In the Court of Appeal of Alberta

Citation: Bow Valley Engage Society v Alberta (*Environmental Protection and Enhancement Act*, Designated Director), 2026 ABCA 188

Date: 20260610
Dockets: 2401-0275AC; 2401-0276AC;
2501-0102AC; 2501-0107AC
Registry: Calgary

Docket: 2401-0275AC

Between:

Bow Valley Engage Society

Respondent

- and -

Designated Director under the *Environmental Protection and Enhancement Act*

Respondent

- and -

Three Sisters Mountain Village Properties Ltd

Appellant

Docket: 2401-0276AC

And Between:

Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation, collectively the Stoney Nakoda First Nations

Respondents

- and -

Three Sisters Mountain Village Properties Ltd

Appellant

- and -

Designated Director under the *Environmental Protection and Enhancement Act*

Respondent

Docket: 2501-0102AC

And Between:

Bow Valley Engage Society

Appellant

- and -

Designated Director under the *Environmental Protection and Enhancement Act* and Three Sisters Mountain Village Properties Ltd

Respondents

- and -

Thunderstone Quarries Canmore Ltd

Respondent

- and -

Minister of Justice of Alberta

Intervenor

Docket: 2501-0107AC

And Between:

Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation, collectively the Stoney Nakoda First Nations

Appellants

- and -

Designated Director under the *Environmental Protection and Enhancement Act* and Three Sisters Mountain Village Properties Ltd

Respondents

- and -

Thunderstone Quarries Canmore Ltd

Respondent

- and -

Minister of Justice of Alberta

Intervenor

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice William T. de Wit
The Honourable Justice Tamara Friesen

Memorandum of Judgment

Appeals from the Order by
The Honourable Justice D. J. Reed
Dated the 20th day of September, 2024
Filed the 11th day of October, 2024
(Dockets: 2401-04875, 2401-09956)

and

Appeals from the Order by
The Honourable Justice O. Ho
Dated the 14th day of March, 2025
Filed the 15th day of April, 2025
(2025 ABKB 158, Dockets: 2401-04875, 2401-09956)

Memorandum of Judgment

The Court:

I. Overview

[1] This decision determines four appeals. The first two appeals are from the first chambers judge's decision of September 20, 2024, and the third and fourth appeals are from the second chambers judge's decision of March 14, 2025. All appeals arise from judicial review applications involving the Three Sisters Mountain Village proposed development near Canmore, Alberta.

[2] In the first appeal, Three Sisters Mountain Village Properties appeals the first chambers judge's decision, on a judicial review application of Bow Valley Engage Society, involving the Designated Director under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, and Three Sisters. In the second appeal, Three Sisters appeals the first chambers judge's decision on the judicial review application of Bearspaw First Nation, Chiniki First Nation, and Goodstoney First Nation, collectively the Stoney Nakoda First Nations, involving the Designated Director and Three Sisters. The decision at issue in the first and second appeals resulted in Three Sisters' preliminary challenges to the applications for judicial review on the basis of standing and abuse of process being dismissed.

[3] In the third appeal, Bow Valley appeals the second chambers judge's decision on its judicial review application involving the Designated Director, Three Sisters, and Thunderstone Quarries. In the fourth appeal, Stoney Nakoda First Nations appeals the second chambers judge's decision on their judicial review application involving the Designated Director, Three Sisters, and Thunderstone. In the third and fourth appeals the chambers judge granted Thunderstone's preliminary challenge to the applications for judicial review, striking the applications for judicial review for want of service, and in the alternative dismissed the applications for judicial review on the merits.

[4] The Minister of Justice of Alberta intervenes on the constitutional question raised by Bow Valley and Stoney Nakoda in the third and fourth appeals.

II. Background

[5] On January 9 and February 7, 2024, Bow Valley and Stoney Nakoda made written demands of the Designated Director under the *Act*, asking her to consider whether an environmental impact assessment was warranted for two area structure plans: the Three Sisters Mountain Village Area Structure Plan, Canmore bylaw 2121-05, and the Smith Creek Area Structure Plan, Canmore bylaw 2021-06.

[6] The Three Sisters Area Structure Plan contemplates the development of approximately 417 acres of land, and the Smith Creek Area Structure Plan contemplates the development of approximately 380 acres of land in the Canmore area. Thunderstone owns 83.5 acres in the Smith Creek Area Structure Plan, with significant development rights, but does not own or possess any lands in the Three Sisters Village Area Structure Plan. Three Sisters is the proponent of the development of both area structure plans; Thunderstone is not.

[7] On February 28, 2024, the Designated Director issued a decision dismissing the Bow Valley and Stoney Nakoda requests, finding she did not have jurisdiction under ss 42 and 44 of the *Act*, as the projects in question were not a "proposed activity" within the meaning of s 39(e) of the *Act*:

> I find that the current Three Sisters project and its ongoing construction are a continuation of the overall tourism and recreational project that was applied for and approved by the Natural Resources Conservation Board in 1992 (NRCB Decision Report, Application #9103). I am not persuaded that it is a "proposed activity" that has not commenced as required under paragraph (i) of section 39(e) of *EPEA*, and does not otherwise fit under paragraphs (ii) to (iv). As such, I am of the opinion that I lack jurisdiction to determine whether an environmental assessment of the project is warranted at this time under the process described in section 44 of *EPEA*, or the remaining provisions within Part 2, Division 1 of *EPEA*.

[8] Bow Valley and Stoney Nakoda filed judicial review applications from the Designated Director's decision, submitting it was unreasonable in the context of the record, and asking the Court to determine what remedy might flow from that decision.

III. Court of King's Bench Decisions

a) Appeals 1 and 2 (2401-0275AC and 2401-0276AC)

[9] In the first two appeals, the first chambers judge dismissed the applications of Three Sisters alleging: (1) Bow Valley and Stoney Nakoda lacked standing to bring their judicial review applications; and (2) those applications were an abuse of process, and a collateral attack on earlier proceedings under the *Municipal Government Act*, RSA 2000, c M-26, and before the Land and Property Rights Tribunal.

[10] The first chambers judge gave oral reasons holding first that under the *Act*, no appeal process to the Court is available. Subject to a privative clause, judicial review is the only recourse for a party unsatisfied with a direction from the Designated Director: *Act*, ss 91, 102; ***Fenske v Director, Central Region, Regional Services, Alberta Environment, re: Beaver Regional Waste Management Services Commission***, 2008 ABEAB 33, para 110. As Bow Valley and Stoney Nakoda were parties before the Designated Director, and subject to her determination, they had

"standing as of right" and private interest standing to bring judicial review applications from that decision.

[11] On private interest standing, the first chambers judge found Bow Valley had "longstanding involvement in the matters in issue in this case", including indirectly, back to 2015, had "strong, local community support" in and around the Town of Canmore, and engaged at the municipal level with the two area structure plans under consideration in the judicial review applications, on the development of the Three Sisters Mountain Village Properties. As such it was fundamentally and directly related in proximity and interest to the [area structure plans] in question" and therefore a "party aggrieved for the purposes of its judicial review application": ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904, paras 8-13, 20, [2007] 4 WWR 131.

[12] The area structure plans included Stoney Nakoda traditional lands still used for traditional and cultural practices, the individual member bands were each signatories to Treaty 7, and this Court had found that was sufficient to establish a legal interest for the purpose of granting intervenor status in prior litigation on this development: ***Town of Canmore v Three Sisters Mountain Village Properties Ltd***, 2022 ABCA 274, para 40.

[13] The first chambers judge found Stoney Nakoda had both standing as of right and private interest standing. They are parties aggrieved for the purposes of the judicial review application, as they have "clear, legal interests engaged" over and above those of the general public, in having the Designated Director make the consideration she was asked to make.

[14] On the allegation of abuse of process, Three Sisters submitted this judicial review was merely "an attempt to relitigate the wildlife corridors approved by Alberta Environment and Parks for the project and the determination by the NRCB that the project is in the public interest" including this Court's decision ***Canmore (Town of) v Three Sisters Mountain Village Properties Ltd***, 2023 ABCA 278 [***Canmore, 2023***]. The first chambers judge found that was not the case. As a result, the first chambers judge dismissed Three Sisters' applications. It appeals that dismissal to this Court in both actions.

b) Appeals 3 and 4 (2501-0102AC and 2501-0107AC)

[15] In the third and fourth appeals, the second chambers judge granted Thunderstone's application to strike the Bow Valley and Stoney Nakoda applications for failure to properly serve Thunderstone with their originating documents. In the alternative, he dismissed their judicial review applications on the merits: ***Bow Valley Engage Society v Alberta (Environmental Protection and Enhancement Act, Designated Director)***, 2025 ABKB 158.

[16] Thunderstone applied to have the two judicial review applications struck for failure to serve it within the six month deadline for service upon a person or body "directly affected by the application": r 3.15(2), (3)(c), *Alberta Rules of Court*, AR 124/2010:

Originating application for judicial review

3.15(2) Subject to *rule 3.16*, an originating application for judicial review to set aside a decision or act of a person or body must be filed and served within 6 months after the date of the decision or act, and *rule 13.5* [variation of time periods] does not apply to this time period.

(3) An originating application for judicial review must be served on

...

(c) every person or body directly affected by the application.

[17] Bow Valley and Stoney Nakoda submitted that Thunderstone is not directly affected by the judicial review, but if it is, its directors are also directors of Three Sisters, and its shareholders are related to Three Sisters' shareholders, such that service on Thunderstone was either effected through service on Three Sisters, or it was aware of the applications through its close relationship with Three Sisters. Additionally, Bow Valley and Stoney Nakoda submitted r 3.15(3)(c) infringes s 96 of the *Constitution Act, 1867*, UK 30 & 31 Victoria, c 3, as constituting a complete block to review by the courts.

[18] The parties agreed that Thunderstone is a landowner operating a business, in part on or beside the Smith Creek lands in question. It also contributed land to the preserved wildlife corridor, one of the conditions imposed by the Conservation Board when it originally approved development in this area, ceding certain of its property in the February 2020 designation of the Smith Creek Wildlife Corridor.

[19] The second chambers judge said the effect of any decision in the judicial reviews "on Thunderstone is direct". Thunderstone had participated in previous discussions about development and had an interest that was "a personal and individual interest as distinct from the general interest which appertains to the whole community": ***Kainaiwa/Blood Tribe v Alberta***, 2024 ABKB 401, para 76, citing ***Re: Endowed Schools Act***, [1898] AC 477 (PC), 483.

[20] The second chambers judge found that proper service on Thunderstone as a distinct legal entity was required "even if there is evidence of actual knowledge of the application". He said it was not relevant that the corporate shareholder of Thunderstone was related to Three Sisters corporate shareholders, nor whether some of Three Sisters' directors were also directors of Thunderstone. He concluded that Thunderstone was directly affected by the judicial review application and "ought to have been served", such that the judicial review must fail.

[21] As to the constitutionality of r 3.15(3)(c), the second chambers judge agreed that legislatures could not entirely shield administrative decisions from curial scrutiny: ***Dunsmuir v New Brunswick***, 2008 SCC 9, para 31, [2008] 1 SCR 190; ***Canada (Minister of Citizenship and***

Immigration) v Vavilov, 2019 SCC 65, para 24, [2019] 4 SCR 653; ***Yatar v TD Insurance Meloche Monnex***, 2024 SCC 8, para 61, 489 DLR (4th) 191. The issue is whether r 3.15(3)(c) creates such a hurdle that it renders it impossible for a party to initiate judicial review in compliance with the rule.

[22] The second chambers judge found the rule did not create an impossible hurdle for applicants. It required merely that parties "directly affected" be identified and served in a personal and individual manner. He concluded the "facts of this case do not require the identities of the individuals who participated in the town hall meetings or who wrote to the Designated Director to be ascertained", only that those individuals "directly affected" be identified and served. He was "not prepared to make any conclusion that the service requirements set out in r 3.15(3)(c) are unconstitutional".

[23] The second chambers judge did, however, then address the substantive submissions of Bow Valley and Stoney Nakoda. He acknowledged that pursuant to ss 41 through 44 of the *Act*, the Designated Director had authority to refer a proposed activity for consideration under the environmental assessment process. He addressed the relevant definitions of "activity", "proposed activity", and "mandatory activity" in the *Act*. He held there is no free-standing provision allowing general members of the public to request environmental assessments be undertaken under the *Act*. That is the purview of the Designated Director whose discretion to refer an activity for further consideration under s 44 is limited only to "proposed activities". "Proposed activities" as defined in s 39(e) of the *Act* means:

> (i) an activity that has not been commenced,
> (ii) an activity that is being carried on and for which an approval or registration, other than a renewal, is required but has not been obtained,
> (iii) a change to an activity where the change is one to which section 67(1) applies and, in the Director's opinion, is of a substantial nature, and
> (iv) in the case of an activity that is the subject of an approval or registration and is carried out in stages, those stages of the activity that are not yet covered by the approval or registration.

[24] The Designated Director found the area structure plans in question "did not fall within the definition of a 'proposed activity'". The second chambers judge said "[i]t was open to the Designated Director to find that the project did not fall within the definition of 'proposed activity'". He found it was reasonable for the Designated Director to find the area structure plans were inherently connected to the Conservation Board approval and formed a continuation of an ongoing project, rather than a first step in an entirely new project. The current proposal was the continuation of an already approved project found to be consistent with earlier approval, such that she had no jurisdiction to proceed to an environmental assessment.

[25] The second chambers judge also found the manner in which the Designated Director dealt with the honour of the Crown was not unreasonable.

IV. Analysis

a) Appeals 1 and 2: Standing

[26] Three Sisters says the first chambers judge erred in granting Bow Valley and Stoney Nakoda standing to bring a judicial review application of the Designated Director's response to their requests regarding the Three Sisters Mountain Village project under the *Act*. Stoney Nakoda asserts there is no reviewable error in the first chambers judge's decision on standing, and Bow Valley adopts Stoney Nakoda's submissions on this issue.

[27] Stoney Nakoda asserted a "standing as of right" because the Designated Director's decision was an administrative decision in which it was directly engaged, and the Designated Director responded to the questions posed by Stoney Nakoda. We understand that to mean an assertion of private interest standing. Private interest standing has two variations; a statutory private interest standing and a common law private interest standing: Blake, Sara, *Administrative Law in Canada*, 7th ed (Toronto: LexisNexis Canada Inc, 2022) s 7.05; Donald J M Brown & John M Evans, *Judicial Review of Administrative Action in Canada* (Thomson Reuters) ss 4.12, 4.13, 4.14.

[28] Whether a party has private interest standing to pursue a claim is a question of law and is reviewable for correctness: ***Quaintance v Quaintance (Estate)***, 2006 ABCA 47, para 10, 56 Alta LR (4th) 6; ***Reece v Edmonton (City)***, 2011 ABCA 238, para 131, 335 DLR (4th) 600, in dissent but not on this point.

i. Statutory Private Interest Standing

[29] Three Sisters submits that Bow Valley and Stoney Nakoda do not have "standing as of right", simply because the Designated Director accepted their letters requesting an environmental impact assessment and responded to them. It says Bow Valley and Stoney Nakoda had no authority to make the requests of the Designated Director under ss 41 to 44 of the *Act* and therefore cannot have standing to seek judicial review of that decision.

[30] Three Sisters says in particular there is no statutory standing under the *Act*. The Designated Director agrees there is no statutory standing as of right for Bow Valley or Stoney Nakoda in ss 41 to 44, or other provisions of the *Act*. She says the broader statutory scheme provides no statutory right for the requests made of the Designated Director, and parties cannot acquire rights under the *Act* to demand a response or to challenge the Designated Director's response. Additionally, the Designated Director says although she chose to consider and respond to the requests of Bow Valley and Stoney Nakoda there was no requirement for her to do so. The fact she did respond does not create a standing not explicitly set out in the *Act*.

[31] Bow Valley and Stoney Nakoda do not have statutory standing. Section 44 of the *Environmental Protection and Enhancement Act* sets out how the Designated Director may determine that an environmental impact assessment is required. Section 41 provides that a director under the *Act* may refer a proposed activity to the Designated Director under ss 43 to 46. That referral cannot come from a party other than a director:

> 41 Where any Director is of the opinion that the potential environmental impacts of a proposed activity warrant further consideration under the environmental assessment process, that Director may refer the proponent or the proposed activity to the Director who is designated for the purposes of sections 43 to 56 so that the proposed activity may be dealt with under section 44.

[32] Section 44 provides "[w]here a proponent of a proposed activity is referred to the Director under section 41, where the Director gives a notice under section 43 or where a proponent on the proponent's own initiative consults with the Director in respect of the application of this Division to a proposed activity, the Director shall," take prescribed steps depending on whether the proposed activity is a mandatory activity or not. This provision is limited to actions commenced by a director under the *Act* or a proponent; a party that "undertakes a proposed activity", s 38(d). In this case, that is Three Sisters. The *Act* does not contemplate third parties making requests to the Designated Director to consider whether an environmental impact assessment should be required.

[33] It is notable that other sections of the *Act*, ss 44(6), 73, 91(1)(a), 127, 196, and 197 do provide certain rights, to interested third parties for other purposes. However, that is not the case here.

[34] Interested parties cannot through their conduct generate statutory rights under the *Act* that do not otherwise exist in the *Act*. If there is no right under the *Act* to initiate the request for an environmental impact assessment, there can be no statutory right of standing on a judicial review from a decision of the Designated Director.

ii. Common Law Private Interest Standing

[35] Three Sisters also contests the conclusion that Bow Valley and Stoney Nakoda have common law private interest standing. It says they are not "aggrieved" persons who have an "interest in the legality of the challenged administrative act that is greater than the interest of the public at large": ***WV v MV***, 2024 ABKB 174, para 113; ***Alberta Liquor Store***, para 10.

[36] Three Sisters says neither Bow Valley nor Stoney Nakoda own or lease property within the relevant area structure plans, have no development rights for land located in the area, and have no business, professional or employment interests in the decision of the Designated Director. It says Stoney Nakoda's claimed Aboriginal rights or Aboriginal title over these lands was resolved by this Court's decision in ***Wesley v Alberta***, 2024 ABCA 276, 499 DLR (4th) 197, which was issued

a month prior to the chambers judge's decision, and the first chambers judge overlooked this Court's decision in referring to "ongoing litigation" over Stoney Nakoda's claimed Aboriginal rights and title.

[37] Bow Valley asserts common law private interest standing arguing it, and its predecessor, an unincorporated association of active members, have been instrumental in opposing what it considers inappropriate development in Canmore and the Bow Valley for decades. Its mission is:

> … to promote civic awareness, engagement and action on issues threatening the environmental sustainability, affordability, and community character of Canmore, Banff, and surrounding areas. It utilizes its membership, contacts and community to focus on "ensuring development in the Bow Valley in a responsible manner".

[38] Bow Valley originated the current process by its January 9, 2024 demand to the Designated Director to require an environmental impact assessment of the proposed doubling of the size of the Town of Canmore, which it says "has a significant impact on business, tourism, recreation, housing, and affordability." It says it engaged in the municipal process on the approval of the two area structure plans before town council, assisted residents in making submissions during a seven day public hearing, collected signatures from approximately 11% of the town's population to support opposition against this project, and made its own submissions in that hearing.

[39] Bow Valley applied unsuccessfully for intervenor status in the Town of Canmore's appeal of the Land and Environmental Rights Tribunal decision requiring that the town approve the two area structure plans: ***Canmore (Town of) v Three Sisters Mountain Village Properties Ltd***, 2022 ABCA 274, paras 5, 46-47. Its application was rejected because, para 50, "the legal positions being advocated by [Bow Valley] will essentially be the same as those that will be advanced by the Town of Canmore". Bow Valley says it did engage with the Designated Director and contributed to the process throughout.

[40] Stoney Nakoda says it has common law private interest standing because the projects in question lie within their traditional territory and the Treaty No 7 territory of the Stoney Nakoda. They say they continue to seek judicial declarations of their asserted Aboriginal rights, including Aboriginal title, over their traditional lands. They say they have a treaty right to hunt, fish, and carry on their traditional way of life on the lands in question, in Canmore and the Bow Valley. That interest is different and greater than the interests of the public at large, and that was the basis upon which Stoney Nakoda was granted intervenor status in the ***Canmore, 2023*** appeal of the Land and Property Rights Tribunal decision.

[41] Both Bow Valley and Stoney Nakoda have common law private interest standing in the decision of the Designated Director. In ***Finlay v Canada (Minister of Finance)***, [1986] 2 SCR 607, paras 17-22, 33 DLR (4th) 321, the Court said the *indicia* of such standing includes "sufficient private or personal interest in the subject matter of the proceedings", asserting "an interference with [a] private right", or for which the applicant "suffered special damage peculiar to himself". It

said the person asserting standing must show "he is exceptionally prejudiced by the wrongful act", or "that he is more particularly affected than other people". The asserting party must show some special interest in the operation of the legislation beyond the general interest that is common to all members of society: ***Minister of Justice (Can) v Borowski***, [1981] 2 SCR 575, 578, 130 DLR (3d) 588.

[42] In ***Alberta Liquor Store***, para 13, the Court noted that common law private interest standing is afforded to a "class of citizen that is found to have a sufficient legally recognized interest in a matter to justify the judicial review application". In ***Alberta (Attorney General) v Malin***, 2016 ABCA 396, para 18, 406 DLR (4) 368, this Court found that personal standing arises out of "a personal basis where one's legal rights have been or are likely to be affected".

[43] Based on the facts found by the first chambers judge, he correctly concluded Bow Valley and Stoney Nakoda meet the test for common law private interest standing. They both have a long history in advocating for and protecting the environment of the Town of Canmore and Bow Valley area. They have opposed this project for more than 30 years, either themselves or through predecessor entities or persons.

[44] In particular, the chambers judge found that Bow Valley was controlled by individuals who "have legal and other interests that are particular to those living in the immediate area of the [area structure plans] and the project and have vested particular interests in the outcome of the request made by the Director" and that Bow Valley "consists of interested individuals, some of whom reside in or around the town of Canmore and who stand to be potentially impacted by the [area structure plans] in question in this case".

[45] In addition, Stoney Nakoda claims treaty rights and Aboriginal rights over the lands in question. This Court's decision in ***Wesley*** did not conclude Stoney Nakoda's litigation in respect of their Aboriginal rights claim; rather, this Court confirmed the decision of the case management judge, which permitted Stoney Nakoda's claims for declaratory relief to proceed: ***Wesley*** at para 259; ***Wesley v Alberta***, 2022 ABKB 713 at paras 169-171. It is clear the development proposed in the two area structure plans will have some impact upon their rights to hunt, fish, and carry on their traditional way of life on the lands to be developed.

[46] The Designated Director's jurisdictional decision in respect of Stoney Nakoda and Bow Valley's request ended this avenue of review of the area structure plans for the applicants. Based on these facts, the first chambers judge correctly concluded both Bow Valley and Stoney have a direct and personal interest in this matter and will suffer a disadvantage if they are not entitled to proceed in the judicial review applications.

iii. Public Interest Standing

[47] The first chambers judge said he did not need to address public interest standing given his decision on private interest standing, which we have upheld. Bow Valley and Stoney Nakoda have

both invited us to address the issue of public interest standing but have provided no written submissions in that regard and have made only passing comments about public interest standing in oral submissions. As the matter is not squarely before this Court, we do not address whether or not Bow Valley or Stoney Nakoda may also have public interest standing in this proceeding. In any event, only one form of standing is required.

b) Appeals 1 and 2: Abuse of Process

[48] Three Sisters says the first chambers judge erred in finding that the applications by Bow Valley and Stoney Nakoda were not an abuse of process as a collateral attack on the Conservation Board approval, decisions of the Land and Property Rights Tribunal, and the decision in ***Canmore, 2023***. It says this application is relitigation of the wildlife corridors approved by Alberta Environment and Parks and the earlier determination of the Conservation Board that the project is in the public interest.

[49] Three Sisters argues such a collateral attack violates the principles of judicial economy, consistency, finality, and the integrity of administrative justice: ***British Columbia (Workers' Compensation Board) v Figliola***, 2011 SCC 52, para 33, [2011] 3 SCR 422; ***Toronto (City) v CUPE, Local 79***, 2003 SCC 63, para 51, [2003] 3 SCR 77.

[50] Three Sisters notes it provided an environmental impact assessment as part of the 1992 process before the Conservation Board, and submissions were made before that tribunal on wildlife corridors, and the traditional use of lands and cultural sites of the Stoney Nakoda. Those issues were also before the Land and Property Rights Tribunal and this Court in subsequent litigation. In ***Canmore 2023***, para 92, this Court said the Conservation Board decision was, "expected to govern for several decades", as its decision included a series of provisions, including that the land be developed over many years and in phases.

[51] Bow Valley and Stoney Nakoda say they seek judicial review only on the factors required for an environmental impact assessment to be ordered at this time pursuant to ss 40 to 49 of the *Act*. They say this issue was not before the Conservation Board in 1992, nor before this Court in ***Canmore, 2023***, in which this Court decided that s 619 of the *Municipal Government Act* required the Town of Canmore to adopt the two area structure plans. Bow Valley and Stoney Nakoda say the question of the Designated Director's jurisdiction in this case is distinct from previous decisions before the Conservation Board, Land and Property Rights Tribunal, and Alberta Environment and Parks, which each have separate processes with distinct scopes in the regulatory life of a large development project.

[52] Stoney Nakoda wishes to advance the argument that their s 35, *Constitution Act 1982*, Schedule B to *Canada Act 1982* [UK], 1982, c 11, rights require an environmental impact assessment on the significant expansion of the lands taken up in the Town of Canmore and the Bow Valley. Stoney Nakoda say those constitutional rights have not been addressed by the Conservation Board or the Land and Property Rights Tribunal.

[53] In an application to strike a claim under r 3.68(1)(a) and (2)(b) or (d) for abuse of process, a chambers judge's assessment of the facts, application of the law to the facts, and ultimate determination as to whether to strike a claim, is discretionary and subject to reasonableness: ***Vanmaele v Maryniak***, 2018 ABCA 179, para 6; ***Grenon v Canada Revenue Agency***, 2017 ABCA 96, para 4, [2017] 6 WWR 146; ***Nammo v Canada (Justice and Attorney General)***, 2015 ABCA 389, para 7, 609 AR 189; ***Lameman v Alberta***, 2013 ABCA 148, para 11, 85 Alta LR (5th) 64; ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140, para 11, [2014] 6 WWR 231; ***Al-Ghamdi v College and Association of Registered Nurses of Alberta***, 2020 ABCA 81, para 10.

[54] There is no basis to interfere with the first chambers judge's refusal to strike these judicial reviews as an abuse of process. This proceeding is only about the jurisdictional decision of the Designated Director under the *Act*. As the chambers judge said, while "there may be similar considerations undertaken by the Director in the future, in relation to the EPEA, and the request made should the judicial review be successful, that does not make these particular applications a collateral attack or an abuse of process".

[55] The matter to be addressed on this judicial review deals with a unique administrative process addressing the jurisdiction of the Designated Director in these circumstances, and is not a collateral attack on previous decisions.

b) Appeals 3 and 4: Service

[56] In the third and fourth appeals, Stoney Nakoda argues grounds of appeal in relation to the failure to serve under r 3.15 of the *Rules of Court*, the striking order of the second chambers judge, and the constitutional challenge to that rule under s 96 of the *Constitution Act, 1867*. Bow Valley adopts Stoney Nakoda's submissions on these points. Bow Valley and Stoney Nakoda say the second chambers judge erred in:

(a) failing to apply or misapplying the principles underlying the modern approach to statutory interpretation in considering the words of r 3.15(3)(c) in their ordinary meaning and entire context;
(b) misapplying the facts and circumstances underlying the application to strike under r 3.15(3)(c);
(c) misapprehending or misapplying the principles in ***Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 SCR 97, 124 DLR (4th) 129, in determining that this case was not an appropriate one in which to make a constitutional pronouncement; and
(d) failing to apply or misapplying the principles under s 96 of the Constitution Act, 1867, when considering their Notices of Constitutional Question.

[57] In an application to strike an application for judicial review under r 3.15(3)(c) for a failure to serve a directly affected party, a chambers judge's assessment of the facts, application of the

law to the facts, and ultimate determination as to whether to strike the application, is discretionary and subject to reasonableness review: ***Vanmaele***, para 6; ***Grenon***, para 4; ***Nammo***, para 7; ***Lameman***, para 11; ***O'Connor Associates Environmental Inc***, para 11; ***Al-Ghamdi***, para 10.

i. Failure to Serve and the Striking Order

[58] Stoney Nakoda says the second chambers judge erred when he concluded that Thunderstone was a directly affected person or body within the meaning of r 3.15(3)(c) of the *Rules of Court*. It says Thunderstone has no connection to the Three Sisters Mountain Village area structure plan and its interest in the Smith Creek area structure plan is only "general in nature".

[59] Thunderstone says it is "directly affected" by the judicial review applications. It says it has played an active role in the development of the lands in question, coordinating with Three Sisters to allow its lands to be included in applications to the Town of Canmore to secure passage of the Smith Creek area structure plan, authorizing a development and planning firm to liaise with Canmore in matters in respect of its lands and to advance all portions of the Three Sisters Mountain Village development. It notes the Smith Creek area structure plan clearly outlined its land holdings and interest. It further notes its interest in the Smith Creek area structure plan was addressed at length before the Land and Property Rights Tribunal and featured prominently in the decision of that tribunal at "Issue #3 – Inclusion of Thunderstone Lands", paras 124 to 130. Its lands were referenced in this Court's ***Canmore, 2023*** decision, para 51.

[60] Thunderstone says in the January 9, 2024 letter from Bow Valley to the Designated Director, numerous references were made to Thunderstone, its land holdings, and the wildlife corridor. Despite this, Thunderstone says it was not served with either Bow Valley's or Stoney Nakoda's originating applications for judicial review, within the six-month service period, nor at all.

[61] Rule 3.15(3)(c) provides that "an originating application for judicial review must be served on ... every person or body directly affected by the application". The words "directly affected" have been the subject of many decisions which indicate compliance with this rule is mandatory and the Court is not entitled to provide relief from its strict application: ***Athabasca Chipewyan First Nation v Alberta (Minister of Energy)***, 2011 ABCA 29, para 27, 505 AR 72; ***Kainaiwa***, paras 12, 13; ***ENMAX Corporation v Alberta (Labour Relations Board)***, 2018 ABQB 431, para 18; ***Tartal v Alberta (Human Rights Commission)***, 2023 ABKB 381, para 54; ***Raczynska v Alberta (Human Rights Commission)***, 2015 ABQB 494, para 65, 91Admin LR (5th) 165; ***Baker v Drouin***, 2017 ABQB 204, paras 11-17; ***Julien***, para 13.

[62] In ***Whitefish Lake First Nation #128 v Alberta (Minister of Environment and Protected Areas)***, 2025 ABKB 499, paras 13-25, upheld, 2026 ABCA 70, the Court conducted an extensive survey of cases and concluded that in the context of whether a judicial review proceeding "directly affects" a particular person or body, the analysis is highly fact dependent: see also ***Julien***, para 8;

Tartal, para 63. On the facts of that application, the Court determined Cold Lake First Nations was not directly affected, and dismissed the application to strike, also dismissing the alternative application of Cold Lake for intervenor status in the judicial review.

[63] Thunderstone points to examples of where an applicant for striking was directly affected because they were landowners whose rights, use, and enjoyment of their property was to be addressed in the judicial review, ***Hazkar Developments Inc v Cochrane (Town),*** 2019 ABQB 552, paras 54-56, or where the person or body will have contractual or economic relationship changes: ***Kainaiwa***, para 75.

[64] However, any effect on Thunderstone as a landowner, or with respect to its interest in the wildlife corridor, potentially flowing from the review of this jurisdictional decision by the Designated Director is too remote to "directly affect" Thunderstone within the meaning of the rule.

[65] If this Court directed that the area structure plans were a "proposed activity" that merits an environmental impact assessment, or if the Designated Director in exercising her discretion, found they were a proposed activity over which she had jurisdiction, she would still have to determine if an environmental impact assessment is required. If the activity is categorized as a "mandatory activity" under the E*nvironmental Assessment (Mandatory and Exempted Activities) Regulation*, AR 111/1993, she then would have to order an environmental impact assessment, s 44(1)(a). If the activity is not a mandatory activity, she could decide whether the proposed activity on its face warrants further environmental assessment, s 44(1)(b).

[66] If the Designated Director decides that further assessment is warranted, she must then require preparation of a screening report to outline the need for an environmental impact assessment, following which she would be required to redetermine whether that assessment was necessary: s 45(1). The screening report and any decision of the Designated Director to order an environmental impact assessment are available to the public, s 45(2), (5).

[67] Once it is determined that an environmental impact assessment is required, the proponent, Three Sisters, would be required to prepare a proposed Terms of Reference, s 48(1), and a First Nations Consultation Plan, which must then be approved by a Consultation Advisor: see Government of Alberta, *Alberta's Environmental Assessment Process*, updated December 2015.[1] Those Terms of Reference would dictate the required contents of an environmental impact assessment, in association with s 49 of the *Act*, which specifies information that would be contained unless otherwise directed.

[68] Three Sisters would next be required to submit a plan for the publication of the proposed Terms of Reference, which must approve its publication and invite public comment. After receipt

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[1] Alberta's Environmental Assessment Process" (last updated December 2015), online: https://open.alberta.ca/dataset/25654f70-8686-407b-b683-0a0521ba50d7/resource/2b4f7770-fd7a-499c-a81d-f0ac2fdee8c3/download/environmentalassessmentprocess-dec2015.pdf

of public comment, the Designated Director would then issue a final Terms of Reference, s 48(3). Three Sisters would then prepare the environmental impact assessment and submit it to the Environmental Assessment Director for review, s 50. A team of experts would be required to review the Designated Director's report, and environmental assessment process, and the Designated Director may choose to request more information from the proponent, Three Sisters.

[69] When the review team is satisfied the Terms of Reference have been met, they notify the Designated Director, and she will decide whether the plan for an environmental impact assessment is complete. If it is determined to be complete, it is referred to the applicable board or Minister to become part of the public interest decision, s 53. This does not mean the project is approved, merely that it has met the minimum information requirements for it to move to the next stage of the regulatory process, typically carried out by Alberta Environment and Parks, the Alberta Energy Regulator, the Alberta Utilities Commission, or the Natural Resources Conservation Board, Alberta's Environmental Assessment Process. The Designated Director does not have authority to approve the final project, although she may issue recommendations, s 53 of the *Act*.

[70] Even if this lengthy process had resulted in an environmental impact assessment being conducted, it appears Thunderstone would have had many opportunities as the process progressed to challenge the Designated Director's decisions in relation to it.

[71] An environmental impact assessment is intended to be a tool to provide information to the regulators and the public. While it may inform the responsible regulator's ultimate decision about whether to approve the project, the outcome of an environmental impact assessment itself does not approve or deny authorization for a project. There would be no potential impact on Thunderstone's land use until a regulator, based upon a completed process, issued a decision that altering the permission attached to the project. That would be the first instance at which Thunderstone would face any direct impact from the administrative decision maker on its land use.

[72] The statutory framework and process outlined above clearly distinguishes these facts from the facts in ***Julien***, ***Tartal***, and ***Haskar***. That potential future impact is simply too remote to find that Thunderstone's interests are "directly affected" at this very early stage of the proceedings.

ii. Section 96 Constitutional Challenge

[73] Bow Valley and Stony Nakoda challenge the constitutionality of r 3.15(3)(c), alleging it infringes s 96 of the *Constitution Act, 1867*, by limiting the court's prerogative to hear, decide, and review decisions to ensure compliance with the rule of law. They say r 3.15(3)(c) is unconstitutional when the identity of directly affected parties is unknown, uncertain, unascertainable, and any failure to serve a directly affected party automatically results in the originating application being struck or dismissed based upon the six-month service period.

[74] Bow Valley and Thunderstone say other jurisdictions either clearly delineate each party who must be served or incorporate flexibility into the service requirements by setting out a method

to verify all necessary parties have been served, and creating mechanisms to cure a failure to serve a party who may be affected by the application: *Federal Court Rules*, SOR/98-106 r 104; *Rules of Civil Procedure*, RRO 1990, Reg 194, r 38.06; *Court of Kings Bench Rules*, Man Reg 553/88, r 38.05; *Rules of Court*, NB Reg 82-73, r 38.05; *Rules of the Supreme Court*, 1986, SNL 1986, c 42, Sch D, r 54.03; *Nova Scotia Civil Procedure Rules*, Royal Gaz: Nov 19, 2008, r 7.07; *Rules of Civil Procedure*, online: https://www.courts.pe.ca/rules-of-civil-procedure, r 38.07; *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010 – 96, rr 595, 597; and Alberta's old *Rules of Court*, Alta Reg 390/1968, r 408, 753.1(3).

[75] Three Sisters agrees that if this rule were "a complete bar to superior court access, to a certain class of individuals" that could be unconstitutional, but it says that is not the case on the facts before this Court.

[76] In the present case, the identity of Thunderstone is known, certain, and was ascertainable by the parties. Moreover, as indicated above, Thunderstone is not presently a directly affected party. We have found that Bow Valley and Stoney Nakoda are not precluded by the striking application from progressing their judicial review applications, rendering the constitutional question hypothetical. It is not necessary for this Court to entertain this moot question, and we decline to do so: ***Borowski v Canada (Attorney General)***, [1989] 1 SCR 342, 353, 57 DLR (4th) 231.

iii. Appeals 3 and 4: Merits Decision

[77] Given the determinations above on standing, abuse of process, failure to serve and striking, this Court must address the merits decision of the second chambers judge on the determination of the Designated Director that she did not have authority to direct an environmental impact assessment for the Three Sisters Village area structure plan or the Smith Creek area structure plan. The decision of the Designated Director was based on her determination that the ongoing construction of the proposed projects was not a "proposed activity" as defined in s 39(e) of the *Act*. The second chambers judge concluded "[i]t was reasonable for the Director to find that as a threshold matter, this was not a proposed activity and there was no jurisdiction to proceed to an EIA".

[78] Bow Valley says the second chambers judge erred in deciding the Designated Director's decision that she lacked jurisdiction was reasonable because:

(a) the statutory scheme and principles of statutory interpretation support an expansive interpretation of the term "proposed activity";
(b) jurisprudence from this Court affirms the Designated Director's jurisdiction to consider a "proposed activity"; and
(c) the precautionary principle favours finding that the Designated Director has jurisdiction.

Stoney Nakoda adopt and agrees with Bow Valley's submissions on these points.

[79] A judicial review judge's selection of the appropriate standard of review is a question of law to be reviewed by this Court for correctness: ***Dr Q v College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, para 43, [2003] 1 SCR 226. Once the correct standard of review has been determined, in reviewing the application of that standard to the facts and law, this Court must "step into the shoes of the lower Court" such that the "appellate court's focus is, in effect, on the administrative decision" applying the reasonableness standard: ***Zenner v Prince Edward Island College of Optometrists***, 2005 SCC 77, paras 29-45, [2005] 3 SCR 645; ***Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)***, 2006 FCA 31, para 14, [2006] 3 FCR 610; ***Canada Revenue Agency v Telfer***, 2009 FCA 23, para 18, 386 NR 2012; ***Merck Frosst Canada Ltd v Canada (Health)***, 2012 SCC 3, para 247, [2012] 1 SCR 23; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36, paras 45, 46, [2013] 2 SCR 559; ***Telus Communications Inc v Telecommunications Workers Union***, 2014 ABCA 199, paras 16, 24, 575 AR 325; ***Blank v Canada (Justice)***, 2016 FCA 189, paras 24, 25, 7 Admin LR (6th) 30; ***Edmonton Police Association v Edmonton (City)***, 2017 ABCA 355, para 36, 58 Alta LR (6th) 318.

[80] Expressed more simply, but to the same end, this Court has said it must determine whether the judicial review judge correctly selected and applied the appropriate standard of review. In effect, the appellate court is in the same position as the reviewing judge: ***Alberta (Municipal Affairs) v Telus Communications Inc***, 2002 ABCA 199, paras 24-26, 218 DLR (4th) 61; ***Pridgen v University of Calgary***, 2012 ABCA 139, paras 154, 155, 350 DLR (4th) 1; ***Calgary (City) v Canadian Union of Public Employees Local 37***, 2019 ABCA 388, paras 78, 79, 439 DLR (4th) 405.

[81] Bow Valley and Stoney Nakoda submit that the proposed significant expansion of the Three Sisters Mountain Village after approximately 30 years, doubling the size and population of Canmore through a "continuation" or "expansion" of the original Conservation Board 1992 determination, is a "proposed activity" as contemplated in s 41 of the *Act*, similar to the proposed activity in ***Alexis v Alberta (Environment and Parks)***, 2020 ABCA 188, paras 21-25, 8 Alta LR (6th) 7. They say the Designated Director did not explain how or why she arrived at the conclusion that this "continuation" was not a "proposed activity".

[82] Bow Valley and Stoney Nakoda say the Designated Director's determination of her jurisdiction did not meet the criteria of reasonableness, justifiability, intelligibility, and transparency: ***Vavilov***, paras 78-81, 95, 99. They submit work in the two area structure plans have not "commenced" under s 39(1)(e) of the *Act*, the area structure plans have only just been approved, and are in the first stage in a regulatory process that includes subdivision and development approvals for its multiple stages.

[83] Bow Valley and Stoney Nakoda say that under the Conservation Board 1992 approval, each phase of development should be individually considered a "proposed activity". They say

interpretation is supported by the purpose sections in the *Act*, ss 2, 40, and the decision in ***Castle-Crown Wilderness Coalition v Flett***, 2004 ABQB 515, para 2, 366 AR 363 (but overturned at 2005 ABCA 283, 52 Alta LR (4th) 17). They rely on the precautionary principle that "where 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"; ***Christian v Alberta Environmental Appeals Board***, 2024 ABKB 586, paras 89-99; ***Reference Re Impact Assessment Act,*** 2023 SCC 23, paras 286, 306-308 (in dissent, but not on this point), 486 DLR (4th) 379, citing ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)***, 2001 SCC 40, paras 30-32, [2001] 2 SCR 241; ***Castonguay Blasting Ltd v Ontario (Environment)***, 2013 SCC 52, para 20, [2013] 3 SCR 323.

[84] Three Sisters submits the Designated Director's decision determining she had no jurisdiction to decide on whether an environment impact assessment was necessary because the proposed developments were not a "proposed activity" within s 41 of the *Act*, was reasonable. It submits the 1992 Conservation Board approval was for all 832 hectares (2,035 acres) to be developed in phases over 20 or more years as a "tourism and recreational project". It says that distinguishes this approval from those more limited appeals in the decisions referenced by Bow Valley and Three Sisters. It says this project has indeed been developed in phases almost continuously since 1992, as contemplated, and currently includes the neighborhoods of Three Sisters Creek, Three Sisters Ridge, Cairns on the Bow, Stewart Creek, Mineside, Homesteads, Peaks of Grassi, Stewart Creek Golf Course, the Gateway at Three Sisters, and the southwest and east wildlife corridors.

[85] Three Sisters says the current development for the area structure plans is one step in this development, does not expand the boundary of the area approved by the Conservation Board, does not intensify the originally contemplated development, nor add more development than approved, does not add more housing than envisioned, and falls within the scope and terms of what was approved for development, confirmed by the Land and Property Rights Tribunal and consistent with this Court's decision in ***Canmore, 2023***.

[86] Three Sisters submits these area structure plans are not a proposed activity as defined in s 39(e) of the *Act*, because this entire project was applied for and approved by the Conservation Board, and accordingly commenced in 1992. Nothing new is starting at this time; the proposed development falls wholly within the activities approved of in 1992.

[87] The purpose of the *Act* is set out in s 2, and the purpose of environmental impact assessments in s 40.

[88] Section 2 of the *Act* provides that its purpose is "to support and promote the protection, enhancement and wise use of the environment" while recognizing, amongst other things "the need for Alberta's economic growth and prosperity in an environmentally responsible manner and the need to integrate environmental protection and economic decisions in the earliest stages of planning". In includes "the principle of sustainable development", "the shared responsibility of all

Alberta citizens for ensuring the protection, enhancement and wise use of the environment through individual actions", and "opportunities made available through this Act for citizens to provide advice on decisions affecting the environment". This section highlights the balance between environmental protection and economic development. Importantly, it highlights that this balancing is to occur at the "earliest stage of planning", in this case 1992.

[89] Section 40 provides that the purpose of the environmental assessment process is "to support the goals of environmental protection and sustainable development, ... integrate environmental protection and economic decisions at the earliest stages of planning activity, ... predict the environmental, social, economic and cultural consequences of a proposed activity, ... assess plans to mitigate any adverse impacts resulting from the proposed activity, and ... provide for the involvement of the public, proponents, the government and government agencies in the review of proposed activities".

[90] In order to determine whether she had jurisdiction, the Designated Director had first to consider the purpose of the *Act*, s 2, the purpose of environmental assessment, s 40, determine whether progress on the area structure plans was an "activity", s 1(a), whether it was a "proposed activity", s 39(e), whether it had "commenced", s 44, whether an approval or registration was required but had not been obtained, whether it required a change or, if being carried out in stages, whether any of those stages were not covered by the initial approval or registration. An examination of the record before the Designated Director shows she had extensive submissions on these topics and did consider these criteria.

[91] It is clear the actions proposed under the area structure plans were activities. As to whether they were "proposed activities" the Designated Director determined they were not, because they had already been commenced, no further approvals or registrations were required, no changes of a substantial nature were proposed, and no approvals or registrations for the current stage of the activity were required for their approvals or registrations. She found that none of the applicable regulatory criteria applied, as the current project was merely "ongoing construction [as] a continuation of the overall tourism and recreational project that was applied for and approved by the Natural Resources Conservation Board in 1992".

[92] Three Sisters and Stoney Nakoda submit that after 30 years, it would be reasonable to direct a new environmental assessment, particularly considering the advance of environmental science in the meantime. Unfortunately, reasonableness or wisdom of a new assessment is not the test. An environmental assessment was done at the commencement of the project, a long-term project intended to be completed in phases over 20 years or more. The developers have properly relied upon these early approvals and do not appear to have strayed outside their terms and conditions.

[93] The issue before the second chambers judge and now before this Court, is whether the Designated Director's determination was reasonable, or put another way, whether it was justifiable, transparent, and intelligible: ***Vavilov***, paras 78-87, 95, 99; ***Dunsmuir***, para 47.

[94] The second chambers judge found the Designated Director's decision was reasonable and we agree. She reviewed the relevant operational provisions of the *Act*, indicated above, her interpretation is sound and her reasons were intelligible, justifiable, and transparent. We see no error in her conclusion that she did not have jurisdiction to exercise her discretion as to whether or not the area structure plans should be referred to an environmental impact assessment.

[95] We note there will be many future opportunities for Bow Valley and Stoney Nakoda to participate in the subdivision, development permit, development approval, and construction phases of the project.

V. Conclusion

[96] The appeals from the order of the first chambers judge are dismissed.

[97] The appeals from the order of the second chambers judge are allowed as to the striking of the judicial review and dismissed as to the merits of the decision of the Designated Director.

Appeal heard on February 5, 2026

Memorandum filed at Calgary, Alberta
this 10th day of June, 2026

Feehan J.A.

Authorized to sign for: de Wit J.A.

Friesen J.A.

Appearances:

S. C. Fluker
R. Harrison
for Bow Valley Engage Society

A.M. Simmonds
D. Aman (no appearance)
for Designated Director under the *Environmental Protection and Enhancement Act*

G. Stewart-Palmer, KC
Z. Gerard (no appearance)
for Three Sisters Mountain Village Properties Ltd

B. Barrett
A. Pantazopoulos
for Collectively the Stoney Nakoda First Nations

D.J. Wachowich, KC
S. Stokes
for Thunderstone Quarries Canmore Ltd

D. Jergeas-Legate
J. L. Keliher
for Intervenor, Minister of Justice