

Court of King's Bench of Alberta

Citation: Skibsted v Alberta (Environment and Protected Areas), 2026 ABKB 98

Date: 20260213
Docket: 2401 06687
Registry: Calgary

Between:

**Rick Skibsted, Linda Skibsted, Richard Clark, Wendy Clark, Half-Diamond HC Limited,
Jonathan Groves, Derek McMillan and Spruce Coulee Farms Ltd.**

Applicants

- and -

**Minister of Environment and Protected Areas, Alberta Environmental Appeals Board,
Designated Director under the *Water Act* and Badlands Recreation Development Corp.**

Respondents

- and -

Minster of Justice for Alberta

Intervener

**Reasons for Decision
of the
Honourable Justice M.R. Gaston**

Introduction

[1] The Applicants seek judicial review of a decision of the Environmental Appeals Board (the Board) and of the Minister of Environment and Protected Areas (the Minister) granting approval to the Respondent, Badlands Recreation Development Corp (Badlands), to conduct certain activities in the Rosebud River Valley near Rosebud, Alberta (collectively, the Decision). The Applicants ask this Court to quash the Decision and remit the matter back to the Board.

[2] For the reasons that follow, the application for judicial review is granted. The Decision is quashed, and the matter is remitted back to the Board.

Background

[3] Badlands owns approximately 508 acres adjacent to the Rosebud River. Badlands intends to develop an automotive racetrack and a full-service recreational resort and residential community. The Applicants are a group of individuals and corporations that either work or own land adjacent to or in the vicinity of the land owned by Badlands.

[4] In 2017 and 2018, Badlands filed applications for approval for certain activities under section 36 of the *Water Act*, RSA 2000, c W-3 for the purpose of constructing a racetrack on a section of land located in the Rosebud River Valley. The Designated Director under the *Water Act* granted approval for both applications on January 8, 2020 (Approval No 00406489-00-00, referred to as the Approval). The Approval authorizes Badlands to: place fill in two wetlands (referred to as Wetlands 2 and 3), modify three wetlands (referred to as Wetlands 1,4, and 5), and construct, operate and carry out maintenance of a stormwater management system.

[5] On January 20, 2020, the Applicants appealed the Approval to the Board under s 115(1)(a) of the *Water Act* and s 91(1)(p) of the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [EPEA]. The Applicants sought to have the Approval reversed in its entirety or, in the alternative, varied.

[6] The parties to the appeal hearing before the Board were the Applicants and Badlands, as well as the Director.¹ Preliminary written motions were heard between February 2020 and October 2022. The Board conducted a site visit on September 2, 2022. A virtual public hearing was held over seven and a half days: November 2-4 and 7, 2022 and January 30-February 2, 2023. Each party tendered evidence from witnesses and conducted cross-examination. Closing written arguments were submitted between February 28 and March 30, 2023. The appeal hearing closed on September 8, 2023.

Report and Recommendation of the Board

[7] Section 99 of the *EPEA* requires that following a hearing of an appeal under section 115(1)(a) of the *Water Act*, the Board submit a report to the Minister, including its recommendations.

[8] On March 28, 2024, the Board issued a 773-paragraph report concluding that the Appellant did not provide sufficient evidence to demonstrate the Approval should be reversed. The Board recommended that the Minister vary the Approval and permit the proposed activities to proceed but under different terms and conditions: *McMillan et al v Director, South Saskatchewan Region, Operations Division, Alberta Environment and Protected Areas, re: Badlands Recreation Development Corp*, 2024 ABEAB 7 [Reasons].

¹ *McMillan et al v Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp*, 2022 ABEAB 22

Decision of the Minister

[9] Pursuant to section 100 of the *EPEA*, upon receiving the Board’s report, the Minister may “confirm, reverse or vary the decision appealed and make any decision that the person whose decision was appealed could make”.

[10] On April 8, 2024, the Minister issued a one-line decision varying the Approval as recommended by the Board (the “Minister’s Order”).

[11] Two of the variances are of particular relevance to this appeal. First, the approval holder is required to submit a Wetland Monitoring Program Proposal for Wetlands 1,4, and 5. Second, before disturbing Wetland 2, the approval holder must provide an avoidance report to the Director for his review and approval documenting the reasons why Wetland 2 cannot be avoided.

Issues

[12] The Applicants raise several grounds on judicial review that relate both to the Decision on the merits and to issues of procedural fairness. They submit that any one of these grounds is sufficient to quash the Decision:

1. the Board failed to consider relevant evidence related to the bank swallow, a threatened species under the *Species at Risk Act*, SC 2002, c 29;
2. the Board misinterpreted and misapplied the precautionary principle;
3. the Board fettered its discretion by failing to exercise discretion that had been afforded to it;
4. the Board’s decision to impose the onus on the appellants “to provide sufficient evidence and argument to demonstrate to the Board that the Director’s approval should be reversed or varied” was unreasonable;
5. the Board applied the incorrect standard of proof;
6. there is a reasonable apprehension of bias on an institutional basis or on the facts of this particular case; and
7. the Board breached its duty of procedural fairness.

[13] The parties to the judicial review included the Applicants, Badlands (the approval holder), the Director, and the Board. The Minister of Justice intervened for the purpose of responding to the Notice of Constitutional Question. This Court was advised that the hearing was the longest in the Board’s history. The Certified Record of Proceedings is over 34,000 pages. The judicial review was heard over five days.

Preliminary Issue: Additional Evidence on Judicial Review

[14] Badlands submits that this Court should not rely on evidence filed by the Applicants that was not before the Board as its admission is contrary to Rule 3.22 of the *Alberta Rules of Court*, Alta Reg 124/2010. As a general rule, evidence that was not before the tribunal that relates to the merits of the decision are not permitted on judicial review: *Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)*, 2006 ABQB 904 at para 42 [*Alberta Liquor*]. But as Justice Slatter (as he then was) recognized, evidence may be allowed to show bias or breaches

of the rules of natural justice: *Alberta Liquor* at paras 41-44 cited with approval in *Northern Air Charters (PR) Inc v Alberta Health Services*, 2023 ABCA 114 at paras 8-9.

[15] The three affidavits of Amy Mitchell do not concern the merits of the decision. Their purpose is to demonstrate alleged procedural unfairness and a reasonable apprehension of bias. For these purposes, the three affidavits are admitted.

Preliminary Issue: Standing

[16] The Applicants submit that the Director and the Board should be granted only limited standing on judicial review. The Applicants argue that such standing should be restricted to submissions on the following: standard of review, institutional bias, reasonable apprehension of bias, and the statutory scheme.

[17] The Board and Director agree that their submissions should be so limited. Neither purport to take a position on the reasonableness or correctness of the Decision.

[18] At the hearing, the Applicants narrowed their position and argued that the Board ought not be permitted to make submissions related to the *de novo* nature of Board hearings and the onus of proof (Part IV.A. of the Board's brief). Relying on *Ontario (Energy Board) v Ontario Power Generation Inc*, 2015 SCC 44 at paras 63-72 [*OEB*], the Applicants argue that the Board's submissions go beyond the permissible scope of tribunal participation in a judicial review of the tribunals' own decision and is, in effect, bootstrapping.

[19] This Court permitted submissions at the hearing by the Board and advised all parties that the ultimate weight assigned to the Board's submissions would be addressed in these reasons. The issue of standing is discussed together with onus later in these reasons.

Standard of Review

[20] The parties agree that two separate standards of review apply to this judicial review.

[21] The first standard is that the substance of an administrative decision is reviewed for reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65. This is a "robust" standard, which ensures that statutory delegates acted within the scope of their lawful authority: *Auer v Auer*, 2024 SCC 36 at para 26.

[22] Reasonableness review focuses "on the decision actually made by the decision maker": *Vavilov* at para 83. The question is whether the decision, including both the rationale for the decision and the outcome are reasonable: *Vavilov* at para 83. A reasonable decision is one that "is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. Ultimately, the purpose of reasons "is to demonstrate 'justification, transparency, and intelligibility'": *Vavilov* at para 81, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 1, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[23] A reviewing court is not entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result":

Vavilov at para 98, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 54, citing *Petro-Canada v Workers' Compensation Board (BC)*, 2009 BCCA 396 at paras 53 and 56. "Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility": *Vavilov* at para 98.

[24] While a decision maker need not address every argument raised by the parties, a decision will be unreasonable if a decision maker fails to "meaningfully grapple with key issues or central arguments raised by the parties": *Vavilov* at para 128.

[25] The second standard applies when questions of procedural fairness are raised. In that case, a court asks whether the requisite standard of procedural fairness as required by the statute or the common law has been afforded: *Vavilov* at para 77. The question is not whether the tribunal's decision was correct but whether the procedure chosen was fair given all the circumstances: *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2020 ABCA 192 at para 11 citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 21; *Institute of Chartered Accountants of Alberta (Complaints Inquiry Committee) v Barry*, 2016 ABCA 354 at para 5.

[26] A final point, the Minister's Order is a one-sentence decision adopting the Board's recommendation in its entirety for a variance to the Approval. There is no statutory requirement that the Minister give reasons. Where a decision maker does not provide reasons, the reviewing court must look to the record as a whole to understand the rationale for the decision: *Vavilov* at para 137. Here, the record demonstrates that the Minister relied on all of the Board's reasons in arriving at her decision. It follows that if the Board's decision ought to be quashed due to either substantive or procedural defects, those same defects will taint the Minister's decision and require that it also be quashed: *McColl-Frontenac Inc v Alberta (Minister of Environment)*, 2003 ABQB 303 at paras 17-18; *Menard v Alberta (Minister of Environment and Parks)*, 2024 ABKB 412 at paras 15-17.

1. The Bank Swallow

[27] The Applicants submit that the Board's decision is unreasonable because the *Reasons* fail to grapple with a key issue put before it. The Applicants led evidence and made argument before the Board about the designation of wetlands affected by the Approvals as critical habitat for the bank swallow, a threatened species under the *Species at Risk Act*, SC 2002, c 29 [SARA]. The Applicants submit that the potential impacts to wildlife, and specifically species at risk, was identified by the Board itself as a key issue for determination but the Board's reasons and recommendation to the Minister failed to grapple with the issue. In short, the Applicants argue that the Board's reasons fail to address relevant evidence that was placed before it in relation to an issue the Board itself acknowledged was a key issue.

[28] A description of the relevant statutory schemes and chronology of events is helpful to understand how the critical habitat of the bank swallow became an issue before the Board.

a) *The Water Act*

[29] Section 36 of the *Water Act* requires that a person seek approval to commence or continue a designated activity. An approval under section 36 authorizes the activity under the *Water Act* but it does not extend so far as to determine whether commencement or continuation of that activity would violate a different piece of legislation.

[30] Any person directly affected by an application may submit a statement of concern to the Director setting out that person's concerns: *Water Act*, s 109.

[31] Section 38 provides that a Director must consider factors specified in the applicable approved water management plan when issuing an approval and has the discretion to consider other factors:

(2) In making a decision under this section, the Director

(a) must consider, with respect to the applicable area of the Province, the matters and factors that must be considered in issuing an approval, as specified in an applicable approved water management plan,

(b) may consider any existing, potential or cumulative

(i) effects on the aquatic environment,

(ii) hydraulic, hydrological and hydrogeological effects, and

(iii) effects on household users, licensees and traditional agriculture users,

that result or may result from the activity, and

(c) may consider

(i) effects on public safety, and

(ii) any other matters applicable to the approval that, in the opinion of the Director, are relevant. [emphasis added]

[32] The Applicants point to section 38(2)(c)(ii) as permission for the Director to exercise a broad discretion to consider any other matters not expressly listed in the *Water Act*.

[33] Section 38(3) permits the Director to issue an approval subject to any terms and conditions the Director considers appropriate.

b) *The Alberta Wetland Policy and Mitigation Directive*

[34] The Alberta Wetland Policy was created in 2013. It applies to all wetlands in the province, except those on federal lands. The policy states: "The goal of the Alberta Wetland Policy is to *conserve, restore, protect and manage* Alberta's wetlands to sustain the benefits they provide to the environment, society, and economy." (emphasis in original)

[35] The Alberta Wetland Mitigation Directive is a reference document created in 2015 by the Alberta Environment and Parks Water Policy Branch. The purpose of the Directive is to "inform planning and decision-making to avoid and minimize negative impacts to wetlands and, where necessary, replace lost wetland area and value".

[36] The Directive creates a wetland mitigation “hierarchy” where avoidance of wetlands is the preferred response, followed by minimization and then replacement as a last resort. The Directive provides that proponents may be required to avoid or minimize adverse effects on wetlands in consideration of a non-exhaustive list of factors. One of those factors is “Wetland-dependent species that are listed as endangered or threatened species under...the *Species at Risk Act* (Canada)”.

c) Decision of the Director

[37] The Director granted the Approval under the *Water Act* on January 8, 2020. In the Director’s decision statement, dated the same day, the Director stated that he reviewed the *Water Act*, the application, the statements of concern, technical reports including the Wetland Assessment and Impact Report (see below), and various policies and guidelines, including the Alberta Wetland Policy. The Director stated that he decided to issue the Approval for several reasons, including:

- The applicant demonstrated avoidance, minimization and compensation for unavoidable impacts to the wetlands as required by the wetland policy and the associated directives.
- ...
- The activities under consideration under the Water Act will have no significant impact on endangered species due to the observations and recommendations made by the applicant's biology consultant.

[38] The Director explained that the concerns raised by the Statement of Concern filers included, amongst other things, concerns about “Impacts to wildlife that use the wetlands and the environmental benefits offsite” and that “Sensitive areas for wildlife will be impacted by the land use”. The Director responded to these concerns as follows:

...the applicant mentioned that three of the five wetlands would not be physically disturbed. This would allow small animals, birds and insects to continue using them and would still provide their natural filtering function polishing the storm water even more.

[39] As for concerns about the land use, meaning using the land for a racetrack, the Director responded:

The last concern has no bearing on the Water Act decisions. Kneehills County is the decision maker for the land use. The consideration I gave to the land use was to determine the avoidance adequacy and the storm water reports validity. It is noted that various correspondences with some of the SOC filers, county staff and references in report 00406489-R002 show that the County was aware of the concerns when they made their decision.

[40] The Wetland Assessment and Impact Report (WAIR) dated October 9, 2019 is a technical report that was prepared for Badlands and incorporated by reference into the Approval. The WAIR was written by Ms. Ferguson, a professional biologist retained by Badlands, based on data collected between 2007 and 2017. The Director relied in part on conclusions drawn by Ms. Ferguson in the WAIR to make his decision to grant the Approval. The only mention of the bank

swallow in the WAIR is that active bank swallow breeding colonies were observed in the north-facing cliffs above the Rosebud River: WAIR at 56.

[41] It appears the WAIR was updated at some point after 2019, but none of the parties addressed this issue before this Court and the update does not appear to impact the WAIR's treatment of the bank swallow: *Reasons* at paras 652-661.

[42] Notices of appeal were filed with the Board on January 20, 2020. After hearing a number of preliminary matters, the merits of the appeal were heard in late 2022 through to September 2023.

d) *The Species at Risk Act*

[43] By the time of the Board's hearing in 2022 and 2023, statutorily mandated planning documents developed under *SARA* related to the bank swallow were finalized. These documents were not available when the Director granted the Approval in January 2020 or when the WAIR was completed in 2019.

[44] In November 2017, about three years before the Approval was granted, the bank swallow was officially listed as a "threatened species" under *SARA*: *SARA*, Schedule 1, Part III; *Skibsted v Canada (Environment and Climate Change)*, 2021 FC 301 at para 1 [*Skibsted FC*]. This list is based on an assessment completed by the Committee on the Status of Endangered Wildlife in Canada (COSEWIC).

[45] A "threatened species" is defined as "a wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction": *SARA*, s 2(1).

[46] The designation of the bank swallow as a threatened species in November 2017 triggered an obligation that the federal Minister of Environment and Climate Change prepare a proposed recovery strategy for the species within two years: *SARA*, s 42(1). The Minister did not meet that two-year deadline: see *Skibsted FC*.

[47] On April 7, 2022, about six months before the Board's appeal hearing and over two years after the Approval was granted, the Minister published a final recovery strategy for the bank swallow on the *SARA* public registry: Environment and Climate Change Canada, *Recovery Strategy for the Bank Swallow (Riparia riparia) in Canada, Species at Risk Act Recovery Strategy Series*, Ottawa (April 7, 2022) (the "Recovery Strategy").

[48] A recovery strategy "sets the strategic direction to arrest or reverse the decline of the species, including identification of critical habitat to the extent possible": Recovery Strategy at i. The content of a recovery strategy is statutorily mandated and set out in s 41 of *SARA*.

[49] *SARA* defines "critical habitat" as "the habitat that is necessary for the survival or recovery of a listed wildlife species and that is identified as the species' critical habitat in the recovery strategy or in an action plan for the species": *SARA*, s 2(1).

[50] Section 58 of *SARA* prohibits the destruction of critical habitat of a threatened species if: (a) the critical habitat is on federal land, (b) the listed species is an aquatic species, or (c) the listed species is a species of migratory birds protected by the *Migratory Birds Convention Act, 1994*.

e) The Bank Swallow Recovery Strategy

[51] The Bank Swallow Recovery Strategy is a lengthy document at over 100 pages. For the purposes of this application, the following points are relevant:

- Over the 40 years preceding 2013, the bank swallow experienced a population decline of 98%. The reasons for the decline are not well understood but include loss of breeding and foraging habitat: Recovery Strategy at 1.
- “The Bank Swallow is protected under the *Migratory Birds Convention Act, 1994*, which protects all individuals of the species as well as its nest and eggs on federal and non-federal lands”: Recovery Strategy at 1.
- “The Bank Swallow is an aerial insectivorous bird that nests in colonies on steep bank faces along waterbodies and human-made habitats”: Recovery Strategy at 2.
- “The Bank Swallow is an aerial insectivore that forages over open country and aquatic habitats that support insect populations... Aquatic habitats include rivers, creeks, lakes, wetlands and sewage lagoons, as well as coastal waters”: Recovery Strategy at 11.
- Bank swallows are a species that forage in a radial pattern from the nest: Recovery Strategy at 11. Based on a number of studies measuring the travel distance between nest and foraging habitat, the Recovery Strategy uses a 500 m distance from colonies as the scale of foraging habitat: Recovery Strategy at 12 and 48. “Open country and aquatic environments suitable for the production of insects found within 500 m from nesting habitat are required to support the reproductive success and long-term persistence of the species”: Recovery Strategy at 48.
- “Critical habitat is delineated within a distance of 5 km from known colonies to capture the dynamic nature of nesting habitat and based on between-year dispersal distances of the Bank Swallow”: Recovery Strategy at 47. Critical habitat was determined on the basis of data collected between 2001 and 2017: Recovery Strategy at 48.
- Critical habitat is defined as a 500-m radial distance around the shorelines of the waterbodies where colonies occur: Recovery Strategy at 49.
- Critical habitat is located on 55 km of shoreline on non-federal land along the Rosebud River: Recovery Strategy at 100 and 120.
- “The ongoing loss of ecosystem functions that support insect production, including the conversion of natural habitats and farmland for residential and commercial developments, and for intensive agriculture is an important threat throughout the species’ range. Aquatic habitats, such as wetlands, ponds and sewage lagoons, likely provide higher-quality prey for Bank Swallows compared to terrestrial habitats and aggregate pits... Across southern Canada, wetlands are especially vulnerable to drainage and land conversion...”: Recovery Strategy at 18.

- “Wetlands and grasslands play a significant role in the production of insects consumed by the Bank Swallow, but continue to be lost or degraded at an alarming rate in North America. The availability of foraging habitat near nesting habitat increases the likelihood of recovering the species... Any new residential, commercial or industrial development should avoid removing foraging habitat near or in areas of critical habitat. In addition, lost or degraded wetlands should be restored, especially in areas of critical habitat.”: Recovery Strategy at 44.
- “Collision with moving vehicles is considered a minor issue relative to other threats, but regularly occurs with Bank Swallow”: Recovery Strategy at 23.
- “If the critical habitat for a migratory bird is not within a federal protected area and is not on federal land, within the exclusive economic zone or on the continental shelf of Canada, the prohibition against destruction can only apply to those portions of the critical habitat that are habitat to which the *Migratory Birds Convention Act, 1994* applies as per SARA ss. 58(5.1) and ss. 58(5.2)”: Recovery Strategy at ii.

[52] As mentioned earlier, the Recovery Strategy was not available when the Director granted the Approval but was available to the Board.

f) The Parties’ Positions before the Board

[53] One of the ten issues the Board identified as being at issue in the proceeding was: “What, if any, are the potential impacts to wildlife, and specifically species at risk?”: *Reasons* at para 36.

[54] The Applicants filed expert evidence (the 2022 Wallis Report) which included a map showing that approximately $\frac{3}{4}$ of the Badlands’ property, including Wetlands 1, 2, 4 and 5 (referred to in the *Reasons* as the “Valley Wetlands”), fell within the area that is deemed critical habitat of the bank swallow in the Recovery Strategy: *Reasons* at paras 664-665. The 2022 Wallis Report concluded that the Approval would destroy habitat designated critical habitat in the Recovery Strategy. The same expert filed an expert report in 2020, before the Recovery Strategy was finalized, describing the presence of bank swallows in the region. The Applicants also submitted evidence in relation to visual observations, including video evidence, of existing bank swallow colonies directly adjacent to the proposed racetrack and bank swallows foraging over Wetlands 1,2,4 and 5: *Reasons* at paras 696-698.

[55] The Applicants also relied on a January 8, 2021 written submission of the Director, filed with the Board prior to the finalized Recovery Strategy, acknowledging that *SARA* prohibits the destruction of any part of the bank swallow’s critical habitat once that habitat is identified in a Recovery Strategy (*Reasons* at para 667):

The Director agrees that section 58 of *SARA* will apply to prohibit the destruction of any part of the bank swallow’s critical habitat, but only once critical habitat has been identified in a finalized and approved recovery strategy that is posted on the federal Species at Risk Public Registry in accordance with section 43 of *SARA*.

[56] Badlands did not file any evidence to contradict the conclusion in the 2022 Wallis Report that the project lands overlapped with bank swallow critical habitat but maintained that the Approval did not impact lands designated critical habitat. Badlands argued that “implementation” of *SARA* was not within the Board’s jurisdiction: *Reasons* at paras 668-669.

Badlands also argued that the nesting sites for the bank swallow were outside the project boundaries: *Reasons* at para 704.

[57] Badlands relied on a January 7, 2021 submission from Ms. Ferguson (issued a year and a half before the Recovery Strategy was finalized) concluding that the project will entirely avoid the nesting sites in the north and south-facing cliffs above the Rosebud River. Ms. Ferguson also opined that the potential impact to bank swallows caused by the removal of Wetland 2 was low because there are other wetlands in the area:

Bank Swallows forage over wetlands and watercourses where flying insects are the most plentiful. There are numerous wetlands and available foraging habitat sites up and down the river valley as well as on all adjacent agricultural lands... Within the river valley portion of the Badlands Motorsports Resort project area, less than 0.51 ha of wetland habitat will be removed during development of the lower track through Wetland 2 (and Badlands has provided replacement compensation). The potential project-related impacts to Bank Swallows caused by the removal of 0.51 ha of wetland in comparison to the abundance of adjacent foraging habitats is considered to be low and insignificant.

[58] Ms. Ferguson testified at the hearing that she did not know whether bank swallows make use of Wetlands 1, 2, 4 and 5.

[59] The Director did not file any evidence to contradict the 2022 Wallis Report that the Approvals would destroy critical habitat but argued that the Director does not have jurisdiction to “enforce” SARA and that because the development was on private, non-federal land, the SARA prohibitions against the destruction of critical habitat do not apply: *Reasons* at para 670. The Director further argued that the Applicants submitted no evidence to suggest that the activities subject to the Approval would have a significant impact on the bank swallow and the Approval does not authorize activities on the banks where the bank swallow nest colonies are found: *Reasons* at paras 709 and 713.²

g) The Board’s Decision

[60] This issue was addressed by the Board in Part 12 of the *Reasons*.

[61] The Board dealt first with the applicability of SARA. At para 673 of the *Reasons*, the Board adopted its earlier comments from *Hanson and Lindberg v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: County of St Paul*, 2013 ABEAB 34 at para 85 [*Hanson*]:

The *Species At Risk Act* is not within the Director’s or the Board’s jurisdiction to ensure compliance. However, the *Species At Risk Act* may be referred to identify species that are endangered or at risk. The *Species At Risk Act* can only be used as a reference to identify species that should be considered; it cannot be used to determine what the Director should or should not consider when issuing the Approval.

² None of the submissions or expert evidence addressed the airspeed velocity of an unladen swallow, indicating that while such queries may be of significance in certain bridge-crossing scenarios, such evidence was, appropriately, not relevant to this inquiry.

[62] The Board concluded that *SARA* had “limited application”: *Reasons* at 675. The Board stated that it took no position on the competing interpretations of *SARA* and how or whether *SARA* applies to the activities subject to the Approval: *Reasons* at para 675.

[63] The Board then stated at para 676:

To the Appellants’ submission that one would think that the fact that two listed species use the impugned wetlands would factor into the Board’s determination of the environmental impacts of the Approval, the Board agrees and notes this is consistent with its previous decision in *Hanson*. The Board finds that *SARA* is useful as a reference to identify species that should be considered. [footnotes omitted]

[64] And finally, the Board held that it is the approval holders’ responsibility “to determine compliance” with *SARA*: *Reasons* at para 674.

[65] The Board then turned to the issue of the impact, if any, on the bank swallow and concluded there was insufficient evidence of harm to the species, at paras 740 and 743:

[740] The Board finds that the Appellants provided evidence, including observations that banks swallows use the Badlands Wetlands and videos of bank swallows flying and feeding over what Mr. Wallis described as “the BMR property,” however they did not provide conclusive evidence that the Valley Wetlands are the only feeding ground for the bank swallows. The Board notes Ms. Ferguson’s comment that bank swallows forage over wetlands and watercourses where flying insects are the most plentiful, and there are numerous wetlands and available foraging habitat sites up and down the river valley as well as on all adjacent agricultural lands.

...

[743] The Board finds that while there will be changes in the Valley Wetlands there was insufficient evidence of potential harm to the bank swallows arising from those changes, and that furthermore, mitigation measures will be taken during construction of the Badlands Activities. The Board also notes that the Director has proposed adding a new condition to the Approval requiring a Wetland Monitoring and Reporting program. The Board is of the view that these measures, taken together, will serve to minimize potential impacts to the bank swallows. [emphasis added]

[66] The reference to the Wetland Monitoring and Reporting Program is in relation to Wetlands 1, 4, and 5.

h) Analysis

[67] This Court finds that the Board’s decision is unreasonable as it relates to the impact of the Approval on the bank swallow for several reasons.

[68] The Board’s holding at paras 673-677 that it does not have jurisdiction to opine on whether *SARA* applies to the Approval and that it only has jurisdiction to consider *SARA* as a “reference to identify species that should be considered” is unintelligible. The Board’s reasons do not provide a rational or coherent explanation for what it means to “consider” a species but only to the extent it is identified in *SARA*.

[69] The word “consider” rings hollow when all of the implications of that species being listed as a threatened species are then ignored – in particular, that (1) the species is at risk of becoming endangered if nothing is done to reverse factors leading to its extirpation or extinction (*SARA*, s 2(1)); and (2) there is evidence that the habitat that is necessary for the survival of that species overlaps with the land subject to the Approval. For what purpose then would the Board “consider” identified species?

[70] While the Board advised it was adopting its comments in *Hanson*, that decision was not on the merits but was a preliminary decision of the Board setting out the issues for the Board’s later hearing of that case. Further, in *Hanson*, no evidence was proffered to suggest that the lands subject to that approval were designated as critical habitat: *Hanson* at para 69. Here, unlike *Hanson*, there was uncontradicted evidence that the lands subject to the Approval are designated as critical habitat. And here, also unlike *Hanson*, the Board identified the impact on wildlife, specifically species at risk, as an issue for the hearing.

[71] Badlands argues that the Director has no obligation to require studies under *SARA* and is not required to review those studies prior to issuing an approval. Badlands points to this position as consistent with the position of the Director in *Hanson* at para 69.

[72] That may be the case, but when *Hanson* was heard on its merits, the Director’s position was not that any studies under *SARA* were irrelevant. Rather, the Director’s position was that if there had been an indication of a threatened or endangered species in the area, the matter would have been referred to subject matter experts for further comments or the approval holder “may have been required to conduct further on-site surveys”: *Hanson and Lindberg v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development, re: County of St Paul*, 2014 ABEAB 4 at para 88.

[73] The Board misinterpreted the scope of *Hanson* and it was unreasonable for the Board to find that *Hanson* settled the issue, especially when, in that case, the Board did not have evidence that the critical habitat of a threatened species overlapped with the land subject to the approval being appealed.

[74] The Board itself identified potential impacts to wildlife, and specifically species at risk, as an issue at the hearing, yet the Board failed to grapple with relevant evidence on that very issue.

[75] The Board had before it uncontradicted evidence in the 2022 Wallis Report that the wetlands subject to the Approval fell within the critical habitat. The Director does not dispute that the evidence before the Board was that the wetlands at issue fell within the critical habitat in the Recovery Strategy. The Director agrees there was no evidence to the contrary. While Badlands argues that the Recovery Strategy is not clear whether the project lands fall within critical habitat, Badlands did not file any evidence with the Board to contradict the conclusions in the 2022 Wallis Report. It was not reasonable for the Board to summarily disregard this relevant evidence: *Vavilov* at para 126; *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at paras 129-131 [*Normtek*].

[76] Further to the Recovery Strategy, critical habitat includes foraging habitat for the bank swallow which is measured as a 500-m radial distance around the shorelines of waterbodies where nesting colonies occur, like the Rosebud River. Badlands’ position on this application, the Director’s position before the Board, and Ms. Ferguson’s evidence that the project will not

disturb the nesting colonies misses the point. Critical habitat extends beyond the nesting colonies.

[77] This Court is also not persuaded that a separate decision under *EPEA* assists Badlands. On December 21, 2021, the Designated Director under the *EPEA* held that an environmental impact assessment report was not required. In that decision, the Designated Director under the *EPEA* stated *inter alia* that the scale of the project is relatively small, species at risk are the mandate of the federal government, most wetlands will be untouched, and wildlife impacts are not a factor to be considered when deciding whether a project requires an environmental impact assessment. That decision was made before the Recovery Strategy was issued in April 2022. And that decision recognizes that the destruction of wetland habitat will be governed by the *Water Act*, which is what this judicial review concerns.

[78] Badlands argues that the Board's conclusion that the appellants filed insufficient evidence of potential harm to the bank swallows shows that the Board considered the evidence in the 2022 Wallis Report but found the evidence unconvincing. This Court disagrees. There is nothing in the *Reasons* to show that the Board weighed, or accounted for, the evidence that the project would destroy critical habitat. The Board summarily disregarded that relevant evidence. The Board failed to provide any reasons to justify why, in the face of such evidence, it reached its conclusion that there was insufficient evidence of potential harm to the bank swallows. A court cannot guess what the Board's findings might have been or speculate on what the Board may have been thinking: *Vavilov* at para 97. If the Board found the conclusions in the 2022 Wallis Report that the Approval would destroy critical habitat unconvincing, that reasoning was missing from the Board's written reasons. This was a central issue raised by the parties, and the Board had an obligation to meaningfully address it: *Vavilov* at paras 127-128.

[79] This Court agrees with the Applicants, that even though *SARA* is a federal statute, and even though a designation of critical habitat is the outcome of a federal statutory process, it does not follow that evidence contained within the Recovery Strategy – prepared by COSEWIC, an expert advisory body that makes science-based designations – is irrelevant to the Board's decision. The ultimate enforcement of provisions of *SARA* is a different matter. But as the Director conceded, the Recovery Strategy provides relevant and useful evidence. The content of the Recovery Strategy paired with the other evidence filed by the Applicants was relevant to the issue of the impact of the Approval on wildlife and specifically species at risk. The Board's failure to grapple with this evidence rendered its decision unreasonable.

[80] On this application for judicial review, the Director agreed with the Applicants that a critical habitat designation was a relevant consideration for the Director and the Board but argued that it was not a factor determinative of whether to grant an Approval. Thus, it argued, the Board's failure to consider critical habitat does not warrant a remedy. While it may be that critical habitat designation is not a determinative factor, the Board's failure to consider this factor at all was unreasonable. Ultimately it is for the Board to decide what to do with the evidence that the wetlands affected by the Approval and the critical habitat identified in the Recovery Strategy overlap, and to provide justified, transparent and intelligible reasons about how this evidence does or does not impact the issues the Board set for itself.

[81] That the designation as critical habitat is a relevant consideration before the Board is also entirely consistent with the Alberta Wetland Policy. The Applicants and the Director agreed that the Alberta Wetland Policy, while not a binding piece of legislation, was a guiding document for

the exercise of the Director’s discretion. The Alberta Wetland Policy directs that proponents may be required to avoid or minimize adverse effects on wetlands taking into consideration wetland-dependent threatened species under *SARA*. The Director’s January 8, 2020 approval statement says that the Director considered the Alberta Wetland Policy. To the extent there must be an express connection between the Director’s decision-making authority and *SARA*, the Wetland Policy provides that connection. But in any event the Director has broad discretion under section 38(2)(c)(ii) of the *Water Act* to consider anything that is “applicable to the approval” and, in the Director’s opinion, relevant. And as already noted, the Director conceded that a critical habitat designation is relevant.

[82] To that end, if, as Badlands suggests, the Board found that the designation of critical habitat was irrelevant and therefore the Board did not have to consider it, the Board did not make this finding and provide this reasoning. The Board simply did not deal with it.

[83] As for the argument that the Board’s decision implicitly authorizes an indictable offence under *SARA*, this Court is not convinced this argument has merit. Ultimately it will be for the approval holder to comply with all applicable laws. But the Board’s obligation to consider relevant evidence about critical habitat of a threatened species when it said it was going to consider impacts to wildlife is a separate matter from enforcing compliance with a federal statute.

i) Conclusion

[84] Having found that the Board unreasonably disregarded relevant evidence, the matter is remitted to the Board. The Board must decide the appeal having regard to the evidence relevant to the issues it set for itself.

[85] While this ground alone justifies remitting the matter back to the Board, the other grounds raised on application for judicial review will be addressed.

2. The Precautionary Principle

[86] The Applicants argue that the Board failed to properly consider, interpret and apply the precautionary principle, and this error makes the Board’s decision unreasonable. The Applicants submit that the Board failed to consider the precautionary principle in relation to the evidence about the critical habitat of the bank swallow and that the Board provided erroneous interpretations of the principle. Badlands submits that the Board properly considered argument about the precautionary principle and a lack of scientific certainty with respect to threats to the bank swallow was only one of the many reasons given by the Board for dismissing the appeal.

[87] The precautionary principle is a well-known aspect of environmental regulation: see *Christian v Alberta Environmental Appeals Board*, 2024 ABKB 586 at paras 89-95. At para 495 of the *Reasons* the Board cited the Supreme Court of Canada in *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 31 [*Spraytech*]: “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.”

[88] Before the Board, the Applicants argued that the Director failed to properly apply the precautionary principle. The Board rejected this argument finding that the Director did not err in this respect: *Reasons* at para 504. In rejecting this argument, the Board cited para 31 of *Spraytech* and then explained at para 496:

Underlying the precautionary principle seems to be an assumption that development is necessary and desirable.

[89] And at para 504:

Insofar as the precautionary principle requires balancing the interests of development with protection of the environment and prevents using scientific uncertainty as an excuse not to impose environmentally protective measures, the Board is satisfied that the Director has acted in accordance with it.

[90] The Board offered no authority for these statements. This Court agrees with the Applicants that the Board's statements are unreasonable as the Board offered no justification for these propositions. This Court agrees with the Applicants that the jurisprudence on the precautionary principle neither assumes that "development is necessary and desirable" nor does it require a balancing of interests of development with environmental protection.

[91] A further mark of unreasonableness is the Board's recognition that scientific uncertainty should not excuse protective measures, while dismissing the appeal in part because the Applicants did not provide "conclusive evidence" that Wetlands 1,4 and 5 are "the only feeding ground for the bank swallows" and "conclusive evidence" that golden eagles "feed only on ducks in the Badlands Wetlands": *Reasons* at paras 740 and 744. This reasoning cannot be reconciled with the precautionary principle the Board recited at para 495 of its *Reasons*.

[92] In the result, the Board's decision is unreasonable because it both misstated the precautionary principle and failed to properly apply it.

3. Fettering Discretion

[93] The Applicants submit that the Board fettered its discretion by failing to consider the economic viability of the Badlands project and the ultimate undertaking for which the Approvals were sought – a racetrack. The Applicants also submit that the Board fettered its discretion by failing to consider *SARA*, but as this issue was earlier addressed, it will not be addressed again.

[94] "Discretion is fettered when a statutory body treats non-legislative guidelines or policies as binding to the exclusion of other valid or relevant reasons for the exercise of discretion": *Cidex Developments Ltd v Calgary (City)*, 2018 ABQB 519 at para 30. Put another way, discretion is fettered when a decision maker fails to exercise the discretion the legislature conferred upon it: *Lac La Biche (County) v Lac La Biche (Subdivision and Development Appeal Board)*, 2014 ABCA 305 at para 11; *Delta Air Lines Inc v Lukács*, 2018 SCC 2.

a) Economic viability

[95] Before the Board, the Applicants submitted two expert reports authored by BDO Canada LLP opining on the economic viability of the racetrack project. Both reports concluded that the racetrack was not economically viable and would not generate market returns. The Applicants argued that approving a project that is not economically viable is inconsistent with the purposes of the *Water Act* (section 2) and the *EPEA* (section 2). The Applicants argued that it was proper for the Board to balance both economic advantages and environmental harm, and where a project will bring no economic benefits, the Board should weigh that in the balance. The Applicants also argued that the Director fettered his discretion by failing to consider the economic viability of the

project – something the Director could have considered under his broad authority under s 38(2)(c)(ii) of the *Water Act*.

[96] The Board rejected this argument, holding that it was not required by the *Water Act* or the *EPEA* to consider the economic viability of the racetrack: *Reasons* at para 120. The Board held that the racetrack is not the “activity” under the *Water Act* that is being approved, therefore the economic viability of the racetrack is outside the Director or Board’s jurisdiction. The Board also held that the purpose statements in the *Water Act* and the *EPEA* that recognize the need for Alberta’s economic growth cannot be interpreted as requiring the Board to analyze the economic viability of particular projects: *Reasons* at para 112. The Board also held that the Director did not fetter his discretion because “there is nothing in the *Water Act* that expressly requires the Director to consider the economic viability of a proposed project”: *Reasons* at para 239.

b) Racetrack

[97] Before the Board, the Applicants raised a number of concerns about the operation of the racetrack, for example noise pollution, the impact on bank swallows, and the cumulative effects of the racetrack on the aquatic environment: *Reasons* at paras 46-59. The Applicants argued that the proposed land use ought to be considered, just like the Board did in *Fenske v Director, Central Region, Regional Services, Alberta Environment, re: Beaver Regional Waste Management Services Commission*, 2008 ABEAB 33 [*Fenske 2008*] when the Board considered issues arising from the operation of a landfill (litter, odour, noise, operating hours, and aesthetics).

[98] The Board rejected the Applicants’ argument, finding that it only had jurisdiction to consider what is being approved as an “activity” as defined by the *Water Act*: *Reasons* at paras 69-79. The Board’s conclusion was succinctly explained at para 74:

Whether the Approval Holder wants to build a shopping mall, or a racetrack, the Director and the Board would only have the jurisdiction under the *Water Act* to consider what is to be built to the extent that it may alter or change the flow or level of water or a water body.

[99] The Board explained that in *Fenske 2008* the Director approved construction and operation of an expansion to a landfill, so the Board had jurisdiction to consider the effects of the expansion of the landfill (litter, odour, noise, operating hours and aesthetics): *Fenske 2008* at paras 133-134. Here the Director did not approve the “racetrack”, rather, the Approval authorizes Badlands to (1) place fill in two wetlands, (2) modify three wetlands, and (3) construct, operate, and maintain a storm water management system for surface water runoff: *Reasons* at para 70.

c) Analysis

[100] This Court understands the Applicants’ argument to be that section 38(2)(c)(ii) of the *Water Act* permits the Director and the Board to consider any matter that, in their opinion, is relevant. The Board’s refusal to consider the economic viability and undertaking for which the Approval was sought (the racetrack) on the basis of a lack of jurisdiction are examples of the Board refusing to exercise a discretion that has been vested in it. The Applicants concede that the Board uses the term “Relevance” in the headings in Part 4 of its *Reasons* but argue the Board did not actually make a finding on whether economic viability and the racetrack were relevant, instead the Board relied on a lack of jurisdiction.

[101] The Applicants say that the Board had discretion to consider economic viability which the Board itself acknowledged at para 113 of the *Reasons* when it observed that, under the *Water Act*, the Board is required to “balance the conservation and management of water resources with economic growth in Alberta”. The Applicants argue that once the Board acknowledged that it was required to balance conservation with economic growth, it was open to the Board to consider the economic viability of the project.

[102] As for the racetrack, the Applicants do not take the position that the Board should consider the merits of the racetrack. They agree that question is for the local municipality. But they argue that the Board’s refusal to consider the impact of the construction and operation of the racetrack on the bank swallows and the cumulative effects of operating a racetrack was unreasonable. The Applicants also submit that *Fenske 2008* is not distinguishable and the Board should have done here what it did in that case.

[103] Badlands, the Director, and the Board advance the position that the Board is limited to considering the effects of what the approval authorizes under the *Water Act* and not the racetrack generally. They argue that the Applicants ignored the full wording of section 38(2)(c)(ii) of the *Water Act* which limits the Director to consider issues “applicable to the approval” and that “in the opinion of the Director, are relevant”. They say that the economic viability of the racetrack, and the operation and construction of the racetrack itself are not “applicable” to the Approval. This Court agrees.

[104] The *Water Act* and the *EPEA* limit the Board’s authority to consider only the effects flowing from what the Approval authorizes. The Approval does not authorize construction and operation of a racetrack. The Approval authorizes Badlands to fill in two wetlands, modify three wetlands, and construct, operate and carry out maintenance of a stormwater management system.

[105] A large development like this racetrack will require multiple authorizations from different levels of government. The sole issue before the Director was whether to approve the activities that are governed by the *Water Act*. The Director did not approve the entirety of the project. All the Approval provides is that Badlands will not be in contravention of the *Water Act* if Badlands fills in wetlands, modifies wetlands, or constructs and maintains a stormwater management system.

[106] This Court is satisfied that even though the Board did not use the term “relevance”, that is what the Board was articulating at para 79 when it said that any negative impacts from the racetrack “do not directly relate to the Approval under the Appeals”: see *Vavilov* at para 92. It follows that the economic viability of the racetrack are also not “applicable to the approval”.

d) Conclusion

[107] In conclusion, the Board did not fetter its discretion when it refused to consider the economic viability of the racetrack, or the effects of the construction and operation of the racetrack.

4. Onus/Burden of Proof

[108] Before the Board, the Applicants argued that they did not have an onus to meet because the Board owed no deference to the Director in a *de novo* hearing. The Board rejected this argument and held that, in appeals under s 115(1)(a) of the *Water Act* and s 91 of *EPEA*, “the onus is on the

Appellant in the matter to provide sufficient evidence and argument to demonstrate to the Board that the Director's approval should be reversed or varied": *Reasons* at para 292.

[109] The Applicants submit that the Board's decision to place the onus on them to demonstrate that the Director's approval should be reversed or varied is unreasonable. The Applicants argue there is no statutory authority for imposing the onus on the appellant. The Applicants further contend that imposing the onus on the appellant is inconsistent with the purposes of the *EPEA*.

[110] Badlands, the Director, and the Board argue that the Board's decision to impose the onus on the appellant is reasonable and consistent with the statutory scheme. They argue that *Imperial Oil Limited v Alberta (Minister of Environment)*, 2003 ABQB 388 at paras 86-88 [*Imperial Oil*] settled the question that the Board has statutory authority to set its own processes and procedures, including onus, and that the onus falls on the party who appeals the decision of the Director.

[111] The Director and the Board argue that the onus falls on the appellant to identify reviewable errors in a Director's decision. The Board must find an error in the Director's decision before it can recommend that the Minister substitute a decision for that of the Director. The Board says this is the longstanding practice of the Board.

a) Scope of Permissible Submissions of the Board

[112] A preliminary issue arose concerning the standing of the Board to make submissions on onus. The Applicants argued that the Board's submissions on the "de novo nature of EAB appeals and the onus of proof applied by the EAB, and clarifying the law relating to the same" (found in Part IV.A of the Board's written submissions and associated oral submissions) were not permissible given the guidance in *OEB*.

[113] This Court finds that most of the Board's submissions were permissible as they explained the statutory scheme, identified relevant controlling authority, and responded to the arguments raised by the Applicants: *OEB* at paras 68-69. However, the Board's tone at times crossed the line from helpful elucidation to aggressive partisanship of an adversary: *OEB* at para 71. Paragraph 67 of the Board's written submissions, for example, raises concerns about impartiality if the decision were remitted to the Board on the issue of onus:

67. In conclusion, references to the *de novo* nature of appeal hearings before the EAB relate to the fact that new evidence may be adduced in EAB appeal hearings that was not before the Director at first instance. The EAB does not regard and has never regarded, its appeals to be *de novo* hearings or trials as defined in the cases of *Young* and *Newton*, meaning that it is hearing the Approval Holder's application completely "anew", as if the Director's original decision had never occurred.

[114] A similarly partisan tone is taken at paragraph 64. This Court cautions the Board as its submissions in favour of upholding its own decision could be seen as disabling it from conducting an impartial redetermination when this matter is remitted to the Board for further consideration: *OEB* at para 50; *Canada (Attorney General) v Quadrini*, 2010 FCA 246 at para 16. This case is not one where the judicial review would have been unopposed were it not for the Board's participation. Badlands had counsel and made many of the arguments reiterated by the Board.

b) Analysis

i. *Imperial Oil* is not determinative

[115] Badlands, the Director and the Board argue that *Imperial Oil* remains authoritative and that it squarely addresses the issue of who bears the onus in an appeal of a Director's decision to the Board. The Applicants say *Imperial Oil* was decided on the narrow issue of procedural fairness and did not address the arguments that are being made in this case. The Applicants say the decision is dated and was decided in the context of an appeal of an Environmental Protection Order (EPO) which is a different process than an appeal of an approval under the *Water Act*.

[116] The Board did not address *Imperial Oil* in its reasons. Regardless, *Imperial Oil* is distinguishable and is not determinative.

[117] The entirety of the discussion of onus in *Imperial Oil* is in three paragraphs at paras 86-88. An appeal was launched, but the matter was not heard by the Court of Appeal because the appeal was discontinued: *Lynnview Ridge Residents' Action Committee v Imperial Oil Ltd*, 2005 ABCA 375 at paras 1-2.

[118] It is helpful to take a closer look at the reasoning that led the Board to conclude that Imperial, as the appellant, bore the burden of proving to the Board that, on balance, the Director did not make the correct decision and that the EPO should be cancelled or varied: *Imperial Oil Ltd and Devon Estates Ltd v Director, Enforcement and Monitoring, Bow Region, Regional Services, Alberta Environment, re: Imperial Oil Ltd*, 2002 ABEAB 23 at para 49 [*Imperial Oil Board*].

[119] Imperial, the appellants in that case, were the recipients of an EPO with a statutory right of appeal under what is now section 91(1)(h). Like here, the Board issued a report to the Minister under section 99 of the *EPEA*.

[120] Before the Board, Imperial argued that the Director must establish on a balance of probabilities that the Director's decision was correct and the Director's decision-making process was reasonable: *Imperial Oil Board* at para 50. Imperial relied on *Andres Wines v BC Marketing Board*, 1987 CanLII 2883 (BCSC) [*Andres Wines*] as authority for the proposition that in an appeal from an administrative decision, the burden of proof must be placed on the administrative decision-making body. Imperial argued that where the original decision maker does not conduct a hearing, and the appellate tribunal hears the matter *de novo*, the burden must rest on the original decision-making body as it did at first instance.

[121] The Board rejected Imperial's argument, finding that *Andres Wines* was irrelevant, largely because the statutory appeal process followed by the tribunal in *Andres Wines* was a "fundamentally different process" from the appeal process before the Board. The Board held that the following features of an appeal to it were distinguishable from the statutory appeal in *Andres Wines*: the Director does not have an interest in the decision he makes; the Board hears submissions not from the same two parties with opposing interests but from a number of parties with a broad range of interests; the Director does not have all the facts required to make a decision and for that reason is given investigative powers; the appellant has, or has the ability to obtain, as much information about an environmental situation as the Director; and the Director meets with parties before he issues an EPO giving the parties the opportunity to voice their concerns: *Imperial Oil Board* at para 53.

[122] The Board held that the integrity of the *EPEA* appeal process would be obstructed if every person who was the subject of an *EPEA* decision could, without establishing a *prima facie* case, require the Director to justify their decision: *Imperial Oil Board* at para 54.

[123] Finally, the Board held that it would be unfair to the parties and cause prejudice if the Director now reversed the burden of proof when the procedure followed during the hearing gave the appellants the benefit in meeting the burden: the appellants presented their case first, introduced rebuttal evidence, and had the last word in closing: *Imperial Oil Board* at para 55.

[124] With that context, *Imperial Oil* is not determinative of the issue in this case. First, that case was decided on the narrow question of whether imposing the onus on the recipient of an EPO who appeals the EPO is a breach of natural justice. The reasonableness of the Board's decision on onus was not at issue. But more importantly, the Board's rationale that the onus must fall on the appellant does not hold up to scrutiny when viewed against the factual background of this case for two reasons: (1) the information available to the recipient of an EPO is different than that available to a "directly affected" person; and (2) concerns about the integrity of the *EPEA* appeal process are not the same.

[125] First, on information asymmetry, in *Imperial Oil* the Board noted that the recipient of the EPO (the appellant in that case) "initially has, or has the ability to obtain, as much information about a specific environmental situation equal to the Director": *Imperial Oil Board* at para 53. For that reason, it made sense for the appellant to bear the onus for proving that the Director's decision was not correct. While that information symmetry may be the case where the appellant is the recipient of the EPO, that is not the case where the appellant is a person "directly affected". In this case, there was an obvious information asymmetry as between Badlands, the statement of concern filers, and the Director at the time the Director granted the Approvals. And that information asymmetry continued through the appeal period where Badlands denied those parties who were "directly affected" access to conduct a site visit: *Reasons* at para 587. The appellants in this case did not have access to information equal to that of the Director. In this case it was the approval holder, not the appellant, that had, or had the ability to obtain, as much information about the specific environmental situation equal to the Director.

[126] Second, the Board's concerns about the integrity of the *EPEA* process are attenuated when you compare the rights of appeal held by the recipient of an EPO with the rights of a statement of concern filer. The recipient of an EPO has a statutory right of appeal under section 91(1)(h) of the *EPEA*; a statement of concern filer does not. The Board appears to have held a floodgates type concern such that if the Director was required to justify every EPO a second time, then the integrity of the *EPEA* process would be compromised.

[127] The circumstance of a *Water Act* approval is different from those of an EPO. A statement of concern filer must first establish that they are "directly affected" by the Director's decision before the Board will hear the appeal on the merits. Whether someone is "directly affected" is not straightforward: *Normtek* at paras 75-105. The Board often offers written reasons on the issue of "directly affected", as they did in this case: *McMillan et al v Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp*, 2022 ABEAB 22. Unlike appeals brought by recipients of EPOs, a screening function narrows the pool of appellants that are granted standing to appeal a *Water Act* approval and preserves the integrity of the *EPEA* appeal process.

[128] As an aside, I note that *Imperial Oil* at para 87 appears to contain a misstatement. The Board’s position was summarized by the Court as “[the Board] cannot substitute its own decision” for that of the Director and therefore it is “not a true *de novo* hearing”. This observation appears to be inconsistent with section 100 of the *EPEA* which provides that upon the Board’s recommendation the Minister can “make any decision that the person whose decision was appealed could make” and “make any further order that the Minister considers necessary for the purpose of carrying out the decision”.

[129] To conclude, this Court does not find that the Board’s reasoning in *Imperial Oil Board* regarding why the onus fell on the appellant in that case – which was upheld in *Imperial Oil* on the narrow basis of natural justice – is determinative of the issues in this matter. Indeed, the Board in *Imperial Oil Board* appears to have recognized that who bears the onus will vary depending on what type of appeal the Board is hearing and the particular circumstances of each case.

ii. The Board’s decision on onus is unreasonable

[130] This Court is of the view that the Board’s decision is unreasonable because it is internally incoherent and not based on a rational chain of analysis.

[131] Before the Board, the Applicants argued that the *de novo* nature of the appeal was a relevant consideration when determining who, if anyone, bore the onus on the appeal. This Court agrees with the Applicants that the Board failed to engage with this argument, summarily dismissing it at para 291 of the *Reasons* based on a misunderstanding of the issue. While the Board is correct that onus, the standard of review and the *de novo* nature of the appeal are distinct concepts, those concepts must together create a coherent appeal process. Here, the Board addressed each concept in a silo and the result is a confusing and unmanageable analysis.

[132] Part of the problem may be attributed to the Board’s use of the phrase “*de novo* hearing” throughout its *Reasons* without explaining what it means: *Reasons* at para 156, 165, 176, 181, 190, 191, 205-207, 242, 297. As all parties have pointed out, the phrase “*de novo* hearing” is ambiguous: *Transglobal Communications Group Inc (Re)*, 2009 ABQB 195 at para 37 [*Transglobal*] cited with approval in *Pacer Construction Holdings Corporation v Pacer Promec Energy Corporation*, 2018 ABCA 113 at para 64 [*Pacer*]; *Young v Alberta Assessors’ Association Practice Review Committee/Executive Committee*, 2019 ABQB 335 at paras 4-8 [*Young*].

[133] The ambiguity was explained in *Pacer* at para 65:

It appears, then, that some courts treat a “hearing *de novo*” as “an entirely new case. . . independent of the original case”, while other courts use the terminology of “hearing *de novo*” to denote a hearing where “new evidence” or “new grounds” may be considered, while still other courts use the term “*de novo*” to describe that a reviewing court may substitute its own opinion for that of the original decision-maker.

[134] Thus, in some *de novo* appeals, the decision of the original decision maker is essentially irrelevant while other *de novo* appeals proceed on the basis that some consideration and deference be given to the original decision: *Young* at para 8.

[135] In its reasons, the Board held that the point was settled that the hearing was *de novo* citing *Chem-Security (Alberta) Ltd v Lesser Slave Lake Indian Regional Council*, 1997 ABCA

241 at paras 11-12: *Reasons* at para 297. Before this Court, the Board and the Director argued that the Board only hears appeals *de novo* in the sense that the Board can hear new evidence that was not before the Director (*EPEA*, s 95(2)(d)) but that the Board does not consider appeals to be a second consideration at first instance – or a true *de novo* appeal – because the Board is limited to reviewing the Director’s decision for errors.

[136] The issue is that the Board never explained what it meant when it used the phrase *de novo*. This problem is compounded by the Board appearing to adopt shifting approaches to the appeal depending on the issue. For example, at para 207 the Board found that even if the Director was biased, that bias was cured by the subsequent *de novo* hearing process suggesting that the Director’s decision was irrelevant:

The Board finds that there is no substance to the Appellants’ allegation of reasonable apprehension of bias on the part of the Director. The Appellants have provided no explanation as to how the Town Hall Statements demonstrate bias. In any event, even if the Board was persuaded that the Director was biased as evidenced by the Town Hall Statements, any such bias would be cured by the *de novo* hearing process and would be irrelevant to the Board in making its recommendations.

[137] In making this finding, the Board relied on *Alberta Foothills Properties Ltd v Director, Southern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, 2013 ABEAB 40 [*Alberta Foothills*]. *Alberta Foothills* offered no authority for this proposition. The rationale appears to be based on the premise that a true *de novo* hearing, where the decision of the original decision maker is irrelevant, can cure procedural fairness at first instance: Donald J.M. Brown et al, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Thomson Reuters, 2009) (loose-leaf release 2025-04) at 3:30; *Young* at paras 11-12 citing *Harelkin v University of Regina*, [1979] 2 SCR 561; *Murphy v Canada (Minister of National Revenue)*, 2002 FCA 400 at paras 9-10; *Khan v Ottawa (University of)*, 34 OR (3d) 535, 1997 CanLII 941 (CA).

[138] And then at para 567 of the *Reasons*, the Board imposed the onus on Badlands as the approval holder to demonstrate that their application met the specifications of the Alberta Wetland Policy and the Alberta Wetland Mitigation Directive as if the Board was hearing the decision afresh and the Director’s decision was irrelevant:

The onus is on the Approval Holder to demonstrate that their *Water Act* application, including supporting documents, met the above requirements. In this case, the Approval Holder failed to do so.

[139] It is not transparent why the Board placed the onus on Badlands to prove their application afresh on this particular issue. The Board did not explain why the onus shifted to Badlands on this particular issue but not on other issues (flow changes at para 463; wetland classification at para 616; location of bank swallow feeding grounds at para 740; impact to golden eagles at para 744; presence of northern leopard frogs at para 746). Of note, the Board did not identify an error in the Director’s decision and instead decided the issue of whether the Approval met the policy requirements afresh.

[140] In contrast to the approach taken in the above two paragraphs, the Board stated that it would attribute significance to the Director’s decision and review it on the correctness standard,

placing the onus on the appellants to provide “sufficient evidence and argument” to demonstrate to the Board that the Director’s approval should be reversed or varied: *Reasons* at paras 261-280, 292 and 299.

[141] The inconsistency is, on the one hand, premising reasons on a true *de novo* appeal and on the other hand, reviewing the Director’s decision on the correctness standard. The distinction was explained in *Pacer* at para 66 citing The Honourable Roger P Kerans & Kim M Willey in *Standard of Review Employed by Appellate Courts*, 2nd ed (Edmonton: Juriliber, 2006) at 43-44:

43 In a true *de novo* hearing, the reviewing tribunal makes its own decision on the issues with no regard to the proceeding before the first tribunal. This is the complete absence of deference. Like absolute deference, it is, strictly speaking, not a standard of review because there is no review.

44 When it views a matter afresh, a reviewing court asks, “What is the right decision?” That is not quite the question implied by the concurrence (correctness) standard, which is: “Was the decision of the first court right?” The second question raises a presumption of fitness, or correctness, about the first decision and allows a reviewer to let a decision stand unless persuaded of a better one. The first requires the reviewer to decide the case.

[142] This Court also finds that the Board’s decision that “the onus is on the Appellants to provide sufficient evidence and arguments to support their position and to demonstrate to the Board that the Director’s decision should be reversed or varied” is unjustified. The Board stated it was following its earlier decisions in *Fenske and Janus v Director, Central Region, Regional Services, Alberta Environment, re: Beaver Regional Waste Management Services Commission*, 2006 ABEAB 12 [*Fenske 2006*]³ at para 41 and *Visscher v Director, Northern Region, Environmental Management, Alberta Environment, re: Provident Energy Ltd*, 2011 ABEAB 23⁴: *Reasons* at para 298-299. The Board held that both *Fenske* and *Visscher* correctly decided that the onus fell on the appellants.

[143] *Visscher* cites no authority for the proposition. *Fenske* cites four cases in a footnote as authority for the proposition. But of the four cases cited, only one case actually determined the question of who bore the onus when dealing with the merits of an appeal of a Director’s decision.

[144] In *Paron et al v Director, Environmental Services, Northern East Slopes Region, Alberta Environment, re: Parkland County*, 2001 ABEAB 40 at para 24 [*Paron*], the Board held that the onus to establish that a person is “directly affected” lies with the party so alleging. *Northcott v Director, Northern Region, Regional Services, Alberta Environment, re: Lafarge Canada Inc*, 2005 ABEAB 6 cites *Paron* for that same proposition and also held that the party seeking a stay has the onus to demonstrate irreparable harm. In neither case did the Board decide

³ The *Reasons* at para 59 create a shortform “*Fenske*” for the Board’s 2008 decision in *Fenske v Director, Central Region, Regional Services, Alberta Environment, re: Beaver Regional Waste Management Services Commission*, 2008 ABEAB 33. The Board uses the shortform *Fenske* in its discussion on onus at paras 290-299. However, based on the parties’ submissions to the Board, it is clear that for the purposes of paras 290-299, the Board is referencing the 2006 *Fenske* decision reported at 2006 ABEAB 12 and not the 2008 *Fenske* decision reported at 2008 ABEAB 33 that is cited at para 59.

⁴ The *Reasons* do not provide the citation for *Visscher*, but all parties agree this is a reference to the Board’s decision reported at 2011 ABEAB 23.

who bears the onus on the merits of an appeal of a Director's decision, and both *Paron* and *Northcott* have been modified by *Normtek* in regards to the burden of demonstrating that a person is "directly affected".

[145] In *Lederer and Chant v Director, Bow Region, Alberta Environment re: Spruce Valley Ranch Ltd*, 2001 ABEAB 9 the Board dismissed an appeal on the basis that the appellants had failed to clearly state their grounds of appeal and the appeal process was not engaged: para 17. The notices of appeal did not raise concerns with the Preliminary Certificate that had been issued, rather, they raised concerns about other activities that had not yet been given approval by the Director: para 6. The Board stated that the "onus" is on the appellants to demonstrate they have a valid appeal: at para 14. This matter was akin to a striking motion, the Board did not decide who bears the onus on the merits of an appeal of a Director's decision.

[146] *Bailey et al #2 v Director, Northern Environmental Slopes Region, Environmental Services, Alberta Environment, re: TransAlta Utilities Corporation*, 2001 ABEAB 24 [*Bailey*] was an appeal of an approval under the *EPEA* for the operation and reclamation of a power plant. The Board stated, without citing any authority, that the onus was on the appellants to prove that the Director's decision was not reasonable: para 36.

[147] Like *Fensky* and *Visscher*, the statement in *Bailey* is unattributed to any authority. The cases cited by the Board are either inapplicable or merely reiterate a proposition without justification rooted in the statutory scheme. This Court agrees with the Applicants that the Board's decision was unreasonable when it relied on *Fenske* and *Visscher* as standing as authority for the proposition cited.

[148] The nature of the appeal before the Board is determined by statutory language: *Newton v Criminal Trial Lawyers' Assn*, 2008 ABCA 404 at para 11; *Stewart v Lac Ste Anne (County) Subdivision and Development Appeal Board*, 2006 ABCA 264 at para 10 [*Stewart*]; *Transglobal* at para 38. While the Board is not required to engage in a formalistic statutory interpretation, the Board's decision on onus must be consistent with the text, context and purpose of the statutory scheme: *Vavilov* at para 120.

[149] The *EPEA* says nothing about appeals being *de novo*, it merely says that the Board has authority to set its own rules and procedures (*EPEA*, s 95(8)). Rule 29 of the Board's *Rules of Practice* provides that:

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

[150] Badlands, the Director, and the Board pointed to this as justification for the Board's finding that the onus fell on the appellants. But this Rule does not go as far as the parties suggest. In *Normtek*, the Alberta Court of Appeal held that the Rule only imposes an onus to adduce evidence in support of one's position: *Normtek* at para 140. And as the Alberta Court of Appeal stated in *Normtek* at para 138, it may not be appropriate to import the adversarial concept of "onus" into the Board's decision-making process under the *EPEA*.

[151] The Director argues that the Board's authority to consider new evidence on appeal does not mean the Director's decision becomes irrelevant. It submits that other features of the statutory scheme show that an appeal to the Board is not intended to be a second consideration at

first instance but rather the Director’s decision is the *status quo* from which the Board operates: the Board can dismiss a notice of appeal that is “frivolous or vexatious or without merit” (*EPEA*, s 95(5)); submitting a notice of appeal does not operate to stay the Director’s decision (*EPEA*, s 97(1)); the Board can determine which matters will be included the appeal (*EPEA*, s 95(2)); and, in practice, the Director files a record of the Director’s proceedings with the Board.

[152] The Board and the Director also referred to *Sarg Oils Ltd v Environmental Appeal Board*, 2007 ABCA 215 at paras 7 and 14 as establishing that an appeal is not a second “consideration at first instance” and the onus falls on the appellants. The comments in *Sarg Oils* relying on the Board’s *Rules of Practice* have been overtaken by *Normtek*. And *Sarg Oils* was not an appeal of a “directly affected person”, but, like *Imperial Oil*, the appellant was the recipient of an EPO that required it to reclaim a number of oil wells. The reasons why that type of appeal before the Board may be different than an appeal of a “directly affected person” were earlier catalogued.

[153] The Director argued that even in cases where weight is not given to the first level of decision, the appellant has the onus of establishing by cogent evidence that the result should be different, relying on *TransAlta Utilities Corp v Kube*, 77 AR 290, 1987 CanLII 3488 at paras 5-8 (KB); *Intensity Resources Ltd v Dobish*, 94 AR 366, 1989 CanLII 3151 at paras 41-46 (KB); *Paloma Petroleum Ltd v Hutterian Brethren Church*, 1987 ABCA 12 at para 5. These cases are unhelpful as they discuss the standard of review in external review of administrative action under the *Surface Rights Act*, RSA 2000, c S-24. On external review, deference is extended by superior courts because the specialized tribunal is presumed to have heightened expertise and insight: *Lamb v Canadian Reserve Oil & Gas Ltd*, [1977] 1 SCR 517 at 527; *Yee v Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para 32.

[154] The parties pointed to a number of Board decisions to show that placing the onus on the appellants is a longstanding practice of the Board. The problem with a blanket rule on the nature of the appeal before the Board is that not all appeals before the Board are equal: the Board hears a variety of types of appeals where the appellant in each type of appeal may not be similarly situated (*EPEA*, s 91(1)). The context of each of these appeals must be taken into account when determining the nature of the appeal.

[155] The Board is not bound by its own decisions in any event. To the extent that the Board seeks to achieve consistency (*Vavilov* at para 129), it may be appropriate for the Board to consider the issue of onus having regard to factors such as the type of appeal, the parties before it, and the issues that the Board has set for itself, similar to what the Board did in *Imperial Oil Board*. The problem, as identified in *Normtek* at para 138, is that appeals before the Board are not adversarial processes and therefore importing adversarial principles:

...may not always be entirely appropriate for poly-centric environmental decision-making under an Act which has purposes as many and varied purposes as those which the legislature has declared in section 2 of the *Environmental Protection and Enhancement Act*.

[156] Much of what occurred before the Board in this case is atypical of the adversarial process: (i) the statement of concern filers who alleged they were “directly affected” only became true parties after the Director’s decision had been made; (ii) the Director (being the original decision maker) provided submissions to the Board on the merits of its own decision, including submissions about errors in the original decision that ought to be corrected and

suggested additional conditions based on hearing new evidence (see *Reasons* at paras 229, 348, 356, 462, 598 and 657); and (iii) the Board heard “extensive new evidence” that was not available to the Director at the time of the original decision whether or not that evidence was available when the matter was initially heard (*EPEA*, s 95(2)(d)).

[157] Recent appellate guidance interpreting similarly worded internal appeal provisions suggests that the structure of the *EPEA* as well as the facts of this particular case required the Board to conduct a true *de novo* hearing in the sense that no regard or deference was owed to the Director’s initial decision and the Board was not limited to reviewing the Director’s decision for error: see *Stewart* at paras 9-12; *Landry v Rocky View County (Subdivision and Development Appeal Board)*, 2025 ABCA 34. In particular: the Board heard “extensive new evidence” that was not heard by the Director, the statement of concern filers filed expert evidence for the first time at the Board hearing and made argument on issues of fact and law not made before the Director, and the Minister was authorized to make any decision that the Director could make and any further order the Minister considers necessary (*EPEA*, s 100). These arguments were made before the Board (see the Applicants’ closing submissions before the Board at paras 495-525) and the Board failed to engage with them, or even provide reasons rooted in the statutory scheme, relying instead on single sentences plucked from *Fenske* and *Visscher: Reasons* at para 298.

[158] It is noted that following the hearing of this case, the Court of Appeal released its decision in *Rusinko v Alberta (Director of SafeRoads)*, 2025 ABCA 121 which was forwarded to this Court as further authority regarding the burden of proof. In particular, paragraph 31 was highlighted, which references s 18(1) of the *Provincial Administrative Penalties Act*, RSA 2020, c P30.8 (applicable to that case), specifying:

18(1) The burden of proof in a review is on the person requesting the review.

[159] The Court of Appeal went on to observe:

This provision merely confirms the general rule that the person challenging a civil administrative decision has the burden of proof.

[160] In light of the forgoing analysis regarding onus, *Rusinko* is not applicable to the case before the Court for judicial review. First, the comment at para 31 of *Rusinko* was made in the context of whether it is inconsistent with the principles of fundamental justice that a driver bear the burden of demonstrating error on the part of a SafeRoads adjudicator. Second, while the Court of Appeal characterized a “general rule” of civil administrative law, this Court does not take it as displacing the principle that the nature of the appeal before an administrative tribunal is determined by the statutory language of the relevant statute, here the *EPEA* not the *Provincial Administrative Penalties Act*. The statutory scheme applicable in *Rusinko*, and the circumstances of that case make it entirely distinguishable from this judicial review.

[161] Even if I am wrong, and *Rusinko* applies and the onus falls on the appellants to prove they are entitled to the relief sought, the Board’s decision on the point was unreasonable as the Board required the appellants to provide both “sufficient evidence and argument to demonstrate to the Board that the Director’s approval should be reversed or varied”: *Reasons* at para 292, emphasis added. This statement ignores the possibility that an appellant could establish *prima facie* grounds for the Board to recommend a reversal or variance by offering no affirmative evidence so long as the appellant shows that the approval is invalid on its face or otherwise

unsupported by the Director’s record. Then it would fall on the Director to provide sufficient evidence to justify the approval: see for example *Ash v Director of Southern East Slopes and Prairie Regions, Environmental Regulatory Service, Alberta Environmental Protection. Re: City of Calgary*, 1998 ABEAB 22 at para 25.

[162] Finally, the Applicants’ arguments analogizing to appeals from an applications judge to a justice at the Court of King’s Bench is not applicable. The constitutional issues that arise on those types of appeals are simply not present here: see for example *Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 at paras 34-56.

c) Conclusion

[163] The Board’s decision on onus is unreasonable because it is internally incoherent and not based on a rational chain of analysis. The Board said it was doing one thing (placing the onus on the appellants to justify a reversal or variance of the approval) and then later did the opposite (placed the onus on Badlands to provide sufficient evidence to justify confirming the approval). The Board’s reasons on onus are not tethered to the statutory scheme and failed to engage with the guidance in *Normtek* regarding the appropriateness of an onus of proof given the nature of the Board’s poly-centric environmental decision making under the *EPEA*.

5. Standard of Proof

[164] The Board held that the Applicants had failed to provide “conclusive evidence” that the Valley Wetlands are the only feeding ground for the bank swallows and made a similar finding with respect to golden eagles in the portion of the reasons addressing impacts to wildlife: *Reasons* at paras 740 and 744. The Applicants argue that the Board’s decision is unreasonable because there are only two standards of proof in Canada: balance of probabilities and beyond a reasonable doubt: *FH v McDougall*, 2008 SCC 53. The civil standard of a balance of probabilities applies to administrative tribunals: *Canada v Canada (Ship-Source Oil Pollution Fund)*, 2022 FC 1310 at para 84. The *EPEA* does not establish a different standard of proof.

[165] This Court agrees with the Applicants that the Board’s holding at paras 740 and 744 that the Applicants were required to provide “conclusive evidence” that the Approval would impact wildlife was unreasonable. The Board failed to explain why the Applicants were held to the standard of “conclusive” proof. On a review of the record, none of the parties argued that the standard of “conclusive” proof should apply. The *EPEA* does not provide for this higher standard. The Board’s decision is unreasonable in this regard.

[166] The Board also held at para 299 that “the standard of proof required to support a recommendation to vary may be lower than that for a recommendation to reverse” citing its decision in *Fenske 2006*. In *Fenske 2006* the Board held that although the appellants had not provided sufficient evidence to support a reversal, the Board was satisfied that a variance was justified: paras 41-42.

[167] The Board’s holding that an appellant faces a higher standard of proof to justify a reversal as opposed to a variance is unreasonable. That is not what *Fenske 2006* says. In *Fenske 2006* the Board was persuaded a variance was justified in that case but a reversal was not. That does not mean there is a higher standard of proof to justify a reversal. The standard of proof never changes. A tribunal may require more cogent or stronger evidence to meet the standard depending on the

nature of the issue before it. Moreover, the *EPEA* does not direct the Board to use different standards of proof for a reversal as compared to a variance.

[168] The Board’s decision on the applicable standard of proof is unreasonable.

6. Bias: Institutional Bias and Reasonable Apprehension of Bias

[169] The Applicants allege institutional bias, or, in the alternative, a reasonable apprehension of bias in this particular case. The parties agree on the applicable test, but they disagree on whether the test is met on the facts of this case.

a) Law

[170] The test for establishing a reasonable apprehension of bias was set out in *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at 394:

. . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”

See also *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 60; *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at paras 20-21.

[171] “The objective of the test is to ensure not only the reality, but the *appearance* of a fair adjudicative process”: *Yukon Francophone* at para 22. Or as Lord Hewart CJ stated “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”: *The King v Sussex Justices, Ex parte McCarthy*, [1924] 1 KB 256 at 259 cited in *Wewaykum* at para 66.

[172] There is a strong presumption of impartiality, the inquiry is inherently contextual and fact-specific, and the burden on the party alleging bias is high: *Yukon Francophone* at paras 25-26. The impugned conduct must be considered in light of the entire proceeding and not in isolation: *Yukon Francophone* at para 26 citing *R v S(RD)*, [1997] 3 SCR 484 at para 114. “In the case of administrative tribunals, the context must be taken into account, including the role and function of the tribunal, the requirements of natural justice and institutional constraints faced by the administrative tribunal”: *Beier v Vermilion River (County) Subdivision and Development Appeal Board*, 2009 ABCA 338 at para 7.

[173] Institutional bias arises where a reasonable apprehension of bias would exist in the mind of a fully informed person in a substantial number of cases: *Canadian Pacific Ltd v Matsqui Indian Band*, [1995] 1 SCR 3 at para 72; *2747-3174 Quebec Inc v Quebec (Régie des permis d’alcool)*, [1996] 3 SCR 919 at para 44 [*Régie*]. If a substantial number of cases can not be identified, allegations of an apprehension of bias cannot be brought on an institutional level and instead must be dealt with on a case-by-case basis: *Matsqui* at para 72.

[174] Courts must defer to the legislator’s intention when assessing the degree of independence required by a specific tribunal. The degree of independence may be ousted by express statutory language or necessary implication: *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52 at paras 22-24 [*Ocean Port*].

b) Did the Applicants waive their right to raise bias on judicial review?

[175] The Board argued that this Court should decline to decide the issue of bias because the Applicants waived their right to allege bias on judicial review by failing to raise the issue with the Board.

[176] “[W]aiver will be inferred only where the party alleging bias has full knowledge and failed to make a timely objection”: *Rothesay Residents Association Inc v Rothesay Heritage Preservation & Review Board et al*, 2006 NBCA 61 at para 27 [*Rothesay*].

[177] This Court finds that the Applicants did make a timely objection. The Applicants raised the issue of bias before the Board based on the information that was known at the time. Bias was not raised for the first time on judicial review: see *Rothesay* at paras 27-28 and 35; *Canadian Natural Resources Ltd v Wood Buffalo (Regional Municipality)*, 2012 ABQB 177 at paras 168-169 [*Wood Buffalo*].

[178] As will be explained below, the record demonstrates that once the Applicants had knowledge about the briefing note and the media statements, they raised the issue with the Board in a timely way. The Applicants did not discover the *ex parte* communications between the general counsel and Mr. Zelazo until January 2025, so the Applicants could not have raised this issue with the Board.

[179] This Court is satisfied there has been no waiver. Even if the Applicants failed to make a timely objection, which is not accepted, this Court would exercise its discretion to hear the allegations of bias for the first time on judicial review because an allegation of institutional bias is not something that the Board could remedy, the full record of the issue is before this Court, and as will be discussed below, the appellant’s case is strong: *Wood Buffalo* at paras 168-169.

c) Reasonable Apprehension of Institutional Bias

[180] The Applicants submit that there is a reasonable apprehension of institutional bias because the administrative processes that lead to decisions under s 99 of *EPEA* are structured so that the outcome of the process is pre-determined. The Applicants say that the institution is structurally biased to confirm the Director’s decision, and that this structure is not authorized by statute.

[181] The Applicants’ materials include a spreadsheet cataloguing 71 Board decisions issued since January 2010 where the Board issued a report and recommendation under s 99 of *EPEA*. Of those 71 decisions, 38 reports and recommendations were issued following a substantive hearing. Of those 38 they say there are only two instances where the Board recommended a reversal of the Director’s decisions: *Cherokee Canada Inc et al v Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks*, 2019 ABEAB 1 and *Hanson and Lindberg v Director, Northern Region, Operations Division, Alberta Environment and Sustainable Resource Development*, 2014 ABEAB 4. The former decision was an appeal by the approval holder and the latter was an appeal by a “directly affected” person. The Applicants say

that the fact there has been only one instance where the Board has recommended a reversal of a Director's decision when a directly affected person is the appellant demonstrates that the structures of the Board pre-determine that decisions of Directors are not reversed.

[182] The Applicants submit that, in addition to the Board's history of not reversing the Director, the following five factors create a reasonable apprehension of bias at an institutional level:

- i. a briefing note prepared by the Board's general counsel;
- ii. the Board's policy of imposing the onus on the appellant to prove either a reversal or a variance;
- iii. the Board's policy of imposing a higher standard of proof to justify a reversal compared to the standard of proof to justify a variance or a confirmation of the decision being reviewed;
- iv. the Board suffers from a lack of funding; and
- v. the Board's general counsel has co-mingled his roles.

The Applicants say that these five factors, viewed together, show that the independence of the Board is compromised and precludes an impartial and fair hearing.

i. Briefing Note

[183] As a result of a FOIP request, the Applicants received a copy of a briefing note prepared by the Board's general counsel in and around May 2020. The briefing note was sent to the Director of Agency and Partnership Governance in the Intergovernmental Relations and Engagement Branch of the Strategy and Governance Division of the Department of Alberta Environment and Parks for the purpose of providing the Minister with advice and recommendations about Board member re-appointments. The briefing note is titled "Bullet Point for Reappointment of Board Members" and specifically mentions the Badlands project (emphasis added):

- The Boards have averaged approximately 100 appeals per year over the last five years. Each appeal that comes before the Boards involves four Board members, one Board Member to act as the mediator, and three Board Members to sit on the hearing panel should mediation be unsuccessful. The Board Members also have to deal with any preliminary motions that may come up before a matter can proceed to a hearing.
- The EAB currently has a large number of appeals before it dealing with economic development. For example, there is an appeal before the EAB by Bow City Power, dealing with a new solar power and hydrogen storage facility in the County of Newell. Another example is the Badlands Motorsports Resort near Rosebud. The timely resolution of the appeals before the EAB is important to ensure that these economically important projects can proceed.
- The EAB also has several appeals before it dealing with municipalities. Again, the timely resolution of the appeals before the EAB is important to allow these municipal projects to proceed.

...

- The [Public Lands Appeal Board] also deals with a large number of appeals relating to sand and gravel. These are important because there is a shortage of supply in some areas of the province hampering economic development.

[184] The Applicants argue that the briefing note demonstrates that the Board appoints panel members for the specific purpose of ensuring that projects are approved and that the Board is institutionally biased against directly affected appellants.

[185] The Applicants were given the briefing note on March 1, 2023 when the Board responded to the Applicants' FOIP request. In the Applicants' rebuttal closing brief (dated March 28, 2023) the Applicants raised the issue of institutional bias and a reasonable apprehension of bias as a result of documents they received in the course of the proceedings. The Board responded on April 11, 2023 that they would allow the parties to provide written briefs in relation to any new issues raised by the Board's FOIP disclosure. The Applicants responded that the only remedy the Board could offer if they were to find a reasonable apprehension of bias was to replace the panel, and any panel of the Board would be tainted by the implications of the briefing note, so there was no point in making argument on the point.

[186] An issue arose before this Court regarding whether disclosure of this briefing note was "inadvertent". At the judicial review hearing the Board did not claim privilege but maintained its position that the briefing note was inadvertently disclosed. The Board's position is that the briefing note is properly before this Court in the Certified Record of Proceedings, so it is something that can be considered.

[187] The Board argues that the briefing note does not establish institutional bias. This note was not a formal ministerial briefing note; it was prepared informally by the Board's general counsel at the request of a Director in the Department of Alberta Environment and Parks for the purpose of providing advice and direction to the Minister about the re-appointment of Board members whose terms were set to expire in October 2020. The Board's general counsel was asked to provide a summary of the nature and number of appeals before the Board that would assist with expediting the re-appointments sought. The Board does not know who ultimately received the briefing note or if it was ever relied on.

[188] The Board submits that there is nothing nefarious about the briefing note, it is not an attempt to recruit Board members who would be biased. Its purpose was to express an urgency for re-appointments to avoid the prospect of five vacancies. The Board and Badlands argue that to a reasonable person, the briefing note expresses an intention that appointments are necessary to permit projects, including the Badlands project, to proceed to *the next step of the process*.

ii. Onus

[189] This Court has already found that the Board's decision to place the onus on the Applicants was unreasonable. The Applicants say that the Board's practice of placing the onus on the appellant is inconsistent with the purposes of the *EPEA* and prevents the Board from fulfilling its function of providing independent reporting to the Minister. Based on the authorities provided by the Board and the Applicants, I accept that the Board has a longstanding practice of

imposing an onus on the appealing party to prove they are entitled to the relief sought regardless of the type of appeal being heard.

iii. Standard of Proof

[190] This Court earlier in these reasons determined that the Board erred in its pronouncements on the standard of proof in this case. The Applicants have not, however, pointed to a substantial number of cases where the Board has applied the reasoning used in this case. Thus, this factor cannot be found to be an institutional bias factor.

iv. Lack of Funding

[191] The Applicants say that correspondence from the Board establishes that due to lack of funding the Board does not have the capacity to provide parties with a fair hearing. The Applicants point to the following:

- an October 28, 2021 Board letter wherein the Board stated that a “staffing shortage” contributed to the delay in issuing the Board’s reasons;
- the Board’s decision to schedule a four-day hearing on the basis that it needed to be “economical” with the appeal process;
- a December 23, 2022 Board letter in response to a request by the Director to add an additional hearing day in February 2023 to reduce the length of each hearing day. The Board’s letter states that it has been “allocated very limited resources and is expected to manage its resources efficiently and effectively for the benefit of all Albertans that bring appeals before it. The Board must be fair with the allocation of its time and resources.” The Board ultimately added an additional half day of hearing time in February 2023 to hear further evidence;
- a March 1, 2023 Board letter wherein the Board acknowledges a delay in responding to a request, and says the delay is due to “staffing issues”; and
- upon filing a FOIP request, the Applicants learned that the Board has not produced an annual report since the 2009/2010 fiscal year.

[192] The Applicants say the lack of capacity to produce an annual report is striking, and the only evidence on the Board’s financial position are the Board’s own statements about staffing shortages and limited financial resources.

[193] In addition to correspondence related to this appeal, the Applicants filed an affidavit exhibiting correspondence dated February 2025 related to a separate appeal where the Board stated due to “very limited resources” the Board changed the rules of practice to provide for virtual hearings as the norm as opposed to in-person hearings.

v. Multiple Roles of the General Counsel

[194] The Applicants submit that the Board’s general counsel takes on a number of roles and that two findings should result.

[195] First, an inference should be drawn that the reason the general counsel takes on multiple roles is a lack of resources. Second, the fact that the general counsel takes on multiple roles creates a reasonable apprehension of bias because of a lack of separation of functions, relying on *Régie*.

[196] The Applicants submit that the general counsel had the following roles during this appeal: conducting confidential mediation, making substantive decisions in the appeal, advising the hearing panel on procedural and substantive issues, organizing the appeal, conducting media relations, responding to FOIP requests, and corresponding with the parties on behalf of the Board.

[197] This Court is not persuaded that the general counsel held the first two roles in this list. The general counsel was present at the mediation to observe, but the record does not support a finding that general counsel “conducted” the mediations. The attendance list shows that the general counsel was in attendance, but the mediator was Dave McGee.

[198] The Applicants say the Board decisions reported at 2022 ABEAB 21 and 2021 ABEAB 17 are evidence that the general counsel was making substantive decisions because his name appears as signatory. An inference that general counsel was the decision maker in those instances does not necessarily follow, only that he was communicating the Board’s decision in letter form. Save for these two roles, general counsel fulfilled the roles listed above: advising the hearing panel, organizing the appeal, conducting media relations, responding to FOIP requests, and corresponding with the parties on behalf of the Board.

[199] The Applicants’ argument that general counsel’s many roles is due to a lack of Board funding is not accepted by this Court. This argument is speculative and the evidentiary foundation is insufficient to draw that inference.

[200] In *Régie*, the Supreme Court dealt with allegations of partiality and a lack of independence against a quasi-judicial tribunal. The Supreme Court held that the possibility that lawyers employed by the tribunal who had the role of prosecuting counsel were also advising the tribunal in the exercise of its adjudicative function raised a reasonable apprehension of bias at an institutional level. The Supreme Court held that “[a]lthough an overlapping of functions is not always a ground for concern, it must nevertheless not result in excessively close relations among employees involved in different stages of the process”: *Régie* at para 48. To determine whether there are excessively close relations, a close review of the institutional structure may be necessary: *Régie* at para 48.

[201] Little information about the role of general counsel in the usual course beyond what occurred in this particular appeal was provided to this Court. The *EPEA* and the regulations are silent on the role of the general counsel. And there is no annual report that defines the roles of the general counsel.

[202] The record indicates that after May 4, 2023, a few weeks after the briefing note was disclosed to the Applicants, general counsel no longer dealt with any matters related to the Badlands appeals.

d) Analysis and Conclusion

[203] The statistics of Board decision outcomes dating back to 2010 cannot be used as evidence of institutional bias. While the statistics can show trends, they cannot be used to draw the inference sought. The challenge the Applicants face is that no statistic would be satisfactory. What percentage of decisions being reversed would the Applicants accept as demonstrating that the Board is not institutionally biased: 25%, 50%, 75%? There are too many variables to consider: the decision at first instance, who was the appellant, did the appellants seek a reversal or only a

variance, how often appellants are successful in having an approval varied, the types of variances imposed by the Board, etc.

[204] As for the briefing note, viewed in light of the context in which it was written, it is not indicative of any institutional bias. It communicates an urgency for Board appointments. That the Badlands project was referenced as an example of one of the matters before the Board seems reasonable as it appears to have been one of the matters occupying a considerable amount of Board resources at the time. Further, the reference made in the briefing note regarding ensuring that the projects “can proceed” is not necessarily a reference to selecting Board members predisposed to approving projects, but rather simply to underscore that matters before the Board may be stalled without a sufficient number of Board members to hear them. Thus, this Court finds that a reasonable person having been informed of all the relevant facts, including that the Board was seeking to communicate an urgency to avoid vacancies, would not reach the conclusion that the Board appoints panel members for the specific purpose of ensuring that projects are approved.

[205] Regarding onus as an indicator of institutional bias, this Court earlier found that the Board’s decision to place the onus on the appellants in this matter was unreasonable. The Board’s apparent practice regarding onus – to place it on the appellant – is insufficient, as a factor on its own, to be determinative of institutional bias. As earlier described, many factors ought to be taken into consideration when assessing where the onus should lie in cases such as this one. A failure to canvas such factors was found to be unreasonable in this case, but such failure does not amount to an institutional bias. Indeed, it may well be that many cases before the Board are those that are more typical of an adversarial appeal and placing the onus on the appellant is appropriate. Insufficient evidence was before this Court to allow it to make a finding of any institutional bias in this regard. This Court can only find that how the Board handled onus in this case was unreasonable, inconsistent and incoherent. Such a finding cannot extend beyond this case to other cases, where a Board default practice to place the onus on the appellant may be completely reasonable without requiring lengthy consideration.

[206] Similarly, this Court is not satisfied that a reasonable person would find that the Board is unable to provide for a fair hearing due to a lack of resources. Even while this Court accepts that the Board is dealing with staffing shortages and limited resources, such finding does not necessarily lead to the conclusion that the Board is unable to provide a fair process. The Board has acknowledged its limited resources, but a reasonable person would view the correspondence as the Board aiming to be efficient with available resources. Resource limitations and efficiency seeking is a practical reality for administrative tribunals as it is for courts, none of which have unlimited time or funds. Also, nothing is inherently unfair about a general rule that hearings be held virtually as opposed to in-person. Of course, unfairness may arise on the facts of any particular case but it did not arise in this case.

[207] As for the multiple roles of the general counsel, the circumstances here are distinguishable from *Régie* where a single lawyer was the prosecutor and also participating in the adjudication process. The overlapping of roles in a single agency is not necessarily problematic: *Régie* at para 47. It is often necessary for a single officer to have multiple roles to permit the tribunal to perform effectively: *Ocean Port* at paras 40-41.

[208] This Court does not accept that general counsel was making substantive decisions in the appeal, and there is no allegation he was making submissions to the Board *qua* prosecutor. The

plurality of roles in this case, which involved advising the panel, organizing and corresponding with parties, conducting media relations, and responding to FOIP requests, does not establish a reasonable apprehension of bias.

[209] To conclude, the Applicants have not established a reasonable apprehension of institutional bias.

e) Reasonable Apprehension of Bias in this Case

[210] The Applicants argue that if institutional bias is not found, there is a reasonable apprehension of bias in this case based on the following:

- i. the briefing note prepared by the Board’s general counsel (same as i. above);
- ii. statements made by the Board’s general counsel to the media about this appeal;
- iii. a letter sent by the Board in December 2022 confirming additional hearing time; and
- iv. the Board’s general counsel had private telephone conversations with Mr. Zelazo, the representative for Badlands.

[211] The Applicants submit that these four factors, viewed together, show that the independence of the Board was compromised in this appeal and precluded an impartial and fair hearing.

i. Briefing Note

[212] Even with no finding of institutional bias, the Applicants submit that the briefing note shows that the Board sought appointments for the specific purpose of ensuring that the Badlands project was approved.

[213] The Board argues that none of the members on the panel for this appeal (Chidinma Thompson (as she then was), Chris Powter and Tamara Bews) were the members whose appointments were going to expire in October 2020. For that reason, this Court is satisfied that a reasonable person would not conclude that the briefing note establishes that the Board sought re-appointment of members for the specific purpose of approving the Badlands project.

ii. Media Statements

[214] In May 2022, a few months before the hearing began, the Applicants became aware that the Board’s general counsel made two statements to the media about the Badlands project.

[215] The Board’s general counsel was quoted in an article that appeared in the Toronto Star on May 5, 2022. The article’s author states that the Board’s general counsel “suggested...that it is extremely rare for an approval to be canceled. Instead, the majority of the time it is either approved as presented, or changes are made.”

[216] The Board’s general counsel was also quoted in an article that appeared in the Strathmore Times in December 2021. The article quotes the Board’s general counsel as saying that the appealing parties have to convince the Board that the Director’s decision has “something wrong with it.”

[217] Both articles are included in the Certified Record of Proceedings as they were attached to correspondence with the Board's general counsel. Counsel to the appellants wrote to the Board on May 12, 2022 attaching the articles and stating concerns with the general counsel making comments on the likely outcome of a live appeal before the Board. The letter states that the appellants are concerned that the general counsel's comments show that the appeal will not be considered with an open mind.

[218] On May 13, 2022 the Board's general counsel wrote a letter to the parties addressing the newspaper articles:

The newspaper articles reflect discussions between the Board's General Counsel and Settlement Officer and members of the media about the Board's jurisdiction and the burden of proof being on the appellants as required by the law. The Board's jurisdiction is to recommend to the Minister to confirm, reverse, or vary the decision of a Director of Alberta Environment and Parks. The Board's jurisprudence is clear that the onus is on the appellants to prove that the decision being appealed should be varied or reversed. In any event, the Board's General Counsel is not a decision-maker, and will not be making any decisions in this matter. The decision-makers are the members of the Board hearing this appeal. You can be assured that the Board Members are approaching these appeals with an open mind and will follow the principles of a fair hearing and the due process that governs the Board.

[219] And in a May 25, 2022 Board decision following a case management meeting, the Board addressed the newspaper articles (2022 ABEAB 21, emphasis in original):

As stated by the Board in its letter of May 13, 2022, the Board's General Counsel is not a decision-maker and will not be making any decisions in this matter. The decision-makers are the members of the Board hearing these appeals. **You can be assured that the Board Members are approaching these appeals with an open mind and will follow the principles of a fair hearing and the due process that governs the Board.**

[220] The Applicants argue that the general counsel's statements cast doubt on the impartiality of the proceedings, especially since the issue of onus was a live issue. The Board says that the general counsel did not say anything controversial and his statements were consistent with the Board's practice to date. The Board also says that the general counsel's statements cannot be imputed to the Board.

[221] Decision makers ought to speak by way of their decisions, and not through statements to the media (*Chrétien v Canada*, 2008 FC 802 at para 104, aff'd *Canada (Attorney General) v Chrétien*, 2010 FCA 283 at para 11):

The media is not an appropriate forum in which a decision maker is to become engaged while presiding over a commission of inquiry, a trial, or any other type of hearing or proceeding. Indeed, the only appropriate forum in which a decision maker is to become engaged is within the hearing room of the very proceeding over which he or she is presiding. Comments revealing impressions and

conclusions related to the proceedings should not be made extraneous to the proceedings either prior, concurrently or even after the proceedings have concluded.

[222] Public statements made by a decision maker that are aimed directly at the parties before that decision maker may give rise to a reasonable apprehension of bias: *Gagliano v Gomery*, 2011 FCA 217 at paras 54-57, Mainville JA, concurring.

iii. Private Conversations Between General Counsel and Badlands

[223] On January 7, 2025, almost a year after the Board's reasons were released, the Applicants learned that the Board's general counsel had "numerous telephone conversations" with Mr. Zelazo, the Badlands representative, during the course of the appeal without notifying the Applicants. The Board's general counsel did not make any record of these conversations. General counsel confirmed these conversations in a January 7, 2025 letter:

Specifically, with respect to Mr. Zelazo, you are correct that I had numerous telephone conversations with him regarding the appeals. This is very common with unrepresented parties, both appellants and approval holders. A key part of my job is assisting both unrepresented parties and represented parties to navigate the Board's appeal process and to provide information about the Board's practices and procedures.

[224] In the same letter, general counsel stated that it was his practice not to make records of phone calls from any party to an appeal unless requested, and regardless of which party he was speaking to. General counsel stated that it was his practice to make clear that any conversations are confidential and to tell parties that any information shared with him would not be disclosed to the Board. General counsel also stated that it was his practice to tell parties that if they want the Board to consider any information, that information must be in writing and shared with all parties or presented formally to the Board.

[225] The Applicants allege that the fact of the private conversations raises the appearance of unfairness. It leaves open the possibility that a lawyer who was advising the Board was having improper *ex parte* communications with one of the parties.

[226] Badlands and the Board say that general counsel was not the decision maker and there was no evidence of any strategic or legal advice given by general counsel to Mr. Zelazo. Badlands says these communications are no different than a party calling the court clerk to get basic information about scheduling or timing. The Board says that general counsel understood his role was to have administrative conversations with parties to help them navigate the Board's practices and procedures. The Board points to examples of other communications between general counsel and parties to the appeal as confirming that general counsel's discussions were limited to issues of practice and procedure.

iv. December 2022 Letter Regarding Additional Hearing Time

[227] The hearing was scheduled to take place over four days in November 2022 (November 2,3,4, and 7). When the hearing did not finish after those four days, the Board directed that the hearing would continue for an additional three days. On November 9, 2022, the Board provided a

list of items to complete during those three days, which included hearing further evidence from all parties as well as closing submissions.

[228] On December 6, 2022, the Board sent a letter scheduling January 30, 31 and February 1, 2023 to continue the hearing. The hearing days were set for 11.5 hours each day from 8:30 am to 8:00 pm.

[229] In response to this scheduling letter, the Director wrote to the Board and asked that a fourth day be added for the continuation of the hearing so that the days would not be longer than 9.5 hours each. The Director noted that the first four days of the hearing were difficult for all parties, as each day the hearing length was between 12-13 hours. The Director was concerned that the schedule was not allowing the parties to provide their best evidence, nor was it conducive to the health and well-being of the participants.

[230] On December 23, 2022, in response to the Director's request to add a fourth day, and noting that all parties were agreeable to the request, the Board added an extra half day. The Board also modified the process, directing that closing submissions would be submitted in writing only as this would allow for shorter hearing days.

[231] In the December 23, 2022 letter the Board stated (emphasis added):

The Board reminds the parties that the Board is an administrative tribunal and as such, it is the master of its own process. The Board has been allocated very limited resources and is expected to manage its resources efficiently and effectively for the benefit of all Albertans that bring appeals before it. The Board must be fair with the allocation of its time and resources.

....

The Board must recommend to the Minister the appropriate remedy in these appeals. However, the Board notes that neither the Director nor the Approval Holder has sufficiently addressed or responded to the Appellants' first relief in their written submissions or at the hearing. In raising the concern, the Board notes that the Approval Holder is not represented by counsel. Therefore, the Board has not received sufficient information it requires to provide the best possible advice to the Minister.

The Board will use the additional hearing days to receive information from the parties to enable it to make a recommendation to the Minister on the first relief sought by the Appellants in these appeals, which is to reverse the Approval. This is in addition to any additional evidence the parties will be presenting to respond to the Appellants' arguments in the alternative to vary the terms and conditions.

[232] The Applicants submit that this letter, and particularly the underlined portions above, shows that the Board was biased against them because the Board added extra hearing time only for the benefit of Badlands and the Director. The Board says that all parties were given the opportunity to provide more evidence over the additional 3.5 hearing days and the Board was acting fairly to all parties.

f) Conclusion on Bias

[233] Looking at the entire context, the role and function of the Board, the requirements of natural justice and institutional constraints faced by the Board, this Court is satisfied that a reasonable, well-informed person would conclude that the Board did not decide this appeal fairly.

[234] The most significant factor to this conclusion are the numerous undocumented private conversations between the Board's general counsel and the representative for Badlands during the course of the appeal.

[235] The question is not whether the process was *actually* fair but whether there was an *appearance* of fairness. Badlands' and the Board's positions that communications between the general counsel and Mr. Zelazo were merely procedural is rejected. The distinction between procedural and substantive is often illusory. Moreover, there is insufficient evidence to permit such a conclusion because there is no record of these conversations. General counsel did not provide any evidence that his conversations with Mr. Zelazo were limited to procedure. General counsel's January 7, 2025 letter does not confirm the procedural nature of his conversations with Mr. Zelazo, as general counsel only references his general practice at the time.

[236] The briefing note or general counsel's media statements alone do not give rise to a reasonable apprehension of bias. While the conduct of the general counsel in making such comments may have been ill-advised, the Board made clear that its general counsel does not speak for the Board and his comments were not to be imputed to it. But in the case of the briefing note and the media statements, the Board knew what the general counsel said, as does the public, and the Board was able to specifically address them. What the Board's general counsel told Mr. Zelazo remains unknown and therein lies the problem. It leaves open the *possibility* – and the appearance – that the lawyer who was advising the Board on substantive matters was providing legal advice to Mr. Zelazo.

[237] As for the December 2022 letter adding additional time, the Board significantly underestimated the time needed to hear all the relevant evidence when it set the hearing down for four days. But the need for additional time was also in response to a motion brought by Badlands asserting procedural unfairness when, on the fourth day of the hearing, the Board asked Mr. Zelazo not to read verbatim from his written submissions. This Court understands Badlands was unrepresented at the time. The Board was communicating its desire to be efficient with the continuation dates. Read in that context, a reasonable, well-informed person would view the December 2022 letter as guidance from the Board to the parties that they ought to focus their submissions and not that the Board was approaching the hearing with a closed mind or biased against certain parties.

[238] As a result of a finding that there was a reasonable apprehension of bias, the Decision is void and remitted to the Board for a new hearing: *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 SCR 623 at 645.

7. Procedural Fairness and the Right to a Fair Hearing

[239] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 the Supreme Court listed relevant factors to consider in determining the content of the duty of

fairness: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance to the individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the decision maker.

[240] Underlying these factors is “the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker”: *Baker* at para 22.

[241] The duty of procedural fairness is variable, flexible, and context specific: *Baker* at para 22; *Vavilov* at para 77. Procedural fairness does not require a perfect process: *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 43; *Knight v Indian Head School Division No 19*, [1990] 1 SCR 653 at 685.

[242] The Applicants submit that they were owed a high degree of procedural fairness, due in large part to the statutory scheme and the legitimate expectations of the parties. The Applicants allege that their right to a fair hearing was breached because:

- i. the Director was granted standing as a party to the appeal before the Board;
- ii. the Board granted the Applicants additional hearing time only after the Applicants had used their initially allotted time, forcing the Applicants to split their case;
- iii. the Board sat for unreasonably long hours;
- iv. the Board provided two additional reports to the Minister without notifying the Applicants;
- v. the Board failed to consider the issues put to it; and
- vi. the Board discounted the Applicants’ position because the Applicants did not provide site-specific data, but the Board knew that the Applicants were not permitted to access the site.

a) Director standing, hearing time, long hours

[243] The first three factors are, at their core, complaints about the timing and allocation of time during the appeal. The Director was properly a party to the appeal under section 1(f)(ii) of the *Environmental Appeal Board Regulation*, Alta Reg 114/1993 which defines “party” to include “the person whose decision is the subject of the notice of appeal”. But the Applicants say it was unfair to grant the Director standing when the Applicants had the onus of proving the Director’s decision was incorrect while two parties (Badlands and the Director) were defending the Director’s decision and could rely on each other’s submissions. Effectively, the Applicants argue that it was unfair that it was two against one, and together Badlands and the Director were given twice as much hearing time for evidence in chief to prove that the Approvals should be confirmed.

[244] Subject to the *EPEA* and the regulations, the Board has discretion to establish its own rules and procedures for dealing with matters. While the process was not perfect, the timing and allocation of time to the parties during the appeal was fair. The Board underestimated the time it would take to run the hearing. When it became apparent that there was not sufficient hearing time for the parties to put forward their evidence and positions, the Board took a practical

approach to the continuation of the hearing with a view to giving each party the opportunity to have their evidence fully considered by the Board. The Board owed a duty of procedural fairness to all parties, not just the Applicants.

[245] As for the claim that the Applicants were not given sufficient time, the Applicants say they were required to rush through their case and forced to decide between presenting new evidence or re-visiting evidence that was not fully canvassed in the initial four days of hearing time. The Applicants have not set out how their case was hindered or what evidence or arguments they were not able to make given the time that was allocated to them, other than a complaint that they were forced to “rush” through their case. In the circumstances, a breach of procedural fairness has not been established.

[246] As for the long hours, the Applicants rely on comments made on the record by panel members during the first four days that the members were having difficulties following the evidence due to the long sitting hours. Given the Board’s discretion to control its own processes, the Board did not breach its duty of procedural fairness. Upon the parties seeking an accommodation (an extra hearing day) to reduce the length of the hearing days for the continuation of the hearing, the Board granted the request to ensure that the hearing days would not be so lengthy.

[247] While the process was not perfect, the standard is not perfection. The circumstances raised by the Applicant are not breaches of procedural fairness.

b) Additional reports to Minister

[248] On March 28, 2024, the Board submitted its report to the Minister (the *Reasons* reported as 2024 ABEAB 7) along with two additional documents: a three-page briefing note and a two-page memorandum. The Applicants were not given copies of these two additional documents until about four months later in July 2024 following the release of *Menard v Alberta (Minister of Environment and Parks)*, 2024 ABKB 412. In *Menard*, Justice Dunlop held that it was a breach of procedural fairness for the Board to provide a briefing note to the Minister without disclosing it to the Applicants. Following release of *Menard*, the Board provided the two additional documents to the Applicants.

[249] The Applicants argue that it was procedurally unfair for the Board to have given these two additional documents to the Minister without notice to them and without affording them an opportunity to respond to their contents. The Applicants also say that the content of these documents mischaracterizes the issues. The Board argues that while there was a technical breach of procedural unfairness, any unfairness was cured when the two additional documents were given to the Applicants in July 2024.

[250] The Applicants ought to have been given the materials that were before the Minister at the same time the Minister issued the Order, consistent with *Menard* at para 12. This Court agrees with the Board that while this omission was technically a breach, it is not one which, on its own, warrants a remedy. The Applicants were not entitled to make submissions on how the Board communicates to the Minister. The Applicants offered no authority for this proposition.

c) Failure to consider issues put to it

[251] In an August 2020 letter to the parties, the Board stated that the hearing would address the following issue: “Are the terms and conditions in the Approval adequate having regard to the

potential environmental impacts of the Approval?” The Applicants say that the Board ignored this issue in its reasons and instead decided something else.

[252] In light of the findings described earlier herein, the Board did fail to reasonably consider some of the issues put to it, including potential environmental impacts relating to the bank swallow and the critical habitat designation of it as a threatened species. Since this Court has already determined in these reasons that this omission was a substantive failure prompting the Decision to be quashed and remitted back to the Board, the Applicants have been provided a remedy in this regard. To the extent this same failure could be further characterized as a breach of procedural fairness, there is no additional remedy beyond what has already been determined.

d) Preference of Badlands’ evidence

[253] The Board did breach its duty of procedural fairness when it preferred the evidence submitted by Badlands over evidence submitted by the Applicants on the basis that Badlands had access to site-specific data and the Applicants did not.

[254] Several times between 2020 and 2022 the Applicants made requests to the Board for access to the site so that their expert could respond to the WAIR report written by Ms. Ferguson. Mr. Zelazo declined the Applicants’ request. The Board stated that it could not order that Badlands give the Applicants access to the site. The Applicants concede that the Board does not have authority to order site access to private lands.

[255] The Board conducted a site visit in September 2022 but the Applicants were not permitted to attend: *McMillan et al v Director, South Saskatchewan Region, Operations Division, Alberta Environment and Parks, re: Badlands Recreation Development Corp*, 2022 ABEAB 34.

[256] Before the Board, the Director argued that limited weight should be placed on Mr. Wallis’ opinion on the accuracy of Ms. Ferguson’s data in filling out the ABWRET-A form used for scoring and categorizing Alberta wetlands because Mr. Wallis had never conducted a site visit: *Reasons* at para 602.

[257] In determining whether the wetlands were properly assessed, the Board accepted the Director’s argument and concluded (*Reasons* at para 616):

The Board finds that the Wetlands were correctly valued based on the ABWRET-A requirements. The Board further finds that the Appellants have provided no site-specific data that would support their assertion that the data collected by Ms. Ferguson were inaccurate and that the Appellants have not demonstrated that any changes to the calculated values of the Badlands Wetlands would have had any impact on the Director’s decision to issue the Approval.

[258] It was not possible for the Applicants to introduce site-specific data to support their assertion that the data collected by Ms. Ferguson was inaccurate. While Rule 29 imposes an onus to adduce evidence in support of one’s position, it is procedurally unfair for the Board to place an onus on “directly affected” parties to produce site-specific evidence for a site on which they have been denied access.

[259] As for the Board’s conclusion that changes to the calculated values would not have impacted the Director’s decision to issue the Approval, that was not the Director’s evidence. The Director stated that a change in the wetland value would not “automatically” mean the Approval

would not have been issued: *Reasons* at para 605. The Director acknowledged that changes to the wetland value would have an impact, although marginal, and a change in the wetland value could have changed his decision on avoidance: *Reasons* at para 598.

[260] This case is not one where the Applicants could have gathered the data but did not, or where the Applicants failed to request a site visit: see *Pastula v North Cowichan (District)*, 2005 BCSC 1605 at para 22; *Amimer v Mills*, 2024 BCSC 1897 at para 50.

[261] While it is not a breach of procedural fairness to prefer the evidence of one party over the other, it was procedurally unfair for the Board to prefer the evidence of Badlands' expert on the basis that the Applicants failed to adduce evidence that was impossible for them to adduce.

e) Conclusion on Procedural Fairness

[262] The Board breached its duty of procedural fairness when it preferred the evidence of Badlands over that of the Applicants on the basis that the Applicants did not adduce site-specific data. As a result, the decision is void and the matter is remitted to the Board for a new hearing.

8. Notice of Constitutional Question

[263] The Applicants also filed a Notice of Constitutional Question on the following two issues:

1. Does s 58 of the federal *SARA* apply to provincial land designated critical habitat for species subject to the *Migratory Birds Convention Act*, excluding application of s 36 of the provincial *Water Act* and the jurisdiction of a Designated Director to issue an approval that would destroy critical habitat?
2. Is s 58 of the *SARA* paramount over s 36 of the *Water Act* such that a Designated Director is precluded from issuing an Approval that destroys critical habitat?

[264] The Applicants did not press the Notice of Constitutional Question at the judicial review hearing. The Minister of Justice intervened in this application and took the position that it was unnecessary for this Court to decide the Notice of Constitutional Question as the resolution of the actual dispute did not require resolution of the questions of law raised in the constitutional question: *Moysa v Alberta (Labour Relations Board)*, [1989] 1 SCR 1572 at 1580.

[265] Given that this Court is quashing the Decision and remitting the matter to the Board on other grounds, it is unnecessary to decide the Notice of Constitutional Question to resolve the judicial review application.

Conclusion

[266] The application for judicial review is granted, the Decision is quashed, and the matter is remitted back to the Board for a rehearing.

[267] The Applicants have been successful in this application and are entitled to costs. Should the parties not be able to agree on costs, submissions can be made to me within 30 days, such argument not to exceed 5 pages.

Heard on the 12th, 13th, 14th, 15th and 16th days of May, 2025.

Dated at the City of Calgary, Alberta this 13th day of February, 2026.

Melanie R. Gaston
J.C.K.B.A.

Appearances:

Richard E. Harrison, Shaun Fluker and Connor Sliman
for the Applicants Rick Skibsted et al

Darin J. Hannaford K.C. and Adrienne S. Funk
for the Environmental Appeal Board

Sean McDonough, Nicole Hartman and Paul Maas
for the Designated Director under the *Water Act*

Evan Jovanovic
for the Badlands Recreation Development Corp.

Heather A. Campbell
for the Minister of Justice for Alberta

.