

In the Court of Appeal of Alberta

Citation: Fort McMurray 468 First Nation v Alberta Energy Regulator, 2026 ABCA 197

Date: 20260617

Docket: 2501-0096AC

Registry: Calgary

Between:

Fort McMurray 468 First Nation

Appellant

- and -

Alberta Energy Regulator and AdhMor Ltd.

Respondents

The Court:

**The Honourable Justice Bernette Ho
The Honourable Justice Kevin Feth
The Honourable Justice Karan Shaner**

Memorandum of Judgment

Appeal from the Decision of
the Alberta Energy Regulator
Dated the 4th day of March, 2025
(Appeal Nos. 1943588 and 19489977)

Memorandum of Judgment

The Court:

Overview

[1] This appeal addresses whether the Alberta Energy Regulator (AER) erred in law when concluding that Fort McMurray 468 First Nation lacked standing to request a regulatory appeal of certain decisions involving an oilfield waste management facility located near Fort McMurray.

[2] The AER had issued approvals authorizing the respondent, AdhMor Ltd to operate the facility, which is in the vicinity of the First Nation's reserves. The First Nation's members exercise treaty and Aboriginal rights near the facility.

[3] The First Nation filed requests for a regulatory appeal of the approvals. Under the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*), a person has standing to request a regulatory appeal only if they are "directly and adversely affected" by a decision. In this case, the First Nation argued the approvals could adversely affect members' ability to exercise treaty and Aboriginal rights. Further, the First Nation contended the cumulative effects of past resource development also affect those rights.

[4] The AER dismissed the requests because the evidence was insufficiently specific about the nature of the rights at issue, and when and where they were exercised. The lack of specificity left the AER unable to determine whether the approvals might have *any* effect on those rights. Given that conclusion, the AER declined to address the cumulative effects of prior resource development.

[5] The First Nation obtained permission to appeal to this Court: ***Fort McMurray 468 First Nation v Alberta Energy Regulator***, 2025 ABCA 242. The First Nation asserts the AER erred in law by taking an unduly restrictive approach to the "directly and adversely affected" requirement for standing, and in declining to consider the cumulative effects.

[6] At its core, the First Nation's complaint is really that the AER erred in finding the evidence insufficient to establish standing. We find that complaint to be focused on an alleged error of fact or mixed fact and law, for which no appeal lies to this Court.

[7] We conclude the AER applied the correct law governing the "directly and adversely affected" requirement. Further, no legal error is found in its reasons for not addressing the cumulative effects of past resource development. The question before the AER was whether the First Nation should be given standing. That question turned on whether the *approvals* might adversely affect the exercise of treaty or Aboriginal rights, not whether past development had done so. Historical impacts can provide context for assessing the seriousness of any adverse effects, but they do not eliminate the need for evidence showing that the approvals might adversely affect the exercise of the asserted rights.

Background

A. The Waste Management Facility

[8] The oilfield waste management facility is located approximately 35 kilometres from Fort McMurray. The facility receives, processes, and disposes of oilfield waste transported from upstream oil operations. The infrastructure includes tanks and equipment to receive and treat the waste, which is separated into process fluids, residual oil, and residual solids. Process fluids are injected into at least two underground disposal wells or transported to another waste management facility.

[9] The facility is situated in the median between the northbound and southbound lanes of Highway 63. The median covers 35 hectares, of which the facility occupies 1.08 hectares.

[10] The site lies eight kilometres from the First Nation's most populous reserve and within a 10 kilometre radius of its four reserves. The First Nation has purported to designate the area as one in which no further resource development may occur, based on concerns about the cumulative effects of previous development.

[11] The site was part of a forested hilly area until Highway 63 was twinned in 2015. That project expanded Highway 63 from a single lane roadway in each direction into a divided four-lane highway. Alberta Transportation cleared 88 acres, including the facility site, of trees and topsoil and excavated clay for construction.

[12] By 2023, when AdhMor applied for the approvals at issue in this appeal, the site was already highly disturbed and situated between the lanes of a busy highway.

B. Approvals for the Waste Management Facility

[13] In 2022, the AER granted these initial approvals to AdhMor for the facility:

- a Mineral Surface Lease permitting well-drilling;
- a Licence to Occupy permitting the construction of a padsite and two access roads; and
- Well Licences permitting the drilling of two disposal wells to a depth of 1960 metres.

The First Nation did not challenge these approvals, and their validity is not at issue in this appeal.

[14] In 2023, the AER issued a well facility approval, well licence amendments, and a miscellaneous lease, which are the contested approvals (the Approvals) for which the First Nation requested a regulatory appeal.

a. Facility Approval

[15] On June 2, 2023, AdhMor applied under the *Oil and Gas Conservation Act*, RSA 2000, c O-6, for an approval to construct and operate the facility (the Facility Approval).

[16] On September 21, 2023, the AER issued the Facility Approval without a hearing. The approval imposed restrictions on the type and amount of waste, monitoring and leak detection requirements, and terms relating to reclamation and mitigation.

b. Well Licence Amendments

[17] On June 8, 2023, AdhMor applied under the *Oil and Gas Conservation Act* to amend the two Well Licences obtained in 2022.

[18] The amendments extended the drilling commencement deadlines by one year, to the end of July 2024, but did not change the nature or scope of permitted activities. The AER granted the amendments on the same day without a hearing.

c. Miscellaneous Lease

[19] The Mineral Surface Lease granted in 2022 authorized AdhMor to use the site to operate a disposal well but not to operate a waste management facility. On June 22, 2023, AdhMor applied to convert that lease into a Miscellaneous Lease under the *Public Lands Act*, RSA 2000, c P-40. That change would authorize operation of the waste management facility but would not expand the lease area.

[20] On September 21, 2023, the AER issued the Miscellaneous Lease without a hearing. The AER characterized the conversion as “administrative in nature” because the site size remained the same and no new disturbance was contemplated.

C. Requests for regulatory appeals

[21] In the summer and fall of 2023, the First Nation filed requests for a regulatory appeal of (1) the Well Licence Amendments and (2) the Facility Approval and the Miscellaneous Lease. Each request was made under s 38 of the *REDA*.

[22] The First Nation’s submissions focussed on the potential adverse effects of the facility on its members’ constitutionally protected rights. Those submissions served two functions: establishing that the First Nation was an “eligible person” with standing to request a regulatory appeal, and supporting the merits of certain grounds of appeal.

[23] The First Nation, which adhered to Treaty 8, asserts treaty and Aboriginal rights in the area around the facility. These rights involve hunting, fishing, trapping for food, harvesting, engaging in traditional uses, and maintaining spiritual and cultural practices. The existence of these rights is

not in question in this appeal. However, a dispute exists about where, in particular, members exercise these rights, which rights they exercise, and what effect, if any, the facility may have on their exercise.

[24] The facility's location within a 10 kilometre radius of the First Nation's reserves is not disputed, and members exercise treaty rights and engage in traditional uses around their reserves. The First Nation asserted to the AER that 148 sites exist within five kilometres of the facility where members engage in activities such as berry picking, hunting, trapping, and harvesting. It also referred to nearby moose and caribou hunting sites.

[25] The First Nation commissioned a "technical report" (the Dillon Report) which provided an overview of "potential impact pathways" on members' rights. The Dillon Report was not a facility-specific traditional knowledge and land use study, but drew on studies completed for other projects and past discussions with First Nation members.

[26] Among the conclusions stated in the Dillon Report were:

- Generations of members have engaged in hunting, trapping, berry picking, and other rights-based activities in areas along what is now Highway 63.
- A "heat map", based on studies for other projects, showed "moderate to high" engagement in traditional uses within 30 kilometres of the facility site between 2006 and 2024.
- The facility lies in a boggy (muskeg) area that supports nearby wildlife habitats. The area had been a moose crossing.

[27] The Dillon Report made various submissions about how the facility might adversely affect members' ability to exercise treaty rights and engage in traditional uses. Hazardous material might spill from the facility (or from trucks transporting the waste) and contaminate nearby freshwater, vegetation, and wildlife, with knock-on effects for members' ability to hunt and harvest. Further, for the duration of the working life of the facility, members would be unable to exercise rights on the facility site. The facility would also bring an increase in truck traffic in the area, which might increase wildlife mortality, impairing opportunities to hunt, trap, and harvest.

[28] The First Nation also referred to the cumulative effects of decades of resource development. It submitted that previous approvals had already diminished members' ability to engage in traditional uses on the First Nation's traditional territory. Against that background, the approvals for the waste management facility could further reduce members' opportunities to exercise those rights and bring members closer to the point where they lack meaningful opportunities to exercise them.

D. Statutory framework for regulatory appeals

[29] A regulatory appeal is an internal administrative appeal of an AER decision made without a hearing. Section 38 of the *REDA* establishes two conditions for standing to request a regulatory appeal: an “appealable decision” and an “eligible person”.

[30] Those terms are defined differently depending on whether the AER’s decision is made under an “energy resource enactment” (such as the *Oil and Gas Conservation Act*) or a “specified enactment” (such as the *Public Lands Act*), although the practical effect is the same.

[31] Section 36(a) of the *REDA* defines which decisions are “appealable decisions”. For decisions made under the *Oil and Gas Conservation Act*, every decision made without a hearing is an “appealable decision”: s 36(a)(iv). For decisions made under the *Public Lands Act*, a decision is an “appealable decision” only if (a) it was made without a hearing and (b) the person requesting the appeal is “directly and adversely affected” by it: s 36(a)(iii) of the *REDA*, read with s 121 of the *Public Lands Act* and ss 211(a) and 212(1)(b) of the *Public Lands Administration Regulation*, Alta Reg 187/2011.

[32] Section 36(b) of the *REDA* sets out who is an “eligible person”. While the definition is more complex for AER decisions under the *Public Lands Act* than decisions under an energy resource enactment, the net effect is the same: an “eligible person” is a person who is “directly and adversely affected by a decision”.

AER Decision

[33] In March 2025, the AER dismissed both requests for a regulatory appeal after concluding the First Nation was not an “eligible person” with respect to any of the Approvals and that the issuance of the Miscellaneous Lease under the *Public Lands Act* was not an “appealable decision.”

[34] The AER held that a finding that an approval directly and adversely affects treaty or Aboriginal rights must be grounded in evidence of “some degree of location or connection” between the project and the asserted rights. Consequently, the First Nation had to adduce specific evidence about the location and nature of rights or traditional uses.

[35] The AER framed the central issue as “whether [the First Nation] has shown that its members exercise rights on or in proximity to the Facility such that it may be affected by the Approvals.” The AER found that the evidence adduced was too generalized to support such a finding.

[36] The Dillon Report described the traditional uses in general terms, such as “hunting, commercial and personal trapping, berry picking and other rights-based uses”, but did not provide particulars. The report was vague about location, stating that members engaged in these uses “in

areas along Highway 63, including the Facility, and in adjacent areas”. The report also did not explain how and to what extent the facility might affect the uses identified.

[37] The report referred to traditional use sites along Highway 63 but indicated that these uses ceased when the land was cleared in 2015 during the Highway 63 twinning project. How the facility, or the Approvals authorizing it, could adversely affect uses that had stopped years earlier was not explained. The heat map also failed to identify what particular traditional uses were depicted and where specifically, the members engaged in them.

[38] The AER found that addressing the First Nation’s arguments about the cumulative effects of prior resource development was unnecessary. Cumulative effects might be relevant to determining, among other things, whether an approval infringes treaty rights, but the issue before the AER was “more basic” - whether the Approvals affected the asserted rights and traditional uses at all. In the absence of sufficiently detailed evidence, the AER was unable to make that finding.

Grounds of appeal

[39] The First Nation obtained permission to appeal on three grounds, but elected to advance only two:

1. Whether the AER erred in its interpretation of the statutory requirements under the *REDA* in its determination that the First Nation was not eligible to appeal the Approvals.
2. Whether the AER erred by refusing to consider the cumulative impacts of the Approvals on the First Nation’s treaty rights and traditional uses in its determination that the First Nation was not eligible to appeal the Approvals.

[40] An appeal of AER decisions to this Court under s 45(1) of the *REDA* is limited to questions of law and jurisdiction. No appeal lies on questions of fact or questions of mixed fact and law: *O’Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA 348 at para 26; *Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14 at paras 18, 57; *Fort McMurray 468 First Nation v Alberta Energy Regulator*, 2025 ABCA 242 at para 7.

[41] To the extent the First Nation argues that the AER’s decision on standing reflects extricable errors of law, the standard of review is correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37, [2019] 4 SCR 653. However, challenges to the AER’s weighing of the evidence or the application of the law to the evidence falls outside the scope of an appeal to this Court.

Analysis

A. The requirement to be “directly and adversely affected by a decision”

[42] The person requesting the regulatory appeal must be “directly and adversely affected by a decision”: *REDA* ss 36(a)(iii), 36(b).

[43] On appeal, the parties generally agree about the law governing this aspect of the standing requirement. Their dispute concerns whether the AER applied the correct law in deciding that the First Nation lacked standing to request a regulatory appeal.

[44] The phrase “directly and adversely affected by a decision” is not defined in the *REDA*. The breadth of the language used, together with the absence of a statutory definition, indicates a legislative intention to confer broad discretion on the AER to determine whether a person is sufficiently affected by an approval decision to have standing to appeal it. As a result, whether a person is “directly and adversely affected” is largely a question of fact, not law, for the AER to decide.

[45] A line of cases originating with *Dene Tha' First Nation v Alberta (Energy and Utilities Board)*, 2005 ABCA 68 [*Dene Tha'*] provides some guidance about how to satisfy the “directly and adversely affected” requirement.

[46] *Dene Tha'* was decided under the predecessor to the *REDA*. Under that legislation, the Energy Resources Conservation Board was required to afford participation rights if “its decision on an application may directly and adversely affect the rights of a person”: *Energy Resources Conservation Act*, RSA 2000, c E-10, s 26(2). Despite the different statutory context, we agree that *Dene Tha'* and cases following it remain authoritative on standing under the *REDA*.

[47] *Dene Tha'* held that standing to participate in a Board decision had a legal and a factual component: *Dene Tha'* at para 10. To satisfy the legal component, the person had to establish a right known to law. To satisfy the factual component, the person had to provide evidence showing that the decision may directly and adversely affect the identified right. The legal component is no longer essential to standing to request a regulatory appeal under the *REDA* because relevant effects are not restricted to effects on legal rights. The language in s 36 of the *REDA* - a person who “is directly and adversely affected by the decision” – does not refer to effects on legal rights.

[48] The issue in *Dene Tha'* was whether a First Nation had provided sufficient information to establish that approvals for wells and access roads on Crown land adjacent to, but not within, its reserve could adversely affect members’ treaty and Aboriginal rights. Commenting on the information supplied, the Court stated at para 14:

[T]he Board *still needed some facts to go on*. It is not compelled by this legislation to order intervention and a hearing whenever anyone anywhere in Alberta merely asserts a possible aboriginal or treaty right. *Some degree of location or connection between the work proposed and the right asserted is reasonable. What degree is a question of fact for the Board* (emphasis added).

Read in context, this passage means that the Board (now the AER) cannot find that a person has standing without evidence explaining how the approval could adversely affect treaty or Aboriginal rights. In some cases, this may require specific evidence about where, in relation to the authorized activity, the rights are exercised and which rights are said to be affected.

[49] In ***Dene Tha'***, the information before the Board was insufficiently specific to find that the First Nation had standing. A number of rights were vaguely identified, including the right to trap, but there was no precise information: ***Dene Tha'*** at para 16. The Board had no “hard information” about where, in relation to the wellsites, the First Nation’s members hunted and trapped: ***Dene Tha'*** at para 18.

[50] ***Dene Tha'*** did not create a fixed rule about the degree of specificity required to establish that an approval could adversely affect treaty or Aboriginal rights. As ***Dene Tha'*** itself recognized, the required degree of “location or connection” is a question of fact, not law. A single judge of this Court took the same approach to standing to request a regulatory appeal in ***O'Chiese First Nation v Alberta Energy Regulator***, 2015 ABCA 348.

[51] ***Dene Tha'*** addressed the need for specific evidence but not the standard of proof. In ***Kelly v Alberta (Energy Resources Conservation Board)***, 2011 ABCA 325, [Kelly] this Court held that it is not necessary to show that the approval will certainly cause, or will probably cause, an adverse effect. A standard of proof lower than a balance of probabilities is appropriate because that preserves the distinction between determining eligibility to appeal and deciding the merits of an appeal. The standard of proof in a particular case will depend on the “magnitude of risk” (i.e., the probability of the adverse effect and how serious it is). The AER decides “whether the magnitude of risk is such that the applicant has become ‘directly and adversely’ affected”: ***Kelly*** at para 26.

[52] The parties referred to this Court’s decision in ***Normtek Radiation Services Ltd v Alberta Environmental Appeal Board***, 2020 ABCA 456 [Normtek], which addressed standing to submit a notice of appeal of an approval of a designated activity under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12. One condition for standing is that the person “is directly affected by the Director’s decision.” ***Normtek*** held that there is no categorical restriction on the types of adverse effect that can give rise to standing and that the standard of proof is a “reasonable possibility”.

[53] For the purposes of this appeal, we see no material difference between the law as stated in ***Normtek*** and in the line of cases following ***Dene Tha'***, and the parties did not argue otherwise.

B. The AER did not misinterpret or fail to apply the law on “directly and adversely affected”

[54] The AER concluded the First Nation did not establish that it was directly and adversely affected by the Approvals because the evidence was insufficiently specific to show how the facility could affect members’ exercise of treaty rights and traditional uses.

[55] On appeal, the First Nation argues the AER reached that conclusion by applying an unduly restrictive understanding of the “directly and adversely affected” requirement for standing. For the reasons to follow, we reject that submission.

[56] The First Nation alleges three related but distinct errors:

1. The AER disregarded “future prospective harms”;
2. The AER applied a standard of proof that was too high; and
3. The AER required greater specificity than is necessary for standing.

[57] The argument about “future prospective harms” is that the AER denied standing because the First Nation’s evidence addressed the prospective effects of the Approvals on treaty rights and traditional uses. The submission suggests that the AER treated prospective effects as falling outside the scope of “direct and adverse effects.”

[58] That submission is unpersuasive because the “directly and adversely affected” test for standing is a causal one and asks whether the approval decision *could cause* adverse effects on a person or their rights. Such effects are necessarily prospective.

[59] In any event, nothing in the AER’s decision suggests the requests for a regulatory appeal were rejected because the First Nation’s evidence concerned “future prospective harms” to its members’ rights. Neither that language nor the suggestion appears in the AER’s reasons.

[60] The First Nation’s argument about the standard of proof fails for similar reasons. As noted, a person requesting a regulatory appeal need not establish with certainty, or on a balance of probabilities, that they will be directly and adversely affected by an approval decision. Although not stated expressly, the First Nation’s factum implies that the AER applied too high a standard of proof to the First Nation’s evidence.

[61] We do not agree. When assessing the evidence, the AER framed “the critical issue” as whether the evidence showed “that its members exercise rights on or in proximity to the Facility such that it *may* be affected by the Approvals”. That is an accurate statement of the standard of proof, and this aspect of the AER’s decision does not disclose an error of law.

[62] The final sub-issue concerns the specificity of the evidence adduced by the First Nation.

[63] The Dillon Report referred to various categories of traditional uses like berry picking, hunting, gathering medicinal plants, trapping areas, and traplines, but did not identify, for example, specific plants or their uses, when the practices were undertaken, or whether the practices continued to present day. In terms of location, the First Nation asserted that numerous traditional use sites were within a five kilometre radius of the facility, and the Dillon Report stated that members engaged in traditional uses “in areas along Highway 63”.

[64] The AER found that evidence was insufficiently specific. The First Nation argues that this discloses an error of law because the AER required greater specificity than is legally necessary for standing.

[65] We disagree. No fixed legal rule prescribes the degree of specificity required to show that an approval decision, or the activities it authorizes, could adversely affect the exercise of treaty or Aboriginal rights. Whether the evidence is sufficiently specific about the nature or location of the asserted rights is a question of fact for the AER.

[66] Since no legal rule prescribes the degree of specificity needed to establish standing, the AER did not err in law by concluding that the First Nation’s evidence lacked sufficient specificity. Any error would, at most, be one of fact or mixed fact and law. Whether the AER made such an error is outside the jurisdiction of this Court. Appeals under s 45 of the *REDA* are restricted to questions of law or jurisdiction, which excludes factual questions.

[67] The parties made submissions on whether the AER’s decision discloses a palpable and overriding error of fact, but that issue does not arise given the limits on the Court’s jurisdiction. This should not be taken as implying that the AER erred. The generality of the evidence left a real question as to *how* the Approvals could adversely affect members’ exercise of treaty or Aboriginal rights. The following considerations contribute to the concern:

- The facility occupies a small portion of the median dividing the northbound and southbound lanes of Highway 63. On average, 4000 vehicles use this section of the highway each day.
- An approximately 88 acre area around the facility was cleared of trees, topsoil, and clay during construction of the Highway 63 twinning in 2015. There is no evidence in the record of regrowth.
- The record indicates that First Nation members ceased engaging in traditional uses in areas along Highway 63 when the land was cleared for the purpose of the twinning project.
- By the time the AER issued the Approvals, construction had already begun under the 2022 approvals. The 2022 approvals were not challenged.

[68] In light of those facts, the AER could reasonably conclude that the evidence about members exercising certain categories of rights in “areas along Highway 63” and within five kilometres of the facility left an explanatory gap, which the generalized evidence did not adequately address.

[69] The First Nation also argued that the Approvals could affect the exercise of rights beyond the facility and areas along Highway 63 because hazardous materials might spill above or below ground, contaminating waterbodies or harvesting sites. However, those concerns were not grounded in specific evidence and remained abstract risks. The Dillon Report, for example, addressed the possibility of surface or subsurface leaks or spills but was unable to assess the sufficiency of preventative and mitigative measures, due to a lack of information. The Facility Approval imposed conditions aimed at monitoring, preventing, and mitigating leaks and spills, and the AER reasonably concluded that insufficient evidence was presented to show the conditions were inadequate.

[70] In summary, we dismiss this ground of appeal.

C. The AER did not err by declining to consider cumulative effects

[71] The First Nation's requests for a regulatory appeal included submissions about the cumulative effects of previous resource development in the area surrounding the facility. Those submissions were meant to provide context for the standing argument. The First Nation argued that past resource development in the oil sands region had significantly impaired members' ability to exercise treaty rights and engage in traditional uses. Against that backdrop, the First Nation submitted it was especially important that the Approvals not further diminish the remaining opportunities to exercise those rights.

[72] The First Nation referred to cases holding that cumulative effects of resource development can be relevant to whether an approval, or the activities it authorizes, infringes treaty rights. In some circumstances, the cumulative effects of past resource development may reach a "tipping point" at which further approvals leave First Nation members without meaningful opportunities to exercise treaty rights, or significantly diminish those opportunities: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 48, [2005] 3 SCR 388 [*Mikisew*]; *Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14 at para 56 [*Fort McKay 2019*]; *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 at para 79 (per Greckol JA, concurring); *Yahey v British Columbia*, 2021 BCSC 1287 at para 528 [*Yahey*].

[73] The AER mentioned those cases but concluded that considering the arguments about cumulative effects was unnecessary:

In the current Requests, cumulative effects do not need to be considered.

The subject of the Requests is not treaty rights, instead the issues concern traditional uses (although the FM468FN does make some reference to treaty rights in their materials). Asserted traditional uses should be specific in terms of what the activity is, where the activity is located and how the Approvals will affect the activity. The

test for directly and adversely affected is the degree of connection between the traditional use and the “work proposed” in this circumstance.

Cumulative effects are deleterious effects that when combined, reach a tipping point where rights become less meaningful or impossible. Here, the materials before the AER are unclear on what the asserted traditional uses are and if they are affected by the Approvals. This is not a case where the asserted rights are firmly established and the AER must decide the degree to which the original right has been altered or affected by gradual change; here, the question is much more basic than that: did FM468FN establish in the first place that their traditional uses are affected by the Approvals?

[74] On appeal, the First Nation argues that the AER’s reasons contain three errors of law: (1) treating the cumulative effects of past resource development as irrelevant to standing to request a regulatory appeal; (2) conflating the “directly and adversely affected” requirement for standing with the test for infringement of treaty rights; and (3) misapprehending the requests for a regulatory appeal as asserting adverse effects on “traditional uses” but not treaty rights.

[75] We reject these arguments.

[76] The primary argument is that the AER disregarded the cumulative effects of past resource development because it had an unduly narrow understanding of their legal relevance. According to the First Nation, the AER assumed that cumulative effects are relevant only to determining whether an approval infringes treaty rights and not to whether a First Nation has standing to request a regulatory appeal.

[77] In our view, however, the AER did not decline to consider cumulative effects by taking an unduly limited approach. The AER did not say that cumulative effects are never relevant to standing. Instead, the AER found that considering cumulative effects in this case was unnecessary because the First Nation had not shown that the Approvals could adversely affect members’ exercise of treaty or Aboriginal rights. That reasoning accurately reflects the law.

[78] Under s 36 of the *REDA*, standing to request a regulatory appeal depends on whether the First Nation “is directly and adversely affected *by a decision*” (emphasis added). The focus is on the effects of the *approval decision*. The cumulative effects of past resource development do not, on their own, give rise to standing. They may inform the assessment of seriousness once it is shown that an *approval decision* could adversely affect the exercise of treaty or Aboriginal rights, but cumulative effects do not remove the need to show that an *approval decision* could impair the exercise of those rights. A similar statement appears in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41, [2017] 1 SCR 1099 at para 41; the duty to consult is triggered by a government decision, not by the cumulative effects of prior resource development.

[79] As the AER concluded that the evidence failed to show that the Approvals could adversely affect the asserted rights, the further question of how serious the effects might be – to which cumulative effects may be relevant – did not arise.

[80] The First Nation also argues that the AER conflated the test governing infringement of treaty rights with the “directly and adversely affected” requirement for standing to request a regulatory appeal. The alleged error led the AER to require more evidence for standing than was legally necessary.

[81] The “directly and adversely affected” requirement for standing and the test for infringement of treaty rights are distinct. For standing, the First Nation must show that the Approvals could adversely affect members’ exercise of treaty or Aboriginal rights. Establishing an infringement of treaty rights arguably requires more -- that the Approvals would deprive First Nation members of all meaningful opportunity to exercise treaty rights or, at least, would significantly diminish those opportunities: see *Mikisew* at para 48; *Fort McKay 2019* at para 56; *Yahey* at paras 526-529.

[82] We do not agree that the AER conflated the two standards. The reasons demonstrate the AER understood that the issue was whether the Approvals could adversely affect the exercise of the asserted rights:

Cumulative effects are deleterious effects that when combined, reach a tipping point where rights become less meaningful or impossible ... here, the question is much more basic than that: did the [First Nation] establish in the first place that their traditional uses are affected by the Approvals?

This confirms that the AER distinguished between the threshold inquiry for standing and the more demanding standard for treaty infringement. The “more basic” question was whether the evidence demonstrated potential adverse effects sufficient for standing, not whether the Approvals, together with prior resource development, would infringe treaty rights.

[83] The final issue is whether the AER misapprehended the requests for a regulatory appeal as asserting adverse effects on “traditional uses” but not treaty rights.

[84] In isolation, the portion of the AER decision reproduced at paragraph 73 above could be read as denying that the First Nation asserted adverse effects on treaty rights. However, when the decision is read as a whole, we are satisfied that the AER understood the First Nation’s argument that the Approvals could have adverse effects on Treaty 8 rights as well as “traditional uses”. Earlier parts of the decision, which summarized the submissions, contain numerous references to the First Nation asserting adverse effects on treaty rights. In the portion quoted, the AER noted that the First Nation “does make some reference to treaty rights in their materials.”

[85] As we understand the reasons, the AER did not deny that treaty rights were in issue. Rather, it observed that the cases cited by the First Nation addressed infringement of treaty rights, which was not the question before the AER.

[86] In summary, we dismiss this ground of appeal.

Conclusion

[87] The appeal is dismissed.

Appeal heard on April 14, 2026

Memorandum filed at Calgary, Alberta
this 17th day of June, 2026

Authorized to sign for: Ho J.A.

Feth J.A.

Shaner J.A.

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