they might otherwise not attend the theatre if the Rosebud River Valley were altered by the Approval.

[143] Ms. Murphy attached two surveys, one from the Hamlet of Rosebud and one from the Rosebud Theatre. With respect to the Hamlet of Rosebud's survey, she stated that 22 percent of respondents selected natural beauty and outdoor activities as either first or second of the most important reasons they visit the hamlet. With respect to the Rosebud Theatre's survey, she stated the responses repeatedly mentioned the peaceful ecology as a driving factor for visitation. She argued the surveys confirmed maintaining the integrity of the Rosebud River Valley was key for the Hamlet of Rosebud and the Rosebud Theatre patrons.

[144] As a recreational user, she said she often brings visitors to the edge of the Approval Holder's property to show them the rare birds and other animals that depend upon the wetlands that are the subjects of the Approval. Ms. Murphy stated she hikes or canoes immediately adjacent to the Approval Holder's property because the wetlands on that property are unique in the Rosebud River Valley and the otherwise dry region around the valley.

[145] In her original Statement of Concern, Ms. Murphy stated she believed the Approval Holder's racetrack proposal would negatively affect her life.

ii. Discussion

[146] The core grounds for Ms. Murphy's concerns are that, as a professional musician who lives and works in the Hamlet of Rosebud and as a recreational user of the Rosebud River Valley, she has economic and social interests, as recognized in *Normtek*, which would be negatively impacted by the Approval and the Activity authorized by the Approval as follows:

1. the Approval would negatively impact her ability to earn an income as a professional pianist playing at the Rosebud Theatre; and

2. the Approval would negatively impact her ability to use adjacent land and the Rosebud River Valley for recreational purposes.

[147] The Board accepts Ms. Murphy's submission that an interest may arise regarding adverse social effects on her recreational use. Accordingly, the Board finds the nature of Ms. Murphy's interest is a personal one and should be regarded as an interest within the meaning of *Normtek*.

[148] Second, the Board accepts Ms. Murphy's submission that a right may arise regarding adverse economic effects on an individual as a professional musician.

[149] Having found Ms. Murphy meets the first component of the test, the Board will consider the second and third components of the "directly affected" test. These components are factual. Has Ms. Murphy provided *prima facie* evidence which shows the Director's decision or the Activity authorized by the Approval may directly affect her economic or social interests? That is, her evidence must show a causal connection between the potential impact of the Director's decision or the Activity and Ms. Murphy's interests.

[150] In the Board's view, Ms. Murphy has not met this test. In reviewing her submissions, the Board finds Ms. Murphy was concerned with the racetrack development in general. However, as the Board noted earlier, general concerns regarding the racetrack development are beyond the Board's authority in these appeals.

[151] Ms. Murphy argued that, based on two surveys, one conducted for the Hamlet of Rosebud and the other for the Rosebud Theatre, the Approval would harm the Rosebud Theatre and, therefore, negatively impact her income as a professional pianist playing at the Rosebud Theatre. However, the Board finds the attached surveys did not clearly support her arguments or conclusions.

[152] With respect to the first survey, the Board's review indicates it provided a compilation of responses from unidentified individuals regarding the Rosebud community (e.g., events, businesses, location, etc.). With respect to the second survey, the Board's review indicates it provided a compilation of 146 responses from unnamed individuals from various places in Alberta, British Columbia, Saskatchewan, Ontario, and California regarding feedback on their Rosebud visitor experience. There is no discussion in these surveys of a connection

between Ms. Murphy's concerns regarding potential impacts on Rosebud Theatre attendance and the Approval or the Activity authorized by the Approval.

[153] In the Board's view, the specific economic impact or harm argued by Ms. Murphy must be directly attributable to the Approval under appeal, which allows for the infilling of two wetlands, the modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system at 22-027-21-W4M, and not the racetrack being proposed by the Approval Holder. Here, the Board finds Ms. Murphy failed to establish a direct effect on her interests which are directly attributable to the Approval, or the Activity authorized by the Approval, under appeal.

[154] Having regard to the above, the Board finds Ms. Murphy failed to meet her onus of providing *prima facie* evidence to demonstrate her ability to earn an income as a professional pianist playing at the Rosebud Theatre would be negatively impacted by the Director's decision or the Activity.

[155] The Board has not found a reasonable possibility that modifying and infilling wetlands 1, 2, 4, and 5 on the Approval Holder's private land would impact Ms. Murphy's ability to hike or canoe immediately adjacent to the Approval Holder's property.

[156] In her submissions, Ms. Murphy, who lives in the Hamlet of Rosebud, indicated she uses the Rosebud River and immediately adjacent land for various forms of recreation, including viewing rare birds and other animals on the wetlands identified in the Approval, canoeing, hiking, nature appreciation, and other aesthetic purposes related to the wetlands. She expressed concerns about the rare birds and other animals that depend upon the wetlands and the uniqueness of the wetlands in an otherwise dry region around the Rosebud River Valley.

[157] In the Board's view, the types of concerns expressed by Ms. Murphy are part of the generalized interest of all Albertans in protecting the environment, as in *Kostuch* at paragraph 25. The Board finds the generalized concerns identified by Ms. Murphy, in this case, were not specific enough to make a finding of directly affected.

[158] Having regard to the above, the Board finds Ms. Murphy is not directly affected by the Approval or the Activity authorized by the Approval. Accordingly, the Board denies Ms. Murphy standing in the appeals.

6. Mr. Stanley Riegel

i. Submissions

[159] Mr. Stanley Riegel resides in the Hamlet of Rosebud. Mr. Riegel explained he is the proprietor of the Rosebud Pharmacy, a member of the Rosebud Community Enhancement Society, and a board member of the Rosebud Historical Society, which oversees the Rosebud & District Centennial Museum. Also, Mr. Riegel indicated he will be opening a train museum in the Hamlet of Rosebud.

[160] Mr. Riegel submitted he was negatively affected by the Approval in four ways: as a Rosebud Hamlet resident, as a business person, as a member of the Rosebud Community Enhancement Society, and as a board member of the Rosebud Historical Society.

[161] In his roles as a business person, a Rosebud Community Enhancement Society member, and a Rosebud Historical Society board member, Mr. Riegel stated that maintaining the ecological integrity of the Rosebud River Valley is key. He stated the long-term vision for the Hamlet of Rosebud is heavily reliant on maintaining and protecting the Rosebud River Valley.

[162] Mr. Riegel said Rosebud is not a town or city and, therefore, it is governed by Wheatland County. He explained the Rosebud Community Enhancement Society works with Wheatland County to develop the community. Mr. Riegel indicated this Society specifically assists Wheatland County with developing tourism within and around the hamlet.

[163] Mr. Riegel submitted the principal goal of the Rosebud Community Enhancement Society is to make the hamlet a place where people want to visit, then decide to stay because they have experienced the beauty of the area. Based on his personal discussions with visitors

and a survey conducted by the Hamlet of Rosebud,[30] Mr. Riegel stated persons come to the community because they are interested in two things: the theatre and the natural environment, specifically the peace they feel as they descend into the valley. Mr. Riegel indicated he has had many conversations with bird watchers in particular.

[164] Mr. Riegel submitted the Rosebud Community Enhancement Society sees the natural environment as a key contributor to developing tourism. Mr. Riegel indicated they are working with Wheatland County to build walking trails throughout the Rosebud River Valley, and they are promoting Rosebud River Valley as an ecological jewel in the region.

[165] Mr. Riegel submitted there are few other areas in the region that boast a river valley akin to the Rosebud River Valley. He indicated the valley supports a diverse array of rare species and provides tremendous recreational activities, including canoeing, hiking, swimming, and bird watching, the latter being a draw for tourists.

[166] Mr. Riegel stated the work contemplated by the Approval would damage the ecological integrity of the Rosebud River Valley. Mr. Riegel submitted the Activity would spoil an otherwise natural environment that has largely escaped development, and it would damage the Hamlet of Rosebud's reputation as a place that promotes the environment and has access to an environmental jewel in the Rosebud River Valley. Mr. Riegel submitted the Approval would harm the Rosebud Community Enhancement Society's ability to promote the community as a place where natural beauty meets culture.

ii. Discussion

[167] The core grounds for Mr. Riegel's concerns are that, as a resident of the Hamlet of Rosebud, a Hamlet of Rosebud business owner, a member of the Rosebud Community Enhancement Society, and a board member of the Rosebud Historical Society, his economic, social, and cultural interests, as recognized in *Normtek*, would be negatively impacted by the Activity as follows:

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[30] See Hamlet of Rosebud Visitor Experience Feedback and Collated Responses to the Community Survey, Appellants' submissions, dated March 3, 2021.

1. the Activity authorized by the Approval would damage the ecological integrity of the Rosebud River Valley by developing an otherwise natural environment, which would result in damage to the Hamlet of Rosebud's reputation as a place that promotes the environment and access to the Rosebud River Valley. In doing so, the Approval would harm the Rosebud Community Enhancement Society's ability to promote the community as a place where natural beauty meets culture;
2. the Activity authorized by the Approval would damage the ecological integrity of the Rosebud River Valley, which would negatively impact the Rosebud Community Enhancement Society's ability to promote the Rosebud River Valley and develop tourism opportunities within and around the Hamlet of Rosebud; and
3. the Activity would affect Mr. Riegel's role as a businessperson in the Hamlet of Rosebud and as a Rosebud Community Enhancement Society member to maintain and protect the ecological integrity of the Rosebud River Valley.

[168] In addition, Mr. Riegel raised general concerns regarding potential adverse effects arising from the racetrack development, including disturbance from any construction that would exacerbate the potential for damage, irrevocably altering habitat.

[169] The Board finds Mr. Riegel, owner of the Rosebud Pharmacy and a residence in the Hamlet of Rosebud, which is approximately three miles from the Approval site, has a property right that satisfies the first component of the "directly affected" test.

[170] The Board accepts Mr. Riegel's submission that a personal right or private interest may arise regarding cultural, economic, and social effects on Mr. Riegel, as an individual member of the Rosebud Community Enhancement Society or as a board member of the Rosebud Historical Society, as per *Ouimet*.

[171] Having found Mr. Riegel meets the first component of the test, the Board will now consider the second and third components of the "directly affected" test. These components are factual. Has Mr. Riegel provided *prima facie* evidence that shows the the Director's decision or the Activity may have a direct effect on his cultural, economic, or social interests? That is, the evidence provided must show a reasonably close causal connection between the potential impact of the Approval or Activity authorized by the Approval and Mr. Riegel's interests. The Board must consider the status of Mr. Riegel to determine if he is individually and personally affected by the Approval or the Activity authorized by the Approval.

[172] In the Board's view, Mr. Riegel has not met this test. In reviewing his submissions, Mr. Riegel is concerned with the racetrack development in general. However, as the Board noted earlier, general concerns regarding the racetrack development are beyond the Board's authority in these appeals.

[173] Concerning Mr. Riegel's position as a member of the Rosebud Community Enhancement Society and a board member of the Rosebud Historical Society, there is no evidence to show Mr. Riegel is authorized to represent the Rosebud Community Enhancement Society or the Rosebud Historical Society in these appeals. Accordingly, the Board finds any submissions or evidence attributed to the Rosebud Community Enhancement Society or the Rosebud Historical Society by Mr. Riegel must be given minimal weight, as these two societies are not properly before the Board in these appeals. The Board notes no Notices of Appeal were filed on behalf of the societies.

[174] Concerning his first issue, Mr. Riegel argued, based on the survey conducted by the Hamlet of Rosebud, that the Approval would harm the Rosebud Community Enhancement Society's ability to promote the community as a place where natural beauty meets culture. However, this survey does not clearly support this argument.

[175] As noted above, the Board's review of the survey indicated that the Hamlet of Rosebud's survey provided a compilation of responses from unidentified individuals regarding the Rosebud community (e.g., events, businesses, location, etc.). There was no discussion in this survey of a connection between Mr. Riegel's concerns regarding potential impacts to the Rosebud Community Enhancement Society's ability to promote the Rosebud River Valley and develop tourism opportunities within and around the Hamlet of Rosebud and the Director's decision or the Activity. The specific impacts or harms argued by Mr. Riegel must be directly attributable to the Approval under appeal, which allows for the infilling of two wetlands, the modification of three wetlands, and the construction, operation, and maintenance of a stormwater management system, and not the racetrack being proposed by the Approval Holder. Here, the Board finds Mr. Riegel failed to establish a direct effect on him that is directly attributable to the Approval under appeal or the Activity.

[176] The Board has not found a reasonable possibility that modifying and infilling wetlands on the Approval Holder's private land would impact Mr. Riegel personally, his business in the Hamlet of Rosebud, or as a member of the Rosebud Community Enhancement Society or Rosebud Historical Society. The Board finds Mr. Riegel is not directly affected by the Approval or the Activity authorized by the Approval. Accordingly, the Board denies Mr. Riegel standing in the appeals.

C. Summary

[177] After reviewing the written submissions, legislation, and relevant case law, the Board grants standing to Mr. Jon Groves and Ms. Shauna Kenworthy. The Board denies standing to Ms. Ruth Bellamy, Will Farms Ltd., Ms. Shauna Murphy, Ms. Della Poulsen, Cactus Coulee Farms Inc., and Mr. Stanley Riegel.

V. Motion 2: Director's Participation in the Appeals

A. Submissions

1. Appellants

[178] The Appellants asked for an Order striking portions of the Director's submission filed on January 8, 2021, on the basis that portions of the submission were improper, irrelevant, unnecessary, and prejudicial to the Appellants.

[179] With respect to the Director's standing in the appeals, the Appellants believed the Director should be limited to making submissions on issues related to the standard of review, bias, and the statutory regime. They argued making substantive submissions to defend his decision was abusing the Director's role as a decision-maker of first instance.

[180] The Appellants argued the Director's submissions were an attempt at *post facto* rationalization in that he was providing further rationalization to his decision to grant the Approval.

[181] The Appellants submitted the sections of the Director's submission regarding the burden of proof, economic analysis, the scope of the hearing, and *post facto* decision-making should be struck. The Appellants took no issue with the Director providing a submission on bias.

[182] Concerning the burden of proof, the Appellants referred to the Director's submission, which read: "[t]he Appellants have not met the onus of proof required to justify a recommendation from the Board to reverse or vary the Director's decision to issue the Approval…,"[31] and the Director's subsequent arguments that the expert reports filed on behalf of the Appellants were irrelevant and insufficient to merit any changes to the Approval.

[183] Concerning economic analysis, the Appellants referred to the Director's submission where the Director stated, "the Board has no jurisdiction to take into account the economic analysis and that the BDO Report is outside the scope of the issue set by the Board."[32]

[184] Concerning the scope of the hearing, the Appellants noted the Director provided submissions on two issues: the applicability of the *Species at Risk Act*, S.C. 2002, c. 29; and the *South Saskatchewan Regional Plan*.

[185] Concerning *post facto* decision making, the Appellants' position was that a significant portion of the Director's submissions was an attempt by the Director to add or provide further reasons for his decision. They cited three examples:

> "255 Upon review of the Appellants' written submission and the Chu Review, the Director submits he would not have made a different decision in approving the stormwater management system or changed the terms and conditions, had he reviewed these documents during the Application process. The Appellants have provided no evidence that would justify applying a higher standard than established AEP stormwater management policies. ...
>
> 274 The Director's opinion is that the stormwater management system will not adversely impact the aquatic environment or have a significant adverse hydraulic, hydrological or hydrogeological effects. …

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[31] Appellants' submission, dated March 3, 2021, at paragraph 42, citing the Director's submission, dated January 8, 2021, at paragraph 84.

[32] Appellants' submission, dated March 3, 2021, at paragraph 42, citing the Director's submission, dated January 8, 2021, at paragraph 94. The BDO Report was commissioned by the Badlands Recreation Development Corp. to assess the economic viability of the proposed racetrack facility.

> 275 The Director's opinion is that the infilling of two wetlands and modification of three wetlands will not have a significant adverse effect on the aquatic environment, other water users, or wildlife species at risk…."[33]

They also argued the Director mischaracterized the Appellants' submission.

[186] The Appellants noted the Director's Decision Statement, found at the Director's Record at Tab 35, is 2.5 pages in length and was signed by the Director as his reasons for his decision. They argued the Director's submission represented an attempt to have the Director supplement his Decision Statement through his counsel, without any authority to do so.

[187] The Appellants argued the Approval Holder provided substantive arguments on each of the issues raised by the Director. The Appellants' stated there was significant overlap and alignment between the arguments of the Director and the Approval Holder in their respective briefs regarding jurisdiction to consider economics, the applicability of the *Species at Risk Act*, the applicability of the *South Saskatchewan Regional Plan*, and the terms and conditions of the Approval.

[188] The Appellants submitted the test for determining a body's ability to make submissions was articulated in *Leon's Furniture Limited* v. *Alberta (Information and Privacy Commissioner)* 2011 ABCA 94 ("*Leon's*"), where the Court of Appeal of Alberta considered the issue of tribunal standing on review:

> "[16] …The appellant challenges the standing of the respondent Commissioner to make submissions on the merits of the appeal. The appellant relies on a long series of cases which hold that an administrative tribunal is free to argue issues of jurisdiction or to explain the record when its decisions are subject to judicial review, but it should not enter the arena and argue the correctness of its decision. That line of cases starts with *Northwestern Utilities* v. *Edmonton (City)*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684, and the issue was recently discussed in *Brewer v. Fraser Milner Casgrain LLP*, 2008 ABCA 160, 90 Alta. L.R. (4th) 201, 432 A.R. 188."

[189] The Appellants argued the Director's ability to make submissions to the Board should be limited to certain instances, based on the Court of Appeal's holding in *Leon's*:

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[33] Appellants' submission, dated March 3, 2021, at paragraph 42, citing the Director's submission, dated January 8, 2021.

> "[28] I agree that the law should acknowledge the multifaceted roles of many modern administrative tribunals, and the realities of the situation. The *Northwestern Utilities* case should be used as a 'source of the fundamental considerations'. Its principle will often be applied with full vigour to administrative tribunals that are exercising adjudicative functions, where two adverse parties are present and participating. While the involvement of a tribunal should always be measured, there should be no absolute prohibition on them providing submissions to the court. Whether the tribunal will be allowed to participate, and the extent to which it should participate involves the balancing of a number of considerations.
>
> [29] It is not possible to compile a list of all the relevant factors to consider when the appropriate level of participation of a tribunal is being established. The existence of other parties who can effectively make the necessary arguments is a central consideration. For example, in *Skyline Roofing* the challenge was to a decision of the Workers' Compensation Appeals Commission, and the Workers' Compensation Board (not the Commission) was the appropriate party to make the arguments. Maintaining the appearance of independence and impartiality of the tribunal is also a key consideration. The effect of tribunal participation on the overall fairness (in fact and in appearance) of the proceedings is a relevant consideration. Of importance too is the role assigned to the tribunal under the statute. Where the statute effectively gives carriage of the proceedings to the tribunal, a greater level of participation is tolerable: *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2005 BCSC 1562, 50 B.C.L.R. (4th) 151 at para. 45. The nature of the proposed arguments is important. A tribunal should not be allowed to supplement its reasons for decision, or to attempt to provide fresh justifications for the result: *Bransen Construction* at para. 33. While the tribunal, like any other party, can offer interpretations of its reasons or conclusion, it cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record. A tribunal can, within those limits, attempt to rebut arguments about how it reasoned and what it decided." (Emphasis added by the Appellants.)

[190] Based on the Appellants' application of the factors outlined in *Leon's*, they argued there was no basis to grant the Director standing:

1. Existence of Other Parties: The Approval Holder was opposing the appeals;
2. Maintaining the Appearance of Impartiality: Should the Minister refuse to grant the Approval, the Approval Holder may reapply. Any further proceedings would be tainted by the Director taking a substantive position on these proceedings;

3. Appearance of Fairness: This was a concern in *Normtek*. Requiring an Appellant to fight a two-front war while granting a Director the ability to perfect or change his decision to meet the case put forward by the Appellants contributes to a perception of unfairness;

4. Role of the Tribunal in the Statute: The Director is the authority of first approval. It is not the final authority - that role, as noted in the Director's submissions, lies with the Minister. This is not a situation like *Leon's*, where the privacy commissioner made its decision in the absence of a complainant; and

5. Nature of Arguments: The vast majority of the Director's arguments were focused on a critique of the Appellants or the manner in which they decided to make their submissions. The Director has made very few substantive submissions addressing the arguments raised by the Appellants:

    i. the environmental impacts outweigh the Approval's economic benefits;

    ii. the proximity of species at risk to the impugned wetlands and the significant biodiversity dependent upon those wetlands raise the value of the wetlands;

    iii. properly applying the precautionary principle requires consideration of the species at risk; and

    iv. the Approval is contrary to the *South Saskatchewan Regional Plan*.

[191] The Appellants relied on *obiter* comments of the Court of Appeal in *Normtek* and findings made by the Court of Queen's Bench judicial review decision, *Normtek Radiation Services Ltd* v. *Alberta (Environmental Appeals Board)*, 2018 ABQB 911 ("*Normtek QB*"), to support their arguments regarding the Director's standing in these appeals.

[192] When determining whether the Director should be given participatory rights in these appeals, the Appellants submitted the Board should consider the Court of Appeal's *obiter* comments in *Normtek*:

> "[47] As an aside, one of the reasons the Director has typically been accorded 'party' status on appeals of Director's decisions is that in order to assess the merits of an appeal of a Director's decision, the Environmental Appeal Board needs to understand the approval and the reasons therefor. But here the Director, who had already ruled that Normtek was not directly affected by Secure Energy's landfill approval application, took a position on Normtek's directly affected status. Whether that was appropriate, we leave for another day, although we note that it also troubled the reviewing judge. If the Director participates in a Board

> proceeding to determine a would-be appellant's standing, its contribution might appropriately be in the form of a response to the merits of the appellant's appeal, not in the form of an adoption of the position of the approval-holder with respect to the appellant's standing. Here the Director failed to assist the Board by not addressing the merits of Normtek's claims. Had the Director done so, it might have become apparent whether Normtek was directly affected or not." (Emphasis added by the Appellants.)

[193] When determining whether to limit the Director to making submissions on issues relating to the standard of review, bias, and the statutory regime, the Appellants submitted that the Board should consider the findings made by the Court of Queen's Bench in *Normtek QB*:

> "[25] However, the Director has already decided in a previous proceeding that Normtek was not 'directly affected' by the proposed amendment. There may be a perception of unfairness that the Director is now allowed to try and further convince this Court of the reasonableness of the Board's decision that Normtek is not 'directly affected'. This perception may exist even though counsel for the Director assumed an appropriate tone in both written and oral argument. Given this perception, and as Secure Energy is a sophisticated party capable of providing the Court with full submissions it is appropriate to limit the Director to arguments on the standard of review, the statutory regime and any arguments framed as jurisdictional." (Emphasis added by the Appellants.)

[194] The Appellants argued the basis for the Court of Queen's Bench judicial review decision in *Normtek QB* was twofold: (1) the ability for a regulator to make substantive comments on its decisions is *post facto* rationalization; and (2) there was a party capable of making those arguments on appeal (the Approval Holder).

[195] The Appellants argued both circumstances exist in these appeals. The Director's submissions amounted to no more than an attempt to issue new reasons supporting his original decision. The Appellants stated the Approval Holder was more than capable of defending the Director's decision.

[196] Furthermore, the Appellants cited *Imperial Oil Limited v. Alberta (Minister of Environment)* ("*Imperial Oil*"), 2003 ABQB 388, to support their arguments the Director's standing should be limited. They submitted that, as noted in *Imperial Oil*, at paragraph 7, the historical approach is "a body whose decision is under review should be restricted to producing its record and making submissions on very restricted areas."

[197] The Appellants' position was that the Director, in this case, exceeded the traditional role of standing (i.e., only speaking to the standard of review and providing the appellate body with assistance with the applicable statutory framework). They argued there was no basis to justify this because the Approval Holder was capable and had made submissions that mirrored the Director's submission.

[198] In support of their arguments, the Appellants relied on *Normtek,* where the Court of Appeal reviewed the substantive submissions made by the Director before the Board and the Court of Appeal and held the Director's submissions mirrored the Approval Holder's submission, advanced the position that Normtek's arguments were "speculative and hypothetical" and lacked evidence, and failed to provide any substantive response to Normtek's arguments and, instead, advanced largely procedural objections.

[199] The Appellants argued the factual circumstances outlined in *Normtek* were applicable here.

[200] In these appeals, the Appellants argued the Director provided reasons outlining his decision to grant the Approval, but he went beyond assisting the Board in understanding his decision. The Appellants submitted the Director made extensive substantive arguments criticizing the Appellants and the positions they were advocating. They stated the Director argued:

1. the Appellants' submissions did not meet the standards required by the Board;
2. the Appellants' arguments on economics were not raised in their Notices of Appeal (factually incorrect);
3. the Appellants' arguments on economics and species at risk were beyond the jurisdiction of the Board;
4. the Appellants' submissions on the *South Saskatchewan Regional Plan* were inapplicable; and
5. the Appellants' suggested terms were erroneous.

[201] The Appellants' argued that four-fifths of the Director's submission was unrelated to the substantive positions advocated by the Appellants. They argued there was little basis for the Director to claim he has any role in these proceedings because the Director provided reasons for his decision. This was particularly so since the Director had, thus far: (1) critiqued the nature

of the Appellants' submissions instead of arguing the substantive positions advanced by the Appellants; and (2) mirrored the submissions advocated by the Approval Holder.

[202] The Appellants referred to section 95(6) of EPEA to support their argument the Board is granted broad discretionary authority to determine a party's entitlement to make submissions before it.

[203] In conclusion, the Appellants argued:

1. the Director's submissions were inappropriate and ought to be struck because they were an attempt by the Director to rationalize his decision following receipt of the Appellants' Notices of Appeal; and

2. the Board ought to exercise its discretion to strike the Director's submissions pursuant to section 95(6) of EPEA.

2. Director

[204] The Director argued the Appellants' motion to strike large portions of the Director's written submission was entirely without merit and should be dismissed by the Board.

[205] The Director submitted he has standing, by virtue of the legislation governing the Board, to participate fully and substantively on the merits of the appeal of the Director's decision to issue the Approval, both in written and oral submissions. Also, the governing legislation explicitly affords the Director party status in appeals before the Board.

[206] The Director noted section l(f)(ii) of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993 (the "Regulation") defines "party" to include "the person whose decision is the subject of the notice of appeal" - that is, the Director. The Director submitted the Appellants' submission neglected to mention the Regulation and this critical definition. Further, the Director's status as a full party to an appeal is further evidenced throughout the Regulation.

[207] The Director noted sections 10(1) and (3) of the Regulation provide that all parties to a hearing must provide written submissions and contemplates that each party will bring forward and rely upon facts and evidence at the hearing.

[208] The Director noted the Regulation makes no distinction between the roles of parties, and it in no way limits the participation of the Director in an appeal as compared to an appellant or approval holder.

[209] The Director cited the Board's decision in *Brookman and Tulick* v. *Director, South Saskatchewan Region, Alberta Environment and Parks*, re: *KGL Constructors, A Partnership* (24 November 2017), Appeal Nos. 17-047 and 17-050-R (A.E.A.B.) ("*Brookman*"), where the appellants' counsel made a similar attempt to restrict the Director's role in a hearing before the Board:

> "[200] ... As stated, the Appellants are of the view the role of the Director in the hearing process should be limited in manner like that of a tribunal being reviewed on judicial review. As has been discussed, the role of the Board in reviewing the Director's decision is not the same as the Court undertaking a judicial review, nor is it the same as the Court of Appeal undertaking a statutory appeal of the Public Utilities Board as occurred in the *Northwestern Utilities* case. Ultimately, the Board's role is to provide the best possible advice to the Minister to make her decision. In the Board's view, the active participation of the Director, where there is new evidence before the Board, is the best way to support this. Specifically, the Board also relies on the provision of the *Environmental Appeal Board Regulation*, Alta. Reg. 114/1993, section l(d).
>
> …
>
> The regulation makes the Director a party to the appeal and makes no distinction between the role of the Director, the appellant, and the project proponent.
>
> [201] This is expressly different from the legislation governing the Public Utilities Board in *Northwestern Utilities*. The Supreme Court of Canada stated:
>
> > 'Section 65 no doubt confers upon the Board the right to participate in appeals from its decisions, but in the absence of a clear expression for the Legislature, the right is a limited one. The Board is given *locus standi* as a participant in the nature of an *amicus curiae* but not a party. That this is so is made evident by [section] 63(2) of the *Public Utilities Board Act*....
> >
> > Under [section] 63(2) a distinction is drawn between 'parties' who seek to appeal a decision of the Board or were represented before the Board, and the Board itself. The Board has a limited status before the Court, and may not be considered a party, in the full sense of that term, to an appeal from its own decision.' [Footnote removed]

> Given this difference in legislation and the purpose of the Board's process, the Board does not accept the arguments of the Appellants. The Director is a full party to the Board's proceedings." (Emphasis added by the Director.)

[210] The Director submitted the rationale for including the Director as a party to an appeal is clear. The Director is in the best position to explain to the Board the Approval and the Director's reasons for issuing it. This means not only outlining the general regulatory scheme but also explaining the details underlying the Director's decision to issue the Approval, including AEP's review and assessment of the Approval Holder's application and supporting technical documents.

[211] The Director argued a decision to limit the Director's role before the Board in the extreme manner proposed by the Appellants would be in direct opposition to a plain reading of section 1(f)(ii) of the Regulation and the clear legislative intent expressed throughout the Regulation.

[212] Further, the Director argued the Appellants relied on an overbroad and incorrect interpretation of the Court of Queen's Bench judicial review decision in *Normtek QB* and the *Normtek* decision in support of their preliminary motion.

[213] The Director said the *Normtek* decisions relate to the discrete preliminary issue of determining whether an appellant is directly affected and, thus, eligible for standing as a party before the Board. The *Normtek* decisions contained no rulings striking the Director's submissions on that matter or otherwise limiting the Director's ability to participate substantively at a hearing on the merits. The Director stated that, contrary to the Appellants' submission, the *Normtek* decisions cannot be broadly applied to significantly limit the Director's role and submissions at a Board hearing, particularly if such application disregards or conflicts with the legislation.

[214] The Director stated that to the limited extent the Court of Queen's Bench decision in *Normtek QB* applies to this motion, the Court confirmed the Director's role as a full party to an appeal before the Board. The Director said, after examining the legislative scheme, including the applicable provisions of the Regulation, the Court of Queen's Bench found the following on the Director's standing and role before the Board:

> "[24] …The [EPEA] gives the Director status, at the Board level, as a party because the Director rendered the decision on the Amending Approval, which is the subject of the appeal. Party status allows the Director to provide submissions on the merits of its decision to grant the Amending Approval. This status also likely extends to a determination regarding preliminary issues on the appeal such as standing." (Emphasis added by the Director.)

[215] The Director submitted the Appellants ignored the Court of Queen's Bench finding in their submission, and this finding was undisturbed by the Court of Appeal in *Normtek.* The Director stated the Court of Appeal noted (in *obiter*) one of the reasons the Director is given party status at a Board appeal:

> "[47] As an aside, one of the reasons the Director has typically been accorded 'party' status on appeals of Director's decisions is that in order to assess the merits of an appeal of a Director's decision, the Environmental Appeal Board needs to understand the approval and the reasons therefor. But here the Director, who had already ruled that Normtek was not directly affected by Secure Energy's landfill approval application, took a position on Normtek's directly affected status. Whether that was appropriate, we leave for another day, although we note that it also troubled the reviewing judge. If the Director participates in a Board proceeding to determine a would-be appellant's standing, its contribution might appropriately be in the form of a response to the merits of the appellant's appeal, not in the form of an adoption of the position of the approval-holder with respect to the appellant's standing. Here the Director failed to assist the Board by not addressing the merits of Normtek's claims. Had the Director done so, it might have become apparent whether Normtek was directly affected or not." (Emphasis added by the Director.)

[216] The Director argued the Appellants' submissions mischaracterized these *obiter* comments as the Court's "conclusion" or "ruling" and failed to acknowledge the comments:

1. explicitly state the Director has party status at Board appeals;
2. are focused on the preliminary matter of the Director's participation in determining a potential appellant's standing as directly affected;
3. indicated a preference for the Director to provide submissions on the merits of Normtek's claim for standing; and
4. did not contemplate, nor result in, striking the Director's submissions on that preliminary matter.

[217] The Director submitted that, even if *Normtek* applied more broadly to this preliminary matter, which it does not, the Appellants' argument would fail. The Director noted the portions of his submission the Appellants wanted to strike were all on the merits of the issues

set by the Board or in direct response to arguments and issues raised by the Appellants. The Director stated both *Normtek* decisions explicitly confirmed the Director's ability to provide submissions on the merits.

[218] The Director argued *Imperial Oil* and *Leon's* had no application to the present motion. The Director said *Imperial Oil* and *Leon's* pertained to the role of administrative tribunals upon judicial reviews of the tribunals' decisions, not to statutory decision-makers of first instance engaging in a statutory appeal.

[219] The Director explained *Imperial Oil* and *Leon's* were clearly distinguishable from the present situation, as in these appeals, the Director is participating, as he is statutorily entitled to do, in a review of his decision before an administrative tribunal, the Board. The Director stated that, just as the Board in *Brookman* found the Supreme Court of Canada's decision in *Northwestern Utilities* v. *Edmonton (City)*, 1978 CanLII 17 (SCC), [1979] 1 S.C.R. 684 ("*Northwestern Utilities*") did not apply to a statutory appeal, the cases cited by the Appellants likewise did not apply in this context.

[220] The Director noted the Appellants also relied on *Leon's* to raise a concern that, if the Minister reverses the Director's decision, a new application by the Approval Holder might be 'tainted' by the Director's role in these proceedings. The Director argued *Leon's* was not applicable to this preliminary motion as *Leon's* was a judicial review that spoke specifically to the independence and impartiality of an administrative tribunal exercising an adjudicative function.

[221] The Director submitted his role in these proceedings is to explain the decision he made, which is now under appeal. The Director stated he would consider any new application based on the individual merits of that application.

[222] The Director argued the cases raised by the Appellants did not form a basis for disregarding the Regulation that expressly defines the Director as a party. As a result, the Board should give these cases no weight with respect to this preliminary motion.

[223] The Director noted the Appellants alleged one "basis" of the Court of Queen's Bench's decision to restrict the Director's standing was that making substantive comments on its

decision is *post facto* rationalization." The Director submitted this was a mischaracterization of the *Normtek QB* decision since the Court made no mention of "*post facto* rationalization," and the Appellants failed to cite any portion of *Normtek QB* that supported this assertion, or even any explanation as to what "*post facto* rationalization" entails.

[224] The Director stated, at paragraph 49 of the March 24, 2021 Submission:

> "Critically, the Court in *Normtek ABQB* was not examining the Director's submissions on the reasonableness of his own decision. Rather, [Justice] Ashcroft found it appropriate to limit the Director's arguments before the Court on 'the reasonableness of *the Board's decision* that Normtek is not 'directly affected' (emphasis added, [paragraph] 25) at the *judicial review* of that decision. The Court did not limit the Director's standing before the Board to make submissions on the merits of the appeal."

[225] The Director submitted that *ex post facto* rationalization does not appear to be an established concept in administrative law. Nonetheless, the Director argued his submissions did not constitute new or additional reasons that did not exist at the time he made the decision to issue the Approval.

[226] The Director referred to his Decision Statement and the other documents he considered as described in that Decision Statement, found in the Director's Record, at Tab 32. The Director stated there is a distinction between explaining a decision with reference to supporting documents, which is occurring in the present appeals and creating new reasons to justify a decision after the fact.

[227] The Director submitted the *de novo* nature of Board hearings means the parties need to address new information or evidence submitted after the decision was made. The Director explained this did not mean the Director was providing new reasons but rather providing AEP's position on new evidence to assist the Board in providing the best possible advice to the Minister.

[228] The Director stated that should the Board find the Director's written submission offers reasons unsupported by the Director's Record and not present at the material time of his decision to issue the Approval, the Board may determine what weight to give those submissions, rather than to strike them in advance.

3. Approval Holder

[229] At paragraphs 47 and 49 of their March 3, 2021 Submission, the Approval Holder submitted the Appellant's citation of *Normtek* did not support the Appellants' contention the Director's participation should be constrained in these appeals. They argued the Court of Appeal in *Normtek* was clearly dealing with the issue of the Director's participation in the matter of standing - i.e., whether *Normtek* was directly affected. The Court of Appeal specifically noted that, even in matters of standing, the Director could participate with respect to the merits of the appeal.

[230] The Approval Holder noted that, other than *Normtek*, nothing had changed since the Board determined the participation of the Director in *Brookman* and decided the Director was a proper party to the proceeding without the restrictions now proposed by the Appellants. The Approval Holder said it should not be necessary for parties to continue to incur costs re-litigating matters again and again.

[231] The Approval Holder noted the Appellants seemed surprised that both the Director and the Approval Holder addressed some similar issues in their submissions to the Board. The Approval Holder questioned whether the Appellants thought, in an appeal of the Approval, the Director or the Approval Holder would not address the terms and conditions of the Approval, address the jurisdictional questions posed by the Board with respect to economic viability, or address the Appellants' submissions on the *Species at Risk Act* or the *South Saskatchewan Regional Plan*.

[232] The Approval Holder asked what would be wrong if the Director and the Approval Holder reached similar conclusions on some issues. The Approval Holder said it quite routinely happens in all types of litigation involving multiple parties, including regulatory appeals, that some of the parties may reach similar conclusions on some issues, but what would not be routine is for any tribunal to limit the participation of a party on the grounds the party may reach the same conclusions as another party. The Approval Holder submitted the Board should be focusing on what information that party can provide to the Board to help it fulfill its mandate of providing recommendations to the Minister, and in that regard, the Director can provide unique information and perspective.

4. Appellants' Rebuttal

[233] In response to the Approval Holder's submissions, the Appellants stated they were not "surprised" the Director's submissions matched those of the Approval Holder. The Appellants argued the Director did not need to make submissions because the Approval Holder was able to advocate the position.

[234] The Appellants stated the primary consideration in determining whether a tribunal may be granted standing on appeal was stated in *Leon's*, at paragraph 29, it stated: "The existence of other parties who can effectively make the necessary arguments is a central consideration." (Emphasis added by the Appellants.)

[235] The Appellants argued that, when considering whether to grant the Director standing to make substantive submissions, the Board should apply the test set out in *Leon*'s together with the requirement in section 95(6) of EPEA.

[236] The Appellants submitted that, ultimately, the Board would not be applying the principles of natural justice if it:

1. forced the Appellants to address submissions advocated by the Approval Holder and the Director;
2. allowed the Director to engage in *post-facto* rationalization; and
3. allowed the Director to take substantive positions, knowing that, should the Board refuse to grant an Approval, the Approval Holder may reapply to that same Director.

[237] Concerning the Director's submissions on the Regulation, the Appellants responded they were applying for a remedy under section 95(6) of EPEA.

[238] The Appellants stated it is contrary to the principles of natural justice for the Board: (1) to require them to respond to two sets of substantive submissions; (2) permit the Director to supplant his reasons for his decision; and (3) colour the role of the Director when the Appellants may be back before him on another application from the Approval Holder.

[239] When balancing the Regulation against EPEA, the Appellants stated the Board's enabling legislation, EPEA, would prevail in all instances.[34] Therefore, if the requirement for the Board to hear from a party conflicts with the principles of natural justice as set out in EPEA, then the Regulation is irrelevant. However, the Appellants acknowledged that EPEA and the Regulation do not conflict.

[240] Concerning the Director's submissions on sections 10 to 15 of the Regulation, the Appellants argued nothing in these sections outlines what submissions a party is required to make. For example, there is nothing that requires the Director to make submissions on his *post facto* rationalization.

[241] Concerning the Director's submissions on the *Brookman* decision, the Appellants referred to *Northwestern Utilities* to argue there was no basis for the Board to conclude the Director's submissions may be any more than a "limited one."

[242] The Appellants argued the Legislature made no clear expression permitting the Director to make substantive submissions on each aspect of the Appellants' appeals. Rather, the Legislature only stated the Director shall give "a summary of the facts and evidence to be relied on by the person filing the submission," as per the Regulation, section 10(3).

[243] The Appellants agreed the Director may outline the statutory scheme. However, they argued there was no statutory authority under EPEA or the Regulation that would allow the Director to make submissions on any other aspect of his decision.

[244] The Appellants submitted the *Brookman* decision, relied upon by the Director and Approval Holder, should be distinguished for the following reasons:

1. on the issue of the Director's participation, *Brookman* was decided before *Normtek*;
2. the Director's January 8, 2021 merit submissions argued the Board should ignore *Brookman* and revisit the standard of review; and

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[34] The Appellants cited Sullivan R., *Statutory Interpretation*, 3d ed (Toronto: Irwin Law, 2016) at page 329, to support their position. The Board notes the passage cited by the Appellants also states: "…the paramountcy of statutes over legislation operates as a presumption. In the event of a conflict, the statute is presumed to prevail, but this presumption is rebuttable by clear evidence of a contrary intent."

3. the Board in *Brookman* did not appear to have considered section 95(6) of EPEA.

[245] The Appellants agreed the Director has standing and may make submissions, but the issue, in this case, was what submissions the Director should be allowed to make. The Appellants argued the Director's submissions went far beyond what the Court in *Normtek* envisioned. The Appellants noted the Director's submission was 46 pages in length, but the reasons for his decision were less than three pages in length.

[246] The Appellants believed the Director took substantive positions. In the Appellants' Submission, dated April 15, 2021, at paragraph 35, they cited the following examples from the Director's submissions:

> "84. The Appellants have not met the onus of proof required to justify a recommendation from the Board to reverse or vary the Director's decision to issue the Approval.
>
> …
>
> 133. Much of the Appellants' submission focuses on the federal *Species at Risk Act* (*SARA*) and the alleged reliance of two SARA listed species, the Bank Swallow and the Little Brown Myotis, on the wetlands approved to be impacted in accordance with the Approval.
>
> 134. However, *SARA* is outside the scope of this appeal.
>
> …
>
> 158. The Appellants' submission appears to allege the Approval fails to properly apply the South Saskatchewan Regional Plan (SSRP).
>
> …
>
> 231. In order to establish the Approval conditions are inadequate to protect the environment, the Appellants must first provide evidence that the Approval activities will have a significant adverse impact. The Appellants have not met the onus to demonstrate that the construction and maintenance of the stormwater management system or the infilling and modification of wetlands, as allowed under the Approval, will have a significant adverse effect on the aquatic environment.
>
> …
>
> 249. The Appellants have not met the onus to demonstrate the stormwater management system as approved will have a significant adverse effect on the aquatic environment. Further, although the Appellants' written submission does not refer to Dr. Chu's comments, the Director submits the Chu Review provides

> no site-specific assessments or evidence of significant adverse impacts on the aquatic environment as a result of the stormwater management system.
>
> …
>
> 257. Notwithstanding their concerns, the Appellants have submitted no evidence to suggest the Approval activities will have a significant impact on any wildlife, including the Bank Swallow or Little Brown Myotis. The Appellants' submission speaks to *SARA* generally and how it might apply if a *SARA*-listed species had an approved recovery strategy with designated critical habitat, which is not the case in this instance. However, there is no reference to how the actual Approval activities might impact wildlife, beyond stating that Bank Swallows and Little Brown Myotis 'use the wetlands.'"

[247] The Appellants referred to Justice Ashcroft's ruling in *Normtek QB* to argue the Director's submissions went far beyond submissions on the merits of his decision to grant the Approval, and they referenced *Normtek* where it stated the Director's submissions should assist the Board with understanding the "approval and the reasons therefor."

[248] The Appellants stated the Director cannot go beyond explaining the statutory scheme and his decision being appealed. Further, where the Director issued reasons for his decision, as he did in these appeals, he is bound to follow those reasons and not supplant or contradict those reasons.

[249] In their submission, dated April 15, 2021, at paragraph 40, the Appellants stated there is no authority for the Director to argue the Court of Appeal in *Normtek* "indicated a preference for the Director to provide submissions on the merits of Normtek's claim for standing." The Appellants submitted that was what the Court of Appeal was "troubled" in *Normtek*. The Appellants stated that in terms of substantive submissions, the Director was limited to providing submissions on his decision to issue the Approval.

[250] The Appellants disagreed with the Director's submissions on the inapplicability of *Leon's*, *Northwestern Utilities*, and other cases. They stated the Director provided no basis that a long line of authority dealing with tribunal participation, starting with *Northwestern Utilities*, should be ignored by the Board.

[251] The Appellants submitted the Director appeared to draw a distinction between judicial and statutory review, but he did not explain why there was a difference.

[252] The Appellants stated there are instances where judicial review is undertaken because there is a right to a statutory appeal, such as under section 45 of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3, and section 470 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. Section 45(1) of the *Responsible Energy Development Act* states: "A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law." Section 470(1) of the *Municipal Government Act* states: "Where a decision of an assessment review board is the subject of an application for judicial review, the application must be filed with the Court of Queen's Bench and served not more than 60 days after the date of the decision."

[253] The Appellants submitted the Director was, therefore, arguing the Court of Appeal and Court of Queen's Bench should ignore *Northwestern Utilities* because there is a statutory right of appeal.

[254] The Appellants argued the Director's argument was nonsensical and contrary to holdings from the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration)* v. *Vavilov*, 2019 SCC 65:

> "[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.
>
> [51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are…s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply '[w]here a decision of an assessment review board is the subject of an application for judicial review': s.470(1)".

[255] The Appellants argued the Supreme Court of Canada clearly articulated that, where there is a statutory right of appeal, principles of judicial review, such as standard of review and tribunal participation, still apply.

B. Board's Analysis

[256] There is no dispute it is appropriate for the Director to make submissions to the Board during the hearing of an appeal. Rather, the issues raised here are:

(1) What is the appropriate role of the Director in these appeals? and

(2) What is the appropriate content of the Director's submissions in these appeals?

As a starting point, the Board must review its governing legislation set out in Part 4 of EPEA, Part 9 of the *Water Act*, and the Regulation.

[257] Section 1(f) of the Regulation defines "party" as:

> "(i) the person who files a notice of appeal that results in an appeal,
>
> (ii) the person whose decision is the subject of the notice of appeal,
>
> (ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the *Water Act*, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and
>
> (iii) any other person the Board decides should be a party to the appeal." (Emphasis added by the Board.)

[258] The Regulation applies to all appeals conducted by the Board pursuant to Part 4 of EPEA and pursuant to any other enactment, including under Part 9 of the *Water Act*.

[259] Therefore, under the legislation establishing Board proceedings, a director whose decision is the subject of the appeal is entitled to "party status" in all appeals conducted by the Board. There is no distinction between the roles of the different "parties" to the appeal in the Regulation.

[260] Here, the Director's decision to issue the *Water Act* Approval is the subject of the appeals and, accordingly, the Board finds the Director is a "party" to the appeals as stated in section 1(f)(ii) of the Regulation.

[261] With respect to the Appellants' references to *Normtek* regarding the Director's participation in an appeal, the Board finds the Courts' comments clearly pertained to the Director's participation in a Board proceeding to determine an appellant's standing before the Board - i.e., whether the appellant is directly affected. The Board notes in these appeals that the Director took no position on the Applicants' application for the reconsideration of their status as "directly affected" parties in this proceeding.

[262] As noted by the Court of Appeal, at paragraph 47, in *Normtek*:

> "…one of the reasons the Director has typically been accorded 'party' status on appeals of Director's decisions is that in order to assess the merits of an appeal of a Director's decision, the Environmental Appeal Board needs to understand the approval and the reasons therefore.…
>
> If the Director participates in a Board proceeding to determine a would-be appellant's standing, its contribution might appropriately be in the form of a response to the merits of the appellant's appeal, not in the form of an adoption of the position of the approval-holder with respect to the appellant's standing."

[263] The Board agrees and adopts this reasoning from *Normtek.*

[264] Based on this analysis, the Board accords the Director "party" status in these appeals to assess the merits of the Director's decision, so he can assist with the Board's understanding of the Approval and the reasons it was granted with the specific terms and conditions.

[265] Given the concerns raised by the Appellants, the Board considered whether the Director should have the same rights to participate in these appeals as the other parties, namely the Appellants and the Approval Holder. In other words, should the Director's participation or standing in these appeals be subject to any limits?

[266] The Board agrees with the Appellants that maintaining the Director's impartiality, principles of natural justice, principles of fairness, and the Director's statutory role, are key

considerations when the Director becomes a party to participate in the appeal of his decision before the Board.

[267] The Appellants relied on *Leon's* and *Northwestern Utilities* to support their position that the Director's participation should be limited. The Appellants agreed the Director is free to argue issues of jurisdiction or to explain the record when the Director's decisions are subject to an appeal, but the Appellants argued the Director should not enter the arena and argue the correctness of his decision. Also, the Appellants argued the Director's submissions should be limited to the standard of review, bias, and the statutory regime but based on the Courts decisions in *Imperial Oil, Leon's*, and *Northwestern Utilities*, new submissions cannot be led.

[268] However, the Board notes *Imperial Oil, Leon's,* and *Northwestern Utilities* predate the Supreme Court of Canada's decision in *Ontario (Energy Board)* v. *Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147 *("Ontario Power Generation").* This case was referenced by Justice Ashcroft in *Normtek QB,* at paragraph 19.

[269] The Supreme Court of Canada's decision in *Ontario Power Generation* is binding legal authority on the Board.

[270] In *Ontario Power Generation,* the Supreme Court of Canada considered several critical issues relating to a tribunal's standing on appeal of its own decision or in a judicial review, including the types of arguments a tribunal may make (jurisdictional, standard of review, or merit arguments) and the content of those arguments. Specifically, the Supreme Court of Canada made a distinction between the tribunal's level of participation and the content of the tribunal's participation.

[271] The Board acknowledges there is a distinction between a judicial review or a statutory appeal of a tribunal's decision and a hearing before the Board. However, the Board finds the Supreme Court of Canada's guidance with respect to tribunals is helpful to the Board's consideration of the Director's appropriate role, as a party, in these appeals of his decision to issue the Approval. As a result, the Board will consider the discussion of the Supreme Court of Canada with respect to the role of tribunals. The Board notes that the Appellants made similar

arguments with respect to the *Responsible Energy Development Act* and the *Municipal Government Act.*

[272] Under section 33(3) of the *Ontario Energy Board Act, S.O. 1998, c. 15 Schedule B.*, the Ontario Energy Board (the "OEB") "is entitled to be heard by counsel upon the argument of an appeal…", and so the OEB participated as a respondent in the appeals before the courts. However, this provision neither expressly grants the OEB standing to argue the merits of the decision on appeal, nor does it expressly limit the OEB to jurisdictional or standard-of-review arguments.

[273] Justice Rothstein, writing for the majority in *Ontario Power Generation*, reviewed and considered the Supreme Court of Canada's previous decisions on tribunal standing, including *Northwestern Utilities* and *Leon's*, which are relied upon by the Applicants in their submissions.

[274] In *Northwestern Utilities*, Justice Estey limited the participation or role of the Public Utilities Board in judicial review proceedings to an explanatory role regarding the record before the board and to making representations relating to jurisdiction because of concerns about the administrative tribunal's impartiality. Justice Estey found active and even aggressive participation can have no effect other than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it or in future proceedings involving similar interests and issues or the same parties. Justice Estey further observed, at page 709, that, given tribunals already receive an opportunity to make their views clear in their original decisions, "... it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court."

[275] Justice Rothstein noted that, while the Supreme Court of Canada has never expressly overturned *Northwestern Utilities*, on some occasions, it has permitted tribunals to participate as full parties without comment.

[276] With respect to *Leon's*, Justice Rothstein noted at paragraph 5 that the Alberta Court of Appeal's position was "... the law should respond to the fundamental concerns raised in *Northwestern Utilities* but should nonetheless approach the question of tribunal standing with

discretion, to be exercised in view of relevant contextual considerations." (Emphasis added by the Board.)

[277] Justice Rothstein continued:

> "[52] The considerations set forth by this Court in *Northwestern Utilities* reflect fundamental concerns with regard to tribunal participation on appeal from the tribunal's own decision. However, these concerns should not be read to establish a categorical ban on tribunal participation on appeal. A discretionary approach, as discussed by the courts in *Goodis*, *Leon's Furniture*, and *Quadrini* provides the best means of ensuring that the principles of finality and impartiality are respected without sacrificing the ability of reviewing courts to hear useful and important information and analysis….
>
> [53] Several considerations argue in favour of a discretionary approach. Notably, because of their expertise and familiarity with the relevant administrative scheme, tribunals may in many cases be well positioned to help the reviewing court reach a just outcome. For example, a tribunal may be able to explain how one interpretation of a statutory provision might impact other provisions within the regulatory scheme, or the factual and legal realities of the specialized field in which they work. Submissions of this type may be harder for other parties to present." (Emphasis added by the Board.)

[278] After carefully considering the case-law cited in *Ontario Power Generation*, Justice Rothstein held:

> "[57] … tribunal standing is a matter to be determined by the court conducting the first-instance review in accordance with the principled exercise of that court's discretion. In exercising its discretion, the court is required to balance the need for fully informed adjudication against the importance of maintaining tribunal impartiality." (Emphasis added by the Board.)

The Board agrees and adopts Justice Rothstein's reasoning from *Ontario Power Generation.* The commentary of Justice Rothstein regarding tribunals is equally applicable to the role of the Director in appeals before the Board.

[279] Therefore, the Board, as the quasi-judicial body conducting the first-instance review of these appeals, will exercise its discretion on the Director's level of participations by balancing the need for fully informed adjudication while also considering the importance of maintaining tribunal impartiality.

[280] In doing so, the Board will consider the three principles identified by Justice Rothstein:

> 1. if an appeal or review is unopposed, the reviewing court may benefit by exercising its discretion to grant standing to the tribunal;
> 2. if there are other parties available to oppose the appeal or review, and those parties have the necessary knowledge or expertise to fully make and respond to arguments on appeal or review, tribunal standing may be less important in ensuring just outcomes; and
> 3. there is a greater concern when the tribunal adjudicates individual conflicts between two adversarial parties than when the tribunal serves a policy-making, regulatory, or investigative role or acts on behalf of the public interest.

[281] With respect to the first principle, the appeals, in this case, are opposed by the Approval Holder. However, the Board's enabling legislation clearly gives the Director, whose decision is the subject of the Notices of Appeal, party status or standing before the Board. Furthermore, that Board's statutory framework is different from the ones considered in *Leon's* and *Northwestern Utilities* in several ways.

[282] Section 95(2) of EPEA provides that "[p]rior to conducting a hearing of an appeal, the Board 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…." Section 95(2)(d) of EPEA further states that, in making that determination, the Board may consider "whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made."

[283] In *Chem-Security (Alberta) Ltd.* v. *Lesser Slave Lake Indian Regional Council*, 1997 ABCA 241, the Alberta Court of Appeal considered section 87(2) of the *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3,[35] and found:

> "[11] Section 87(2) of the Act contemplates that, prior to the hearing of an appeal, the Board may determine which matters set out in a notice of objection will be

[35] Section 87(2) of the *Environmental Protection and Enhancement Act*, S.A. 1993, c. E-13.3 is similar to the current section 95(2) of EPEA.

> included in the hearing of the appeal. In making that determination the Board is entitled to consider 'whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made'.
>
> [12] It follows that the hearing before the Board is a *de novo* hearing. The Board is empowered to consider evidence that was not before the Director. For example, if significant changes in p.c.b. emissions had occurred since the Director pronounced, the Board might consider that."

[284] Under the statutory provisions set forth in Part 4 of EPEA, in most instances, the Board makes recommendations to the Minister of Environment and Parks on the substantive disposition of an appeal under section 99(1) of EPEA, which the Minister may follow at his or her discretion under section 100(1) of EPEA.

[285] As noted in *Court* v. *Alberta Environmental Appeal Board*, 2003 ABQB 456:

> "[37] [EPEA] does not empower the Board to confirm, reverse or vary certain appealed decisions of the Director, such as the decision in this case. The Minister is so empowered under [section] 100, but that power is triggered only on receipt of a report of the Board following the completion of an appeal hearing. If the Board dismisses a notice of appeal under [section] 95(5)(a)(ii), as it did in this case, there is no appeal hearing and no report is submitted to the Minister. In consequence, the appealed decision of the Director stands, subject to any permitted revisitation of that decision by the Director, of her own initiative….
>
> [49] [EPEA], as a whole, is directed at supporting and promoting the 'protection, enhancement and wise use of the environment', through the extra-judicial resolution and balancing of several competing policy objectives and the oft-conflicting interests of multiple constituencies, and the Board plays a role in effecting that purpose."

[286] The Board is guided by the purposes of EPEA, as set out in section 2, and the purposes of the *Water Act* as set out in section 2.

[287] The Board must balance the interests of the Appellants and the Approval Holder when considering the legislative purposes of the *Water Act* and EPEA, as well as the public interest, as represented by the Director, who serves various roles, including policy-making, investigative, and regulatory roles.

[288] Ultimately, the Board's role is to provide the best possible advice to the Minister to make his decision in the public interest of Albertans. In the Board's view, the active participation of the Director, where there is new evidence before the Board, is the best way to

support this Board function. Since the hearing before the Board is a *de novo* hearing, it is anticipated new evidence will be brought forward that may require a response from the Director.

[289] With respect to the second principle, the Approval is opposed by the Appellants, and the appeals are opposed by the Approval Holder. However, the Board finds neither the Appellants nor the Approval Holder has the same knowledge and expertise the Director has regarding the underlying issues, in particular policy issues, which are the subject of the appeals. Here, the Appellants raised concerns about the merits of the Director's regulatory decision regarding the Approval and the Activity authorized by the Approval, which they argued directly affects them. As a result, the appeals involve issues related to the Director exercising or fulfilling a regulatory role under the *Water Act* rather than adjudicating a dispute between the Approval Holder and the Appellants.

[290] Given the nature of the underlying issues in these appeals, the Board adopts and applies the observations of Justice Rothstein of *Ontario Power Generation*. The Board finds the Director's expertise and familiarity with the *Water Act* legislative scheme may help the Board provide the best possible advice to the Minister. For example, the Director may be called on to explain how the interpretation of various provisions of the *Water Act* are interrelated, and how a particular decision may impact the interpretation of other sections of the *Water Act*. In the Board's view, these types of submissions may be harder for the other parties to present.

[291] In addition, the Board adopts and applies the guidance of the Court of Appeal in *Normtek*. On that basis, the Board finds the Director's evidence and submissions should be in a form which assists the Board's understanding and reasons for the Approval so the Board can assess the merits of the appeals. However, they cannot be made in such a way to call into question the Director's impartiality.

[292] With respect to the third principle, these appeals involve issues related to the Director exercising or fulfilling a regulatory role under the *Water Act* and the issuance of the Approval. The role of the Director is not to adjudicate a dispute between the Approval Holder and the Appellants. In other words, the Director reviewed the *Water Act* application taking into consideration the applicable legislation and AEP policies. In his decision-making role, the Director does not adjudicate individual conflicts between the Appellants and the Approval

Holder. However, as noted above, the Director does use a Statement of Concern process in making his decision on the *Water Act* and EPEA applications to promote good decision-making by considering a broad range of stakeholder interests. Given the concerns raised by the Appellants, the Board finds submissions provided by the Director will assist the Board in assessing the merits of the appeals.

[293] In summary, having considered these three principles, the Board finds the Director can participate in these appeals by providing both jurisdictional and merit arguments without comprising the principles of finality and impartiality. However, the Board wishes to distinguish its decision on the Director's participation in an appeal, and what types of arguments the Director may make, from the content of the Director's arguments.

[294] Concerning the content of the Director's submissions, the Appellants argued the Director engaged in *post facto* rationalization of his original decision by presenting additional evidence and making additional arguments. In response, the Director submitted that by virtue of the Board's governing legislation, he can participate fully and substantively on the merits of the appeal of his decision to issue the Approval, both in written and oral submissions.

[295] The Board notes *Ontario Energy Generation* addressed a similar concern of "*post facto*" rationalization when Justice Rothstein considered the issue of a tribunal "bootstrapping." This was a particular concern raised in the Appellants' arguments. Justice Rothstein differentiated when it is proper for a tribunal to act as a party on an appeal of its decision from the content of the tribunal's arguments. Specifically, Justice Rothstein noted at paragraph 63 that: "[t]he standing issue concerns what types of argument a tribunal may make, i.e. jurisdictional or merits arguments, while the bootstrapping issue concerns the content of those arguments."

[296] Justice Rothstein noted a tribunal is bootstrapping where it seeks to supplement what would otherwise be a deficient decision with new arguments on appeal. Put differently, Justice Rothstein wrote, at paragraph 64, that a tribunal may not "defen[d] its decision on a ground that it did not rely on in the decision under review."

[297] Justice Rothstein held, at paragraph 65, that the principle of finality dictates that once a tribunal has decided the issues before it and provided reasons for its decision, "absent a power to vary its decision or rehear the matter, it has spoken finally on the matter, and its job is done."

[298] Under the principle of finality, Justice Rothstein noted appellate courts have held:

- tribunals could not use a judicial review as a chance to "amend, vary, qualify or supplement its reasons;"[36] and
- a tribunal could "offer interpretations of its reasons or conclusion, [but] cannot attempt to reconfigure those reasons, add arguments not previously given, or make submissions about matters of fact not already engaged by the record."[37]

[299] Justice Rothstein observed there is merit in both positions on the issue of bootstrapping:

> "[67] On the one hand, a permissive stance toward new arguments by tribunals on appeal serves the interests of justice insofar as it ensures that a reviewing court is presented with the strongest arguments in favour of both sides…. This remains true even if those arguments were not included in the tribunal's original reasons. On the other hand, to permit bootstrapping may undermine the importance of reasoned, well-written original decisions. There is also the possibility that a tribunal, surprising the parties with new arguments in an appeal or judicial review after its initial decision, may lead the parties to see the process as unfair. This may be particularly true where a tribunal is tasked with adjudicating matters between two private litigants, as the introduction of new arguments by the tribunal on appeal may give the appearance that it is 'ganging up' on one party. As discussed, however, it may be less appropriate in general for a tribunal sitting in this type of role to participate as a party on appeal."

[300] However, after considering both positions, Justice Rothstein decided on a permissive stance toward new arguments by tribunals on appeal. Specifically, Justice Rothstein found the following arguments by a tribunal did not offend the principle of finality:

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[36] *Ontario (Energy Board)* v. *Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147, at paragraph 65, citing *Canada (Attorney General)* v. *Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3, at paragraph 16.

[37] *Ontario (Energy Board)* v. *Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147, at paragraph 65, citing *Leon's Furniture Limited* v. *Alberta (Information and Privacy Commissioner)* 2011 ABCA 94, at paragraph 29.

- the introduction of arguments on appeal that interpret or were implicit but not expressly articulated in its original decision;
- explanations of its established policies and practices to the reviewing court, even if those were not described in the reasons under review; and
- responding to arguments raised by a counterparty.

[301] Justice Rothstein held, at paragraph 68, that "[a] tribunal raising arguments of these types on review of its decision does so in order to uphold the initial decision; it is not reopening the case and issuing a new or modified decision. The result of the original decision remains the same even if a tribunal seeks to uphold that effect by providing an interpretation of it or on grounds implicit in the original decision."

[302] However, Justice Rothstein's opinion was that tribunals should not have the unfettered ability to raise entirely new arguments on appeal. To do so may raise concerns about the appearance of unfairness and the need for tribunal decisions to be well reasoned in the first instance.

[303] With respect to these concerns, Justice Rothstein found the proper balancing of these interests against the reviewing courts' interests in hearing the strongest possible arguments from each side of a dispute is struck when tribunals retain the ability to offer interpretations of their reasons or conclusions and to make arguments implicit within their original reasons.

[304] However, Justice Rothstein cautioned that a tribunal should pay careful attention to the tone of its submission on appeal. At paragraph 71, he quoted Justice Goudge in *Goodis*:

> "…if an administrative tribunal seeks to make submissions on a judicial review of its decision, it [should] pay careful attention to the tone with which it does so. Although this is not a discrete basis upon which its standing might be limited, there is no doubt that the tone of the proposed submissions provides the background for the determination of that issue. A tribunal that seeks to resist a judicial review application will be of assistance to the court to the degree its submissions are characterized by the helpful elucidation of the issues, informed by its specialized position, rather than by the aggressive partisanship of an adversary."

[305] Having regard to the Board's regulatory framework and the guidance of the Supreme Court of Canada in *Ontario Power Generation*, the Board believes it should adopt a permissive stance towards new submissions made by the Director on these appeals. However, in

doing so, the Board will consider whether the Director's submissions fall within the appropriate categories identified by Justice Rothstein, taking into consideration the Board's regulatory framework:

- the introduction of arguments on appeal that interpret or were implied but not expressly articulated in the original decision;
- explanations of established policies and practices, even if those were not described in the Director's Record or decision under appeal; or
- responding to arguments raised by the Appellants or Approval Holder.

[306] After carefully reviewing the Parties' submissions, the Board finds the Director's submissions primarily fall into the above categories. Furthermore, given the *de novo* nature of the Board proceedings, the Board is empowered to consider evidence that was not before the Director when he made his decision to issue the Approval. Accordingly, the Parties need to address any new evidence or arguments submitted after the Director's original decision was made to issue the Approval, and the Director should have the right to address any new issues that are raised so the Board can, in turn, provide the best possible advice to the Minister.

[307] Finally, the Board considered the tone of the Director's submissions given the cautions and guidance of Justice Rothstein.

[308] Here, the Board finds the tone of the Director's submission is appropriate. In his reply, the Director understands his role in these proceedings is to explain the decision he made, which is now under appeal, and he will consider any new application based on the individual merits of that application. As a result, the Board has no concerns about the Director's ability to remain impartial in future applications that come before him.

[309] Having considered the above, the Appellants' motion to limit the Director's participation in the appeals to submissions relating to the statutory scheme, bias, and the standard of review is denied.

[310] Given the Board's decision, the Board does not have to consider whether a portion of the Director's submission should be struck.

VI. Motion 3: Further and Better Written Submissions

A. Submissions

1. Appellants

[311] Pursuant to Rule 19 of the Board's Rules of Practice, the Appellants requested the Director provide a summary for each of his witnesses. The Appellants clarified they were not requesting a "will say" statement for each witness since Rule 19 of the Board's Rules of Practice does not specifically require one. However, their position was that a "will say" statement was one way to provide this evidence.

[312] The Appellants submitted the Director was the only party that had not complied with Rule 19. The Appellants stated the Director sought to be a party to the proceedings with full participatory rights. However, the Director neglected to abide by the clear requirement to provide a summary of each of his witnesses' evidence.

[313] The Appellants stated their six expert witnesses provided their evidence in the form of two expert reports, and each of the expert witness' testimony and evidence could be derived from their expert reports. The Appellants explained two of their witnesses would be providing their evidence in "will say" statements.

[314] With respect to the Director's five witnesses, the Appellants stated the Director had not provided an expert report or a "will say" statement for his witnesses.

[315] The Appellants argued they had no understanding as to what the Director's witnesses would say in their testimonies and whether that evidence would extend beyond the Director's Record. The Appellants said there was little evidence in the Director's Record that might assist the Appellants in determining the nature of the evidence to be provided by the Director's witnesses. The Appellants stated they had no knowledge of whether the witnesses would be providing evidence like the documents in the Director's Record or whether the witnesses would go beyond the documentary evidence in the Director's Record.

[316] The Appellants argued the purposes of Rule 19 were clear:

1. to prevent parties from being surprised at the hearing by a witness' evidence;

2. to provide details outlining a witness' evidence to allow the opposing party the opportunity to fill gaps through cross-examination; and
3. to accord the parties with procedural fairness.

[317] The Appellants submitted it would be a breach of procedural fairness to hold the Director to a different standard than the other parties. Therefore, they requested a summary of each of the Director's witnesses' testimonies to comply with Rule 19.

2. Approval Holder

[318] The Approval Holder took no position except to note that if "will say" statements or some equivalent were required of the Director, the Board should make it clear such statements are not intended to limit the participation of the Director, or his staff, in the hearing by confining them to the content of the statement.

[319] The Approval Holder submitted the Board needs to consider the intent is to provide the Board with the best record to use in making its recommendations, and any attempts to "silo" witnesses to limit the evidence they can give should be resisted.

3. Director

[320] The Director requested the Board dismiss this motion.

[321] The Director stated his written submission contains a summary of the evidence his witnesses will speak to that is sufficient to meet Rule 19. Also, the Director cited his January 19, 2021 correspondence to the Board, which noted the evidence the Director and his witnesses intended to rely on and speak to at the hearing was included in the Director's Record, which the Appellants have had for over a year.

[322] The Director explained that consistent with previous hearings before the Board, the Director and his witnesses' testimonies will explain:

1. their expertise and each of their roles in AEP;
2. the applicable legislation and the regulatory scheme;
3. the applicable AEP policies, standards, and guidelines (all of which are found in the Director's Record);

4. AEP's process in reviewing the application, including review and assessment of the Approval Holder's technical reports;
5. the Director's considerations, reasons, and ultimate decision to issue the Approval;
6. the terms and conditions of the Approval; and
7. other relevant matters as necessary to respond to the Appellants' submissions and the issues for hearing.

[323] In addition to the Director's Record, the Director also provided curriculum vitae for each witness outlining their areas of expertise. Further, the Director would be submitting a copy of the Director's PowerPoint presentation in advance of the hearing, as requested by the Board. The Director confirmed he would only be relying on documents that are already before the Board.

[324] The Director said the suggestion his evidence was a "mystery" was unfounded. He stated the evidence his witnesses will speak to is found in the Director's Record and extensively referenced throughout the Director's written submission. The Director noted the summary of evidence the Appellants now requested was largely found in the submissions they were seeking to strike.

[325] The Director submitted that, should anything unexpected arise during the appeals, legal counsel would have the opportunity to cross-examine each of his witnesses.

[326] The Director maintained it was unnecessary to provide any further information on his witnesses' anticipated testimonies in advance of the hearing. However, should the Board require a list of specific documents in the Director's Record that each of his witnesses would likely speak to, the Director could provide one.

4. Appellants' Rebuttal

[327] The Appellants disagreed the Director's written submissions contained a summary of the evidence his witnesses would speak to that was sufficient to meet Rule 19. The Appellants said they reviewed the submissions and did not find a summary or citation to substantiate the Director's submission.

[328] Concerning the Director's submission regarding the ability to cross-examine the Director's witnesses on any unexpected evidence, the Appellants argued witnesses' statements serve that exact purpose. The Appellants stated they should not be caught by surprise, and they had a right to prepare for their cross-examination instead of having to do it without any foundation.

[329] The Appellants stated that if the Director's position was upheld, the Appellants and their witnesses should be at liberty to speak to matters far outside their witness statements. They argued the Director and Approval Holder would be precluded from complaining about the basis they could cross-examine those witnesses.

[330] The Appellants submitted that, as the Director is a legislated party to these appeals, he should be held to the same standard as the Appellants and Approval Holder.

[331] The Appellants stated the fact the Director was opposed to providing witness statements speaks to his intention to surprise the Appellants, and this conduct should not be permitted.

B. Board's Analysis

[332] The Board's statutory authority for establishing its own processes and procedures is set out in section 95(8) of EPEA.

[333] Rule 19 of the Board's Rules of Practice provides the requirements for written submissions:

> "Every Party to an appeal must file a written submission with the Board and provide a copy to every other Party at least 7 days before the date of the hearing or as set out by the Board.
>
> Written submissions shall be given to all other parties.
>
> A written submission shall contain:
>
> - summary of the facts and evidence to be relied on by the Party;
> - a list of witnesses to be called on by the Party and a summary of each witness' evidence; and
> - the name, address, e-mail, and telephone and fax numbers of the lawyer or other agent acting on behalf of the party."

[334] In this case, the Appellants and Director both agreed that "will say" statements are not required under Rule 19. The Board agrees. The Board notes the Appellants provided their "will say" statements on their own volition. However, the Appellants and the Director disagreed on what basis the Director is required to provide further written submissions as to his intended testimony in the appeals.

[335] Here, the Board finds the appeals involve an Approval that has already been issued by the Director. The Parties were provided with a full record regarding the Director's decision to issue the Approval. In his submissions, the Director has: (1) identified his witnesses and provided their curriculum vitae to the Appellants, and Approval Holder; (2) noted testimony his witnesses will rely on and speak to at the hearing is included in the Director's Record; and (3) stated he will only be relying on documents that are already before the Board.

[336] Having regard to the above, the Board finds the Director's written submissions have complied with Rule 19. Accordingly, the Board denies the Appellants' motion.

[337] Given the Board's decision above, the issue of whether the Appellants should be required to submit detailed summaries of their witnesses need not be considered.

VII. Additional Matters

[338] The Board notes the Director offered to provide a list of specific documents in the Director's Record that each of his witnesses will likely speak to at the hearing. In the Board's view, this list would be helpful to have ahead of time and would streamline the hearing of these appeals; therefore, the Board asks the Director to provide this list. However, in making this request, the Board wishes to make it clear this is not a standard requirement, but the Board is taking up the Director's assistance for these particular appeals.

[339] Further, in making this request, the Board is not suggesting that the Director's witnesses would be limited to the list of documents they identify when they are undergoing cross-examination by the Appellants or questioning by the Board.

VIII. Decision

[340] The Board grants the reconsideration in part and finds Mr. Jonathon Groves and Ms. Shauna Kenworthy are directly affected by the Director's decision to issue the Approval and, therefore, their appeals will be heard by the Board at the substantive hearing. The Board denies the reconsideration in part and finds the appeals of Ms. Elaine Bellamy and Will Farms Ltd., Ms. Della Poulsen and Cactus Coulee Farms Inc., Ms. Shauna Murphy, and Mr. Stan Riegel are dismissed for being found not directly affected.

[341] The Board denies the application to strike out portions of the Director's written submission on the basis that the role of the Director in an appeal should be limited. The Director will participate fully in the hearing as a party as identified in the legislation.

[342] Finally, the Board denies the application to require further and better information as to what the witnesses of the Approval Holder and Director will testify. The Director and Approval Holder and their witnesses are not required to provide "will say" statements, and the initial submissions provided by the Director and Approval Holder satisfy the requirements of the Board's Rules of Practice.

Dated on May 31, 2022, at Edmonton, Alberta.

-original signed-

_____
Meg Barker
Panel Chair

-original signed-

_____
Tamara Bews
Board Member

-original signed-

_____
Chris Powter
Board Member

Legislation

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

2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:

(a) the protection of the environment is essential to the integrity of ecosystems and human health and to the well-being of society;

(b) the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning;

(c) the principle of sustainable development, which ensures that the use of resources and the environment today does not impair prospects for their use by future generations;

(d) the importance of preventing and mitigating the environmental impact of development and of government policies, programs and decisions;

(e) the need for Government leadership in areas of environmental research, technology and protection standards;

(f) the shared responsibility of all Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions;

(g) the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment;

(h) the responsibility to work co-operatively with governments of other jurisdictions to prevent and minimize transboundary environmental impacts;

(i) the responsibility of polluters to pay for the costs of their actions;

(j) the important role of comprehensive and responsive action in administering this Act.

91(1) A notice of appeal may be submitted to the Board by the following persons in the following circumstances:

(a) where the Director issues an approval, makes an amendment, addition or deletion pursuant to an application under section 70(1)(a) or makes an amendment, addition or deletion pursuant to section 70(3)(a), a notice of appeal may be submitted

(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 73 and is directly affected by the Director's decision, in a case where notice of the application or proposed changes was provided under section 72(1) or (2), or ….

95(2) Prior to conducting a hearing of an appeal, the Board 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, and in making that determination the Board may consider the following:

(d) whether any new information will be presented to the Board that is relevant to the decision appealed from and was not available to the person who made the decision at the time the decision was made….

95(5) The Board

(a) may dismiss a notice of appeal if …

(ii) in the case of a notice of appeal submitted under section 91(1)(a)(i) or (ii), (g)(ii) or (m) of this Act or section 115(1)(a)(i) or (ii), (b)(i) or (ii), (c)(i) or (ii), (e) or (r) of the *Water Act*, the Board is of the opinion that the person submitting the notice of appeal is not directly affected by the decision or designation….

95(6) Subject to subsections (4) and (5), the Board shall, consistent with the principles of natural justice, give the opportunity to make representations on the matter before the Board to any persons who the Board considers should be allowed to make representations.

95(8) Subject to the regulations, the Board may establish its own rules and procedures for dealing with matters before it."

99(1) In the case of a notice of appeal referred to in section 91(1)(a) to (m) of this Act or in section 115(1)(a) to (i), (k), (m) to (p) and (r) of the Water Act, the Board shall within 30 days after the completion of the hearing of the appeal submit a report to the Minister, including its recommendations and the representations or a summary of the representations that were made to it.

100(1) On receiving the report of the Board, the Minister may, by order,

(a) confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make,

(b) make any direction that the Minister considers appropriate as to the forfeiture or return of any security provided under section 97(3)(b), and

(c) make any further order that the Minister considers necessary for the purpose of carrying out the decision.

101 Subject to the principles of natural justice, the Board may reconsider, vary or revoke any decision, order, direction, report, recommendation or ruling made by it.

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

2 The purpose of this Act is to support and promote the conservation and management of water, including the wise allocation and use of water, while recognizing

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;
(b) the need for Alberta's economic growth and prosperity;
(c) the need for an integrated approach and comprehensive, flexible administration and management systems based on sound planning, regulatory actions and market forces;
(d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision making;
(e) the importance of working co-operatively with the governments of other jurisdictions with respect to trans boundary water management;
(f) the important role of comprehensive and responsive action in administering this Act.

109(1) If notice is provided
(a) under section 108(1), any person who is directly affected by the application or proposed amendment … may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

115 A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:
(a) if the Director issues or amends an approval, a notice of appeal may be submitted
(i) by the approval holder or by any person who previously submitted a statement of concern in accordance with section 109 who is directly affected by the Director's decision, if notice of the application or proposed changes was previously provided under section 108….

Responsible Energy Development Act, S.A. 2012, c. R-17.3.

45(1) A decision of the Regulator is appealable to the Court of Appeal, with the permission of the Court of Appeal, on a question of jurisdiction or on a question of law."

Municipal Government Act, R.S.A. 2000, c. M-26.

470(1) Where a decision of an assessment review board is the subject of an application for judicial review, the application must be filed with the Court of Queen's Bench and served not more than 60 days after the date of the decision."

Environmental Appeal Board Regulation, Alta. Reg. 114/1993

1 In this Regulation, …

(f) "party" means

(i) the person who files a notice of appeal that results in an appeal,

(ii) the person whose decision is the subject of the notice of appeal,

(ii.1) where the subject of the notice of appeal is an approval or reclamation certificate under the Act or an approval, licence, preliminary certificate or transfer of an allocation of water under the *Water Act*, the person who holds the approval, licence or preliminary certificate, the person to whom the reclamation certificate was issued or the person to whom the allocation was transferred, and

(iii) any other person the Board decides should be a party to the appeal.

10(1) A party to an appeal shall file a written submission with the Board….

10(3) A written submission, whether filed by a party or a person referred to in section 9(2), shall contain

(a) a summary of the facts and evidence to be relied on by the person filing the submission,

(b) the name, address and telephone number of the lawyer or other agent acting on behalf of the person filing the submission, and

(c) in a case where there will be an oral hearing, a list of witnesses to be called by the party filing the submission.

Environmental Appeals Board – *Rules of Practice*

Rule 19 Every Party to an appeal must file a written submission with the Board and provide a copy to every other Party at least 7 days before the date of the hearing or as set out by the Board.

Written submissions shall be given to all other parties.

A written submission shall contain:

- a summary of the facts and evidence to be relied on by the Party;
- a list of witnesses to be called on by the Party and a summary of each witness' evidence; and
- the name, address, e-mail, and telephone and fax numbers of the lawyer or other agent acting on behalf of the party.

Rule 29 Any Party offering evidence shall have the burden of introducing appropriate evidence to support its position. Where there is conflicting evidence, the Board will decide which evidence to accept and will generally act on the preponderance of the evidence.