2026 ABEAB 9 **Appeal No. 25-014-D**

ALBERTA ENVIRONMENTAL APPEALS BOARD

Decision

Date of Decision – April 17, 2026

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

-and-

IN THE MATTER OF appeals filed by Sturgeon Lake Cree Nation with respect to *Water Act* Licence No. DAUT0021649 issued to the Municipal District of Greenview No. 16 by the Designated Director under the *Water Act*, Regulatory Assurance Division South, Alberta Environment and Protected Areas.

Cite as: Standing Decision: *Sturgeon Lake Cree Nation* v *Designated Director under the Water Act, Regulatory Assurance Division South, Alberta Environment and Protected Areas*, re: *Municipal District of Greenview No. 16*, 2026 ABEAB 9.

Classification: Public

BEFORE:		Ms. Barbara Johnston, Board Chair.
PARTIES:	**Appellant:**	Sturgeon Lake Cree Nation, represented by represented by Chief Sheldon Sunshine and Ms. Orlagh O'Kelley, O'Kelly Law.
	Licence Holder:	Municipal District of Greenview No.16, represented by Ms. Shauna N. Finlay, Reynolds Mirth Richards & Farmer LLP.
	Director:	Ms. Fidelma Horgan, Designated Director under the *Water Act*, Regulatory Assurance Division South, Alberta Environment and Protected Areas represented by Ms. Vivienne Ball, Environmental Law Section, Alberta Justice.

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EXECUTIVE SUMMARY

Alberta Environment and Protected Areas issued Licence No. DAUT0021649 under the *Water Act* to the Municipal District of Greenview No. 16 (the Licence Holder) authorizing the operation of works and diversion of up to 6,000,000 cubic metres (m^3) of water per year at a maximum rate of 0.56 m^3 per second for commercial and industrial purposes within the boundaries of the Greenview Industrial Gateway from the Smoky River at SE-30-067-04-W6M (the Licence). The application for the Licence was made on February 10, 2025, and the Licence was issued on April 7, 2025.

The Environmental Appeals Board (the Board) received a Notice of Appeal from the Sturgeon Cree Lake Nation (the Appellant or SLCN). The Board acknowledged the Appellant's appeal, advised the Licence Holder and the Director, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the Director) of the appeal, and requested that the Director provide the Board a copy of the Director's records relating to the Licence which the Director reviewed in issuing in the Licence (the Director's Record) to the Board. The Director agreed to provide the Director's Record to the Board approximately 7 weeks later on July 4, 2025. Shortly thereafter, the Licence Holder made two preliminary motions to the Board to dismiss the appeal on the basis of the Appellant not being directly affected and the grounds of appeal raised in the Notice of Appeal being constitutional questions outside the jurisdiction of the Board. On July 4, 2025, the Director advised the Board that it would not make the Director's Record available at that time as the Licence Holder had challenged the standing of the Appellant.

The Board subsequently requested and received submissions from the Appellant, the Licence Holder, and the Director (the Parties) regarding the provision of the Director's Record. On December 11, 2025, the Board issued its decision requiring the Director to provide the Board with the publicly available documents described in section 15(1) of the *Water (Ministerial) Regulation* and any information from the Government of Alberta's Aboriginal Consultation Office (the Limited Director's Record).[*]

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[*] Decision Letter: *Sturgeon Lake Cree Nation v Designated Director under the Water Act, Regulatory Assurance Division South, Alberta Environment and Protected Areas, re: Municipal District of Greenview No. 16*, dated December 11, 2026.

The Board received the Limited Director's Record on January 23, 2026, approximately 7 weeks after the Board's made its decision regarding the requirement for the provision of the Limited Director's Record. The Board subsequently set a submissions process and received submissions from the Parties on whether the Appellant was directly affected by the Licence and whether the grounds of appeal raised in the Notice of Appeal related to the requirement for and adequacy of consultation were constitutional questions outside the jurisdiction of the Board.

The Board found the Appellant and the SCLN members have a direct or personal interest in the quality and quantity of the water in the Smoky River as users of the Smoky River and the Smoky River Watershed. The Appellant and the SLCN members use the area near the point of diversion to hunt, fish, trap, gather, and exercise Aboriginal and Treaty Rights, and rely on the Smoky River for drinking water.

However, the Board found that the Appellant was not directly affected by the Director's decision to issue the Licence. The Appellant had alleged broad impacts arising from the Licence including impacts to water quality and quantity, impacts to wildlife, and impacts to the exercise of Aboriginal and Treaty Rights. However, the Appellant did not submit any evidence to the Board regarding how the alleged impacts directly or adversely impact the Appellant, or how the impacts were connected to the Director's decision to issue the Licence. The Licence Holder and the Director's evidence was that the impact to the Smoky River from the diversion authorized by the Licence would be temporary and negligible, representing approximately 0.0556 percent of the yearly flow rate of the Smoky River and less than 1 percent of the daily flow of the Smoky River.

As the Board found that the Appellant was not directly affected by the decision to issue the Licence, the Board did not consider whether the grounds of appeal raised by the Appellant were within the Board's jurisdiction. The Board noted the Board can consider evidence of constitutional rights as evidence of a right to access or use an area or resource. However, the Board further noted that the Board is not constitutional decision-maker under the *Administrative Procedures and Jurisdiction Act* and does not have jurisdiction to consider constitutional questions including the adequacy of consultation.

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1. INTRODUCTION

[1] These are the reasons for the decision of the Environmental Appeals Board regarding the directly affected status of the Sturgeon Cree Lake Nation (the Appellant or SCLN) in respect of its appeal of Licence No. DAUT0021469 (the Licence) issued to the Municipal District of Greenview No. 16 (the Licence Holder) under the *Water Act*, RSA 2000, c W-3 (the *Water Act*) by the Designated Director under the *Water Act*, Regulatory Assurance Division South, Alberta Environment and Protected Areas (the Director).[1]

[2] The Licence authorizes the Licence Holder to operate works and divert up to 6,000,000 cubic metres (m^3) of water per year at a maximum rate of 0.56 m^3 per second for commercial and industrial purposes within the boundaries of the Greenview Industrial Gateway (the GIG) from the Smoky River at SE-30-067-04-W6.

[3] The Environmental Appeals Board (the Board) received a Notice of Appeal from the Appellant.

[4] The Licence Holder made two preliminary motions. The first motion challenged the standing of the Appellant and argued that the Appellant was not directly affected by the Licence. The second motion argued that the grounds of appeal raised by the Appellant in the Appellant's Notice of Appeal were constitutional questions outside the jurisdiction of the Board. The Licence Holder requested that the Board dismiss the Appellant's Notice of Appeal.

[5] To have a valid Notice of Appeal and standing in the appeal, the Appellant must be directly affected by the Director's decision to issue the Licence.

[6] The Board requested submissions from the Appellant, the Licence Holder, and the Director (the Parties) regarding the directly affected status and the Board's jurisdiction to consider the Appellant's grounds of appeal raised in the Notice of Appeal.

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[1] See: Decision Letter: *Sturgeon Lake Cree Nation v Designated Director under the Water Act, Regulatory Assurance Division South, Alberta Environment and Protected Areas, re: Municipal District of Greenview No. 16*, dated April 2, 2026.

[7] After considering the written submissions from the Parties, the Board decided the Appellant was not directly affected by the decision of the Director to issue the Licence and therefore did not have standing in the appeals.

[8] The Board having decided that the Appellant was not directly affected, determined that it did not need to decide the jurisdiction issue. However, the Board noted that generally, the Board does not have jurisdiction to consider constitutional questions, including issues related to the duty to consult.

2. BACKGROUND

[9] The Board has considered the records before it, including the Limited Director's Record, and the written submissions of the Parties and has summarized the relevant information for the purposes of this decision below.

2.1. Procedural Background

[10] On April 7, 2025, the Licence was issued to the Licence Holder. The Licence authorizes the operation of works and diversion of up to 6,000,000 m^3 of water per year at a maximum rate of 0.56 m^3 per second for commercial and industrial purposes.

[11] On May 12, 2025, the Board received a Notice of Appeal from the Appellant which was acknowledged by the Board on May 12, 2025. The Board requested that the Director provide further information regarding whether:

a. a preliminary certificate was issued prior to the issuance of the Licence;

b. the application was dealt with by Notice of Decision or Notice of Application with Statements of Concern; and

c. if the Notice was advertised and Statements of Concern were requested, that the Director provide the Board with the Notice and the Statements of Concern.

[12] On May 12, 2025, the Director advised the Board that a Preliminary Certificate had not been issued for the Licence. The Director further advised that a Preliminary Certificate had been issued to the Licence Holder on February 29, 2024, for 24,000,000 m^3 in support of the GIG project and that a Notice of Application for this Preliminary Certificate had been advertised on

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Environment and Protected Area's (EPA) pre-cursor authorization viewer to the Digital Regulatory Assurance System (DRAS) on August 11, 2021, and in the local newspaper on September 30, 2022. The Director stated no Statements of Concern were received in relation to the Preliminary Certificate and the amount allocated under the Licence was much smaller than the proposed Preliminary Certificate. The Director further advised that the Licence is an interim licence and will be cancelled if the Licence for the full 24,000,000 m^3 proposed under the Preliminary Certificate is allocated. The Director advised that no Notice of Application for the Licence was posted, and no Statements of Concern were received in relation to the Licence. The Director further advised that a Notice of Decision was posted on DRAS for 30 days immediately following the issuance of the Licence.

[13] On May 22, 2025, the Board acknowledged the Director's May 14, 2025 Letter, and requested the Director provide a copy of the Director's records (all documents and all electronic media) she reviewed and that were available to her when making the decision to issue the Licence, including policies, guidelines, directives, legislation, and an index. This includes all the records within the approvals group relating to this appeal (the Director's Record). The Board asked the Director to advise by May 30, 2025, as to when the Director's Record could be provided and requested the Parties advise of any preliminary motions.

[14] On May 29, 2025, the Licence Holder requested to have until to June 20, 2025, to respond to the Board and advise of any preliminary motions.

[15] On May 30, 2025, the Director requested an extension until June 20, 2025, to respond to the Board.

[16] On June 2, 2025, the Board acknowledged the Licence Holder's Letters, and granted the requested extensions to June 20, 2025, to file any preliminary motions.

[17] On June 9, 2025, the Director advised that the Director's Record would be available by July 4, 2025.

[18] On June 10, 2025, the Board acknowledged the Director's June 9, 2025 Letter, and requested the parties provide available dates for mediation in July and August.

[19] On June 19, 2025, the Licence Holder made two preliminary motions:

1. a motion to dismiss the Appellant's appeal on the grounds of the Appellant not being directly affected (the Directly Affected Motion); and
2. a motion to dismiss the Appellant's appeal based on some or all the Appellant's grounds being outside the Board's jurisdiction (the Jurisdiction Motion).

The Licence Holder provided initial argument on these preliminary motions.

[20] On June 24, 2025, the Board acknowledged the Licence Holder's preliminary motions and set a submission process. The Board further acknowledged the Director's correspondence regarding date the Director would provide the Director's Record to the Board.

[21] On July 4, 2025, the Director advised that as the Licence Holder had challenged the jurisdiction of the Board to hear the appeals, the Director "…[would] not provide the Director's Record at this time."[2]

[22] On July 7, 2025, the Board acknowledged the Director's July 4, 2025 Letter and requested comments from the Appellant and the Licence Holder as to whether the Director's Record was required to determine the two preliminary motions.

[23] On July 14, 2025, the Licence Holder advised that it did not require the Director's Record to be produced to address the preliminary motions. The Appellant stated the Appellant was entitled to the Director's Record and required the Director's Record to respond to the preliminary motions. The Board set a submissions process regarding the requirement of the Director to provide the Director's Record with respect to the appeal.

[24] On December 11, 2025, the Board issued its decision requiring the Director to provide the Board with the publicly available documents described in section 15(1) of the *Water (Ministerial) Regulation*, AR 205/1998 and any information from the Government of Alberta's Aboriginal Consultation Office (the Limited Director's Record).[3]

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[2] Director's Letter to the Board, July 4, 2025, at page 1.

[3] Decision Letter: *Sturgeon Lake Cree Nation* v *Designated Director under the Water Act, Regulatory Assurance Division South, Alberta Environment and Protected Areas*, re: *Municipal District of Greenview No. 16*, dated December 11, 2025.

[25] On December 17, 2025, the Director advised that the Limited Director's Record would be available by January 23, 2026.

[26] On January 23, 2026, the Director provided the Limited Director's Record to the Board.

[27] On January 26, 2026, the Board provided the Limited Director's Record to the Parties and set a process to receive submissions on the Licence Holder's preliminary motions to the dismiss the Appellant's appeal.

[28] The Board received the Appellant's Initial Written Submission on February 17, 2026 (Appellant's Initial Submission).

[29] On March 3, 2026, the Licence Holder provided its response submission (Licence Holder's Response Submission). On March 3, 2026, the Director also provided its response submission (Director's Response Submission).

[30] On March 27, 2026, the Appellant provided its rebuttal submission (Appellant's Rebuttal Submission).

[31] On April 2, 2026, the Board issued a letter advising that it had determined that the Appellant was not directly affected, and therefore the appeal was dismissed.[4] The Board's letter advised that its reasons for this decision would follow. These are the Board's reasons.

3. ISSUE

[32] The issues before the Board are:

a. whether the Appellant is directly affected by the decision of the Director to issue the Licence; and

b. whether the grounds of appeal raised by the Appellant fall outside the Board's jurisdiction, as the Notice of Appeal raises constitutional issues.

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4 Decision Letter: *Sturgeon Lake Cree Nation v Designated Director under the Water Act, Regulatory Assurance Division South, Alberta Environment and Protected Areas, re: Municipal District of Greenview No. 16*, dated April 2, 2026.

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4. SUBMISSIONS

[33] The Board has considered the written submissions of the Parties and has summarized the relevant information for the purposes of this decision below.

4.1. Appellants

[34] The Appellant submitted it is directly and adversely affected by the Licence.

[35] The Appellant submitted that the issues raised by the Appellant relating to the duty to consult, the honour of the Crown, and Treaties are not *ipso facto* questions of constitutional law outside the Board's jurisdiction.

[36] The Appellant argued the Licence Holder's preliminary motions should be dismissed. In the alternative, the Appellant argued that the issue of jurisdiction is better addressed on the merits of the appeal when the evidence can demonstrate the relevance of the duty to consult, honour of the Crown, and Treaty issues.

[37] The Appellant argued that honour of the Crown is always at stake; the duty to consult is procedural and prospective and not related to the determination of rights; and that the Board's decision-making is subject to legal constraints, including those under the *Constitution Act*, *1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (*Constitution Act*, *1982*).[5] The Appellant argued that the Board's decision could impact the Section 35 Rights of the Appellant, and therefore the Board's conduct is governed by the honour of the Crown.

[38] The Appellant stated that the Crown has on several occasions recognized the need to consult the Appellant in relation to *Water Act* licences in the area and failed to provide notice of the Licence.

[39] The Appellant stated its reserve land is located near the town of Valleyview, Alberta. The Appellant further stated that its territory spans from north of High Prairie, east past Edmonton, south to Jasper, and west across the British Columbia border (SLCN Territories). The

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5 Appellant's Initial Submissions at paragraph 3.

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Appellant stated this area is where its members exercise and practice their contemporary Treaty Rights.[6]

[40] The Appellant stated that Alberta legislates the approval of water licences under the *Water Act*, and that any challenge to a *Water Act* licence must go to the Board. The Appellant noted that the Board is not a constitutional decision-maker under section 11 of the *Administrative Procedures and Jurisdiction Act,* RSA 2000, c A-3 (APJA), but argued however that the Board is not prohibited by its enabling statute from considering consultation like the Alberta Energy Regulator (AER).[7]

[41] The Appellant stated that Alberta has created a parallel process to discharge the duty to consult through the Aboriginal Consultation Office (ACO). The Appellant stated that the ACO is not established through statute, and provides notice of projects, assesses the level of consultation required, and determines who will be consulted on any given project.[8] The Appellant stated the ACO requires consideration of site-specific impacts and does not consider cumulative effects.[9]

[42] The Appellant further stated that the proponent is tasked with the procedural aspects of consultation, and the ACO determines the adequacy of consultation. The Appellant stated it was unaware of the ACO having made a determination of whether consultation in the SCLN Territories was inadequate.

[43] The Appellant stated that on February 9, 2020, Alberta announced a Memorandum of Understanding with the Tri-Municipal Industrial Partnership (TMIP) to sell up to 7000 acres of Crown land to the Licence Holder, which became the GIG. The Appellant stated consultation occurred between March 2020 and August 2021, during which the Appellant raised 57 water

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[6] Appellant's Initial Submissions at paragraph 9, citing Affidavit of Chief Sheldon Sunshine Affirmed February 17, 2026 (Sunshine Affidavit), at paragraph 4.

[7] Appellant's Initial Submission at paragraph 12, citing *Responsible Energy Development Act*, SA 2012, c R-17.3 (REDA) at section 21.

[8] Appellant's Initial Submission at paragraph 13, citing https://www.alberta.ca/indigenousconsultations-in-alberta and *Mikisew Cree First Nation* v *Alberta*, 2024 ABKB 578, at paragraph 47.

[9] Appellant's Initial Submission at paragraph 13, citing the Sunshine Affidavit at paragraph 18.

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related concerns in the GIG.[10] The Appellant stated that consultation focused on the transfer of the land and that the Appellant was told that "any water related concerns that are environmental in nature would be considered at a later processes [sic] when applications for specific projects come in that fall under the *Water Act*."[11]

[44] The Appellant stated that in February 2022, Alberta sold approximately 2000 acres of land to the Licence Holder as a part of the GIG, and that it is unclear how and when further acres were transferred from Alberta to the Licence Holder for the GIG.[12]

[45] The Appellant stated that the Licence Holder unilaterally proposed its own memorandum of understanding with the Appellant in February 2024. The Appellant further stated this memorandum of understanding was rejected and that on May 17, 2024, the Appellant had requested that meaningful discussions continue.

[46] The Appellant stated that droughts and wildfires have been issues in the Smoky Watershed. The Appellant further stated that its community was ravaged by wildfire and lost multiple structures. The Appellant stated the expenses related to wildfires remain significant, and that the Appellant is carrying a $19 million deficit.[13] The Appellant further stated that in July 2025, the Licence Holder declared a drought and agricultural crisis.[14]

[47] The Appellant stated that on November 15, 2024, the Licence Holder applied for Pre-Consultation Assessment with ACO for the Licence. The Appellant further stated that on

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[10] Appellant's Initial Submission at paragraph 15, citing the Sunshine Affidavit at paragraph 13 and paragraph 14, and Exhibit B to the Sunshine Affidavit.

[11] Appellant's Initial Submission at paragraph 16, citing the Sunshine Affidavit at paragraph 14, and Exhibit B to the Sunshine Affidavit.

[12] Appellant's Initial Submission at paragraph 17, citing the Sunshine Affidavit, at paragraph 15, and Exhibit A.

[13] Appellant's Initial Submission at paragraph 19.

[14] Appellant's Initial Submission at paragraph 19, citing Municipal District of Greenview No. 16, Media Release, July 4, 2025, Greenview Declares Agricultural Disaster for Livestock Industry, available here: https://mdgreenview.ab.ca/greenview-declares-agricultural-disaster-forlivestock-industry/.

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November 21, 2024, without notice or submissions from the Appellant, the ACO determined that impacts to Treaty Rights and traditional lands would be "negligible."[15]

[48] The Appellant stated that on or about January 13, 2025, the Appellant wrote an open letter to Premier Ms. Danielle Smith asking if the Appellant had acquired a water licence and requesting documentation regarding the water licence if it existed, along with any consultation records.[16]

[49] The Appellant stated that it did not receive a response to its January 13, 2025 Letter from the Premier. The Appellant further stated that the Minister of Indigenous Relations, Mr. Rick Wilson, replied on February 25, 2025, indicating that EPA had issued a preliminary certificate, that the preliminary certificate did not create an entitlement to water, and that the issuance of a *Water Act* licence was contingent upon meeting mandatory conditions including appropriate consultation with First Nations (Wilson Promise). The response advised that no additional applications had been submitted to EPA, and no water licence had been issued for the GIG.[17]

[50] The Appellant stated that the Licence Holder had submitted an application to EPA on February 11, 2025, without notice to the Appellant. The Appellant further stated:

a. the ACO Assessment determined that impacts to Treaty Rights and traditional land uses are expected to be negligible;

b. a WaterSMART Report was submitted in relation to the Licence on February 7, 2025; and

c. the application for the Licence was made on February 10, 2025.

[51] The Appellant stated a meeting with several Government of Alberta Ministers was arranged for April 9, 2025 (the April 9, 2025 Meeting). The Appellant further stated that a copy

15 Appellant's Initial Submissions at paragraph 20.

16 Appellant's Initial Submissions at paragraph 25, citing Letter to Premier D. Smith dated January 13, 2025, attached as Appendix D to the Appellant's Notice of Appeal.

17 Appellant's Initial Submissions at paragraph 26, citing Letter from Minister R. Wilson, February 14, 2025, as Appendix E to the Notice of Appeal (the Wilson Letter).

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of the Preliminary Certificate was sought and instead, the Appellant received a copy of the Licence under appeal.[18]

[52] The Appellant stated it was not provided advance notice of the Preliminary Certificate or the Licence, and therefore it was unable to submit a Statement of Concern.

[53] The Appellant stated that at the April 9, 2025 Meeting, the Appellant was advised that Alberta had determined that it did not need to consult on the Licence.[19] The Appellant stated that it was advised after the meeting to file a Statement of Concern and were refused a copy of the ACO Assessment.[20]

[54] The Appellant argued that the Appellant is directly affected by the Licence for two reasons:

1. the Alberta Government has recognized that the Appellant should be consulted in this area on *Water Act* applications; and
2. the Appellant's *prima facie* evidence demonstrates a strong connection and use of the area.

[55] The Appellant argued the test to determine standing is not in dispute and is stated in *Woodland Cree First Nation* v *Director, North Boreal District, Regulatory Assurance Division, Alberta Environment and Protected Areas*, re: *Aurora Peat Products ULC*, 2026 ABEAB 1 (*Aurora Peat*) at paragraph 45:

> "1. whether there is an interest being asserted by the person consistent with those identified in Normtek, namely adverse effects on safety, human health, or property, and any environmental, social, economic, or cultural interests that are directly affected;
>
> 2. whether the person demonstrated on a prima facie basis that there was an adverse impact on the identified interest; and

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[18] Appellant's Initial Submission at paragraph 28, citing the Sunshine Affidavit at paragraph 29 and paragraph 30, and Exhibit G to the Sunshine Affidavit.

[19] Appellant's Initial Submission at paragraph 28, citing the Sunshine Affidavit at paragraph 31 and paragraph 32.

[20] Appellant's Initial Submission at paragraph 31, citing the Sunshine Affidavit at paragraph 30 through paragraph 33, and Exhibit H to the Sunshine Affidavit.

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3. whether the person demonstrated on a prima facie basis that the impact on the identified interest was direct" (the McMillan Test). [citation removed]"[21]

[56] The Appellant noted that in assessing whether the Appellant is directly affected, the Board may look to the following factors:

a. factual circumstances that vary on a case-by-case basis;

b. interest must be direct, personal or private, greater than the generalized community, and may be related to human health, social, or economic impacts;

c. any harm to natural resources the SLCN uses;

d. adverse effect must be greater than to the public at large;

e. harm must be caused by the decision of the Director, in this case, the Licence; and

f. *prima facie* evidence need only demonstrate a reasonable possibility that the Appellant will be directly affected.[22]

[57] The Appellant argued that *Aurora Peat* was persuasive, if not determinative of the present appeal. The Appellant argued that as in *Aurora Peat*, the Appellant has to provide *prima facie* evidence to demonstrate that the Appellant has an interest and will suffer an effect beyond that of the general public, including their traditional land use, their cultural and ceremonial gathering points within 5 to 10 kilometres, and one of their members' Registered Fur Management Areas (RMFAs).

[58] The Appellant noted that *Aurora Peat* concluded that at minimum, the Woodland Cree First Nation "would be considered a downstream user in the Project Areas,"[23] and argued that just based on preliminary maps without site visits, traditional land use studies, or technical reviews, the same was true of the Appellant.[24]

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21 Appellant's Initial Submission at paragraph 41, citing *Aurora Peat* at paragraph 45.

22 Appellant's Initial Submission at paragraph 44, citing Standing Decision: *Jeans-Moline et al* v *Director, North Region, Regulatory Assurance Division, Alberta Environment and Parks,* re: *Canadian Carmelite Charitable Society Inc.*, 2023 ABEAB 9 (*Jeans-Moline*) at paragraph 75.

23 Appellant's Initial Submission at paragraph 48, citing *Aurora Peat* at paragraph 217.

24 Appellant's Initial Submission at paragraph 48, citing the Sunshine Affidavit at paragraph 43 through paragraph 45, and Exhibit K.

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[59] The Appellant argued the Government of Alberta had recognized the Appellant's interests in traditional land use in the area through its consultation obligations, and that this recognition by the Government of Alberta is the best evidence that the Appellant is directly and adversely affected. The Appellant stated that the Government of Alberta had stated on multiple occasions that the Appellant should be consulted and therefore was possibly directly and possibly adversely affected by projects in the GIG, including:

a. the 2021 GIG land transfer consultation;[25] and

b. on February 14, 2025, through Minister Wilson's promise of consultation.[26]

[60] The Appellant stated that one of the Appellant's RMFAs is within 5 to 10 kilometres of the Licence's diversion point, and that there are other RMFAs that rely on the Smoky River. The Appellant further stated that the Appellant has ceremonial and traditional land use sites approximately 5 kilometres downstream from the diversion point. The Appellant stated that the SLCN relies on the Smoky Watershed for its drinking water and that it is the Appellant's traditional water source.[27]

[61] The Appellant stated that sufficient water quality and quantity is necessary for SLCN ceremonies, way of life, and to exercise Treaty Rights.

[62] The Appellant stated that from review of the diversion point and the Limited Director's Record, the impacts to the Appellant are:

a. reduced ability to fish, hunt, and trap for moose, deer, or other ungulates, rabbits, and other furbearers;

b. inability to use water in sufficient quantity and quality;

c. impact on the watershed, including ice flows downstream;

d. impact on fish habitats and fish;

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25 Appellant's Initial Submission at paragraph 49(a), citing the Sunshine Affidavit at paragraph 14 and Exhibit B.

26 Appellant's Initial Submission at paragraph 49(b), citing the Wilson Letter.

27 Appellant's Initial Submission at paragraph 37, citing the Sunshine Affidavit at paragraph 8 and INAN Committee, June 17, 2024, Chief Sheldon Sunshine Testimony, at paragraph 115.

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e. impact on climate change, including in relation to the fire the Appellant suffered from May 5, 2023, in which many SLCN structures were lost and for which the Appellant is still carrying a $19 million deficit;

f. impacts to SLCN members' ability to gather culturally and spiritually significant medicines, food source plants, and traditional use plants;

g. impacts to the Appellant's culturally sacred sites;

h. loss of access to sufficient and clean water for drinking and other purposes;

i. impacts on SLCN members' ability to practice traditional social, cultural, and spiritual activities at the diversion point; and

j. the cumulative effects of further water diversion in an already heavily industrialized area.[28]

[63] The Appellant stated that it if had been provided the opportunity to consult on the Licence, it would have:

a. conducted site visits at the diversion point;

b. interviewed elders regarding the sacred sites, campground areas as well as the trapline holders in the area, especially downstream of the diversion point;

c. retained experts, including a limnologist wildlife habitat expert, and/or a climate change scientist to assess the Licence's impacts; and

d. conducted technical review of previous water allocation restrictions in the watershed or adjacent watersheds, as well as the declarations of drought in the area.[29]

[64] The Appellant argued that the SLCN's exercise of its way of life, Treaty Rights, traditional land use, and rights of its trapline holders downstream, at minimum, depend on water of sufficient quality and quantity, which could be impacted by the Licence.

[65] The Appellant argued that without analyses or submissions, there is no certainty that the Licence will not affect the SLCN's access to water in sufficient quality and quantity to exercise its rights or protect its interests. The Appellant further argued that this is especially true in an area already subject to drought and wildfires.

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28 Appellant's Initial Submission at paragraph 39, citing the Sunshine Affidavit at paragraph 47.

29 Appellant's Initial Submission at paragraph 39, citing the Sunshine Affidavit at paragraph 48.

[66] The Appellant argued that it has been unable to consider or lead evidence on whether the Licence will contribute to conditions that make wildfires more common or exacerbate climate change. The Appellant further argued that increased wildfire risk will directly affect the Appellant, who is already carrying a $19 million deficit from previous wildfires.

[67] The Appellant argued it would be unfair and incorrect to find that the Appellant is not directly affected.

[68] The Appellant stated it is not disputing that the Board is not a constitutional decision-maker or that the Board cannot consider questions of constitutional law. The Appellant stated that it is not asking the Board to determine the scope of Aboriginal and Treaty Rights, nor strike down legislation.[30]

[69] The Appellant noted that a question of constitutional law is defined by APJA and subject to a Notice of Constitutional Question if challenged in the Courts. The Appellant stated that it was not challenging the applicability or validity of an enactment as contemplated by APJA.[31] The Appellant further noted that it was not asking for the determination of any right pursuant to section 10(d)(ii) of APJA, noting that the duty to consult and the honour of the Crown applies at all times even before the determination of a Treaty or Aboriginal Right.

[70] The Appellant relied on *Rio Tinto Alcan Inc.* v *Carrier Sekani Tribal Council*, 2010 SCC 43 (*Carrier Sekani*), noting at paragraph 35 the Supreme Court had explained:

> "'*Haida Nation* sets the framework for the dialogue *prior* to the final resolution of claims by requiring the Crown to take contested or established Aboriginal rights into account *before* making a decision that may have an adverse impact on them […] The duty is *prospective*, fastening on rights yet to be proven."'[32]

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[30] Appellant's Initial Submission at paragraph 53, citing *Canada (Minister of Citizenship and Immigration)* v *Vavilov*, 2019 SCC 65 (*Vavilov)*, at paragraph 55.

[31] Appellant's Initial Submission at paragraph 53 through paragraph 55, citing AOPA at section 10(d) and the *Constitutional Notice Regulation*, AR 102/1999 at section 1.

[32] Appellant's Initial Submission at paragraph 52, citing *Carrier Sekani* at paragraph 35.

Classification: Public

Therefore, argued the Appellant, even if determining the duty to consult arises, it is not determining a right, it is determining the duty to consult on a potential right. The Appellant further argued that the appeal does not require the determination of a right.

[71] The Appellant argued that neither the duty to consult nor the honour of the Crown are questions of constitutional law as defined by section 10(d) of APJA. The Appellant argued that the honour of the Crown is a principle of aboriginal law or constitutional law, but it is not a constitutional question.[33] The Appellant argued that the duty to consult arises before proof of Aboriginal Rights and is necessarily speculative. The Appellant further argued that it is a principle developed in common law[34] and that it is incorrect to assert that everything that relates to "Aboriginal peoples" interests and rights, and the obligations to them are constitutional questions.

[72] The Appellant argued that the Board's lack of jurisdiction to consider constitutional questions does not mean that the Board's decision-making process operates in a vacuum, separate from the *Constitution Act*, *1982* and the Treaties. The Appellant argued the Treaties are foundational documents,[35] and that the constitutional constraints of section 35 of the *Constitution Act, 1982* applies to administrative decision-making in the same manner as the *Charter* values.[36]

[73] The Appellant further noted that there is no legislation granting all consultation authority to the ACO and neither is there a law removing consultation authority from the Board. The Appellant argued that the ACO ceded its authority by neglecting to notify the Appellant.

[74] The Appellant noted that unlike the AER, the Board is not statutorily or expressly excluded from considering consultation adequacy. The Appellant further noted that the Board is not integrated with the ACO, where it must rely on the determination of the ACO as the AER does.

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[33] Appellant's Initial Submission at paragraph 57, citing *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 (*MCFN v Canada*) at paragraph 21 and paragraph 23.

[34] Appellant's Initial Submission at paragraph 57, citing I. Brideau, The Duty Consult Indigenous Peoples: Background Paper, Research and Education, Library of Parliament, 2019-06-2, section 2.2: https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E#a3-5.

[35] Appellant's Initial Submission at paragraph 58, citing *Chief Electoral Officer of Alberta* v *Sylvestre*, 2025 ABKB 712, at paragraph 173.

[36] Appellant's Initial Submission at paragraph 58, citing *Goodwin* v *Alberta College and Association of Chiropractors*, 2022 ABQB 177 at paragraph 43.

The Appellant argued that in the absence of such a provision, the Board was an entity capable of discharging or considering the consultation obligations owed to the Appellant. The Appellant noted that the Federal Court of Appeal, in a decision upheld by the Supreme Court, noted a similar situation with the National Energy Board (NEB) and that the NEB could discharge the duty to consult in the absence of an exclusionary provision such as the one applicable to the AER.[37]

[75] The Appellant argued that in upholding the decision in *Chippewas SCC*, the Supreme Court found that where the NEB's decision would impact Treaty and Aboriginal Rights, the decision itself was Crown conduct engaging the duty to consult.[38] Therefore, the NEB could discharge the duty to consult. The Appellant argued the same holds true of the Board's decision, which regardless of constitutional jurisdiction, will impact the Appellant's Treaty Rights and therefore triggers the duty to consult.

[76] The Appellant argued the honour of the Crown is always at stake[39] in dealings with First Nations and governs all Treaty implementations,[40] including the administrative decision-making of this appeal. The Appellant argued that a Treaty is a perpetual relationship,[41] and it is not possible to carve out entire regimes from Treaty implementation[42] under the guise of a constitutional question.

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37 Appellant's Initial Submission at paragraph 61, citing *Responsible Energy Development Act*, SA 2012, c R-17.3, at section 21; *Fort McKay First Nation* v *Prosper Petroleum Ltd*, 2020 ABCA 163 (*Prosper)*, at paragraph 49; and *Chippewas of the Thames First Nation* v *Enbridge Pipelines Inc*., 2015 FCA 222 (*Chippewas*), at paragraph 74 and paragraph 75.

38 Appellant's Initial Submission at paragraph 62, citing *Chippewas of the Thames First Nation* v *Enbridge Pipelines Inc*., 2017 SCC 41 (*Chippewas SCC*), at paragraphs 29 through paragraph 34.

39 Appellant's Initial Submissions at paragraph 63, citing *MCFN v Canada*, at paragraph 23.

40 Appellant's Initial Submissions at paragraph 63, citing *MCFN v Canada* at paragraph 28.

41 Appellant's Initial Submission at paragraph 63, citing *Ontario (Attorney General)* v *Restoule,* 2024 SCC 27 (*Restoule*), at paragraph 13.

42 Appellant's Initial Submission at paragraph 63, citing *Restoule* at paragraph 73.

Classification: Public

[77] The Appellant argued that the honour of the Crown, consistent with the imperative of reconciliation, should permeate all administrative decision-making just as Charter values inform administrative decision-making.[43]

[78] The Appellant relied on *Vavilov,* arguing that a reasonableness review will depend on whether the Board took into account the legal context or the legal constraints on decision-making, including binding precedents, the common law and statutory scheme, and the *Constitution Act, 1982*.[44]

[79] The Appellant concluded by arguing that it is artificial to separate issues around the impacts to the Appellants from its Treaties and the honour of the Crown. The Appellant submitted there are no constitutional questions, and that given the failure to provide advance notice of the Licence, these issues should be determined on the full record. The Appellant argued the effect of throwing a blanket of "constitutional question" over issues relating to Treaty and Aboriginal Rights, and the duty to consult, was to "ghettoize" the rights and interests of First Nations people, contrary to the direction of the Supreme Court.[45]

4.2. Licence Holder

[80] The Licence Holder submitted the Appellants were not directly affected by the Licence and that constitutional questions are outside the jurisdiction of the Board.

[81] The Licence Holder stated the Licence was sought by the Licence Holder to support the preliminary diversion of 6,000,000 m^3 of water annually from the Smoky River as the first step in the development of the GIG. The Licence Holder stated that as outlined in the Licence Application, the Licence Holder is establishing a water utility for the GIG and the Licence will enable the Licence Holder to begin supplying potential developers within the GIG.[46] The Licence

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43 Appellant's Initial Submission at paragraph 63, citing *MCFN v Canada* at paragraph 49, citing *Doré* v *Barreau du Québec*, 2012 SCC 12, at paragraph 36.

44 Appellant's Initial Submission at paragraph 64, citing *Vavilov* at paragraph 111.

45 Appellant's Initial Submission at paragraph 65.

46 Licence Holder's Response Submission at paragraph 2, citing Section 4.0 in the Water License Application under the Water Act, dated February 2025, prepared by WaterSMART Solutions Ltd., the Limited Record, Tab 13, at page 33 through page 35.

Classification: Public

Holder stated that potential developers would be required to obtain the necessary industrial approvals issued under *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 (EPEA) as the Licence only authorizes the diversion of water. The Licence Holder further stated that the application materials included a Water Availability Assessment, which concluded that there was ample capacity in the Smoky River for the requested diversion amount.[47]

[82] The Licence Holder stated that the diversion would only operate while the river is ice-free, between mid-April to early November, and that the Licence Holder would rely upon stored water during times that water could not be diverted.

[83] The Licence Holder noted that the Licence was issued on April 7, 2025, and that the Appellant had appealed the issuance of the Licence on May 7, 2025. The Licence Holder further noted that the Appellant had raised nine grounds of appealing, including:

1. inadequate consultation with the Appellant prior to the issuance of the Licence;
2. the Appellant will be impacted by the Licence;
3. the Smoky River is already over allocated;
4. the Licence is contrary to the Province's instream flow objectives; and
5. the Licence contributes to additional cumulative impacts to other allocations, leading to scarcity and interference with the Aboriginal, inherent and Treaty Rights of the Appellant.

[84] The Licence Holder noted that on June 19, 2025, the Licence Holder had raised two issues with the Appellant's appeal, firstly, that the appeal engaged constitutional questions and matters outside the Board's jurisdiction, and secondly, that the Appellant is not directly affected by the Licence, as the Licence will not affect the Appellant's use of the water or any other use the Appellant makes of the Smoky River.

[85] The Licence Holder stated the Board's jurisdiction is determined by statute. The Licence Holder noted that pursuant to EPEA and its associated regulations, in the case of a notice

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47 Licence Holder's Response Submission at paragraph 3, citing Section 4.2 through 4.4 in the Water License Application under the Water Act, dated February 2025 prepared by WaterSMART Solutions Ltd., Limited Director's Record, Tab 13, at page 33 through page 35.

Classification: Public

of appeal submitted under section 91(1)(a) through (m) of EPEA and section 115(1)(a) through (i), (k), (m) through (p), and (r) of the *Water Act*, the Board provides a report to the Minister who ultimately has the authority to confirm, reverse, or vary the decision of the Director.[48]

[86] The Licence Holder noted other legislation may expand or limit the Board's jurisdiction. The Licence Holder stated that pursuant to section 11 of APJA, no decision-maker has the authority to determine a question of constitutional law unless a regulation under the APJA confers the jurisdiction to do so.[49] The Licence Holder stated the relevant regulation is the Designation of Constitutional Decision Makers Regulation, AR 69/2005 (Constitutional Decision Makers Regulation), which does not name the Board. The Licence Holder noted that the AER and the Alberta Utilities Commission (AUC) were granted authority to answer questions of constitutional law but also noted the AER and the AUC are licencing or approving authorities as opposed to being an appeal body like the Board.[50]

[87] The Licence Holder argued that the Board is not as described by the Federal Court of Appeal, a "regulatory agency to which the Crown delegates responsibility to exercise functions under its governing legislation that will fulfill what the duty to consult requires in the circumstances",[51] and further argued that the Board cannot therefore fulfill the duty to consult. The Licence Holder argued that whether consultation is required in any particular case and whether consultation has been adequate, has been determined to be a constitutional question.[52]

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[48] Licence Holder's Response Submission at paragraph 9 and paragraph 10, citing section 99(1) and section 100 of EPEA, and section 115(1) of the *Water Act*.

[49] Licence Holder's Response Submission at paragraph 11, citing APJA at section 11. Section 11 of APJA provides:

> "11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so."

[50] Licence Holder's Response Submission at paragraph 12 and paragraph 13, citing the Constitutional Decision Makers Regulation.

[51] Licence Holder's Response Submission at paragraph 14, citing *Roseau River First Nation v Canada (Attorney General)*, 2023 FCA 163 (*Roseau River)*, citing *Clyde River (Hamlet)* v *Petroleum Geo-Services Inc.*, 2017 SCC 40 at paragraphs 30 though 34.

[52] Licence Holder's Response Submission at paragraph 15, citing *Cold Lake First Nation* v *Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304 (*Cold Lake First Nation*), paragraph 7, Notice of Constitutional Question appended to this decision. *Roseau River* at paragraph 8.

Classification: Public

[88] The Licence Holder relied on *Roseau River* and argued that assessing and determining if the honour of the Crown has been fulfilled involves assessing whether a right protected by the *Constitution* is in danger of being adversely affected and whether the constitutionally protected right to be consulted has been fulfilled.[53] The Licence Holder further noted that the Board has found that "adequacy of consultation is a constitutional question outside the Board's jurisdiction."[54]

[89] The Licence Holder argued that the Appellant's suggestion that the Board has the authority to determine consultation because there is no legislation removing the authority to determine adequacy of consultation as there is for the AER through the operation of section 21 of REDA, is incorrect.

[90] The Licence Holder argued that the Court of Appeal in the *Prosper* considered whether the AER had committed an error of law by failing to consider the honour of the Crown with respect to a promise made by the Premier to establish a Moose Lake Access Management Plan (MLAMP) addressing the cumulative effects of oil sands development in the Fort McKay First Nation's traditional territory. The AER concluded that considering the honour of the Crown in this context was outside its jurisdiction as a result of section 21 of REDA. The Court of Appeal considered the jurisdiction of the AER and concluded that it did have the jurisdiction to consider whether the honour of the Crown required the project to be delayed until negotiations regarding the MLAMP had concluded despite section 21 of REDA. The Licence Holder noted that the Court of Appeal found that the AER was entitled to do so because of its jurisdiction to determine questions related to constitutional law and its obligations to fulfill certain aspects of the duty to consult and determine appropriate accommodations.[55] The Licence Holder argued the AER had

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53 Licence Holder's Response Submission at paragraph 16, citing *Roseau River* at paragraph 26 through paragraph 28.

54 Licence Holder's Response Submission at paragraph 16, citing *Aurora Peat* at paragraph 233, and *Grayling et al.* v *Director, Capital District, Regulatory Assurance Division, Alberta Environment and Protected Areas,* re: *Suez Canada Waste Services Inc. and Her Majesty the Queen in Right of Alberta as represented by the Minister of Infrastructure*, 2023 ABEAB 5 at paragraph 37 and paragraph 38.

55 Licence Holder's Response Submissions at paragraph 18, citing *Prosper* at paragraphs 40 through paragraph 42, and paragraph 48.

Classification: Public

broad implied jurisdiction to consider the potential adverse impacts of the project at issue on Aboriginal Rights under section 35 of the *Constitution Act, 1982*, which has also been confirmed by ministerial orders.[56]

[91] The Licence Holder argued that the adequacy and scope of the duty to consult is an important constitutional question and the Board does not have the authority to determine such issues.

[92] The Licence Holder stated it was important to note that the Appellant was not without a remedy. The Licence Holder noted that based on *Aurora Peat*, which cited *McMillan et al* v *Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks,* re: *Badlands Recreation Development Corp.*, 2022 ABEAB 22 (*McMillan*), the Appellant may assert that its use of the lands or water will be directly affected by a decision, here being the issuance of the Licence, provided that it can demonstrate that there is a reasonable possibility that its rights to access or use water will be directly affected. The Licence Holder further stated that this does not preclude the Appellant from asserting its entitlement to be consulted in connection with the Licence before the Courts.[57]

[93] The Licence Holder stated that the Board has recently reviewed the law respecting how it is required to determine if a party has standing under the legislation to bring an appeal.

[94] The Licence Holder noted the relevant legislation is section 115(1)(c) of the *Water Act*, which requires a person to be directly affected by the decision.[58] The Licence Holder further noted the Board had articulated the test as follows:

1. Is there a personal or private interest, consistent with the underlying policies of the applicable statutes, being asserted by a person?
2. Is there an adverse effect to the identified person?
3. Is the adverse effect to the identified interest direct?[59]

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[56] Licence Holder's Response Submissions at paragraph 18, citing *Prosper* at paragraph 42 and paragraph 48.

[57] Licence Holder's Response Submissions at paragraph 22, *Aurora Peat*, and *McMillan*.

[58] Licence Holder's Response Submissions at paragraph 24, citing section 115(1)(c) of the *Water Act*.

[59] Licence Holder's Response Submissions at paragraph 25, citing *McMillan* at paragraph 222.

Classification: Public

[95] The Licence Holder stated that in *Jeans-Moline* the Board expanded on the principles the Board must apply when answering the above questions,[60] and argued the principles which would be applicable to the Board's determination of the Appellant's Notice of Appeal are:

1. interest;
2. adverse effect;
3. direct; and
4. evidence required.[61]

[96] The Licence Holder stated that *Aurora Peat* also addressed whether the directly affected tests for groups set out in *Jeans-Moline* would apply to a First Nation asserting that it is directly affected by virtue of its Treaty Rights. The Licence Holder noted that the Board had determined that *Jeans-Moline* did not apply because the Treaty Rights are held collectively by the First Nation.[62] The Licence Holder further noted that the Board had referenced Rule 29 of the Board's Rules of Practice in *Aurora Peat*, which provides that any party offering evidence has the burden of introducing appropriate evidence to support their position.[63]

[97] The Licence Holder argued that consequently, the Appellant must provide evidence that the Appellant has "(i) has an interest, and (ii) that it is reasonably possible for that interest to be directly and adversely affected by the issuance of the Licence."[64]

[98] The Licence Holder argued many of the facts relied upon by the Appellant in its submissions are not relevant to the Board's analysis of directly affected. The Licence Holder further argued that the Board's determination of the jurisdictional issue is primarily based upon applying the law as set out above to the grounds of appeal raised by the Appellant and that the determination of the Appellant's standing requires a factual determination to determine if the test for standing is met for any grounds of appeal that are within the Board's jurisdiction.

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60 Licence Holder's Response Submissions at paragraph 25, citing *Jeans-Moline*.

61 Licence Holder's Response Submissions at paragraph 26, citing *Jeans-Moline* at paragraph 76.

62 Licence Holder's Response Submissions at paragraph 27, citing *Aurora Peat* at paragraph 224 and paragraph 225.

63 Licence Holder's Response Submissions at paragraph 27, citing *Aurora Peat* at paragraph 226.

64 Licence Holder's Response Submissions at paragraph 29.

Classification: Public

[99] The Licence Holder argued that the key facts necessary for the Board's determination of the standing issue are:

1. the rights being asserted;
2. whether there is evidence that supports the reasonable possibility that those rights will be adversely affected; and
3. if there is a reasonable possibility of an adverse effect, is that adverse effect direct.

[100] The Licence Holder argued that the grounds of appeal are outside the jurisdiction of the Board. The Licence Holder noted that the Appellant had raised nine grounds of appeal and asserted that it is directly and adversely affected by the Licence, including because its members exercise Treaty Rights on the Smoky River and the Smoky River Basin, which the Appellant relies on for its drinking water.

[101] The Licence Holder conceded that if there is a reasonable possibility that the Appellant's Treaty Rights or use of the Smoky River or the Smoky River Basin will be adversely affected by the Licence the Appellant will have standing. The Licence Holder argued that all other grounds of appeal raised by the Appellant related to consultation or the process of issuing the Licence are outside of the jurisdiction of the Board.

[102] The Licence Holder noted the Appellant had argued its rights to procedural fairness were not met in the issuance of the Licence. The Licence Holder stated that the scope of a party's entitlement to procedural fairness stems from the possibility that the party will be directly affected by a particular decision. The Licence Holder further stated jurisprudence has established that appeal processes that allow a party to fully participate in the review of an original decision may be sufficient to address previous breaches of procedural fairness.[65] The Licence Holder submitted that in the event that the Licence Holder is found to be directly affected by the Licence, the Board's process would cure any alleged defect in procedural fairness by virtue of the Appellant being able to raise issues, adduce evidence, and cross-examine parties with respect to the Licence.

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[65] Licence Holder's Response Submission at paragraph 36, citing *Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 at paragraph 28.

Classification: Public

[103] The Licence Holder noted that much of the grounds of appeal raised by the Appellant are grounded in allegations of a failure to find a duty to consult or a failure to consult.

[104] The Licence Holder noted the Appellant had asserted that the "Respondent" breached a duty of candour to the Appellant by failing to provide notice of any step or disclosure of records in relation to the Licence. The Licence Holder stated it is assumed that the Appellant is referring to the Director, and that it was unclear what the scope or the source of the duty is, whether it is procedural fairness or the honour of the Crown. The Licence Holder argued that if the Appellant's arguments are based on procedural fairness, its arguments regarding remedy through the Board's process apply. The Licence Holder further argued that if the Appellant's arguments are based on the honour of the Crown, the Licence Holder's arguments regarding constitutional questions apply.

[105] The Licence Holder noted the Appellant had challenged the correctness of the ACO's decision that no consultation was required in connection with the Licence. The Licence Holder argued that the Board has no jurisdiction or authority to reverse or review this determination. The Licence Holder further argued that this ground would require the Board to review and assess the ACO's decision and, presumably come to its own determination of whether the decision was correct. The Licence Holder argued that undertaking such an analysis would be treading into territory the Board has already determined constitutes a constitutional question outside the Board's authority.

[106] The Licence Holder noted that the Appellant raised a failure to consult with respect to the Licence as a ground of appeal and that the issuance of the Licence to the Appellant was an attempt to avoid the duty to consult. The Licence Holder argued that these were issues of whether there was a duty to consult the Appellant and if that consultation did not occur, and that these were constitutional questions outside the jurisdiction of the Board.

[107] The Licence Holder relied on *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40 (*Clyde River*), noted in this particular case the NEB had the authority to decide constitutional questions, and that the Supreme Court had held that "a tribunal must be able to determine constitutional issues if it is entitled to consider issues of law, 'absent a clear

demonstration that the Legislature intended to exclude such jurisdiction from the tribunal's power.'"[66] The Licence Holder noted that the Appellant has requested that the Board's process be used to discharge any duty to consult associated with the Licence and argued that the Board's authority was not comparable to the breadth of the NEB. The Licence Holder argued that the Board's processes cannot be used to satisfy the duty to consult as the Board has not been provided with a statutory authority to have its process satisfy the duty to consult, should such a duty be found to arise with respect to the Licence.

[108] The Licence Holder noted that the Appellant had argued that the honour of the Crown was not fulfilled because of the failure to fulfill the Wilson Promise, stating that appropriate consultation would take place prior to the issuance of any licence pursuant to the Preliminary Certificate. The Licence Holder argued that this ground of appeal seeks a finding of whether a duty to consult arose pursuant to the Wilson Promise or the Licence, both of which require the Board to answer a constitutional question concerning the existence of and scope of the duty to consult the Appellant with respect to the Licence.

[109] The Licence Holder noted that the Appellant had asserted that determining and assessing the honour of the Crown and the duty to consult in this context are not constitutional questions as defined by section 10(d), and further noted that section 10(d)(ii) provides:

> "10(d) 'question of law' means …
>
> (ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights."

[110] The Licence Holder submitted that determinations regarding the duty to consult are constitutional questions by virtue of the cases relied upon by the Licence Holder because they engage the consideration of obligations that arise from s. 35 of the *Constitution Act, 1982*. The Licence Holder further submitted that the Board does have jurisdiction however to consider whether matters raised in a notice of appeal are constitutional questions outside the jurisdiction of the Board as the Board did in *Aurora Peat*.

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66 Licence Holder's Submissions at paragraph 41, citing *Clyde River* at paragraph 31 through paragraph 34.

Classification: Public

[111] The Licence Holder argued that the Appellant had not met the test for directly affected based on the technical assessments including the Water Availability Assessment for the GIG,[67] which indicate that the Licence will not diminish the amount of water available in the Smoky River or the Smoky Basin, or access to or use of water. The Licence Holder further argued that the infrastructure required to support the diversion is minimal, temporary, and will not interfere with or prevent any access to the Smoky River or Smoky River Basin.

[112] The Licence Holder stated the following:

a. under all scenarios for withdrawing water from the Smoky River for the GIG, there will be no significant decline in water elevation; [68]

b. there will be no measurable change to ice formation or the space under the ice along the shoreline because of forecasted withdrawals;[69]

c. the Smoky River remains within sustainable withdrawal limits and is not currently overallocated. The cumulative licenced water withdrawals from the Smoky River have not yet reached allocation threshold established to protect ecological function and downstream users, based on the Surface Water Allocation Directive. There is capacity under current conditions for additional allocations without exceeding the river's environmental flow requirements. [70]

[113] The Licence Holder noted that Figure 8 in the Water Availability Assessment for the GIG provides a visual representation of the protected flow in the Smoky River, the remaining unallocated volumes, the allocated volumes, and the portion represented by the Licence. The Licence Holder argued that this demonstrates how expansive the water resources within the Smoky River are, and the very limited nature of the allocation of water by the Licence.

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67 Licence Holder's Response Submission at paragraph 46 and paragraph 47, citing the Water Availability Assessment for the Greenview Industrial Gateway, Water License Application under the *Water Act*, dated February 2025, WaterSMART Solutions Ltd., The Preliminary Record, Tab 16, at page 57 through 74 (Water Availability Assessment for the GIG) and the Technical Memorandum dated February 26, 2026, (Technical Memorandum) attached as Appendix B to the Licence Holder's Response Submission.

68 Licence Holder's Response Submission at paragraph 48, citing the Technical Memorandum at paragraph 18, page 9.

69 Licence Holder's Response Submission at paragraph 48, citing the Technical Memorandum at paragraph 18, page 9.

70 Licence Holder's Response Submission at paragraph 48, citing the Technical Memorandum at paragraph 30, page 18.

[114] The Licence Holder argued that the impacts raised by the Appellant relate to the GIG project as a whole and not the temporary diversion contemplated by the Licence.

[115] The Licence Holder noted that the Appellant raised concerns about the ability to use water in sufficient quality and quantity, to access clean drinking water and water for other purposes. The Licence Holder argued that the Appellant has not provided any technical evidence that would allow the Board to assess the reasonable possibility that these impacts will occur because of the Licence. The Licence Holder further argued that its evidence is that there will be no adverse impacts to water quality or quantity.

[116] The Licence Holder noted that the Appellant had argued that it had not provided technical evidence due to a lack of consultation regarding the Licence. The Licence Holder noted that the Licence Holder had filed its letter raising preliminary issues on June 19, 2025, over seven months ago. The Licence Holder argued that there was sufficient time for the Appellant to undertake the necessary work to acquire the technical support and that the Appellant had not requested additional time to undertake such work.

[117] The Licence Holder noted the Appellant had argued that the diversion point is directly upstream of from SLCN trapline holders and that the area surrounding the diversion point is used for the exercise of Treaty and Aboriginal rights. The Licence Holder argued that the Appellant did not detail adverse impacts from the diversion pursuant to the Licence specifically nor is there an explanation of how the diversion as planned will prevent the exercise of Treaty and Aboriginal Rights.

[118] The Licence Holder argued that the Appellant had not filed any technical or expert evidence that would support the conclusion that it is reasonably possible for the Licence to result in adverse impacts to the use of, or access to, the Smoky River.

[119] The Licence Holder argued the Appellant's case is in contrast to that of the Woodland Cree First Nation (WCFN) in *Aurora Peat*. The Licence Holder noted that in the case of the WCFN, the area used by the WCFN was going to be totally transformed by the project. The Licence Holder noted that the authorization in question in that appeal, an approval, authorized the disturbance of 492 hectares of lands and the removal of over 233 acres of wetlands, the cutting of

trees, draining of water from those lands, removal of plant life, and the dislocation of fish and wildlife. The Licence Holder further noted that the WCFN had noted in that case that the authorized activities distinguished the approval issued to Aurora Peat from many other approvals issued under the *Water Act* for the construction of water diversion or retention structures which may only impact water flows and hydrology.[71] The Licence Holder noted that based on the WCFN's used of the lands and areas that were going to be removed from their access, the Board was able to conclude that the WCFN was directly affected.

[120] The Licence Holder argued the circumstances in *Aurora Peat* and the Appellant's circumstances are not comparable because it is unclear how the Appellant's use of the areas downstream of the diversion point or the Appellant's use of the water and associated resources in the Smoky River Basin will be adversely affected or affected at all.

[121] The Licence Holder argued there was no evidence before the Board upon which to conclude that there was a reasonable possibility that the issuance of the Licence will have an adverse impact on the use and enjoyment of the Smoky River by the SLCN. The Licence Holder further argued therefore, the Appellant had not met the "directly affected" test for standing.

[122] The Licence Holder argued the following:

a. the Ministry of Environment and Protected Areas is responsible for administering the *Water Act*, not the Board;

b. the Appellant's concerns regarding Alberta asserting control over water in the Province is not an issue which the Board can decide or for which the Board can provide a remedy;

c. the Appellant noted that with more time it would have provided technical materials to support the alleged impacts, however, the basis on which the Appellant is asserting those impacts is unclear without technical information. The Licence Holder noted the Appellant has a nuanced understanding of its use and access to the Smoky River Basin, and further noted there is no basis for the conclusions that the Licence and diversion volumes contemplated will have a reasonable probability of causing the alleged impacts.

d. the Appellant alleged it has not been consulted for the additional volumes contemplated under the Preliminary Certificate. The Licence Holder noted

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71 Licence Holder's Response Submission at paragraph 54, citing *Aurora Peat* at paragraph 237.

> the prerequisites for a licence for the additional volumes contemplated in the Preliminary Certificate have not been fulfilled and argued that this is not a matter properly before the Board in connection with the current Licence.[72]

[123] The Licence Holder noted that the Appellant had argued that *Aurora Peat* was determinative. The Licence Holder argued that it was unclear how *Aurora Peat* was determinative as the circumstances in *Aurora Peat* were strikingly distinct. The Licence Holder noted that the Appellant had further argued that it is "impossible without corresponding technical reviews to determine whether such impacts would be 'negligible' as summarily determined by the ACO."[73] The Licence Holder argued that the Licence relates to the temporary diversion of a volume of water, which is a fraction of the allocatable water volume within the Smoky River. The Licence Holder noted that unlike *Aurora Peat* where the land was being dewatered and peat being removed, here the flow and level of water is not expected to materially change. The Licence Holder argued that therefore, unlike *Aurora Peat*, there is no *prima facie* evidence confirming the Appellant will be directly and adversely affected.

4.3. Director

[124] The Board is mindful of the Director's role in ensuring the wise and sustainable allocation of resources for the benefit of all Albertans, and in managing impacts to the aquatic environment arising from applications and decisions made under the *Water Act*. The Board is also mindful of the Court's comments in *Normtek* regarding the appropriateness of the Director adopting a position with respect to a would be appellant's standing.[74] The Board also notes the Director's Statement of Concern Procedure Policy[75] and role with respect to Statements of Concern. Finally, the Board notes there is a Licence Holder capable of defending the Director's decision to issue the Licence under appeal. Based on the foregoing, while the Board finds the Director's evidence regarding the reasons the Licence was issued and the potential effects of the

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72 Licence Holder's Response Submission at paragraph 58.

73 Licence Holder's Response Submission at paragraph 58, citing the Appellant's Initial Submission at paragraph 47.

74 *Normtek* at paragraph 47.

75 *Statement of Concern Procedure Policy*, Government of Alberta, Environment and Protected Areas, June 16, 2025 (Statement of Concern Procedure Policy).

Licence helpful, the Board places lesser weight on the arguments of the Director regarding the standing of the Appellant and the validity of the Appellant's Notice of Appeal.[76]

[125] The Director stated that the Director took no position on the preliminary motion related to questions of constitutional law identified in the Board's January 26, 2026 Letter.

[126] The Director argued the Appellant was not directly affected by the Director's decision to issue the Licence or the activities authorized by the Licence. The Director further argued the Appellant's Notice of Appeal was not valid and consequently, the Board has no jurisdiction to accept the Appellant's Notice of Appeal. The Director argued that the Notice of Appeal not being valid, should be dismissed by the Board.

[127] The Director argued that the only decision relevant to the preliminary motions was the Director's decision to issue the Licence under section 51(1)(b) of the *Water Act.*

[128] The Director argued that a person has no right to appeal the issuance of a licence under section 51(1)(b) where the Director has waived the requirement for a Notice of Application unless the person is directly affected by the decision.

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[76] In considering the role of the Director in making arguments regarding the Appellant's standing in this appeal, the Board finds the approach taken by Justice Rothstein in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at paragraph 71 instructive. In considering the role of the initial decision-maker on judicial review, Justice Rothstein discussed the need to balance the value of the unique evidence that the initial decision-maker can bring to the judicial review, with the need for the initial decision-maker to remain impartial with respect to future dealings with the parties. Justice Rothstein cautioned the decision-maker on the tone of their participation in the proceedings. Justice Rothstein quoted Justice Goudge of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner)*, 2005 CanLII 11786, 75 O.R.(3d) 309, at paragraph 61 with approval, stating:

> "…[I]f 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."

While the Director did not make an initial determination of the Appellant's directly affected status in this case, the Board agrees with Justice Rothstein and Justice Goudge that it is important that Director submissions should be a "…helpful elucidation of the issues, informed by [her] specialized position, rather than by the aggressive partisanship of an adversary." In the circumstances of this case, this caution sees the Board considering the evidence presented by the Director but placing less weight on the arguments presented by the Director.

Classification: Public

[129] The Director argued the Appellant has the onus of proving that it is directly affected by the Licence and that the Appellant had failed to prove that the Appellant is directly affected by the Licence. The Director further argued that the Director's technical evidence directly contradicts the Appellant's submissions on possible impacts to the Appellant and its members.

[130] The Director argued that the negligible volume of diversion authorized by the Licence, the non-sensitive fish habitat at the point of diversion, the temporary and seasonal nature of the activities, the use of a floating barge, and the limited instream footprint "mean that neither the issuance of the Licence nor the activities it authorizes adversely affects the SLCN or its members' abilit[ies] to engage in the activities described [in] the Appellant's submissions."[77]

[131] The Director argued that the Appellant had not satisfied the three-part test set out in *McMillan* that the Board uses to determine if a person is directly affected, or as followed by the Board in *Aurora Peat*.

[132] The Director stated that the Licensee applied for the Licence on February 10, 2025.

[133] The Director further stated that the application did not require a Notice of Application because the adequate notice of the subject matter of the application had already been provided for under the *Water Act* for the issuance of Preliminary Certificate No. 00476030-00-00. The Director stated that as a result, the Director waived the requirement for Notice of the Application under section 108(6)(c) of the *Water Act.*

[134] The Director stated that because there was no notice, there was no procedure for persons to submit Statements of Concern. The Director further stated that a Public Notice of Decision was posted on DRAS on April 7, 2025, for 30 days.

[135] The Director relied on section 115(1)(c)(ii) of the *Water Act* and argued that a person cannot appeal the Director's decision to issue the Licence under section 51(1)(b) of the *Water Act* where Notice of the Decision has been issued under section 108(6) of the *Water Act*, unless that person is directly affected by the decision to issue the Licence.

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77 Director's Response Submission at paragraph 10.

Classification: Public

[136] The Director argued that a Notice of Appeal must satisfy section 115(1) of the *Water Act* and that only a Notice of Appeal that satisfies section 115(1) of the *Water Act* initiates an appeal of the decision objected to. The Director further argued that a Notice of Appeal submitted with respect to a Licence which does not satisfy section 115(1)(c)(ii) of the *Water Act* is not a valid Notice of Appeal and argued the Notice of Appeal submitted by the Appellant did not satisfy section 115(1)(c)(ii) of the *Water Act*.

[137] The Director relied on *Alberta Wilderness Association* v *Alberta (Environmental Appeal Board)*, 2013 ABQB 44 (*Alberta Wilderness*), arguing that the Board does not have inherent jurisdiction,[78] but only the jurisdiction granted to it by the provisions of EPEA and the *Water Act*. The Director further argued that to reflect the Board's limited jurisdiction, the Legislature has set out the decisions that can be appealed to the Board in section 115(1) of the *Water Act* and 91(1) of EPEA.[79]

[138] The Director relied on section 94(1) of the EPEA and argued that the Board can only conduct a hearing upon receipt of a valid notice of appeal. The Director argued that because the Notice of Appeal is not a valid a notice of appeal, the Board does not have the authority to conduct a hearing.

[139] The Director argued that pursuant to section 95(5) of EPEA, the Board may dismiss an appeal.

[140] The Director argued that as a preliminary matter the Board may consider whether it has the jurisdiction to determine if a notice of appeal submitted to the Board is valid. The Director further argued that section 115(1) of the *Water Act* does not provide jurisdiction over matters arising out of the *Water Act* that the Legislature did not grant jurisdiction to the Board by the provisions of the *Water Act*.[80]

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78 Director's Response Submissions at paragraph 34, citing *Alberta Wilderness Association* at paragraph 23 and paragraph 27.

79 Director's Response Submissions at paragraph 35, citing *Alberta Wilderness Association* at paragraph 27, and *Cleanit Greenit Composting System Inc. v Director (Alberta Environment and Parks)*, 2022 ABQB 582, at paragraph 70 and paragraph 84.

80 Director's Response Submissions at paragraph 38, citing *Alberta Wilderness* at paragraph 28.

[141] The Director stated the Board having received a preliminary motion from the Licensee challenging its jurisdiction to accept the Notice of Appeal, must decide if it can accept the Notice of Appeal objecting to the Licence. If the Board decides that it does not have jurisdiction, the Director argued the Board must dismiss the Notice of Appeal pursuant to section 95(5)(a)(ii) of EPEA because the Notice of Appeal is not properly before it.

[142] The Director argued that where the Director has waived the requirement for a Notice of Application and issued a licence under section 51(1)(b), a person cannot appeal unless the person is directly affected by the decision.

[143] The Director argued the Board does not have jurisdiction to accept the Notice of Appeal and should dismiss the Notice of Appeal pursuant to section 95(5)(a)(ii) of EPEA.

[144] The Director argued the Director's technical evidence directly contradicts the Appellant's submissions on possible impacts to the Appellant and its members.

[145] The Director further argued that the negligible volume of diversion authorized by the Licence, the non-sensitive fish habitat at the point of diversion, the temporary and seasonal nature of the activities, the use of a floating barge, and the limited instream footprint "mean that neither the issuance of the Licence nor the activities it authorizes adversely affects the SLCN or its members' abilit[ies] to engage in the activities described [in] the Appellant's submissions."[81]

[146] The Director stated the Licence authorizes the Licensee to divert:

a. up to 6,000,000 m^3 water per year;

b. the volume of water from the Smoky River, within the boundaries of the GIG, located approximately 45 km south of the City of Grande Prairie;

c. from the point of diversion located at SE-30-067-04-W6, which is located on the south downstream bank of the Smoky River; and

d. at a maximum rate of 0.56 m^3 per second.[82]

[147] The Director noted that the *Water Act* defines "diversion of water" as:

81 Director's Response Submission at paragraph 10.

82 Director's Response Submission at paragraph 42, citing the Licence at page 1.

"(m) 'diversion of water' means

(i) the impoundment, storage, consumption, taking or removal of water for any purpose, except the taking or removal for the sole purpose of removing an ice jam, drainage, flood control, erosion control or channel realignment, and

(ii) any other thing defined as a diversion in the regulations for the purposes of this Act;"[83]

[148] The Director stated that to mitigate any potential impacts of the activities authorized by the Licence, Condition 7110 and the Diversion Table in Schedule 1 establishes weekly diversion limits during low-flow periods on the Smoky River.[84]

[149] The Director stated that the volume of water authorized by the Licence is too small to adversely affect the Smoky River or the Appellant's access to or use of the Smoky River, as described in the Appellant's submissions.

[150] The Director stated that while the volume of water to be diverted under the Licence sounds large, it is quite small in the context of the size and power of the Smoky River.[85] The Director stated that comparing the rate of water withdrawn from the point of diversion to the overall flow of the Smoky River is a sound and widely accepted method for assessing whether a diversion could affect current or future users of the river, because this method directly measures the relationship. The Director stated that when the volume pumped is very small compared to the river's natural flow, the potential impact to the river and on all current and future users is expected to be very low.[86]

[151] The Director stated the Smoky River at the Water Survey of Canada station 07GJ001 - Watino Station hydrometric station (Watino Station) carries approximately 10.8 billion m^3 water each year. The Director further stated that pumping 6,000,000 m^3 of water from the

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83 Director's Response Submission at paragraph 43, citing the *Water Act* at section 1(1)(m).

84 Director's Response Submission at paragraph 44, citing the Licence at Condition 7110 and Schedule 1.

85 Director's Response Submission at paragraph 47, citing the Affidavit of Fidelma Horgan, sworn March 2, 2026 (Director's Affidavit) at paragraph 10.

86 Director's Response Submission at paragraph 48 and paragraph 49, citing the Director's Affidavit at paragraph 9.

Classification: Public

Smoky River at a maximum rate of 0.56 m^3 per second is approximately 0.0556 percent of the yearly flow rate of the Smoky River. The Director stated that the Licence authorizes pumping at the point of diversion that is less than 1 percent of the river's daily flow. The Director compared the amount of water the Licence authorizes the Licence Holder to divert from the Smoky River to removing a small cup of water from a full bathtub.[87]

[152] The Director noted the graph titled "Smoky River at Watino – Comparing GIG diversion rate to natural river flow" illustrates how small the maximum diversion rate authorized by the Licence is relative to the Smoky River's natural flow rate, and demonstrates that the Smoky River's average daily flow throughout the year ranges from hundreds to thousands of m^3 per second during the spring runoff when flows peak. The Director noted by way of comparison that the licenced diversion rate of 0.56 m^3 appears almost flat along the bottom of the graph.[88]

[153] The Director stated the Watino Station is the only location on the Smoky River that provides a long-term, continuous, and complete record of flow which makes it uniquely reliable for applying the Licence thresholds. The Director stated the Watino Station was used for the Licence because:

a. the Watino Station represents the overall behaviour of the river, especially during low-flow periods;

b. it is the only station with a year-round measurement and an 80-year record, which helps understand how the river behaves in high and low-flow periods;

c. it is maintained to a high national standard and is intended for decisions such as setting flow thresholds for water diversion licences;

d. it provides near real-time, quality-checked flow information, which allows the Licensee to quickly respond to changing river conditions and adjust diversion when flow beings to drop; and

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87 Director's Response Submission at paragraph 51 through paragraph 54, citing the Director's Affidavit at paragraph 10 and paragraph 12.

88 Director's Response Submission at paragraph 55 and paragraph 56, citing the Director's Affidavit at paragraph 12 and the "Smoky River at Watino – Comparing GIG diversion rate to natural river flow", attached to the Director's Affidavit as Exhibit "A", and to this Decision as Appendix "A" – "Smoky River at Watino – Comparing GIG diversion rate to natural river flow".

Classification: Public

e. other nearby stations do not have year-round data or long-term records, so they cannot provide the same confidence for applying the cutback and cutoff rules set out in the Licence.[89]

[154] The Director stated that Condition 7120 of the Licence is a precautionary safeguard preventing diversion when river flow is unknown. The Director further stated that if the Watino Station does not operate there is no reliable real-time flow data to determine whether diversion is safe under the cutback and cutoff rules, and therefore Condition 7120 further requires the Licensee to stop diverting water whenever the Watino Station is not operational, unless authorized by the Director in writing. The Director stated that the Director may only allow diversion if the current river flow can be confirmed through another reliable method, such as a manual flow measurement.[90]

[155] The Director stated that Condition 6790 of the Licence prevents the Licensee from depositing or causing any substance to be deposited at the point of diversion that has, may have or has the potential to adversely affect the source of water. The Director stated that the point of diversion:

a. is surrounded by moderate, 0.75 – 1.0 m depth, run habitat;

b. contains large woody debris in the pool caused by frequent tree falls into the channel, which provides instream cover and velocity breaks for fish;

c. provides limited overhead cover or shading because of bank height; and

d. is dominated by fines with some embedded large cobbles.[91]

[156] The Director noted that according the "Provisional Intake Fish Habitat Assessment Summary" prepared by Associated Environmental, which included a spawning survey and noted the fish habitat at the point of diversion:

a. is not unique or limited in the local area of the Smoky River;

b. is not anticipated to provide critical habitat for any resident species;

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89 Director's Response Submission at paragraph 57 and paragraph 58, citing the Director's Affidavit at paragraph 29 through paragraph 32, and paragraph 34.

90 Director's Response Submission at paragraph 59 through paragraph 62, citing the Director's Affidavit at paragraph 33 through paragraph 35.

91 Director's Response Submission at paragraph 63 and paragraph 64, citing the Director's Affidavit at paragraph 16, and the Director's Limited Record at Tab 17.

Classification: Public

c. does not represent unique fish habitat features;

d. does not provide suitable spawning habitat for salmonid species such as bull trout;

e. no nests (redds) were identified; and

f. the presence of abundant sediment (fines) reduces the survivability of eggs deposited by salmonid species.[92]

The Director further stated that there are other areas of deep-pool habitat documented during the fish habitat assessment that are expected to provide similar fish habitat functionality to the point of diversion location.[93]

[157] The Director stated that the diversion of water under the Licence is temporary, will only occur during the ice-free period from mid-April to mid-November each year, and that there will be no permanent installation of structures at the point of diversion. The Director further stated that the pumps will be located on a floating barge, must be removable with no permanent infrastructure left in the bed and shore of the Smoky River, and meet the requirements of Schedule 1, 2(f) of the *Water (Ministerial) Regulation*, AR 205/1998, to be exempt from an approval under the *Water Act*.[94]

[158] The Director stated that the barge will be situated near the shore of the Smoky River, placed in the river by crane, and assembled prior to the diversion taking place. The Director further stated that the hold piles will hold the barge in place like spikes or crampon rather than drilling into the riverbed. The Director stated the maximum instream footprint is 400 m^2.[95]

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92 "[A] … redd has the structural form and function of a nest and is used for salmon egg incubation, hatching, and the early rearing of hatchlings (alevins)." See: https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/residence-descriptions/atlantic-salmon-inner-fundy-2018.html.

93 Director's Response Submission at paragraph 65 and paragraph 66, citing the Provisional Intake Fish Habitat Assessment Summary, Associated Environmental, February 10, 2025 (Fish Habitat Summary), the Director's Limited Record at Tab 17.

94 Director's Response Submission at paragraph 67 through paragraph 69, citing the Director's Affidavit at paragraph 14, paragraph 18, and paragraph 23.

95 Director's Response Submission at paragraph 70 through paragraph 72, citing the Director's Affidavit at paragraph 19 and paragraph 24, and Exhibit "B" and Exhibit "C".

Classification: Public

[159] The Director stated the point of diversion is the location where the volume of water is pumped from the Smoky River by the Licensee to operate the works and conduct the activities authorized by the Licence. The Director further stated the point of diversion:

a. located on the left downstream bank of the Smoky River, which consists of partially vegetated, vertical, eroding bank;

b. is a pool of an approximate area of 100 m^2 or 0.1 hectares (20 metres long by 5 metres wide); and

c. is approximately 1.0 metre in depth.

The Director stated that the location was chosen because it was outside the high flow velocity of the Smoky River to prevent any limitations imposed on the use of the river and any potential impacts to fish and fish habitat.[96]

[160] The Director stated that Schedule 1 of the Licence includes important safeguards to protect the Smoky River and users of the river, including the Appellant. The Director further stated Schedule 1 establishes cutback and cutoff flow levels that reduce or stop diversion when the river is experiencing very low flows, ensuring that withdrawals only occur when the river has sufficient water. The Director further stated over-use will be prevented during sensitive periods by linking diversion limits to real-time river conditions. The Director stated that the practical effect is that the Licence prevents the diversion of water when the Smoky River is under low-flow stress or when diversion could affect the Appellant, other users, or the environment.[97]

[161] The Director stated that the purpose of the cutback requirement is to begin protecting the Smoky River as soon as river flow enters the lower range, and that when the river flow enters that lower range the Licensee must immediately reduce the volume of water withdrawn from the river and shift to the reduced diversion rate as specified in Schedule 1 of the Licence. The Director explained that the cutoff requirement is to provide stronger protection as the Smoky River approaches very low-flow conditions. The Director stated that when the flow of the river enters

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[96] Director's Response Submission at paragraph 73 through paragraph 75, citing the Director's Affidavit at paragraph 15, paragraph 21 through paragraph 24, Exhibit "D", and the Director's Limited Record at Tab 17.

[97] Director's Response Submission at paragraph 77 through paragraph 79, citing the Director's Affidavit at paragraph 25.

Classification: Public

very low-flow conditions, the Licensee must reduce diversion to the more restrictive cutback diversion rates specified in Schedule 1.[98]

[162] The Director stated that the purpose of the cutoff threshold is to provide the strongest protection for the Smoky River during extreme low-flow periods, and that this threshold is triggered when the river falls below the cutoff threshold. The Director stated that when the cutoff threshold is reached, the Licensee must stop all diversion of water and cannot take any water until the flow of water rises above the cutoff threshold.[99]

[163] The Director argued that in *Normtek*, the Court of Appeal assessed the meaning of "directly affected" based on the intent of EPEA, and the term's "ordinary meaning."[100] The Director stated that the Court of Appeal had held that the ordinary meaning of the phrase directly affected limits the class of persons who can appeal a director's decision but gave the Board discretion to determine who is directly affected beyond finding only harm to a natural resource the interested party uses.[101]

[164] The Director stated that in response to *Normtek*, the Board established the McMillan Test, which it refined in *Jeans-Moline*. The Director further stated that the Board has applied the McMillan Test to individuals, or groups with a distinct personal or private interest separate from its members, and that the Board in *Jeans-Moline* had added seven principles to guide the Board in applying either the McMillan Test or the Jeans-Moline Test.[102]

[165] The Director noted that the Board had determined in *Aurora Peat* that the McMillan Test is the test to apply when considering if a First Nation is directly affected by the decision under appeal.[103]

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98 Director's Response Submission at paragraph 80 through paragraph 85, citing the Director's Affidavit at paragraph 26 and paragraph 27.

99 Director's Response Submission at paragraph 86 through paragraph 88, citing the Director's Affidavit at paragraph 27 and paragraph 28.

100 Director's Response Submission at paragraph 89, citing *Normtek* at paragraph 81.

101 Director's Response Submission at paragraph 90, citing *Normtek* at paragraph 85.

102 Director's Response Submission at paragraph 91 through paragraph 93, citing *McMillan* at paragraph 56 and *Jeans-Moline* at paragraph 74.

103 Director's Response Submission at paragraph 94, citing *Aurora Peat* at paragraph 183 and paragraph 225.

Classification: Public

[166] The Director argued that to satisfy its onus that it is directly and adversely affected by the Licence the Appellant must provide evidence to establish:

a. it has a personal and private interest, consistent with the underlying policies of the *Water Act*;

b. there is an adverse effect to the identified interest; and

c. the adverse effect is directly caused by the activities authorized by the Licence.[104]

The Director argued that the Appellant has not discharged its onus to establish that it is directly affected.

[167] The Director argued that *Aurora Peat* is distinguishable from the current appeal for several reasons. The Director stated that *Aurora Peat* authorized the harvesting of peat under approvals, while the Licence authorizes the diversion of water. The Director further stated that the area subject to the approvals in *Aurora Peat* was 492 hectares, while the area subject to the Licence is 0.0378 hectares. The Director noted that the activities authorized in *Aurora Peat* were 16 km from the WCFN's Reserves, while in the present appeal the point of diversion is 63 km from the Appellant's Reserves. The Director further noted that the nature of the aquatic environment was wetlands in *Aurora Peat*, and in the present appeal, it is the Smoky River near the left downstream bank.[105]

[168] The Director argued that while the potential impact of the activities in *Aurora Peat* was the drainage of water from 233 hectares of wetlands, the cutting of trees, and the displacement of fish and wildlife species, the potential impacts to the Smoky River from the Licence are negligible, noting that the diversion of water authorized by the Licence represents approximately 0.0556 percent of the river's annual flow and less than 0.15 percent of the river's daily flow at the point of diversion, and that the Licence sets cutback and cutoff limits to the rate of diversion.[106]

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104 Director's Response Submission at paragraph 95, citing *Aurora Peat* at paragraph at 235.

105 Director's Response Submission at paragraph 97, citing the Appendix to the Director's Response Submission.

106 Director's Response Submission at paragraph 97.

[169] The Director noted the potential temporal impacts of the approvals in *Aurora Peat* may be lasting, with the inability to use the wetlands for 50 years, while the Licence would not create an impact. The Director stated there would be no lasting impact from the Licence as the Licence only allows diversion through mid-April through mid-November, and the pumps, barge, and pipes are removed each year.[107]

[170] The Director further noted that while the approvals in *Aurora Peat* may impact drinking water by creating a loss of access and a loss of filtration provided by the peatlands, in the present appeal there was no evidence of an impact to the quality or quantity of drinking water.[108]

[171] The Director argued that in this case the Appellant has not provided the requisite evidence to satisfy all three steps of the McMillan Test and therefore has not established that it or its members are directly affected by the issuance of the Licence or the activities authorized by it.

[172] The Director stated that the first step of the McMillan Test requires an appellant to provide evidence that it has a direct personal or private interest greater than the abstract or generalized interest of the community in the area or all Albertans. The Director stated the second step of the McMillan Test requires an appellant to provide evidence to show a reasonable possibility that their personal or private interest, once established, could be negatively affected. The Director further stated that third step of the McMillan Test requires an appellant to provide evidence that the asserted negative effect or harm could be caused by the Director's decision, or the activity authorized by the Director's decision.[109]

[173] The Director noted that in *Aurora Peat* the Board found that the appellant had established a direct or personal interest in the use of the area covered by the approvals and therefore met the first step of the McMillan Test because the appellant used the water and aquatic environment in the area covered by the approvals.[110]

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[107] Director's Response Submission at paragraph 97.

[108] Director's Response Submission at paragraph 97.

[109] Director's Response Submission at paragraph 99 through paragraph 101, citing *Aurora Peat* at paragraph 228 and paragraph 235.

[110] Director's Response Submission at paragraph 102 through paragraph 103, citing *Aurora Peat* at paragraph 234.

Classification: Public

[174] The Director noted that the Board had determined in *Aurora Peat* that the appellant had satisfied the second and third steps of the McMillan Test. The Director further noted the Board determined the activity authorized by the approvals would impair or harm the appellant's members' ability to hunt, trap, gather, harvest food, or use water in the area covered by the approvals, as the approvals permitted the removal of peatland and disturbance of 492 hectares in the area covered by the approvals, which had the effect of inhibiting the appellants' members' abilities to use water and natural resources in the area. The Director stated that based on the foregoing, the Director found the appellant directly affected.[111]

[175] The Director noted that the Appellant had stated that the location of the point of diversion is within the area that its members hunt, fish, trap, and exercise Aboriginal and Treaty Rights. The Director further noted that based on *Aurora Peat* that these uses were likely to satisfy the first step of the McMillan Test.[112]

[176] The Director argued however, that the Appellant's Reserve is 63 km to the east of the point of diversion where the activities authorized by the Licence are located, one of the traplines identified by the Appellant is 5 to 10 km downstream of the location of the point of diversion, and the use identified on the "Sturgeon Lake Cree Nation Map" that is closest to the point of diversion appears to be gathering on the bank of the Smoky River across from the point of diversion.[113]

[177] The Director argued that the Appellant had not provided evidence to establish an adverse effect on it or on SLCN members' abilities to engage in their Aboriginal or Treaty Rights, and further argued that the Director's evidence directly contradicts the Appellant's submissions about possible impacts and establishes that the Licence does not adversely affect the Appellant or SLCN members' abilities to engage in their Aboriginal or Treaty Rights, noting:

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[111] Director's Response Submission at paragraph 104 through paragraph 107, citing *Aurora Peat* at paragraph 234 and paragraph 235.

[112] Director's Response Submission at paragraph 108 and paragraph 109.

[113] Director's Response Submission at paragraph 110, citing the Appellant's Submission at paragraph 37 and Chief Sunshine's Affidavit at Exhibit "K".

Classification: Public

a. the volume of water to be diverted is negligible, being approximately 0.0556 percent of the Smoky River's annual flow and less than 0.15 percent of its daily flow at the point of diversion;

b. the fish habitat at the point of diversion is neither sensitive nor unique, and does not provide critical habitat for any resident fish species, as similar deep-pool habitats providing a similar ecological function are common along the Smoky River;

c. the pumping of the water is during part of the year from mid-April to mid-November by way of a floating barge that will not be anchored to the riverbed or have permanent structures installed at or near the river; and

d. the instream footprint at the point of diversion is limited to approximately 400 m^2.

The Director submitted the Appellant had not provided any evidence that contradicted the evidence of the Director.[114]

[178] The Director argued that with no adverse effect established there was no need to consider a causal connection to the Licence. The Director argued in the alternative, if the Board determines there is an adverse effect, the Appellant has not established that the adverse effect is connected to the Licence or the activities authorized by the Licence.[115]

[179] The Director stated that the Director is not aware of any commitments made to the Appellant as described by the Appellant, nor does the Director have knowledge of the Appellant's consultation area. The Director argued that a point of diversion being located in the Appellant's consultation area does not by itself mean that the Appellant is directly affected by the Licence or the activities authorized by the Licence.[116]

4.4. Appellants' Rebuttal

[180] The Appellant argued the submissions of the Licence Holder and the Director should be rejected as all the issues identified by the Licence Holder and the Director went to the merits of the appeal.

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[114] Director's Response Submission at paragraph 112 through paragraph 114.

[115] Director's Response Submission at paragraph 115 and paragraph 116.

[116] *O'Chiese First Nation* v *Alberta Energy Regulator*, 2015 ABCA 348.

Classification: Public

[181] The Appellant further argued that the evidence of the Director could only be addressed and considered on the merits of the appeal. The Appellant argued the appeal should proceed to hearing where the issues raised by the Licence Holder and the Director, and the evidence of the Director, could be addressed and considered appropriately.

[182] The Appellant argued that the Licence Holder and the Director had argued for an almost impossible standard, conflating the branches of the Board's standing test. The Appellant stated that the test for standing, the McMillan Test, was not in dispute.[117]

[183] The Appellant argued no deference was owed to the Director's determination that the Appellant is not directly or adversely affected.[118]

[184] The Appellant argued the Licence Holder and the Director both seek to place an impossible standard on the Appellant to demonstrate conclusively that there will be a significant impact to their interests, and Aboriginal and Treaty Rights. The Appellant argued that it has demonstrated on a *prima facie* basis that the Appellant holds traplines in the direct vicinity of the water intake and that their Aboriginal and Treaty Rights may be impacted adversely. The Appellant further argued that the Director introduced significant evidence that is not appropriate, nor consistent with the onus on the Appellant, at this preliminary stage, as confirmed by the Court of Appeal.[119]

[185] The Appellant argued that the standard is reasonable possibility, which is significantly less onerous that the standard proposed by the Licence Holder and the Director. The Appellant further argued that standard sought by the Licence Holder and the Director seeks to collapse branch 2 and branch 3 of the McMillan Test into a standard requiring certainty of direct and adverse impacts.

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[117] Appellant's Rebuttal Submission at paragraph 4 and paragraph 5, citing *Aurora Peat* at paragraph 45, and *Jeans-Moline* at paragraph 75.

[118] Appellant's Rebuttal Submission at paragraph 6, citing *Skibsted* v *Alberta (Environment and Protected Areas)*, 2026 ABKB 98, at paragraph 157.

[119] Appellant's Rebuttal Submission at paragraph 7, citing *Normtek* at paragraph 141.

Classification: Public

[186] The Appellant argued the Licence Holder and the Director sought to impose an inappropriate evidentiary standard on the Appellant for this stage, akin to requiring the Appellant to prove conclusively not only that it will be affected, but that the magnitude of the effect will be significantly adverse. The Appellant argued this is not a matter that is appropriate for a preliminary application but for the hearing of the appeal.

[187] The Appellant further argued that the Licence Holder and the Director both took a position inconsistent with what the Alberta Court of Appeal called the "'poly-centric environmental decision-making under an Act which has purposes as many and varied as those which the Legislature has declared in section 2 of the *Environmental Protection and Enhancement Act*.'"[120]

[188] The Appellant noted that the Board found that the WCFN "could be considered a downstream user of the water in the Project Areas,"[121] and argued the same was true of the Appellant based on the preliminary maps, even without site visits, a traditional land use study or technical reviews.[122] The Appellant argued that to the extent that the Appellant's evidence is insufficient, it is due to the Director's failure to provide notice or a fulsome record of the decision.

[189] The Appellant stated it is not disputed that the Board is not a constitutional decision-maker. The Appellant argued the issue is whether the duty to consult or the honour of the Crown is a question of law as defined by section 10(d) of the APJA, which the Appellant argued does not include consideration of the trigger for consultation on potential rights or the adequacy of such consultation.[123]

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120 Appellant's Rebuttal Submissions at paragraph 10, citing *Normtek* at paragraph 138.

121 Appellant's Rebuttal Submissions at paragraph 11, citing *Aurora Peat*.

122 Appellant's Rebuttal Submission at paragraph 11, citing Chief Sunshine's Affidavit at Exhibit "K", paragraph 43 through paragraph 45.

123 Appellant's Rebuttal Submission at paragraph 12 through paragraph 14, citing section 10(d) of the APJA. Section 10(d) of the APJA provides:

> "10 In this Part,
>
> (d) "question of constitutional law" means

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[190] The Appellant argued that whether the questions raised by the Appellant are constitutional questions was not an issue in *Cold Lake First Nation* (CLFN) as the Licence Holder asserted. The Appellant argued the question at issue in that particular appeal was whether the Energy Resources Conservation Board (ERCB) erred in determining "[d]id ERCB err in determining that it does not have jurisdiction to determine whether the Crown discharged its duty to consult and accommodate the CLFN in relation to the adverse impact arising from bitumen recovery project CLFN treaty rights?" and noted that the Court specifically declined to comment on this issue.[124]

[191] The Appellant argued that the APJA does not oust the Board's jurisdiction to consider consultation as REDA does in section 21 for the AER.[125] The Appellant argued there was no clear language that the Board could not decide questions of law,[126] and further argued that similarly, with the Board's statutory authority, as in *Clyde River*, no "provision in either statute suggests an intention to withhold from the [National Energy Board] the power to decide the adequacy of consultation."[127]

[192] The Appellant concluded by arguing that it had not raised any questions of constitutional law that would oust the Board's jurisdiction to hear and determine the issues. The Appellant further argued that in the event the Board disagreed, any questions of jurisdiction could be determined on the merits, that there was no determination of right, and therefore no need for evidence on the issue.

(i) any challenge, by virtue of the Constitution of Canada or the *Alberta Bill of Rights*, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or

(ii) a determination of any right under the Constitution of Canada or the *Alberta Bill of Rights*."

124 Appellant's Rebuttal Submission at paragraph 15, citing *Cold Lake First Nation* at paragraph 8.

125 Appellant's Rebuttal Submission at paragraph 16, citing REDA at section 21.

126 Appellant's Rebuttal Submission at paragraph 17, citing *Clyde River* at paragraph 36.

127 Appellant's Rebuttal Submission at paragraph 17, citing *Clyde River* at paragraph 37.

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5. LEGISLATION AND CASE LAW

[193] For the Board to find the Appellant's Notice of Appeal properly before it, the Board must determine if the Appellant has met the prerequisites to filing an appeal and has standing to appeal the Director's decision to issue the Licence.

[194] The Director did not issue a Notice of Application but instead issued a Notice of the Decision under section 108(6) of the *Water Act*. Therefore, there was no opportunity for the Appellant to file a Statement of Concern with respect to the Licence, and the Appellant filed a Notice of Appeal based on the Notice of Decision.

[195] There is no dispute amongst the Parties that the Notice of Appeal was filed within the legislated time period for doing so, however, what is at issue in the appeal is whether the Appellant is directly affected by the Licence or the activities authorized by the Licence, and if the Board has jurisdiction to hear the issues related to a lack of consultation as alleged by the Appellant and raised in the Notice of Appeal. Therefore, the Board must first determine if the Appellant is directly affected by the decision of the Director to issue the Licence. If the Board finds that the Appellant is not directly affected by the decision of the Director to issue the Licence, the Board must dismiss the Appellant's Notice of Appeal pursuant to section 95(5)(a)(ii) of EPEA.

[196] Section 115(1)(c)(ii) of the *Water Act* provides that a person who is directly affected by the Director's decision to issue a licence may submit a notice of appeal:

> "115(1) A notice of appeal under the Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:
>
> (c) if a preliminary certificate has not been issued with respect to a licence and the Director issues or amends a licence, a notice of appeal may be submitted, …
>
> (ii) by the licensee or by any person who is directly affected by the Director's decision, if the Director waived the requirement to provide notice under section 108(6) and notice of the application or proposed changes was not provided;"

[197] The Board notes that following the Court of Appeal's decision in *Normtek*, it is no longer a prerequisite that a potential appellant must show harm to a natural resource used by it or

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must show harm to its use of a natural resource to be found directly affected. Instead, the Court in *Normtek* set out a series of guiding principles to be considered by the Board when making a directly affected determination. In consideration of the guidance provided by the Court of Appeal in the *Normtek* decision, the Board in *McMillan* developed a framework consisting of a three-part test together with seven guiding principles to be used by the Board when deciding whether an appellant is directly affected by the decision of a director. Although, the framework developed by the Board in *McMillan* was later revisited by the Board in *Jeans-Moline*, the Board is of the view that its decision in *McMillan* better reflects the articulation of the principles established in *Normtek* and will be applied by the Board when determining the directly affected status of an appellant.

[198] The Board also notes that in *Aurora Peat*, the Board had observed that Aboriginal and Treaty Rights, "'…are collective rights held by the nation but not necessarily exercised individually,'"[128] and further that "Aboriginal and Treaty Rights are 'owned and enjoyed by the community' and [do not] vest in any particular individual.'"[129] Here, none of the parties disputed the application of the McMillan Test, and the Board adopts its earlier reasoning that the appropriate test for the determination of whether a First Nation is directly affected by the decision of the Director is the McMillan Test.

[199] The Board in *McMillan* confirmed the directly affected test under section 115(1) has three components:

> "1. whether there is an interest being asserted by the person consistent with those identified in *Normtek*;
>
> 2. whether the person demonstrated on a prima facie basis there was an adverse impact on the identified interest; and
>
> 3. whether the person demonstrated on a prima face basis the impact on the identified interest was direct.
>
> For a person to be directly affected, they must meet all three components."[130]

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128 *Aurora Peat* at paragraph 225, citing *Behn v Moulton Contracting Ltd*., 2013 SCC 26, at paragraph 33 through paragraph 35.

129 *Aurora Peat* at paragraph 225, citing *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2004 ABQB 655, at paragraph 174.

130 *McMillan* at paragraph 56 [citations omitted].

[200] Further, as stated by the Board in *McMillan:*

> "[58] Trying to define in advance or limit the circumstances in which an appellant might be found directly affect it to be avoided. The Board will interpret directly affected as limiting the class of persons who can appeal a Director's decision. However, the Board retains broad discretion to determine who is directly affected. *Normtek* and other decision 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 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;
> 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;
> 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. Directly affected connotes an adverse impact;
> 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. The appellant must provide prima facie evidence to support their position they are directly affected. This evidence need only establish a reasonable possibility they will be directly affected; 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."[131]

[201] Rule 29 of the Board's Rules of Practice states that "[a]ny Party offering evidence shall have the burden of introducing appropriate evidence to support its position."

[202] Section 95(5)(a)(ii) of EPEA provides that the Board 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,"

6. ANALYSIS AND FINDINGS

[203] As previously noted, for an appellant to have standing and a Notice of Appeal to be properly before the Board, section 115(1)(c)(ii) of the *Water Act* requires a person filing a notice of appeal to be directly affected by the Director's decision.[132] Since the Director did not provide Notice of Application and there was no opportunity for the Appellant to file a Statement of Concern, the relevant consideration is whether the Appellant is directly affected by the Director's decision to issue the Licence as contemplated by section 115(1)(c)(ii) of the *Water Act.*

6.1. Personal or Private Interest of the Appellant

[204] The first step of the McMillan Test requires that the Appellant provide evidence it has a direct or personal interest greater than the abstract or generalized interest of the community in the area or all Albertans.

[205] The Appellant argued that the Appellant is directly affected by the Licence because the Appellant has a strong connection to the area in which the point of diversion is located. The

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131 *McMillan* at paragraph 58 [citations omitted].

132 "Section 115(1)(c)(ii) A notice of appeal under this Act may be submitted to the Environmental Appeals Board by the following persons in the following circumstances:

(c) 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…"

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Appellant stated the Smoky Watershed is the Appellant's traditional water source, that the SLCN members rely on the Smoky Watershed for their drinking water, and that the Appellant has ceremonial and traditional land use sites approximately 5 km downstream of the diversion point.[133] The Appellant stated that an SLCN member has an RMFA within 5 to 10 km of the diversion point and that there are other RMFAs that rely on the Smoky River.

[206] The Appellant further argued that the Government of Alberta has recognized the Appellant's interest in traditional land use in the area through its consultation obligations, noting that the Government of Alberta has recognized that the Appellant should be consulted in the area on *Water Act* applications.

[207] The Licence Holder did not dispute the Appellant's statements regarding the Appellant's interest in the area or the Smoky River. The Director noted the Appellant had stated that the location of the point of diversion is within the area that its members hunt, fish, trap, and exercise Aboriginal and Treaty Rights. The Director also noted there appears to be a location used for gathering on the bank of the Smoky River across from the point of diversion.[134] The Director acknowledged that based on *Aurora Peat* that these uses were likely to satisfy the first step of the McMillan Test.[135]

[208] The Board finds the Appellant has a direct or personal interest in the area near the point of diversion and the Smoky River. The Appellant's members use the area near the point of diversion to hunt, fish, trap, gather, and exercise Aboriginal and Treaty Rights, and rely on the Smoky River for drinking water. The Appellant has met the first requirement of the McMillan Test. The Appellant has raised concerns regarding impacts to the Smoky River, the watershed, and the aquatic environment which the Appellant's members rely on for drinking water and to exercise their Aboriginal and Treaty Rights, which is a direct or personal interest consistent with the underlying policies of the *Water Act*.

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[133] Appellant's Initial Submission at paragraph 37, citing the Sunshine Affidavit at paragraph 8 and INAN Committee, June 17, 2024, Chief Sheldon Sunshine Testimony, at 115.

[134] Director's Response Submission at paragraph 110, citing the Appellant's Submission at paragraph 37 and Chief Sunshine's Affidavit at Exhibit "K".

[135] Director's Response Submission at paragraph 108 and paragraph 109.

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6.2. Aurora Peat

[209] The Board notes the Appellant argued that *Aurora Peat* was persuasive, if not determinative of the appeal. The Appellant argues that based on *Aurora Peat* and the Board's finding that the WCFN was directly affected as a downstream user in the Project area, the Appellant similarly "would be considered a downstream user in the Project Areas"[136] based on a review of preliminary maps even without site visits, a traditional land use study or technical reviews. The Board understands the Appellant to be arguing in reliance on *Aurora Peat* that the location of the diversion point in its traditional lands and consultation area is *prima facie* evidence that the Appellant is directly affected, even without traditional land use studies or technical reviews.

[210] The Licence Holder argued that it was unclear how *Aurora Peat* was persuasive or determinative as the circumstances in *Aurora Peat* are distinct and the circumstances of the WCFN in *Aurora Peat* are not comparable. The Licence Holder noted the activities authorized by the approval in *Aurora Peat* can be distinguished as the authorization in *Aurora Peat* was an approval that authorized the disturbance of 492 hectares of lands and the removal of over 233 hectares of wetlands, the cutting of trees, draining of water from those lands, removal of plant life, the dislocation of fish and wildlife, and the harvesting of peat. The Licence Holder argued in contrast the Licence authorizes the diversion of a small amount of water and a temporary diversion point.

[211] The Board notes the evidence of the Director is that the area subject to the Licence is 0.0378 hectares, and that the diversion of water authorized by the Licence represents approximately 0.0556 percent of the river's annual flow and less than 0.15 percent of the river's daily flow at the point of diversion. The Board further notes the evidence of the Director that the point of diversion for the Licence is located approximately 63 km from the Appellant's Reserves.[137] The Director further noted that the diversion is only authorized from mid-April to mid-November, and the barge, pumps, and pipes will be removed each winter.

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[136] Appellant's Initial Submission at paragraph 48, citing *Aurora Peat* at paragraph 217.

[137] Director's Response Submission at paragraph 97, citing the Appendix to the Director's Response Submission.

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[212] The Licence Holder noted that in the case of the WCFN, the area used by the WCFN was going to be totally transformed by the project, the WCFN's use of the lands and areas were going to be inaccessible in *Aurora Peat*, and consequently the Board was able to conclude that the WCFN was directly affected. The Licence Holder argued it is not clear that the Appellant's use of the areas downstream of the diversion point or the Appellant's use of the water and associated resources in the Smoky River Basin will be adversely affected, or affected at all, as the flow and level of water in the Smoky River is not expected to materially change.

[213] The Board is of the view that *Aurora Peat* can be distinguished from the present appeal before the Board. In the case of *Aurora Peat*, the activities authorized by the approval were for the dewatering of 233 ha of wetlands and the disturbance of 433 ha of land in an area approximately 16 km from the appellant WCFN's Reserves. The activities involved the cutting of trees, draining of water from those lands, removal of plant life, the dislocation of fish and wildlife, and the harvesting of peat. In this regard, the Board notes that the appellant WCFN was granted standing not because the project areas were located in the WCFN's traditional territories, but rather because the authorized activities would change the landscape in the project areas such that the WCFN members' ability to use water or natural resources in the project areas would be effected for a period of at least 50 years.[138]

[214] In the present appeal, the activity approved by the Licence is the diversion of water representing approximately 0.0556 percent of the river's annual flow and less than 0.15 percent of the river's daily flow at a point of diversion. The water will be diverted from a temporary pumping barge placed in a pool outside of the main flow of the river, located approximately 63 km from the Appellant's Reserves. The evidence before the Board is that the point of diversion is unsuitable as fish habitat and that encounters with fish are expected to be incidental to the operation of the temporary pumping barge. The temporary pumping barge is not expected to have a lasting effect on the aquatic environment and will only operate from mid-April to mid-November. While the point of diversion is located approximately 6 km from an SLCN member's RMFA and across from a gathering location for the Appellant, there is no evidence before the Board that the temporary

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[138] *Aurora Peat* at paragraph 244 and paragraph 245.

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pumping barge will disturb the Appellant SLCN members' ability to gather or interfere with the RMFA by disturbing wildlife. Lastly, given the relatively small amount of water authorized for diversion in comparison to the amount of water in the Smoky River, the Board is of the view that impacts to downstream users will be negligible.[139] Based on the foregoing, the Board finds that *Aurora Peat* is distinguishable from the present appeal and therefore, the Board further finds that location of the diversion point alone being located in the Appellant's traditional lands is not *prima facie* evidence of an adverse effect without additional evidence of an adverse effect connected to the activity authorized by the Licence or the decision to issue the Licence.

6.3. Direct Adverse Effect to an Identified Interest

[215] For the second and third components of the McMillan Test, the Appellant must provide *prima facie* evidence to show a reasonable possibility that the Appellant's personal or private interest could be negatively affected, and the asserted negative effect or harm could be caused by the Director's decision, or the activity authorized by the Licence. This means the Board must consider if the activity would impair or harm the quality or quantity of water in the Smoky River, the aquatic environment, or impact the Appellant or SLCN members' use of the area around the point of diversion.

[216] The Appellant argued that the SLCN's exercise of its way of life, Aboriginal and Treaty Rights, traditional land use, SLCN ceremonies, and rights of its trapline holders downstream, depend on water of sufficient quality and quantity which could be impacted by the Licence.

[217] The Appellant argued that from a review of the diversion point and the Limited Director's Record, the impacts to the Appellant are:

a. reduced ability to fish, hunt, and trap for moose, deer, or other ungulates, rabbits, and other furbearers;
b. inability to use water in sufficient quantity and quality;
c. impact on the watershed, including ice flows downstream;
d. impact on fish habitats and fish;

[139] See Appendix "A" to this Decision, Smoky River at Watino – Comparing GIG diversion rate to natural river flow.

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e. impact on climate change, including in relation to the fire the Appellant suffered from May 5, 2023, in which many SLCN structures were lost and for which the Appellant is still carrying a $19 million deficit;

f. impacts to SLCN members' ability to gather culturally and spiritually significant medicines, food source plants, and traditional use plants;

g. impacts to the Appellant's culturally sacred sites;

h. loss of access to sufficient and clean water for drinking and other purposes;

i. impacts on SLCN members' ability to practice traditional social, cultural, and spiritual activities at the diversion point; and

j. the cumulative effects of further water diversion in an already heavily industrialized area.[140]

[218] The Appellant argued that without analyses or submissions, there is no certainty that the Licence will not affect the Appellant's access to water in sufficient quality or quantity to exercise its rights or protect its interests. The Appellant argued this was especially true since the area is already subject to drought and wildfires.

[219] The Licence Holder argued the Appellant must show there is a reasonable possibility that its identifiable interests will be directly affected by the Director's decision to grant the Licence for the Appellant to have standing before the Board and that the Appellant has failed to do so. The Licence Holder argued that the impacts raised by the Appellant relate to the GIG project as a whole and not the temporary diversion contemplated by the Licence. The Licence Holder further argued there was no evidence before the Board upon which to conclude that there was a reasonable possibility that the issuance of the Licence will have an adverse impact on the use and enjoyment of the Smoky River by the Appellant or SLCN members, or that the impacts raised by the Appellant will occur because of the Licence.

[220] The Licence Holder stated that the Licence was sought to support the preliminary diversion of 6,000,000 cubic m^3 of water to develop a water utility for the GIG,[141] and that under

140 Appellant's Initial Submission at paragraph 39, citing the Sunshine Affidavit at paragraph 47.

141 Licence Holder's Response Submission at paragraph 2, citing Section 4.0 in the Water License Application under the Water Act, dated February 2025 prepared by WaterSMART Solutions Ltd., The Preliminary Record, Tab 13, at page 33 through page 35.

all scenarios for withdrawal of water for the GIG, there will be no significant decline in the water surface elevation. The Licence Holder further argued that based on the technical assessments the Licence Holder had received for the Licence, the Licence will not diminish the availability of the water in the Smoky River or the Smoky River Basin. The Licence Holder stated the infrastructure required to support the diversion is minimal, temporary, will only operate between mid-April and mid-November, and will not interfere with or prevent any access to the Smoky River or Smoky River Basin.

[221] The Licence Holder submitted there will be no measurable change to ice formation or to the space under the ice along the shoreline because of the forecasted withdrawals.[142] The Licence Holder stated the Smoky River remains within sustainable withdrawal limits and is not currently overallocated, has not reached the allocation threshold limit established to protect ecological function and downstream users, and that there is still capacity for additional water licencing without exceeding the river's environmental flow requirements.[143]

[222] The Board observes that the Licence Holder's submissions regarding the capacity of the Smoky River was supported by the information and independent evidence of the Director regarding the flow rates as recorded at the Watino Station. The Board notes the Director stated that the volume of water to be diverted is negligible, noting that Licence authorized the diversion of approximately 0.0556 percent of the Smoky River's annual flow and less than 0.15 percent of its daily flow at the point of diversion.

[223] The Licence Holder noted the Appellant raised concerns about the ability to use water in sufficient quality and quantity, and to access clean drinking water and for other purposes. The Licence Holder argued that its evidence is that there will be no adverse impacts to water quality or quantity. The evidence of the Director regarding the Smoky River's natural flow rate as measured from the Watino Station supports a conclusion that there will be a negligible impact to the Smoky River as a result of the authorized diversion; the Smoky River's average daily flow

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[142] Licence Holder's Response Submission at paragraph 48, citing the Technical Memorandum at paragraph 18, page 9.

[143] Licence Holder's Response Submission at paragraph 48, citing the Technical Memorandum paragraph 30, page 18.

Classification: Public

throughout the year ranges from hundreds to thousands m^3 per second during the spring runoff when flows peak in comparison to the licenced diversion rate of 0.56 m^3 per second.[144] The Director also provided evidence that there were conditions in the Licence to ensure that rate of diversion was cutback or cutoff at certain thresholds, ensuring that the Licensee is able to respond to changing river conditions and adjust diversion when flow begins to drop.

[224] The Licence Holder noted the Appellant had argued that the diversion point is directly upstream from SLCN trapline holders and that the area surrounding the diversion point is used for the exercise of Treaty and Aboriginal rights. The Licence Holder argued that the Appellant did not detail adverse impacts caused by diversion pursuant to the Licence specifically, nor is there an explanation of how the diversion as planned will prevent the exercise of Aboriginal and Treaty Rights. The evidence of the Director which refers to the Provisional Intake Fish Habitat Assessment Summary prepared by Associated Environmental, supports a conclusion that the diversion point will not impact fishing as the diversion point is not anticipated to provide critical habitat for any resident species, does not represent unique fish habitat features, does not provide suitable spawning habitat for salmonid species, and the presence of abundant sediment reduces the survivability of eggs deposited by salmonid species.[145] The Director stated the pumping of water will occur from mid-April to mid-November by way of a floating barge that will not be anchored to the riverbed or have permanent structures installed at or near the river, and that the approximate instream footprint is limited to 400 m^2.[146] The Director further advised there are conditions in the Licence preventing the Licensee from depositing or causing any substance to be deposited at the point of diversion that has, may have or has the potential to adversely affect the source of water.[147]

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[144] Director's Response Submission at paragraph 55 and paragraph 56, citing the Director's Affidavit at paragraph 12 and the "Smoky River at Watino – Comparing GIG diversion rate to natural river flow", attached to the Director's Affidavit as Exhibit "A", and to this Decision as Appendix "A" – "Smoky River at Watino – Comparing GIG diversion rate to natural river flow".

[145] Director's Response Submission at paragraph 65 and paragraph 66, citing the Provisional Intake Fish Habitat Assessment Summary, Associated Environmental, February 10, 2025 (Fish Habitat Summary), the Director's Limited Record at Tab 17.

[146] Director's Response Submission at paragraph 112 through paragraph 114.

[147] Director's Response Submission at paragraph 63 and paragraph 64, citing the Director's Affidavit at paragraph 16, and the Director's Limited Record at Tab 17.

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[225] The Licence Holder argued that the Appellant had not filed any technical or expert evidence that would support the conclusion that it is reasonably possible for the Licence to result in adverse impacts to the use of or access to the Smoky River and noted the Appellant had stated this was because of a lack of consultation regarding the Licence. The Licence Holder argued the Appellant had sufficient time to undertake the necessary work to acquire technical support, noting that the Appellant had filed its letter raising preliminary issues on June 19, 2025.

[226] The Board notes the Appellant raised in its submissions that if the Appellant had properly been consulted, the Appellant would have conducted site visits at the point of diversion, interviewed elders and trapline holders regarding sacred sites and campground areas, retained experts, and conducted technical reviews of the previous water allocation restrictions in the watershed or adjacent watersheds. The Board further notes that the Appellant also raised concerns that it was unable to consider or lead evidence on whether the Licence will contribute to conditions that make wildfires more common or exacerbate climate change.

[227] The Board notes at this preliminary stage the Appellant does not have to prove the SLCN are directly affected but must provide *prima facie* evidence that there is a reasonable possibility they are directly affected. The Board is of the view, that the low threshold reflects the comments of Justice Laycraft in *Leduc (No 25) v Local Authorities Board,* 1987 ABCA 172 at paragraph 12, as set out in *Normtek:*

> "The Board must ensure that those persons with a serious interest in the proceeding are fairly heard. At the same time, it must protect itself, and the legitimate parties to the hearing, from having the whole proceeding complicated and made more expensive by those with no real interest at stake. The Board, by the nature of its task, is bound to make its ruling at an early stage of the proceeding. It is bound to rule fairly on a balance of probabilities whether the hearing has the potential to affect or vary a person's rights given the variations in result possible at the conclusion of the hearing."[148]

[228] The Board notes the Appellant has to provide *prima facie* evidence to demonstrate that the Appellant has an interest and will suffer an effect beyond that of the general public, to their use of and access to the Smoky River, and that this can include evidence of possible impacts

[148] *Normtek* at paragraph 88.

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to their traditional land use, their cultural and ceremonial gathering points at the diversion point, and the use of their nearby RMFAs. The Board is of the view that if the Appellant were to experience a reduction in water quality or quantity because of the decision of the Director to issue the Licence there would be an adverse effect to a natural resource used by the Appellant which would be sufficient to find that the Appellant is directly affected. Similarly, if the Appellant were to provide evidence that the temporary pumping barge would cause a noise disturbance at the point of diversion with the potential to affect wildlife, interfere with the exercise of traditional land use activities such as gathering or ceremonial practices, or cause sedimentation or other measurable physical changes to the environment that are causally connected to the diversion authorized by the Licence, this would also support a finding of the Appellant being directly affected.

[229] Such evidence must demonstrate a reasonable possibility of the adverse effect occurring because of the Licence, rather than generalized or speculative assertions. Mere proximity to the proposed point of diversion, does not in and of itself, meet this evidentiary threshold without a direct effect. In this regard, the Board notes that the Court of Appeal in *Normtek* recognized that for an effect to be direct there must be an uninterrupted chain of causes and effect and that there appeared to be a temporal aspect when interpreting the term “direct” or “directly” such that the effect must be “immediate” or “at once, without delay.” With respect to the interpretation of the term “directly” the Court in *Normtek* stated:

> “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 or 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*.” It is acknowledged that some types of prospective harm may be too remote or too speculative, but not all will be.”[149] [*Emphasis* added by the Board.]

[230] The Board is of the view that a decision of a director to issue a Licence may result in some or a range of effects. Some of these effects may be actual and immediate or imminent, and as such the continuous nature of the chain of causation may be easy to ascertain. For example, if

149 *Normtek* at paragraph 81.

an activity authorized under an approval caused the discharge of a pollutant into a water body used by an appellant, the chain of causation is clear, and any adverse effect would likely be immediate and direct. While it is easier to establish the chain of causation is not broken or delayed when an adverse effect can be detected immediately, the Board recognizes that "some types of prospective harm may be too remote or too speculative, but not all will be."[150]

[231] The onus on the Appellant is to provide *prima facie* evidence there is a reasonable possibility it is directly affected. Here, the Board notes that despite this low threshold, the Appellant has not provided any evidence for the Board to consider regarding the existence of an uninterrupted chain of cause and effect between the activity authorized by the Licence and the potential impacts to the Appellant or SLCN's members use of the water or use of the area near the diversion point. While the Appellant has attributed this deficiency to a lack of consultation, as pointed out by the Licence Holder, the Board further notes that the Appellant has had over seven months to obtain site-specific evidence with which to advance the Appellant's concerns. In contrast, the Licence Holder and the Director have both provided uncontradicted evidence to the Board that establish that the diversion rate authorized by the Licence is negligible in comparison to the overall flow rate of the Smoky River. The Licence Holder and the Director have also provided uncontradicted evidence that no adverse effects are anticipated to result to the Smoky River because of the diversion authorized by the Licence, and that there are conditions in the Licence to manage any potential effects of the diversion.

[232] The Board finds that the Appellant has not met the second or third parts of the McMillan Test as the Appellant has not provided any evidence to establish a direct or adverse impact arising from the Director's decision to issue the Licence.

[233] Therefore, the Board is of the view that the Appellant does not have standing in the appeal as the Appellant is not directly affected by the decision of the Director to issue the Licence.

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150 *Normtek* at paragraph 81.

Classification: Public

6.4. Constitutional Questions/Jurisdiction

[234] The Board notes that the Licence Holder argued the Board does not have the jurisdiction to consider constitutional questions as the Board's jurisdiction is granted by EPEA and its associated regulations. The Board further notes the Licence Holder stated the Board's jurisdiction could be expanded under APJA to include constitutional questions, however the Board is not designated as a constitutional decision-maker under the APJA's associated regulations. The Licence Holder contrasted the Board's authority to that of the AER and the AUC, both of which are designated as constitutional decision makers and unlike the Board, are also licencing authorities.[151] The Licence Holder argued that whether consultation is required in any particular case and whether consultation has been adequate, is a constitutional question,[152] and that the Appellant is not without remedy. The Licence Holder argued the Appellant may assert that its use of the lands or water will be directly affected by a decision, here being the issuance of the Licence, provided that it can demonstrate that there is a reasonable possibility that its rights to access or use water will be directly affected. The Licence Holder further stated that Appellant is also not precluded from asserting its entitlement to be consulted in connection with the Licence before the Courts.[153]

[235] The Director did not take a position regarding the Board's jurisdiction to consider the constitutional issues raised by the Appellant.

[236] The Appellant argued the issues raised by the Appellant relating to the duty to consult, the honour of the Crown, and Treaties are not questions of constitutional law outside the Board's jurisdiction. The Appellant further argued that because the Board's decision could impact the Appellant's section 35 Rights, the Board's conduct is governed by the honour of the Crown. The Appellant did not dispute that the Board is not a constitutional decision-maker or that the Board cannot consider matters of constitutional law. Instead, the Appellant argued that the

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151 Licence Holder's Response Submission at paragraph 12 and paragraph 13, citing the Constitutional Decision Makers Regulation.

152 Licence Holder's Response Submission at paragraph 15, citing *Cold Lake First Nation* v *Alberta (Energy Resources Conservation Board)*, 2012 ABCA 304 (*Cold Lake First Nation*), paragraph 7, Notice of Constitutional Question appended to this decision. *Roseau River* at paragraph 8.

153 Licence Holder's Response Submissions at paragraph 22, *Aurora Peat*, and *McMillan*.

Classification: Public

consideration of whether the duty to consult exists is not a question of constitutional law and that this consideration is necessarily speculative and arises even before proof of Aboriginal Rights arise.[154] The Appellant further argued that unlike the AER, the Board is not statutorily or expressly excluded from considering consultation adequacy.

[237] Having found that the Appellant is not directly affected by the Director's decision to issue the Licence, the Board does not need to determine whether the issues raised by the Appellant in its Notice of Appeal regarding the adequacy of consultation are within the jurisdiction of the Board. However, noting the arguments of the Appellant and the Licence Holder, the Board restates its jurisdiction as set out in *Aurora Peat*; the Board may accept evidence regarding a constitutionally protected right as the basis for a First Nation or First Nation member's right to use water, hunt, fish, trap, harvest, or gather within an area, however the Board cannot consider or determine constitutional matters[155] and adequacy of consultation is not within the scope of the Board's jurisdiction.[156]

6.5. Conclusion

[238] The Board finds the Appellant has a direct or personal interest in the area near the point of diversion for the Licence and in the quality and quantity of water in the Smoky River and the Smoky River Watershed that could be adversely affected by the decision of the Director to issue the Licence.

[239] The Appellant has not provided any *prima facie* evidence to establish that the Appellant or that SLCN members will be directly or adversely affected by the Licence or the Director's decision to issue the Licence. In contrast, the Licence Holder has provided evidence that the Licence is anticipated to have a negligible impact on the Smoky River and the Smoky Watershed, and fish habitat as demonstrated by the Fish Habitat Summary. The evidence of the Licence Holder is supported by the independent evidence provided by the Director, being the flow

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154 Appellant's Initial Submission at paragraph 57, citing *MCFN v Canada* at paragraph 21 and paragraph 23.

155 *Aurora Peat* at paragraph 189.

156 *Mikisew Cree First Nation* v *Director, Northern Region, Environmental Management, Alberta Environment,* re: *Nexen Inc*., 2010 ABEAB 13, at paragraph 18 and paragraph 22.

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rates of the Smoky River as recorded at the Watino Station. The Director's evidence regarding the reasons for the conditions in the Licence to mitigate possible impacts of the Licence to the Smoky River further support a conclusion that the impact of the Licence to the Smoky River will be negligible, noting there are conditions to ensure there are no deposits of harmful substances in the Smoky River and that withdrawal rates are responsive to river flow rates.[157]

[240] After conducting a limited review of the evidence and the merits of the appeal for the purposes of determining whether the Appellant has met the *prima facie* threshold of establishing that the Appellant is directly or adversely impacted by the Director's decision to issue the Licence, the Board finds that the Appellant is not directly affected by the decision of the Director to issue the Licence.

7. DECISION

[241] Having reviewed the submissions of the Parties, the Board finds the Appellant is not directly affected by the Licence and does not have standing in the appeal. The Board dismisses the Appellant's Notice of Appeal pursuant to section 95(5)(a)(ii).

Dated on April 17, 2026, at Edmonton, Alberta.

-original signed-

Barbara Johnston
Board Chair

157 See Condition 6570, Condition 6790, Condition 7110, and DAPP0123946.

Classification: Public

Appendix "A" – Smoky River at Watino – Comparing GIG diversion rate to natural river flow