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COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

APPLICANT PEMBINA INSTITUTE, FORT MCMURRAY ENVIRONMENTAL ASSOCIATION

RESPONDENTS DIRECTOR, NORTHERN REGION, ALBERTA ENVIRONMENT AND SUSTAINABLE RESOURCES DEVELOPMENT and SOUTHERN PACIFIC RESOURCE CORP.

DOCUMENT **JUDICIAL REVIEW BRIEF ON BEHALF OF THE APPLICANTS**

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## I. INTRODUCTION

1. The Applicants seeks judicial review of a decision by the Director to reject the Applicants' Statement of Concern submitted pursuant to section 73 of the *Environmental Protection and Enhancement Act* ("EPEA") and section 109 of the *Water Act* (collectively the "Acts").
2. Section 73 of *EPEA* and section 109 of the *Water Act* entitle a "person" who may be "directly affected" by an application for an oil and gas extraction project, and other activities, to submit a "Statement of Concern" to the Director. This in turn entitles the person to other participatory rights under the Acts, including the right to appeal the Director's decision to issue an approval.
3. In March of 2012, the Applicants submitted a Statement of Concern with respect to Southern Pacific Corp's ("STP") application to construct and operate a steam-assisted gravity drainage oil sands project on the MacKay River (the "Project"). The Applicants hold a licence to occupy land for recreational purposes on the MacKay River and in proximity to the Project.
4. The Director applied incorrect interpretations of "person" and "directly affected" in determining that the Statement of Concern was not "valid" as the Applicants, who are legal persons, needed to demonstrate that a majority of their individual members are directly affected by STP's applications. The Record of Proceedings filed in this Application revealed that the Director also breached his duties of procedural fairness as he took into consideration improper and irrelevant factors, including the Applicants membership in a multi-stakeholder oil sands development organization and the content of the Pembina Institute's publications on oil sands.
5. The Applicants submit that the Director's decision is wrong in law because it:
  - a. Misinterpreted "person" to exclude legal entities other than individuals;
  - b. Applied a majority affected tested to the Applicants' individual members;
  - c. Required the Applicants to prove that they "are" directly affected by the application rather than show a reasonable probability of a direct effect; and
  - d. Breached the principles of natural justice by taking into account improper and irrelevant considerations.
6. In the alternative, if the Director's interpretation of the relevant provisions of the Acts is correct, his conclusion that the Applicants are not affected by STP's applications is unreasonable given the facts before the Director on the Record.

## II. FACT SUMMARY

### The Applicants

7. The Pembina Institute (“Pembina”) is a legal “person” and specifically, a non-profit environmental research and policy analysis organization founded in Alberta in 1985.

Certified Record of Record of Proceedings filed May 11, 2013 at  
Vol.1, Tab 2 & Tab 8 at p. 2 [Record].

8. Pembina holds a licence to occupy for recreational purposes the Métis lands located at or near Fort McKay and on the MacKay River. These lands are legally described as:
  - a. all those portions of lots 1 -4 which lie generally north and east of the left bank of the MacKay River;
  - b. portions of sections 25 and 26; Township 94; Range 11; Meridian 4;
  - c. LSD 16; section 27; Township 94; Range 11; Meridian 4; and
  - d. LSD 1; section 34; Township 94; Range 11; Meridian 4.

(the “Lands”).

Record at Vol. 1, Tab 8(i).

9. This licence to occupy entitles Pembina to use and occupy the Lands for hiking, camping, and accessing MacKay River for kayaking and other boating activities, and other recreation purposes.

Record at Vol. 1, Tab 8(i).

10. The Fort McMurray Environmental Association (“FMEA”) is a legal “person”, a society consisting of residents living in and around Fort McMurray who are concerned about the effects of oil sands development on human health, the ecosystem and the socio-economic quality of life in the municipality of Wood Buffalo. FMEA is also a party to the licence to occupy the Lands.

Record at Vol. 1, Tab 8 at p. 2.  
Record at Vol. 1, Tab 8(i).

11. Both Pembina and FMEA are members of the Oil Sands Environmental Coalition (“OSEC”). OSEC is an unincorporated group or coalition of Alberta-based environmental organizations with a long-standing interest in environmental and socio-economic issues associated with oil sands development. The Alberta Wilderness Association is also a member of OSEC but not a party to this Application.

Record at Vol.1, Tabs 2 & 6.

12. Pembina was once part of the Cumulative Environmental Management Association (“CEMA”), but withdrew sometime before August 12, 2009. CEMA is a local multi-stakeholder group involved with advising the government of Alberta on the cumulative environmental effects of Alberta’s oil sands.

Record at Vol. 12, Tab 19.

## The Respondents

13. The Regional Approvals Manager, Northern Region, (the “Director”) is a Professional Engineer and is the designated authority pursuant to section 25(1) of the *EPEA* for the purposes of making decisions and issuing approvals under Part 2 of *EPEA*: Environmental Assessment Process, Approvals and Registrations and the designated authority pursuant to section 163(1) of the *Water Act* for making regulatory decisions under the *Water Act*.

Record at Vol. 1, Tab 1 at p.2.

*Environmental Protection and Enhancement Act*, R.S.A. 2000 c. E-12 at s.25(1)

[*EPEA*] [TAB 1].

*Water Act*, R.S.A. 2000 c.W-3 at s.163(1) [TAB 2].

14. Southern Pacific Resource Corp. (“STP”) submitted applications to the Director for approvals under the Acts for an oil sands extraction project, for which the Applicants submitted a Statement of Concern to the Director on March 28, 2012.

Record at Vol. 1, Tab 5.

## STP’s Applications for Approval

15. In November 2011, STP applied to the Director for approval under the Acts. Specifically STP applied:

- a. to amend its existing *EPEA* Approval No.255245-00-00 in order to expand an existing oil sands extraction scheme called the STP McKay Thermal Project – Phase 2; and
- b. for a water licence to divert 1 424 000 m<sup>3</sup>/annum of fresh groundwater to be used as the water source for steam generation in the extraction of bitumen.

Record at Vol. 1, Tab 5.

16. The Project is located 40km southwest of Fort McKay with a processing plant and multiple deep well steam injection and oil sands extraction wells on the MacKay River and is designed to produce an additional 3,816 m<sup>3</sup>/day of bitumen, for a total of 5,724

m<sup>3</sup>/day of bitumen, for approximately 25 years. The well pads are located on both sides of the MacKay River and its tributaries. The Project expects to use up to 1705 m<sup>3</sup>/day of groundwater for the life of the Project and 4,000 m<sup>3</sup>/day of groundwater for the first two years of operation. The west portion of the Project is proposed to be located within the Wabasca-Dunkirk Caribou Management Zones and provides habitat for a broad range of mammals, birds and amphibians.

Record at Vol. 1, Tab 4 at p. 11 & 13;  
Vol. 1., Tab 5 & Tab 8 at p.4.

17. As required by *EPEA*, STP submitted an Environmental Impact Assessment (EIA) in support of its *EPEA* and *Water Act* applications. The EIA concluded the Project results in:

- a. a decrease in groundwater entering the river for both the Project and the expected oil sands developments in the area;
- b. a shift in the hydraulic relationship between the MacKay River and underlying groundwater units with the MacKay River now supplying recharge to the groundwater units; and
- c. that the expected loss from the MacKay River is a negligible quantity in comparison to the mean seasonal flow of the MacKay River.

Record at Vol 5, Tab 11,  
STP EIA: Consultant Report #3 at p.18 & 27 **[TAB 11]**.  
*Environmental Assessment (Mandatory and Exempted Activities) Regulation*, Alta.  
Reg. 111/1993 at ss 1 & Schedule 1 **[TAB 3]**.

18. On January 25, 2012, the Director issued a public notice of STP's applications. The public notice provided opportunities for public participation in reviewing STP's applications stating:

- a. Any person who may be directly affected by the applications may submit a written Statement of Concern under *EPEA* and the *Water Act*;
- b. If no Statements of Concern are received, the applications may be approved without further notice; and
- c. Failing to submit a Statement of Concern may affect the right to file an appeal with the Environmental Appeal Board.

Record at Vol. 1, Tab 5 at p.2.

## The Statement of Concern

19. On March 28, 2012, OSEC submitted its Statement of Concern with respect to STP's applications to the Director. The Statement of Concern provided:

- a. That OSEC is a coalition that is composed of FMEA, Pembina, the Alberta Wilderness Association and the Toxics Watch Society of Alberta.
- b. OSEC "holds a recreational lease" on lands directly downstream of the Project which are used for camping, hiking, fishing, wildlife, viewing and swimming. (A subsequent letter to the Director dated May 31, 2012 clarified that the Applicants, Pembina and FMEA, hold the licence to occupy the Lands on behalf of the members).
- c. The Project would directly impact OSEC's use and enjoyment of the Lands due to the loss of wildlife populations, increased air emissions, reduced flow rates on the MacKay River, increasing fishing pressure as a result of increased traffic and the risk of spills and damage to the MacKay River.

Record at Vol. 1., Tabs 6 at p.1-2 & 8 at p.1.

20. On May 2, 2012, the Director received a Statement of Concern from Fort McKay First Nation and the Fort McKay Métis Community which included a technical review of STP's EIA that concluded that the Project could cause the MacKay River to be drained of all water during low flow periods:

- a. STP's assessment of its Project effects on the flow of the MacKay River flow is based on an average of March to October flow rates;
- b. The Project could have a significant impact on the MacKay River in low flow winters;
- c. In the Application case (the Project plus approved projects), the predicted reduction in groundwater interaction with surface water would create a 59% decrease in water levels during low flow conditions; and
- d. In the Planned Development Case (the Project in addition to approved and planned projects), 100% of the water would be eliminated during the lowest flow conditions recorded for the River. The River could be dry in places and the established ice cover could settle onto the river bed. Eliminating all flow for such an event in a river the size of the MacKay River would be precedent setting.

Record at Vol. 11, Tab 15(b) at p.43.

21. On May 8, 2012, the Director wrote OSEC in response to its March 28, 2012 Statement of Concern requiring further information from OSEC to determine whether the March 28, 2012 "submission constitutes a Statement of Concern," including:

- a. Number of OSEC members "that are directly affected by the proposed project" with details of their "individual activities";
- b. Number of "people" that are members of OSEC with documentation of "persons officially belonging to" OSEC;
- c. How "one" becomes a member of OSEC;
- d. A breakdown of OSEC membership in terms of the communities in which the members live; and
- e. A description of the "recreational lease land" and how the land "is directly affected by the proposed project."

Record at Vol 1., Tab 7.

22. On May 31, 2012, OSEC responded to the Director's letter of May 8, 2012 on behalf of its members stating:

- a. The members of OSEC are FMEA; Pembina; and Alberta Wilderness Association;
- b. All OSEC members are directly affected by the proposed project; all OSEC members have access to the Lands; FMEA and Pembina on behalf of all members of OSEC have an interest in land by way of the licence to occupy where members can access the Lands;
- c. OSEC has participated in over 14 Energy Resources Conservation Board hearings for oil sands projects; and
- d. Any individual or organization sharing OSEC's objectives can become a member.

Record at Vol. 1, Tab 8.

23. Attached to this May 31, 2012 letter was Pembina and FMEA's licence to occupy the Lands and a description of how the Lands could be directly affected by STP's applications including impacts on water quantity and quality; wildlife; air quality and land access including:

- a. The Project requires significant amounts of groundwater with steady-state make-up water at 1,708m<sup>3</sup>/d and approximately 4,000m<sup>3</sup>/day of make-up water in the first two years;



- b. Decreases in groundwater entering the MacKay River are likely given the proximity of the well pads to the MacKay River and the underground aquifer/channel that parallels the River under the Project;
- c. There is a risk the River could run dry in the winter which will impact recreational activities such as fishing; and
- d. STP's applications predict elevated arsenic concentrations to occur in non-saline aquifers that could contaminate the River and restrict the recreational use of the Lands.

Record at Vol. 1., Tab 8.

24. On June 15, 2012, STP wrote the Director with respect to OSEC's Statement of Concern of March 28, 2012 and its responding letter of May 31, 2012 arguing that OSEC's Statement should not be accepted as an "official statement of concern."

Record at Vol 1., Tab 9 at p.1.

25. By letter dated June 26, 2012, the Director responded to OSEC's May 31, 2012 letter and advised that OSEC's "submission will not be considered a Statement of Concern pursuant to section 73 of [EPEA] and section 109 of the *Water Act*" because:

- a. The information provided by OSEC "does not sufficiently demonstrate that a majority of OSEC or its members are directly affected by the subject applications;" and
- b. The licence to occupy "does not demonstrate that OSEC or its members are directly affected" by STP's applications.

Record at Vol 1. Tab 1.

26. On July 6, 2012, OSEC's legal counsel wrote the Director requesting him to review and reconsider his decision of June 26, 2012 stating that:

- a. there is no statutory requirement or legal principle that a majority of OSEC's members or a majority of the members' individual membership must be directly affected by STP's applications;
- b. OSEC is not a legal entity but short hand for the combined efforts of its organization members;
- c. Pembina and FMEA are "persons" as legally defined that have legal rights directly affected by STP's applications; and

- d. Pembina and FMEA's rights to the use and enjoyment of their licence of occupation may be reduced in value and utility by STP's applications.

Record at Vol.1, Tab 2.

27. On July 17, 2012, the Director responded to the July 6, 2012 letter re-affirming his decision that the Applicants did not file a "valid statement of concern" stating:

- a. He applied the most recent decisions of the Environmental Appeal Board to determine if "OSEC was directly affected";
- b. He asked for information about OSEC's membership to "determine if there were individuals who could be directly affected"; and
- c. He considered whether the "project could possibly have any effect" on the licence to occupy; OSEC did not identify "individuals who could be reasonably affected by the project."

Record at Vol.1., Tab 3.

28. On March 11, 2013, the Director filed the Record in this Application. It contains a briefing note to the Deputy Minister dated August 12, 2009 on the subject "Statement of Concern Rejection of Oil Sands Environmental Coalition," in connection to OSEC's Statement of Concern submitted for another oil sands project. The briefing note described the reasons for "Alberta Environment rejecting the coalition as a Statement of Concern filer", including OSEC's withdrawal from CEMA:

The Oil Sands Environmental Coalition has been a consistent Statement of Concern filer over the past decade, for most major mineable oil sands projects. There had at one point been an internal decision to accept them, setting some precedence for continued acceptance. Considerations for accepting in the past included: the Fort McMurray Environmental Association was quite active in local multi-stakeholder groups like the CEMA for the Wood Buffalo Region and the Wood Buffalo Environmental Association; many of the members of the Fort McMurray Environmental Association live in and around Fort McMurray; they have been relatively simple to work with as Statement of Concern filers (they've never appealed a decision); the OSEC has engaged in the Statement of Concern process since its early stages, when the "directly affected" test has not yet been fully established; and they were given the benefit of the doubt. *The OSEC and its member organizations have since withdrawn completely from the CEMA and as reflected in the Pembina Institute's recent publications about the oil sands, are now less inclined to work cooperatively.* [emphasis added]

Record at Tab 19.

29. The Record also includes three decisions subsequent to the August 2009 briefing note rejecting the Applicants' Statements of Concerns submitted for other projects – consistent with the briefing note's description to reject OSEC as a "Statement of Concern filer."

Record at Vol. 12, Tabs 16 -18.

### III. ISSUES

- A. Did the Director err in interpreting sections 73 of *EPEA* and 109 of the *Water Act* by:
- i. interpreting "person" to only mean individuals?
  - ii. Requiring a majority of the Applicants' individual members to be directly affected by STP's applications, rather than the Applicants who are "persons" holding rights independent of the personal rights of their individual membership?
  - iii. Requiring the Applicants prove they "are" directly affected rather than to show a reasonable probability of a direct effect on the Applicants rights' as legal entities?
- B. Assuming the Director correctly interpreted the legislation, was the Director's decision unreasonable for concluding that the Applicants' interests and rights arising from the licence to occupy the Lands could not be directly affected by the applications and the potential loss in the quality and quantity of water in the MacKay River?
- C. Did the Director err by breaching his duties of procedural fairness in making his decision upon improper and irrelevant considerations that were never disclosed to the Applicants and thereby refusing to exercise his discretion?

### IV. THE STATUTORY FRAMEWORK

30. The Director's decision required him to interpret section 73 of *EPEA* and 109 of the *Water Act*:

Statement of concern

73(1) Where notice is provided under section 72(1) or (2), any person who is directly affected by the application or the proposed amendment, addition, deletion or change, including the approval holder in a case referred to in section 72(2), may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or the proposed amendment, addition, deletion or change.

.....

Statement of concern

109(1) If notice is provided

(a) under section 108(1), any person who is directly affected by the application or proposed amendment, and

.....

may submit to the Director a written statement of concern setting out that person's concerns with respect to the application or proposed amendment.

*EPEA, supra* at s. 73 [TAB 1].  
*Water Act, supra* at 109 [TAB 2].

31. A Statement of Concern entitles a person to two general rights. One, the Director is required to consider the concerns set out in making his decision with respect to an application for approval under the Acts. Two, the Statement of Concern entitles the person to a variety of other public participation rights under the Acts, including the right to:

- a. Appeal the Director's decision to issue an approval to the Environmental Appeal Board ("EAB");
- b. Receive a copy of the Director's proposed approval for comment; and
- c. Receive notice of the Director's decisions with respect to the project, including his decision to require an environmental impact assessment; approve the application; or amend or cancel the approval.

*EPEA, supra* at ss. 46, 74 & 91(1)(a) [TAB 1].  
*Water Act, supra* at ss. 111 & 115 (1)(a)(i) [TAB 2].  
*Approvals and Registrations Procedure Regulation,*  
Alta. Reg. 113/1993 at s.8 [TAB 4].  
*Environmental Assessment Regulation,*  
Alta. Reg. 112/1993 at s. 5(2) [TAB 5].

32. In addition to the proponent's application for approval, opportunities to submit a Statement of Concern arise for:

- a. An activity that requires an environmental impact assessment;
- b. An activity that requires registration under *EPEA*;
- c. Any changes, additions or deletions to an existing approval; and
- d. Designation of contaminated sites.

*EPEA, supra* at ss.44(1)(b), 72 & 127 [TAB 1].  
*See Water Act, supra* at s.108(1)[TAB 2].

33. The function of the Statement of Concern serves to meet a primary purpose of the Acts: public participation. The Minister of Environment at the time *EPEA* was enacted explained the central value of public participation in *EPEA*:

The seventh principle is the opportunities made available through this Act for citizens to provide advice on decisions affecting the environment. In other words, Mr. Speaker, this Act, Bill 23, is not just a set of laws; it really is an environmental agenda. It's an environmental agenda that will be amended and probably changed through the course of time but only through the input of the citizens of Alberta. Basically this principle allows the facilitation of public access and service by providing a single-window approach to Alberta Environment making for more streamlined administrative procedures. It includes an access to information section, a requirement for state-of-the-environment reporting, increased public consultation and participation in all aspects of environmental protection and enhancement activities, provisions supporting studies on the environment, a library, educational materials, public consultation in the development of guidelines, objectives, and regulations, public consultation in the environmental impact assessment process and the approvals process, opportunities for appeals for parties directly affected by decisions through the creation of an environmental appeal board. This board will provide an independent review of the decisions made by directors and other people within the department to provide a system of checks and balances on those decisions. This principle also provides for allowing for requests by citizens for investigations and contraventions.<sup>1</sup>

Debates of Legislative Assembly of Alberta,  
4<sup>th</sup> Session, 22<sup>nd</sup> Leg., June 1992, p.1884 [TAB 10].

34. The intention of the legislature to promote public participation in decisions affecting environmental matters is operationalized in section 2 of *EPEA*, which says the purposes of the Act include:

**Purpose of Act**

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

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

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<sup>1</sup> See *R. v. Morgentaler*, [1993] 3 S.C.R. 463 at p.484: Hansard evidence relevant on judicial review for background and purpose of the legislation.

.....

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

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

*EPEA, supra at s.2 [TAB 1].*

35. In addition to submitting a Statement of Concern pursuant to section 73, public participation is facilitated through provisions requiring public notice, consultation, and enforcement, including:

- a. Providing public notice of the Director's decisions such as requiring an EIA; issuing EIA terms of reference; suspending or cancelling an approval;
- b. Inviting public comments on the proposed terms of reference for an EIA;
- c. Requiring the proponent to hold a public meeting;
- d. Enabling any member of the public to trigger an investigation of a regulatory offence; and
- e. Making a broad range of information and records available to the public.

*EPEA, supra at ss. 35, 44(5), 45(5), 48 & 196 [TAB 1].  
Environmental Assessment Regulation, supra at  
ss. 3(1), 6(1), 7(1) & 8 [TAB 5].*

36. Section 2 of the *Water Act* includes similar public participation legislative objectives as *EPEA*:

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

(a) the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future;

.....

(d) the shared responsibility of all residents of Alberta for the conservation and wise use of water and their role in providing advice with respect to water management planning and decision-making;

*Water Act, supra* at s.2 [TAB 2].

37. The *Water Act* has similar public notice and consultation provisions as *EPEA* in implementing its public participation objectives.

*Water Act, supra* at ss. 8(4), 9(2)(f), 15, 61 & 108(1) [TAB 2].

38. Submitting a Statement of Concern is a precondition for those persons wanting to appeal the Director's decision to issue an approval to the EAB. To obtain standing before the EAB, the person must have submitted a "statement of concern in accordance" with the Acts and be "directly affected by the Director's decision."

*EPEA, supra* at 91(1)(a) [TAB 1].

*Water Act, supra* at s.115(1)(a) [TAB 2].

39. In addition to the necessary approvals under the Acts, project proponents must also obtain regulatory approval from either the Energy Resources Conservation Board (now called Alberta's Energy Regulator ["AER"]) or the Natural Resources Conservation Board depending on the type of development. Those directly affected by an application are also entitled to submit their concerns for consideration by these regulators for matters that fall within their jurisdiction. Oil and gas projects are within the AER's jurisdiction.

*Natural Resources Conservation Board Act, R.S.A. 2000 c.N-3* at s.8 [TAB 6].

*Responsible Energy Development Act, S.A. 2012 c.R-17.3* at s.32 [TAB 7].

40. Environmental legislation calls for a broad and liberal interpretation as the protection of a healthy environment is a fundamental Canadian value and a "public purpose of superordinate importance." The Supreme Court of Canada has consistently recognized that the preservation of the environment engages the involvement and responsibility of all members of our society.

*Ontario v. Canadian Pacific,*

[1995] 2 S.C.R. 1031 at para. 55 [TAB 12].

*R v. Hydro-Quebec,* 1997 CanLII 318 (SCC) at para. 85;

[1997] 3 S.C.R. 213 [TAB 13].

## V. STANDARD OF REVIEW

### 1. Determining the Standard

41. The fundamental function of judicial review is to ensure the "legality, reasonableness and fairness of the administrative process and outcomes."

*Dunsmuir,* 2008 SCC 9 at para. 28 [Dunsmuir] [TAB 14].

42. *Dunsmuir* sets out a two part test for identifying the appropriate standard of review for judicial review on substantive grounds. First, the reviewing court considers whether the appropriate standard of review for the question raised has been established in the jurisprudence. If the inquiry is unsuccessful or the precedents are inconsistent with the jurisprudence on standard of review, the reviewing court undertakes a full analysis to determine the appropriate standard of review.

*Dunsmuir, supra* at para. 62 [TAB 14]  
recently cited in *Agraira v. Canada (PSEP)*,  
2013 SCC 36 at para. 48.

43. The full analysis for determining the appropriate standard of review is contextual and is dependent on these factors: the presence of a privative clause; the purpose of the decision-maker; the nature of the question at issue; and the relative expertise of the decision-maker.

*Dunsmuir, supra* at para. 64 [TAB 14].

44. Generally, questions of fact, discretion and policy, and those legal questions that cannot easily be separated from factual issues are reviewed for reasonableness, while many legal issues are reviewed for correctness.

*Dunsmuir, supra* at para.51 [Tab 14].

45. The correctness standard applies to constitutional questions; questions of general law that are both a central importance to the legal system and outside of the decision maker's expertise; the drawing of jurisdictional lines; and true questions of jurisdiction. The correctness standard applies in these circumstances even if the decision-maker is interpreting its home statute.

*Alberta v. Alberta Teachers' Association*,  
2011 SCC 61 at para. 30 [ATA] [TAB 15].

46. Provided that the decision-maker applied the correct legal test, the ensuing discretion will be judicially reviewed for reasonableness.

*Halifax (Regional Municipality) v. Canada (PWGS)*, 2012 SCC 29 at para. 43 [TAB 16]  
citing *Montreal(City) v. Montreal Port Authority*, 2010 SCC 14.

47. While *Dunsmuir* establishes the analysis for determining the standard of review for judicial review on substantive grounds, the same analysis does not apply to matters of procedural fairness. Procedural fairness is a fundamental principle of administrative law that requires public authorities to act fairly and is reviewed on the correctness standard.

*Edmonton Police Association v. Edmonton (City Of)*, 2007 ABCA 184  
at para. 3 [Edmonton Police] [TAB 17].  
*Dunsmuir, supra* at para. 129 [TAB 14].



48. In this Application, the interpretation of sections 73 and 109 is reviewed for correctness and the Director's application of the facts to the correct test is reviewed on the reasonableness standard. The Director's reliance on improper and irrelevant considerations engages the correctness standard due to the resulting breach of procedural fairness.

*Issue A: The Director's Interpretation of section 73 of EPEA and 109 of the Water Act is Reviewed for Correctness*

49. The standard of review of the Director's authority pursuant to section 73 of *EPEA* or 109 of the *Water Act* has not been judicially considered. However, other decisions of the Director made pursuant to the Acts have been considered for the appropriate standard of review:

- The Director's interpretation of the term "construction" included in a development permit was reviewed on a correctness standard.
- The Director's discretion to require an environmental impact assessment for an activity pursuant to section 44 of *EPEA* was reviewed with less deference on the reasonableness spectrum as the exercise is law intensive.
- The Director's discretion to amend a water licence pursuant to section 54 of the *Water Act* was reviewed on a reasonableness standard for being a question of mixed fact and law.

*Alberta Cement Corp. v. Alberta (Director)*,  
1996 CanLII 10564 at para. 17; 45 Admin L.R. (2d) 38 (Alta. Q.B.) [TAB 19].  
*Castle-Crown Wilderness Coalition v. Alberta*,  
2005 ABCA 283 at para.39 [*Castle-Crown*] [TAB 20].  
*979899 Alberta Ltd. v. Alberta*, 2008 ABQB 5 at para.16 [TAB 21].

50. Applying the four factors of the standard of review analysis to this Application, a correctness standard applies to the Director's interpretation of sections 73 of *EPEA* and 109 of the *Water Act*.

51. While *EPEA* provides a privative clause with respect to decisions made by the Minister and the EAB, there is no privative clause for the Director's decisions. This favours a correctness standard. There is right of appeal to the EAB of a decision by the Director, but it is limited and does not include the Director's decisions regarding Statements of Concern. Further, *EPEA* preserves all civil remedies.

*EPEA*, *supra* at ss. 91, 102 & 217 [TAB 1].

*Water Act, supra* at s. 115 [TAB 2].

52. The purpose of the statutory power also favours the correctness standard. The Acts are public interest legislation. The Director's role is to issue approvals for regulated activities and set the terms and conditions of these approvals to protect the environment and society. Section 73 of *EPEA* and 109 of the *Water Act* do not import policy considerations as the provisions require the Director to identify the nature of rights in the face of private interests that threaten those rights.

*EPEA, supra* at Part II [TAB 1].  
*979899 Alberta Ltd. v. Alberta, supra* at para.14 [TAB 21].

53. The Court of Appeal recently applied the correctness standard to a decision of the Subdivision and Development Appeal Board of which version of the city's *Land Use Bylaw* applied to an application for a development permit. Because the board's decisions have consequences for property rights holders and their neighbours; and because the legislative scheme involves balancing landowner rights with the public interest, the Court held that the correctness standard applied even though the decision maker was interpreting its home statute.

*Cameron Corporation v. Edmonton*, 2012 ABCA 254 at para.7 [TAB 22].

54. The interpretation of sections 73 and 109 is a question of law that is of central importance to the legal system as a whole and outside of the decision-maker's expertise. The interpretation of "person" is a basic concept of our legal system and its correct interpretation is independent of the Director's expertise. It is defined by Alberta's *Interpretation Act*, R.S.A. 2000 c.I-8. The phrase "directly affected" is also not unique to the Acts. Similar language is used in several statutes including:

- a. *Alberta Land Stewardship Act*, S.A. 2009 c.A-26.8 at s.19.2 ("A person who is directly and adversely affected by a regional plan");
- b. *Natural Resources Conservation Board Act*, R.S.A. 2000 c. N-3 at s.8 ("persons who may be directly and adversely affected");
- c. *Public Health Act*, R.S.A. 2000 c. P-37 at s.5 ("a person who is directly affected by a decision of a regional health authority");
- d. *Alberta Utilities Commission Act*, S.A. 2007, c. A-37.2 at s.9(2) ("its decision or order on an application may directly and adversely affect the rights of a person");
- e. *Public Lands Act*, R.S.A. 2000 c.P-40 at s.54.03(1) ("any person who is directly affected by an order under this section"); and

- f. *Responsible Energy Development Act*, S.A. 2012, c.R-17.3 at s.32 “the person may be directly and adversely affected by an application may file a statement of concern”).

55. The Court of Appeal has confirmed the Director has no relative expertise over courts in interpreting the language of *EPEA*.

*Castle-Crown, supra* at para.30 [TAB 20].

56. In summary, all four *Dunsmuir* factors indicate the correctness standard applies to the Director’s interpretation of section 73 of *EPEA* and 109 of the *Water Act* as: no privative clause applies; the Director’s purpose is to regulate activities that may threaten the environment and property rights; and the correct interpretation of “directly affected” and “person” is an important general question of law that informs multiple statutory regimes for which the Director has no unique expertise.

*Issue B: The Director’s Conclusion that the Applicants’ Licence to Use the Lands Could Not be Directly Affected is Reviewed for Reasonableness*

57. If the Director correctly interpreted the legislation, the reasonableness standard applies to the Director’s application of the legal test to the facts as the question is one of mixed fact and law and the Director presumably has relative expertise in assessing the potential effects of oil and gas activities.

*Issue C: The Director’s Reliance on Improper and Irrelevant Considerations is Reviewed for Correctness*

58. The Director’s decision relied on considerations that were not only undisclosed to the Applicants but are improper and irrelevant to the Director’s statutory authority. These matters engage the duty of procedural fairness and are therefore reviewed for correctness.

## ***2. Applying the Standard of Review***

### *Correctness Standard*

59. In reviewing a decision on substantive grounds, the correctness standard requires the Court to undertake its own analysis of the question before the decision-maker to determine if the decision-maker was correct.

*Dunsmuir, supra* at para. 50 [TAB 14].

60. The function of the Court on judicial review for issues of procedural fairness is to determine the scope of the duty of natural justice and determine whether the decision-maker adhered to the duty.

*Edmonton Police, supra* at para. 4 [TAB 17]  
citing *Moreau-Berube v. New Brunswick*, 2002 SCC 11.

### *Reasonableness Standard*

61. The reasonableness standard requires the Director's decision to be reasonably defensible on the law and the facts:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

*Dunsmuir, supra* at para. 47 [TAB 14].

62. The reasonableness standard is a contextual analysis that requires the decision-maker to meet the purpose and objectives of the governing legislation, including the scope of the decision-maker's authority.

*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2  
at paras. 18 & 23 [TAB 23].

63. This standard requires the Court to supplement the decision-maker's reasons by looking at the record when necessary to determine whether the decision as a whole in the context of the record is reasonable.

*Nurses' Union v. Newfoundland and Labour*,  
[2011] 3 S.C.R. 708 at paras. 12, 15 [TAB 24].

## **VI. LEGAL PRINCIPLES THAT REVEAL THE ERRORS**

### *Issue A: The Director's Interpretation of Section 73 of EPEA and Section 109 of the Water Act is Wrong in Law*

#### *1. The meaning of "person"*

64. It is unclear which legal test the Director applied in his June 26, 2012 decision. He wrote: "the information provided does not sufficiently demonstrate that the majority of the members of OSEC are directly affected by the applications. Nor does the agreement between the parties demonstrate that OSEC or its members are directly affected by the applications."

65. However, it is clear from his July 16, 2012 letter that he is interpreting “person” in the Acts to mean individuals. The Director wrote that he:

had corresponded with OSEC to determine if there were individuals who were directly affected by the application. This was to assist in determining whether the OSEC group had individuals who could also be directly affected.

I had also considered whether the project could possibly have an effect upon the recreational lease. OSEC did not identify individuals who could reasonably be affected by the project.

66. Statutory interpretation seeks the intent of the legislature by reading the words in their entire context and according to their grammatical and ordinary sense. If the words are clear, the ordinary meaning will apply with the overriding purpose of the statute to assist as necessary. In all instances, the provisions of the Act must be read in a consistent manner.

*Celgene Corp. v. Canada (AG)*, 2011 SCC 1 at para.21 [TAB 25].

67. The interpretation of statutes that express fundamental values and goals must be interpreted liberally.

*Canada (CHRC) v. Canada (AG)*, 2011 SCC 53 at para. 33 [TAB 26].

68. Neither *EPEA* nor the *Water Act* defines the term “person”; however, its plain and ordinary meaning includes incorporated legal entities. The *Interpretation Act* provides the following definition: “person includes a corporation and the heirs, executors, administrators or other legal representatives of a person.”

*Interpretation Act*, R.S.A. 2000, c.I-8 at s.28(1)(nn) [TAB 8].

69. The word “person” is used in other provisions of *EPEA* and the *Water Act* in a manner that must include corporations as it would be nonsensical that the regulatory regime only regulates activities of individuals:

39(d) “proponent” means a person, the Government, a Government agency, the government of another jurisdiction or an agency of that government that undertakes a proposed activity.

See *EPEA*, supra at s.39(d) [TAB 1].

70. The Director's interpretation of "person" to mean individuals disentitles project proponents from filing Statements of Concern and the rights of appeal to the EAB, which is inconsistent with the statutory framework.

71. Therefore, the Director misdirected himself and failed to consider the potential impacts of Pembina and FMEA specifically as beneficiaries of the licence to occupy the Lands.

## *2. The Director Erred in Applying the EAB's Majority of Individuals Test*

72. Relying on EAB decisions, the Director misinterpreted sections 73 of *EPEA* and 109 of the *Water Act* to require a majority of individuals of a group to be affected by STP's applications. This interpretation is not grounded on any wording of the legislation. The EAB's "test" cited by the Director has no relevance as it arises from different facts, and in any event, EAB decisions are not binding and do not supplant the Director's duty to apply the law correctly.

Record at Vol. 1, Tab 3.

73. Blind adherence to EAB decisions is an error. Administrative decisions, such as the EAB's, are not binding on any agency, particularly on the interpretations of law. Treating EAB decision as binding is wrong as it can result in the Director's refusal to exercise his duty to make the decision or fetter his discretion.

*Domtar Inc. v. Quebec*, [1993] 2 S.C.R. 756 [TAB 27].  
*Pandurangan v. Alberta Association of Architects*,  
1981 CanLII 1051 at paras. 33-36. (Alta. Q.B.) [TAB 28].

74. The EAB decisions referred to by the Director are irrelevant to the facts before him. These decisions involved situations where a single organization applied for standing before the EAB pursuant to sections 91 of *EPEA* and 115 of the *Water Act*. The organizations themselves had no legal rights that could be affected, such as interests in lands, but had individual members that may have had such interests. The EAB has expressly acknowledged the significant difference between rights held by legal entities and the *in personam* rights of individuals:

A common problem is that groups, particularly the type that have appealed in this case, do not have a property right that can be impacted by a project. As a result, groups such as the ones here, are left to argue there will be an effect on their "*in personam*" rights as the basis of their directly affected claim. The Appellants do not have a property or an estate interest in the Bow River Basin, and they do not have an identifiable *in personam* interest. This distinguishes the position of corporate and municipal entities from groups such as the Appellants. This does not mean there will not be circumstances where these groups will be granted standing, but based on the circumstances of these appeals and the submissions

provided, they have not demonstrated they are directly affected by the Licence Amendments.

*Water Matters Society of Alberta et al. v. Director re: Western Irrigation District* (April 10, 2012), Appeal Nos. 10-53-055 and 11-009-014-D at para.129 (A.E.A.B) [TAB 29].  
*Hazeldean Community League v. Director*, (July 6, 1995) Appeal No.95-002 at pp.3-4 [TAB 30].

75. Accordingly, the “majority members” test had no relevance to the facts before the Director.

### 3. The Director Erred in the Certainty of Proof Required to Show a Direct Effect

76. It appears the Director required the Applicants to show they “are” directly affected by STP’s applications. The correct test with respect to applications for approval of projects not yet constructed is whether the facts show a reasonable probability of a direct effect.

77. The following principles were applied to the interpretation of section 91 of *EPEA*, which states those persons who are “directly affected by the Director’s decision” may file an appeal with the EAB and is near identical to sections 73 of *EPEA* and 109 of the *Water Act*:

- a. The person need not prove with certainty that its rights will be affected but only a potential effect on a balance of probabilities or a reasonable probability;
- b. Effects on a person’s use of a natural resource meets the requirements of directly affected;
- c. Close proximity between the location of the person’s use and the project meets the requirements of directly affected; and
- d. The person need not show a preponderance of evidence of a direct effect but rather a *prima facie* showing of potential harm.

*EPEA*, supra at s.91 [TAB 1].  
*Court v. Alberta Environmental Appeal Board*,  
2003 ABQB 456 at paras. 69-71 [TAB 31].

78. In cases interpreting similar wording in the *Energy Resources Conservation Act* – which grant standing and intervener funding with respect to applications for energy projects, including oil sands – the Court of Appeal has established the following principles in interpreting when the Board’s decision “may directly and adversely affect the rights of

a person”; and a person who has land “that is or may be directly and adversely affected by the decision”:

- a. A person need only show a reasonable belief that the evidence may disclose that its rights could be affected or could be prejudiced, these facts need not be present at the time the application is considered;
- b. The risk of harm need not be certain or likely;
- c. Effects on the value and use of land, as well as physical damage, meet the requirements of directly affected;
- d. The person need only be in occupancy of land that is directly affected; there is no requirement that the person own an interest in land; and
- e. There is no legal requirement that a person establish that it may be affected in a different way or to a greater degree than members of the general public;

*Energy Resources Conservation Act*,  
R.S.A. 2000, c.E-10 at ss.26 & 28 (repealed: June 17, 2013)<sup>2</sup> [TAB 9].  
*Kelly v. Alberta (Energy Resources Conservation Board)*,  
2009 ABCA 349 at paras. 32, 37 & 39 [TAB 32] considering *ERCA*, supra at s.26.  
*Kelly v. Alberta (Energy Resources Conservation Board)*,  
2011 ABCA 325 at para.26 [TAB 33] considering *ERCA*, supra at s.26.  
*Kelly v. Alberta (Energy Resources Conservation Board)*,  
2012 ABCA 19 at paras. 26 & 27 [TAB 34] considering *ERCA*, supra at s.28.

79. In summary, the Director erred: in interpreting sections 73 and 109 to require individuals to be directly affected; treating EAB decisions as binding; failing to correctly interpret EAB decisions to differentiate between rights held by legal entities and rights held by individuals; and requiring the Applicants to prove a direct effect beyond the risk that the value and use of the licence to occupy the Lands for recreational purposes could be affected by STP’s applications.

## **Issue B: The Outcome of the Director’s Decision is Unreasonable Given the Facts on the Record**

80. The outcome of the Director’s decision is unreasonable based on the facts:

- a. STP predicted a decrease in groundwater entering the MacKay River; and
- b. The Director had expert opinion that the Project created a risk that the MacKay River could run dry.

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<sup>2</sup> This legislation has been replaced by the *Responsible Energy Development Act*, S.A. 2012 c.R-17.3.



Record at Vol.11, Tab 15(b) at p.43.  
Record at Vol 5, Tab 11,  
STP EIA: Consultant Report #3 at p. 18 & 27 [TAB 11].

81. The Applicants' licence to occupy the Lands is for the right to use the Lands for recreational purposes abutting the MacKay River, including for kayaking and other boating activities. A loss in the quantity of water in the MacKay River at the Lands could have a direct effect on use and value of the licence of occupation. It is unreasonable to assume causing a major river down to dry up could not harm the ecosystem that provides environmental amenities and make the adjoining land desirable for outdoor recreation.

Record at Vol. 1, Tab 8(i).

82. The law does not require the Director to agree or disagree with the Applicants' concerns or require certainty or proof that the concerns will materialize. He need only be satisfied that the Applicants' concerns have a reasonable basis and the applications could possibly affect their rights. When in doubt, the Director should favour accepting and considering Statements of Concern because of the important social values underlying the legislation and the important role of public participation in the Acts.

### **Issue C: The Director was Wrong for Relying on Improper and Irrelevant Considerations**

83. The Director's Record of documents reviewed in making his decision includes a briefing note that includes improper considerations – ones that are completely irrelevant to the statutory purpose of a Statement of Concern. Specifically, the withdrawal of OSEC's members from a voluntary organization and the content of Pembina's recent publications on oil sands:..."The OSEC and its member organizations have since withdrawn completely from the CEMA and as reflected in the Pembina Institute's recent publications about the oil sands, are now less inclined to work cooperatively."

Record at Vol. 11, Tab 19.

84. The Record includes three decisions of the Director subsequent to the 2009 briefing note rejecting the Applicants' Statements of Concern for three other projects. The Record, including the briefing note and other decisions, are relevant as a reviewing Court is entitled to consider the Record as a whole and the Director's other decisions in similar circumstances to determine the purpose of and full reasons for the Director's decision.

Record at Vol. 12, Tabs 16-18.  
*ATA, supra* at para. 56 [TAB 15].

85. Relying on the factors set out in the briefing note in making his decision, the Director breached his duties of procedural fairness as the considerations are:

- a. Improper and irrelevant;
- b. The Applicants were not given an opportunity to respond to them before the decision was made; and
- c. Indicate the Director failed to exercise his duty to decide to the issue before him.

86. While the content of procedural fairness is dependent on the factors laid out in *Baker*, the fundamental principles of the duty require:

- a. a fair and open procedure;
- b. the right to be heard;
- c. consideration by the decision-maker with the duty to decide; and
- d. decisions to be free from the reasonable apprehension of bias.

*Baker v. Canada*, [1999] 2 S.C.R. 817  
at paras. 22 & 45 [*Baker*] **[TAB 35]**.

87. The Development Appeal Board was found to breach its duties of procedural fairness by considering the past business practices of an applicant developer. The Court held that these considerations did not serve the purpose of the legislation and were therefore irrelevant even if relevant factors were taken into the decision-making. The reasoning in *Dallinga* was followed in the judicial review context where our court found city council's reliance on irrelevant considerations on land use classification to amount to an unfair process.

*Dallinga v. Calgary (City)*, 1975 ALTASCAD 13 (CanLII) at para.4;  
[1976] 1 W.W.R. 319 [*Dallinga*] **[TAB 36]**.  
*Campeau Corporation v. Calgary (City)*, 1978 ALTASCAD 266 at para.72 (CanLII);  
7 Alta. L.R. (2d) 294 **[TAB 37]**.

88. Reliance on irrelevant factors amounts to the Director's refusal to exercise his statutory duty to exercise his discretion and a breach of the fundamental principle that "he who hears must decide."

*Labour Relations Board v. The Queen*, [1956] S.C.R. 82 **[TAB 38]**.  
*Campeau Corporation v. Calgary (City)*, *supra* at para.99 (CanLII);  
7 Alta. L.R. (2d) 294 **[TAB 37]**.  
*Ellis-Don*, *supra* at para.66 **[TAB 18]**.

89. A breach of procedural fairness occurs when decisions are made on information and considerations undisclosed to the person affected, who must have an opportunity to be heard on the issues raised.

*Budge v. Alberta (Workers' Compensation Board)*, 1985 ABCA 226 [TAB 39].

90. Baker confirmed the test for the reasonable apprehension of bias: what would an informed person, viewing the matter realistically and practically –and having thought the matter through---conclude. A reasonable apprehension of bias arises when decisions are made on assumptions involving personal traits, political views and membership in organizations. The Record reveals that such considerations have influenced the Director's decision and taint the result.

*Baker, supra* at paras. 46 & 48 [TAB 35].

*R. v Smith & Rhuland Ltd.*, [1953] 2 S.C.R. 95 at 100 [TAB 40].

*Roncarelli v. Duplessis*, 1959 CanLII 50, [1959] S.C.R. 121 [TAB 41].

## VII. Remedy

91. For the reasons above, the Applicants request the Court:

- a. Quash the decision of the Director; and
- b. Declare the Applicants' Statement of Concern valid pursuant to section 73 of *EPEA* and 109 of the *Water Act*; or
- c. In the alternative, remit the decision back to the Director on the direction that the Applicants' statement of concern meets the requirements of section 73 of *EPEA* and section 109 of the *Water Act*; and
- d. Award the Applicants costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Dated this \_\_\_\_\_ day of August 2013 at the City of Edmonton, in the Province of Alberta.

**Klimek Buss Bishop Law Group**

Per: \_\_\_\_\_

**KARIN E. BUSS, LLB**

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