

NOTICE OF DECISION

FILE NO. **SDAB 2024-003**

APPLICATION No.: **2023-DP-00125**

DEVELOPMENT: **Liquor Store, Office and Warehouse**

LAND USE DESIGNATION: **HC – Hamlet Commercial District**

LEGAL DESCRIPTION: **Lot 3, Block 10, Plan 5642NY**

CIVIC ADDRESS: **Fort Chipewyan, Alberta**

IN THE MATTER OF AN APPEAL filed with the Regional Municipality of Wood Buffalo Subdivision and Development Appeal Board (“the Board”) pursuant to Sections 685 and 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26, the Appeal Hearing was held via hybrid format on Monday, October 28, 2024 with members of the Board in the Jubilee Centre, 7th Floor Boardroom, 9909 Franklin Avenue, Fort McMurray, Alberta and the parties attending virtually.

BETWEEN:

Appeal 1 - Daniel Roy (“Appellant 1”) represented by Robert Homersham, Counsel for the Appellant

Appeal 2 - Mikisew Cree First Nation acting through 1112958 Alberta Ltd., Cree-Ations Enterprises; and
Mistee Seepee Development Corporation Ltd (collectively “Appellant 2”) represented by Orlagh O’Kelly, Counsel for the Appellant

-and-

The Regional Municipality of Wood Buffalo (“the Respondent”)

BEFORE:

D. Cleaver (Chair)
K. Carruthers
N. Mahgoub
T. Morris

Administration:

H. Fredeen, Clerk for the Subdivision and Development Appeal Board
S. Soutter, Manager, Legislative Services

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- [1] This hearing deals with 2 appeals in relation to Development Permit No. 2023-DP-00125 issued to Mr. Daniel Roy for a Liquor Store, Office and Warehouse at 193 Mackenzie Avenue, Fort Chipewyan, AB, legally described as Lot 3, Block, 10, Plan 5642NY (the "Lands"). Mr. Roy (Appellant 1) filed an appeal against Condition 26, which imposed limits on the hours of operations. A second appeal was filed by Mikisew Cree First Nation acting through 1112958 Alberta Ltd., Cree-Ations Enterprises; and Mistee Seepee Development Corporation Ltd (collectively "Appellant 2") against the issuance of the Development Permit.
- [2] The Board determined that it would hold one hearing in relation to both appeals, since both appeals were related to the same Development Permit. The hearing was opened by the Board on September 19, 2024. At that hearing, the Development Authority requested an adjournment due to the lack of availability of the Planner who handled the file. Following submissions from the parties, the Board adjourned the hearing to October 28, 2024 and set out exchange dates for the parties.
- [3] Appellant 2 provided notice to the parties (and included argument in their written submissions) that they would be arguing that the Municipality and the Development Authority had failed to comply with their duty to consult. Following exchanges of correspondence amongst the parties regarding whether the hearing set for October 28, 2024 would address only the question of the Board's jurisdiction or would address both the jurisdictional question and the merits, the Board directed that all parties be ready to present their cases on both the jurisdictional question and the merits of the appeal on October 28, 2024.
- [4] On September 19, 2024 and October 28, 2024, following the introduction of the Board, the Chair confirmed with the parties in attendance that there were no objections to the constitution of the Board. None of the Board members identified any reason they could not hear the appeals.

PRELIMINARY ISSUES

- [5] The Board outlined the process that it was going to follow which included that the Board would sit until 8.30 pm and then, if it could not complete the hearing, adjourn to another date.
- [6] The Board advised the parties that its standard practice is to permit the Appellant, Applicant and Development Authority 20 minutes for their presentations, and to allow 5 minutes for those parties for closing. The Board provides affected persons 5 minutes to make their presentations. The Board advised that it was aware that the Court of Appeal grants parties 30 minutes to make their presentations for permissions to appeal and 45 minutes on a full appeal. The Board noted that planning matters are to be dealt with expeditiously and in a timely manner. With that, the Board was prepared to be flexible recognizing that all parties need to be provided with procedural fairness. Since the hearing

started at 4.00 pm, the Board would be sitting for 4.5 hours on October 28, 2024. The Board proposed that each party would be provided with one hour for their main presentations (by counsel) and that there would be questioning possible following that. Those individuals speaking in support of the party would be given 5 minutes to speak, before questioning was available to the other parties. The Board identified the following speakers:

- a. For Appellant 1 – Daniel Roy, Guy Thacker, Charlie Frazer and Bruce Inglis;
- b. For Appellant 2 - Chief Billy-Joe Tuccaro, Councillor Paul Tuccaro, CEO Kerrie Ceretzke and Mitchel Bowers.

[7] The Board advised the Board's standard practice is not to allow cross examination, and all questions should be through the Chair.

[8] The Board asked whether the parties had any objections to the process. None of the parties raised any objections to the identified process.

[9] Appellant 1 asked whether the jurisdictional questions from Appellant 2 would be addressed as a preliminary matter, suggesting that it would be better for the preliminary question to be argued first.

[10] Appellant 1:

- a. noted that the initial suggestion of Appellant 2 was to use the October 28, 2024 hearing date to schedule further hearings;
- b. wanted the Board to come to a decision as soon as reasonably possible because the permit was applied for in 2023;
- c. suggested that the time on October 28, 2024, be used to address the jurisdictional issue and that the Board can determine that issue during the hearing or adjourn until it makes its decision on that point;
- d. advised that the question of jurisdiction is not pre-emptory. The Board must decide what is properly within its jurisdiction and cannot hear all of the evidence and then sort it out; and
- e. argued that all of the evidence is in the hearing package. There are other issues that Appellant 2 has raised that are non-constitutional and before the Board. Appellant 1 is not suggesting that Appellant 2 does not have an appeal or that it is only a constitutional challenge. However, Appellant 2's constitutional challenge is outside the jurisdiction of the Board, and the Board must make that decision before proceeding.

[11] In response, Appellant 2:

- a. argued that they had raised as a possibility using the hearing on October 28, 2024 to address the jurisdictional question in relation to whether the Board had the ability to hear and discharge the duty to consult, but Appellant 1 had disagreed;
- b. would like the issues of consultation and the merits of the appeal to be heard together;
- c. took issue with the characterization of their concerns as purely constitutional on the basis that it suggested a racial basis for the complaints;
- d. argued that their concerns are community-based, and the issues can be framed in a number of avenues. They were prepared to proceed on all fronts as the Board suggested; and
- e. argued that hearing the matter separately raises procedural fairness issues, particularly since they had previously proposed splitting the issues of jurisdiction and merit. The appeal is about the health of the community. Appellant 2 argued that splitting the jurisdictional hearing from the merit hearing without notice would be procedurally unfair.

[12] The Municipality:

- a. stated that the Board is the master of its own procedure and suggested that there may be some practical clarity afforded by first dealing with Appellant 1's characterization of the preliminary issue of the jurisdiction of the Board, in the same way that the Board makes a determination at the outset of a hearing regarding whether parties are affected;
- b. stated that if the Board only rules on the question of jurisdiction, the Board may be left going back and forth between the parties' submissions; and
- c. supported all matters being heard, but for the benefit of all, the Municipality would prefer to address the jurisdictional matters at the outset with the Board deciding and if it proceeds on a full hearing, then it can come back to the planning matters.

[13] Following consideration of the submissions of the parties, the Board determined that it would hear the submissions of the parties on jurisdiction and merit together. The evidence dealing with jurisdiction and the merits of the appeal appear to be intertwined. The Board was of the view that attempting to separate out the questions of merit and jurisdiction might take more time than hearing the evidence and argument together. The Board is mindful that the parties wish for an expeditious hearing and that this matter has already been adjourned once. All of these submissions (on the jurisdictional question and on the merits) are within the Board's hearing package and the Board is able to consider the argument on

jurisdiction as well as the merits and make a decision. The Board has weighed the parties' right to a full and fair hearing and their right to an expeditious resolution of the planning merits. The Board is of the view that procedural fairness is accorded to all parties by having the jurisdictional question and the merits of the appeals dealt with at the same time.

[14] The Chair confirmed that everyone in attendance had the full hearing package prepared for the hearing. There were no objections to any of the exhibits. The Board marked the exhibits received as set out at the end of this decision. There were no further written submissions not previously provided to the Board that any party wished to include.

[15] The appeals were filed in time, in accordance with s. 686 of the *Municipal Government Act, RSA 2000, c M-26* (the "MGA").

MERIT HEARING

Summary of Hearing

[16] The following is a brief summary of the oral and written evidence and arguments submitted to the Board.

Submission of the Development Authority

[17] The Development Authority spoke to Exhibit 12, the submissions of the Development Authority. The lands are zoned Hamlet Commercial in the Regional Municipality Wood Buffalo's Land Use Bylaw ("LUB"). The development permit application for a liquor store, office and warehouse sales was approved subject to conditions on August 16, 2024. The Development Authority noted that Alberta Gaming, Liquor and Cannabis (AGLC) allows liquor stores to operate from 9.00 am-2.00 am on Mondays through Sundays. Outside of the hours listed, the sale of alcohol is prohibited. Condition 26 of the development permit approval limits the hours of operation from 9.00 am – 6.00 pm, Monday to Sunday. The AGLC retail liquor store handbook is found at Exhibit 12, Attachment 14 at page 203.

[18] The LUB provides that the uses of liquor store, office and warehouse sales are discretionary in the Hamlet Commercial district and the Development Authority is able to approve the uses with or without conditions. It is within the authority of the Board to consider the appeal. Given the nature of the use, the development permit application was referred to Municipal Planning Commission ("MPC") (Exhibit 12, Attachment 13).

[19] The Development Authority identified deficiencies within the application and advised the Applicant on July 19, 2023. On July 19, 2023, the missing information was provided to the Development Authority. On July 21, 2023, the application was elevated to MPC for enhanced community engagement.

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- [20] The Applicant was advised that interested parties could appeal the decision to the Subdivision and Development Appeal Board. On July 25, 2023 the Development Authority circulated the application to internal and external stakeholders (page 159 of the hearing package) with a response date for comments of August 17, 2023.
- [21] The Development Authority was of the view that enhanced engagement was required to address community concerns about alcohol. Section 17.2.b of the LUB states that the Development Authority may refer to the Municipal Planning Commission permitted or discretionary uses that the Development Authority wishes to refer. The normal process of the Development Authority is to notify adjacent property owners within a 100-metre radius of a proposed development and to circulate the application to internal and external reviewers. The Development Authority did circulate the application to the internal and external reviewers, but due to the concerns about the broader community, notifications were also sent to all property owners within the Fort Chipewyan hamlet boundary, posted at the community hall in the community, and provided to the three First Nations- Athabasca Chipewyan First Nation, the Fort Chipewyan Métis Nation and the Mikisew Cree First Nation ("MCFN"). The Development Authority provided a deadline of August 17, 2023 for residents and reviewers to provide comments. The decision to notify property owners exceeded the Municipality's standard process and was within the discretionary authority of the Development Authority.
- [22] On August 17, 2023, the Development Authority was notified by the Municipality's Indigenous and Rural Relations Department that community leadership had requested a one-week extension to the August 17, 2023 deadline and the deadline was moved to August 25, 2023. The Development Authority received comments from internal reviewers such as Engineering, Safety Codes and the Regional Emergency Services Department. By August 25, 2023, the Development Authority received 9 letters from individual residents of Fort Chipewyan. The Development Authority received a letter from the MCFN signed by Chief Tuccaro. None of those letters expressed support for the development. Those responding referred to current issues within the community relating to drugs and alcohol including the escalation of crime within the community. Between September 2023 and June 2024, the Development Authority worked with the Applicant to address the comments from the internal and external reviewers. There was a period between December 2023 and February 2024 during which the Applicant was not in communication with the Development Authority by reason of the agent not being able to fulfill their duties. In July 2024, the Development Authority was ready to render a decision having received all required information. The major items requested by the reviewers were addressed by the Applicant. This included submitting new technical drawings required by Emergency Services and other reviewing agencies.

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- [23] On August 16, 2024, the Development Authority approved and issued Development Permit No. 2023-DP-00125 with conditions, including condition 26 which restricted the hours of operation of the liquor store. The Development Authority stated that there was no justifiable planning reason to refuse the application. The Development Permit Application was in alignment with the Municipal Development Plan and the Fort Chipewyan Area Structure Plan 2018 and the regulations in the Land Use Bylaw (see Exhibit 12, page 193).
- [24] Section C.2.4 of the Municipality's Municipal Development Plan emphasizes the importance of balanced growth in Fort Chipewyan and encourages development near the community core to direct development into the area to optimize the use of under-utilized lands.
- [25] Under the Fort Chipewyan Area Structure Plan, the property is situated within the designated Community Core, which is envisioned to be the heart of the hamlet and hub for commercial, institutional and residential uses. Existing vacant industrial lands have been identified to provide opportunities for development. The Fort Chipewyan Area Structure Plan supports the development of retail commercial, public service and residential uses within the community core and allows a mix of commercial uses.
- [26] The LUB has zoned the lands as Hamlet Commercial (section 110). Liquor store, office and warehouse sales are all discretionary uses within that district.
- [27] The Development Authority imposed the condition restricting hours of operation pursuant to the authority granted under section 27.2(a) of the LUB.
- [28] The Development Authority noted that there were no grounds to refuse the application. However, considering the feedback from community members and the letter from Chief Tuccaro on behalf of the MCFN, it was important for the Development Authority to address the concerns raised. Therefore, the Development Authority imposed conditions restricting the hours of operation which it felt was appropriate and were aimed to mitigate a primary community concern regarding the accessibility and availability of alcoholic beverages.
- [29] Counsel for the Development Authority addressed the Board's role as a constitutional decision maker. The question of the duty to consult was a constitutional question. Treaty rights that arise from the oral tradition were considered in the case of *Clyde River* (located in Exhibit 14). The decision by the Supreme Court of Canada in the *Clyde River* case is accompanied by a second case, *Chippewas of the Thames First Nation v. Enbridge* (also found in Exhibit 14).
- [30] Paragraph 19 of the Clyde River case states:

[19] The duty to consult seeks to protect Aboriginal and treaty rights while furthering reconciliation between Indigenous peoples and the Crown (Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, [2010] 2 S.C.R. 650, at para. 34). It has both a constitutional and a legal dimension (R. v. Kapp, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; Carrier Sekani, at para. 34). Its constitutional dimension is grounded in the honour of the Crown (Kapp, at para. 6). This principle is in turn enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal and treaty rights (Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), 2004 SCC 74, [2004] 3 S.C.R. 550, at para. 24). And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (Haida, at para. 53).

- [31] Counsel for the Development Authority noted that *Clyde River* states that the duty to consult has a constitutional and legal dimension. The constitutional component is enshrined in section 35(1) of the *Constitution Act, 1982*, which recognizes existing Treaty Rights and its legal obligation on the Crown.
- [32] For the purposes of what is before the Board, the duty to consult and the duty to accommodate arising from it are constitutional questions. The Board is bound by provincial legislation which includes the *Administrative Procedures Jurisdiction Act*, RSA, 2000, c. A-3 and the *Designation of Constitutional Decision Makers Regulation* (see Exhibit 14). The Board is not a constitutional decision maker within the scope of the Regulation. As a result of the comments in *Clyde River*, the Board cannot hear the constitutional questions including whether the duty to consult and the duty to accommodate are triggered or were fulfilled in this case.
- [33] On the merits of the appeal, if the Board determines that this is a matter properly before it, the question is whether alcohol and the regulation of it is properly before the Board. Counsel for the Development Authority referenced the case of *Neskonlith v. Salmon Arm* 2012 BCCA 379 at page 379. That case addressed the question of whether municipalities have a duty to consult, holding that municipalities have insufficient resources or powers to respond to the duty to consult. That decision has been criticized but has been followed in a number of cases. The argument that the *Neskonlith* case should be reconsidered in light of *Clyde River* and *Chippewas of the Thames First Nation* has not yet been decided. Based on cases and the Regulation, existing case law supports that planning decisions do not require municipalities to discharge the Crown's duty to consult. The British Columbia decision in *Neskonlith* is not binding in Alberta, but it is persuasive. There is no case law in Alberta leading to the conclusion that municipalities do have a duty to consult.

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- [34] Counsel for the Development Authority referenced the Protocol Agreement between the MCFN and the Municipality. Section 13.1 of the Agreement states that it is non-binding. It is intended to set up and continue a path to Truth and Reconciliation and to incorporate principles from the final Report on Truth and Reconciliation. Counsel for the Development Authority referred the Board to various sections of the Protocol Agreement including section 5.7 which states that nothing in the agreement diminishes the duty to consult with the MCFN by other law.
- [35] The Development Authority met the conventional engagement requirements under the MGA and the LUB. In the context of its role, the Development Authority is not required to render reasons for approval. Only if there is a refusal is it required to issue reasons. The Board will issue its reasons and that aspect of providing full and frank disclosure of decision making will be part of the record.
- [36] The Development Authority did not take issue with the position that anyone in the hamlet and the neighbouring reserves being affected. There are no hard and fast lines for what constitutes “community”.
- [37] In relation to the role of the Board following its consideration of the question of jurisdiction, the Development Authority is to describe how it came to its decision, review the statutory framework of the use (discretionary use) and respond to questions about procedure considering the application. The Development Authority has attempted to be objective and neutral in its submissions. The Development Authority stated that it has a duty when an application is made to it to process the application and engage the community. The Development Authority has met those expectations in the conventional sense. With discretionary permit decisions, the Development Authority is bound by the land use policies (under section 622 of the MGA), the development regulations including the *Matters Relating to Subdivision and Development Regulation* and by the LUB as well as any statutory plans, here the Municipal Development Plan and the Fort Chipewyan Area Structure Plan.
- [38] The refusal of a discretionary use requires a sound planning reason. The Development Authority felt there was no sound planning reason to refuse the development permit.
- [39] The Development Authority provided its rationale for the imposition of condition 26. Section 640(2)(4) and sections 26 and 27 of the LUB give the Development Authority the ability to impose conditions for permitted and discretionary uses. The condition must be for a valid planning purpose and not be imposed in bad faith, or for discriminatory, retroactive or vague reasons or be uncertain.

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- [40] In imposing condition 26, the Development Authority was responding to concerns of the community. It is a valid planning condition responding to circumstances that are unique to Fort Chipewyan and in the circumstances, the condition is fair and reasonable. It is not unusual for an applicant to come back and request that a condition be amended or discharged based on evidence of operation. The Development Authority stated the condition was a reasonable one and within the jurisdiction of the Development Authority to impose.
- [41] The Development Authority met the standard of what was traditionally applied in planning applications and went beyond the normal terms of engagement. There is potentially an evolving scope of engagement with indigenous communities. The Municipality entered a Protocol Agreement agreeing to engagement. The Development Authority believes it met the duty to engage in accordance with the legislation and the limited scope that had been delegated by the province of Alberta. The Development Authority is not the Crown. The honour of the Crown does not devolve to municipalities in Alberta.
- [42] In response to questions from Mr. Roy, the Development Authority stated:
- a. The notice of the development permit application went to every address in Fort Chipewyan and in the First Nations surrounding it which was not the standard process for notifying parties. The normal process is to use a 100-metre radius for notification. In this instance, the Development Authority sent letters to every address available by Canada post as well as to the three First Nations;
 - b. The notification to the Regional Emergency Services was to the Fire Marshall group relating to life safety matters;
 - c. They reached out to the RCMP of Fort Chipewyan which provided basic statistics about potential crime attributed to alcohol;
 - d. In response to the question of whether the imposition of condition 26 was based upon concerns about availability of alcohol raised by the MCFN and other community members, the Development Authority was asked whether it had any evidence that reducing the hours will have the effect that was hoped. The Development Authority advised that it had done an environmental scan for other jurisdictions in Alberta and Canada about hours of operation where hours of operation were limited for similar reasons. The Development Authority looked at uses such as cannabis and liquor stores. In some jurisdictions, hours were limited if they were near schools or places of worship. Based upon the comments and letters received, the Development Authority felt the condition regarding hours was appropriate. One of the issues in Fort Chipewyan is crime in the evenings. The Development Authority is aware of crime that occurs in the hamlet and that it occurs more often in the evening. That was the rationale to limit hours of operation to limit crime that the community is experiencing;

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- e. In response to a question regarding whether the Development Authority took into account the hours of operation of the first liquor store within the community which is open to 10:00 p.m. most days, the Development Authority stated that it was aware of the first liquor store, but that liquor store did not have a legal permit with the Municipality. The last time it had a valid development permit was in 2014. The Municipality is in the process of working with the property owner to bring it into compliance. When making its decision on this development permit application, the Development Authority did not consider the existing business operating illegally;
 - f. The Development Authority was not aware of any separation distances for liquor stores within the statutory plans or the LUB;
 - g. The Development Authority was not provided with the letters of support (Exhibit 4 and 13) for the development during the pre-notification process. The Development Authority did not receive the letters after notification of approval had been provided. The letters of support came in only during the appeal process to this Board which is when the Development Authority became aware of that support. The Development Authority therefore did not factor in the letters of support in its decision.
 - h. When the Development Authority was considering restrictions, it notified Mr. Roy about the limitation of hours.
- [43] In response to questions from MCFN, the Development Authority stated:
- a. It acknowledged the letters that had been received from interested parties during the communication with the community between July and August 2023 and when the permit had been approved. For the MCFN, the leadership met with the Mayor, who spoke with Chief Tuccaro regarding the development application and the concerns that the MCFN had in relation to the application;
 - b. The Municipality's response to MCFN was to acknowledge receipt of the letters and to note that they would be considered as part of the development approval process;
 - c. It reached out to the RCMP as it would for any external reviewer of a development permit application. The RCMP do not officially provide feedback. The Constable provided crime statistics for 2023 which were taken into consideration making the decision. The Development Authority examined the provisions of the statutory plans (Municipal Development Plan and Area Structure Plan);

- d. Fort Chipewyan is unique given its geographic location and its access by way of air or winter road only. It is Alberta's oldest settlement. The Applicant had to do an historical and cultural review.
- e. The Development Authority worked with the Municipality's consultation group and supported them. The Development Authority was aware of the Protocol Agreement. It went above and beyond at the process under the MGA and the LUB and allowed for engagement in the community within the confines of what the Development Authority is allowed to do. It was a longer and more thorough process than the ordinary process. Generally, the Development Authority does not send notices to all addresses before a decision. The Development Authority extended the radius to include the community hall and the First Nations' contact offices. The Development Authority allowed the residents to reach through to the Development Authority to answer questions, and the Development Authority answered questions orally which were then transcribed to respect the oral tradition. The Development Authority received only nine letters. Based on that, the Development Authority believed that it had met the Protocol Agreement and met the obligation of the Development Authority to work with Indigenous communities;
- f. There was no consultation through the process but rather engagement. This is a different process with a higher degree of communication. It was not just notification; they also took the feedback. The Development Authority stated that it wanted to treat everyone fairly, regardless of use. The Development Authority does not regulate morality but land use;
- g. The decision by the Development Authority to go beyond the 100-metres was an elevation of the ordinary process and another level of transparency, accountability and engagement.

[44] In response to Board questions, the Development Authority stated:

- a. The evidence of the environmental scan to justify the hours and how it would reduce the issues in the community was not included in the materials brought before the Board;
- b. In response to questions about whether the Development Authority had any other information about whether reducing the hours would achieve the result that they had hoped, the Development Authority could not guarantee that the reduced hours would reduce the impact which was identified in the various letters sent to the Development Authority. The Development Authority's view was that the two comments heard most about their concerns was access and availability to alcohol and the impacts on crime. The position of the Development Authority was they could limit some of those issues relating to availability by limiting hours of operation and access.

Submissions of Appellant 1 - Mr. Roy

- [45] Counsel for Appellant 1 addressed the jurisdictional question first. He stated constitutional questions are not within the purview of the Board. The arguments about the duty to consult arising from Aboriginal and Treaty rights in s. 35(1) of the *Constitution Act* were outside the jurisdiction of the Board. The duty to consult is based upon Treaty 8. The MCFN argues that the heightened duty is articulated in the Supreme Court of Canada decision of *Clyde River* and applies to tribunals and delegates of the Crown. In fact, *Clyde River* states the opposite. He referenced paragraph 36 of the case which states as follows:

[36] Generally, a tribunal empowered to consider questions of law must determine whether such consultation was constitutionally sufficient if the issue is properly raised. The power of a tribunal “to decide questions of law implies a power to decide constitutional issues that are properly before it, absent a clear demonstration that the legislature intended to exclude such jurisdiction from the tribunal’s power” (Carrier Sekani, at para. 69). Regulatory agencies with the authority to decide questions of law have both the duty and authority to apply the Constitution, unless the authority to decide the constitutional issue has been clearly withdrawn (R. v. Conway, 2010 SCC 22, [2010] 1 S.C.R. 765, at para. 77). It follows that they must ensure their decisions comply with s. 35 of the Constitution Act, 1982 (Carrier Sekani, at para. 72).

- [46] Counsel for Appellant 1 reviewed the regulation under the *Administrative Procedures and Jurisdiction Act* noting section 2 states that only the decision makers listed in Column 1 of the Schedule have the jurisdiction to determine questions of constitutional law. The Subdivision and Development Appeal Board is not listed in Schedule 1 and therefore does not have jurisdiction to address any constitutional questions. The issues raised by the MCFN are important but are not questions over which the Board has any jurisdiction. The questions of the obligation of the Development Authority regarding a duty to consult, whether a common law or Treaty Right, is not part of the Board’s jurisdiction. Paragraph 19 of *Clyde River* notes that the duty to consult has a constitutional dimension grounded in the honour of the Crown which is enshrined in section 35 of the *Constitution Act*, recognizing and affirming existing Aboriginal and Treaty Rights.

- [47] Whether the duty to consult is arrived at through honour of the Crown, whether it is a specific Treaty Right in Treaty 8 or whether it exists in some common law form, those questions are constitutional. It is clear from the Designation of Constitutional Decision Makers Regulation and *Clyde River* that a tribunal does not have jurisdiction to make this decision, if there is clear exception. There is a clear exception in the Regulation. In regard to the question of whether the Development Authority was the delegate of the Crown, Counsel for Appellant 1 stated those questions and whether the duty was met through the consultation undertaken by the Development Authority are valid questions but not for this

Board.

- [48] The Board must determine whether the Development Authority had a non-constitutional duty to consult with the neighbours. Appellant 1's position was that there was extended consultation regarding the development permit application. There was an extended period for receiving comments, prompted by the notification to every municipal address in Fort Chipewyan and giving notice to the various First Nations and Métis Nations in and around Fort Chipewyan. The Development Authority gave evidence about the standard required by the MGA and LUB and that it was met. The obligation under the planning legislation is to notify "affected parties" and the term "affected parties" is elastic. The Development Authority erred on the side of caution by giving notice to the whole of Fort Chipewyan and the surrounding Nations. It did not just send notices but received comments with regard to the larger community and took those into account.
- [49] The next question properly before the Board is whether the Development Authority's decision is reasonable. There is no obligation under the MGA or the LUB to give reasons for the approval, but only for approval. Taken into account the concerns raised by the MCFN regarding the effects of alcohol on the community, the Development Authority's response went beyond the typical consultation process. Appellant 1 does not object to the heightened notice and the Development Authority taking into account those responses. However, Appellant 1 wishes to separate that activity from the duty to consult with affected parties.
- [50] Counsel for Appellant 1 stated that the Protocol Agreement is a non-binding instrument to collaborate on a range on matters of municipal interest. Section 6.1 identifies areas of mutual interest including section 6.1(e) land planning, zoning and land use. There is no protocol imposing specific engagement or consultation. It is not meant to be imposed at an individual development permit level.
- [51] Counsel for Appellant 1 referred to Exhibit 15 to address why the imposition of condition 26 should be removed. The Development Authority sought to mitigate the effects of alcohol on the basis that if alcohol cannot be purchased in the evening, it should mitigate the issues of alcoholism and crime associated with alcohol consumption. The other liquor store is operating illegally and selling liquor into the evening and has been allowed to sell alcohol since 2014 without approval. There is an inconsistency of action between the approval for Appellant 1 having limited hours as compared to an unlicensed activity which is selling alcohol into the evening. It is patently unfair and is an unreasonable and uneven treatment between the two liquor stores.

- [52] There were 128 letters of support for Appellant 1. Each letter objects to the restriction of operating hours at 6:00 p.m. noting that a closing time of 6:00 p.m. would not be convenient for those who will patronize the business due to family or work commitments. There is unfair competition. The Development Authority is unfairly benefitting the illegally existing liquor store in terms of its ability to sell alcohol into the evenings while Appellant 1 will be restricted from doing so. The environmental scan referenced by the Development Authority did not include those where liquor stores were adjacent to reserves or First Nations. If the planning argument is made about proliferation, this is not a proliferation argument. The Alberta Gaming Liquor Cannabis (AGLC) handbook sets out hours of operation from 9:00 a.m. to 2:00 a.m. and discusses the training that is required including crime prevention through environmental design. The specific rules of the AGLC are more than adequate to address what condition 26 is attempting to address. The condition is attempting to address not who the alcohol is sold to, but to address those who are intoxicated. Nothing in the AGLC handbook says that reducing operating hours is effective or that it is a means to reduce alcohol related crime. Counsel for Appellant 1 urged the Board to remove condition 26 and uphold the approval. There is no evidence from the Development Authority that restricting the hours of operation will properly address the issues raised, and the condition was not imposed for valid planning purpose.

Daniel Roy

- [53] Mr. Roy indicated that he has lived in the community for 24 years. He bought the land and proposed to build a new liquor store to replace the existing one. Mr. Roy had 128 letters in support from local residents, all of legal age. He stated that there is no more crime now (with one liquor store) than when there were two liquor stores. His position is that his liquor store would be safer because the current liquor store is located in a dark area. His liquor store will be within a lit area. He is put at a competitive disadvantage to the existing liquor store due to the hours of operation imposed upon his development permit.
- [54] Mr. Roy stated that such an early closing time will cause bootlegging to thrive. He suggested 9.00 pm would be a reasonable closing time and is happy to work with the community.

Ernest Thacker

- [55] Mr. Thacker spoke in support of Mr. Roy's appeal. He stated that the existing liquor store is congested and has been broken into. It has also being set on fire. There should be a better use of that property. Mr. Thacker suggested that a liquor store in the downtown where lighting is good and the roads are good would be better. There is already alcohol sold at various places in the community, including a beer garden and the community hall. There are fights outside of the existing liquor store.

Charlie Fraser

- [56] Mr. Fraiser spoke in support of Mr. Roy's appeal. He is 85 years old and was born and raised in Fort Chipewyan. He had concerns regarding the existing liquor store. He wants to have a better liquor store in town.

Bruce Inglis

- [57] Mr. Inglis spoke to the need to have a level playing field and for there to be consistent oversight of the whole community. There are complex issues at play but they should be dealt with at other levels of government. He has lived in the region for 69 years and 60 of them in Fort Chipewyan. The downtown core had been vibrant but has been losing businesses. If there is no access, bootlegging will occur. He hopes that this is taken into account. It is not possible to solve the problem of alcohol with a single prohibition.

Submissions of Appellant 2 – Mikisew Cree First Nation Nation acting through 1112958 Alberta Ltd., Cree-Ations Enterprises, Mistee Seepee Development Corporation Ltd

- [58] Counsel for Appellant 2 stated that there is no binding legal authority stating that the Municipality is not the Crown. It would be absurd to allow the Provincial Crown to abdicate its obligations as the Crown to the Municipality. The Municipality, the Development Authority and this Board are akin to the Natural Resources Conservation Board referenced in the *Clyde River* decision. They exercise delegated powers on behalf of the Crown and are an emanation of the Crown to which the honour of the Crown applies. In *Fort McKay First Nation vs. Prosper Petroleum Ltd.*, the Court considered the Alberta Energy Regulator (the AER) and whether it could engage in the duty to consult. The legislation governing the AER specifically ousts the duty to consult which is always at stake. The hamlet has 2 First Nation reserves close by.
- [59] Counsel for Appellant 2 asked whether a person's right to do business supersedes the First Nations right to say no. The Truth and Reconciliation component of the Report on Truth and Reconciliation means that Appellant 2 is more than just another stake holder. Counsel for Appellant 2 advised that the question of compatibility will be spoken to by the individuals who will speak on behalf of Appellant 2.
- [60] The parties are committed to Truth and Reconciliation as evidenced by the Protocol Agreement. Counsel for Appellant 2 reviewed various provisions of the Protocol Agreement including sections 4.1.a and 5.3a. The Protocol Agreement required more than notification. It required engagement which was not satisfied by the notice. Notice to the community was not collaboration. Section 6.1.e of the Protocol Agreement references land use planning, which is the topic before the Board today. The Protocol Agreement created legitimate expectations by Appellant 2 that they would have engagement and collaboration on the granting of a permit. The concerns of Appellant 2 are not concerns about establishing business priorities or making the core of the hamlet vibrant. Their

concerns are about a liquor store in the core of the community, the impact on their Treaty Rights and the health and public interest of the community.

- [61] Exhibit 16, Appendix 9 is a letter from Dr. Darcy Lindberg, who provides an opinion stating that it is an express promise in Treaties 6, 7 and 8 to not have intoxicating substances in the MCFN territory.
- [62] Appellant 2 owns and manages property within Fort Chipewyan and the land titles are included for the properties owned by the three corporations.
- [63] MCFN responded as soon as it could to the notifications by the Municipality, given the wild fire and the election which happened. Despite the letter from Chief Tuccaro to the Municipality, there was no consultation. The rights of one person (the person applying for the development permit) should not be put above the rights of the residents who are part of the Treaty, who are 583 of the thousand residents of the hamlet.
- [64] Alcohol has a significant effect on the community. The survey which was conducted overwhelmingly was in opposition to the liquor store. Eighty four percent of the individuals who responded opposed the liquor store. This is in contrast to the *pro forma* letters received in support of Appellant 1's development permit application. The Board was urged to read the comments on the survey which are individual and which note the impacts.
- [65] Appellant 2 provided crime statistics as part of its submissions. The RCMP advised that 697 crimes occurred in Fort Chipewyan in the previous year and 328 (almost half) were alcohol related. Of the 87 prisoners held in the RCMP detachment in 2023, 69 were intoxicated by alcohol. These are valid concerns that need to be considered.
- [66] Appellant 2 understands that the granting of the permit is discretionary, but the use is not compatible with neighbouring uses. There are valid concerns of the community that it is detrimental to the health, safety, convenience and general welfare of the community. The current liquor store operating is causing issues with regard to property damage, etc. While Appellant 2 shares the goals of revitalizing the core of the hamlet, in this instance, the Board must look at neighbouring properties to determine the impact on them. Bootlegging already thrives and is not a reason to grant the permit. Section 617 of the MGA speaks to the public interest. The Board does not need to go to the duty to consult. Appellant 2 is the public and deserves to have their concerns heeded.
- [67] The Board was urged to consider that once Appellant 2 was engaged in the process, they should have a meaningful opportunity to respond, which means engagement and collaboration. Counsel for Appellant 2 disputed that the Municipality went above and beyond its obligations. In Appellant 2's view, the Protocol Agreement was not exceeded.

[68] In relation to the question of whether the decision point is a constitutional question over which the Board has no jurisdiction, Counsel for Appellant 2 pointed to section 10 of the *Administrative Procedures and Jurisdiction Act* which defines a question of constitutional law as:

10(d) “question of constitutional law” means

- (i) any challenge, by virtue of the Constitution of Canada or the Alberta Bill of Rights, to the applicability or validity of an enactment of the Parliament of Canada or an enactment of the Legislature of Alberta, or
- (ii) a determination of any right under the Constitution of Canada or the Alberta Bill of Rights.

[69] Appellant 2’s position was that there was no constitutional question arising in the issues before the Board. *Clyde River*, paragraph 19 applies in this case. Unlike the AER whose legislation precludes the duty to consult (s. 21), the Board’s jurisdiction to consider consultation is not ousted. *Clyde River* notes that there is both a constitutional and a legal obligation in the duty to consult. Therefore, there is a legal component owed to Appellant As a result, the duty to consult is not constitutional and is triggered in this case.

[70] Counsel for Appellant 2 referenced paragraph 14 of the *Paul First Nation v. Parkland (County)*, 2006 ABCA 128 (exhibit 14) which stated that there was no duty of consultation regarding privately owned lands. Appellant 2’s position is that the *Paul* case is overturned by the *Clyde River* decision, noting paragraph 29 of the *Clyde River* decision:

[29] By this understanding, the NEB is not, strictly speaking, “the Crown”. Nor is it, strictly speaking, an agent of the Crown, since — as the NEB operates independently of the Crown’s ministers — no relationship of control exists between them (Hogg, Monahan and Wright, at p. 465). As a statutory body holding responsibility under s. 5(1)(b) of COGOA, however, the NEB acts on behalf of the Crown when making a final decision on a project application. Put plainly, once it is accepted that a regulatory agency exists to exercise executive power as authorized by legislatures, any distinction between its actions and Crown action quickly falls away. In this context, the NEB is the vehicle through which the Crown acts. Hence this Court’s interchangeable references in Carrier Sekani to “government action” and “Crown conduct” (paras. 42-44). It therefore does not matter whether the final decision maker on a resource project is Cabinet or the NEB. In either case, the decision constitutes Crown action that may trigger the duty to consult. As Rennie J.A. said in dissent at the Federal Court of Appeal in Chippewas of the Thames, “[t]he duty, like the

honour of the Crown, does not evaporate simply because a final decision has been made by a tribunal established by Parliament, as opposed to Cabinet” (para. 105). The action of the NEB, taken in furtherance of its statutory powers under s. 5(1)(b) of COGOA to make final decisions respecting such testing as was proposed here, clearly constitutes Crown action. (emphasis added)

- [71] The *Neskonlith* case is not binding. Counsel for Appellant 2 urged the Board not to find it persuasive. Municipalities are governments “in mini” and have powers delegated to them by the Crown in right of the Province. The Province cannot avoid the duty to consult by delegation.
- [72] Both the *Paul* and case of *Kappo v. SDAB (Municipal District of Greenview No. 16)*, 2003 ABCA 146 are not good law. Under section 687 (3)(c) of the MGA, the Board has the remedial power to address the duty to consult. If the Municipality has not discharged the duty to consult, the Board must discharge that duty.
- [73] Counsel for Appellant 2 referenced the article written by Paul Daly who spoke about an analogy between charter values and charter rights. A similar analysis must be done here. If there is a gap, it is not clear where Appellant 2 could go to challenge it and what the constitutional challenge would be. If there is no availability to consider issues before the Board in relation to a live issue, then there is likely no remedy. Such a conclusion is contrary to the rule of law and to the United Nations Declaration on the Rights of Indigenous Peoples, and section 96 of the *Constitution Act*.
- [74] Appellant 2 opposes appeal 1. They recognize that it is a fair comment to question how limited hours ameliorate issues regarding alcohol. Their response is that the way to address it is not to have liquor stores in the first place. The fact that the first liquor store has been allowed without a permit since 2014 is not relevant. The proliferation argument also does not justify having this liquor store.

Chief Tuccaro

- [75] Chief Tuccaro spoke to the impact that alcohol has on the community. He is not against the sale of alcohol, but is concerned about the impact that it has on the community both in relation to safety, and drunk driving, etc. He stated that there are problems and did not want those problems contributed to by the addition of another liquor store. He spoke to the significant negative personal impacts which alcohol has had on himself and his family.

Councilor Paul Tuccaro

- [76] Councilor Tuccaro noted the damage that alcohol can do in terms of the community, including domestic violence. He stated that a new liquor store will come at the cost of health and safety of the community and that the choice today sets the tone for the community. He stated that there are unfortunate incidents including safety and road accidents. He stated that as a community, they have acknowledged the serious repercussions due to an increase in alcohol including crime and domestic violence and the impact on people.

CEO Kerri Ceretzke

- [77] Kerri Ceretzke, Acting Chief Executive Officer for MCFN, and the Director of Education and the principal of the school, spoke to the impact which alcohol has had on her family and to students with whom she has had dealings. She stated that making liquor more accessible is not appropriate. She spoke to the significant negative personal impacts which alcohol has had on herself and the school community.
- [78] Upon conclusion, the Chair asked the parties present, if they felt that they had a sufficient opportunity to present their evidence and argument to the Board. No issues were brought to the Board's attention.

Mitchel Bowers

- [79] Mr. Bowers stated that the MCFN has consulted with the Municipality on various statutory plans, including the Municipal Development Plan and the Area Structure Plan. There has been consultation on 21 infrastructure projects between 2013 and 2024 including projects dealing with water supply, winter roads, etc. Despite section 5.4.b of the Protocol Agreement indicating the MCFN has the right to establish necessary engagement, they did not get that opportunity because this matter was not brought to the joint committee despite the concerns raised.

Findings Of Fact

- [80] In addition to the specific facts set out under the Board's reasons, the Board makes the following findings of fact:
- a. The Lands are municipally described as 193 Mackenzie Avenue, Fort Chipewyan, AB and legally described as Lot 3, Bloc, 10, Plan 5642NY.
 - b. The Lands are located in the HC – Hamlet Commercial District.
 - c. The proposed development is a Liquor Store, Office and Warehouse.
 - d. The proposed development is a discretionary use in the Hamlet Commercial District.

Decision

[81] **The Subdivision and Development Appeal Board decides as follows:**

- a. **Question jurisdiction** - The Board concludes that it is bound by the two Alberta cases which confirm the Board has no jurisdiction to decide questions of the sufficiency of the duty to consult.
- b. **Development Authority duty to consult** - the Board finds there is no such obligation on the Development Authority.

[82] **Appeal 1 is denied**

[83] **Appeal 2 is granted. Development Permit 2023-DP-00125 is revoked.**

Reasons for The Decision

- [84] The Board notes that its jurisdiction is found within section 687(3) of the *Municipal Government Act, RSA 2000, c.M-26* (the "MGA"). In making this decision, the Board has examined the provisions of the Municipal Development Plan, the Fort Chipewyan Area Structure Plan and the LUB and has considered the oral and written submissions by and on behalf of the Development Authority, Appellant 1, Appellant 2 as well as those persons speaking to both appeals.

Affected Persons

- [85] The first question the Board must determine is whether the Appellants as well as those individuals who made written submissions and appeared before the Board are affected persons. The Board notes that no party raised any objection with any other party's participation but wishes to address this question for completeness.
- [86] As the person whose development permit is under appeal, Appellant 1 is affected by this appeal.
- [87] Appellant 2 is comprised of the Mikisew Cree First Nation acting through 1112958 Alberta Ltd., Cree-Ations Enterprises; and Mistee Seepee Development Corporation Ltd. The corporations own land within Fort Chipewyan. The First Nation has lands within close proximity to the hamlet, as well as having members living in the hamlet. Based on those facts, the Board finds that Appellant 2 is affected.
- [88] All of those individuals who provided oral submissions to the Board live in Fort Chipewyan. In light of the fact that the individuals are part of a close-knit community, the Board is of the view that they are all affected by the proposed development.

Issues to be Decided

- [89] The ultimate question facing the Board is under section 687(3)(c): whether the Board should "confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own". However, in order to make that determination, the Board must determine the following issues:
- a. Does the Board have the jurisdiction to determine whether the Development Authority met what is alleged to be their duty to consult?
 - b. If yes, has the Development Authority met that duty?
 - c. If no, what is the nature of the use of the proposed development and is the use authorized under the LUB as a permitted or discretionary use?
 - d. Given the nature of the use under the LUB, is the use compatible with neighbouring uses?
 - e. In relation to condition 26, should the condition be confirmed, revoked or varied?
- a. Does the Board have the jurisdiction to determine whether the Development Authority met what is alleged to be their duty to consult?**

[90] There was a preliminary question raised about whether the Board has the jurisdiction to determine questions regarding the sufficiency of consultation. Appellant 2's grounds of appeal included the argument that the Regional Municipality of Wood Buffalo or the Development Authority did not consult with Appellant 2 or breached Treaty No. 8. The Board must consider the scope of its jurisdiction to determine if it can consider these arguments and sets out a very brief summary of the positions of the parties on the questions that form part of the larger question.

[91] Appellant 2 argued that:

- a. the Development Authority had a duty to consult, which it did not fulfill. The duty is a provincial duty which is delegated to the municipality in the creation of the municipality, and thus to the Development Authority and the Board in their creation. Appellant 2's argument was that the notices provided in 2023 were only notices, but not engagement. Appellant 2 also argued that if the Development Authority failed to fulfil its duty to consult, then this Board had the jurisdiction to consider the duty to consult and to fulfill that duty.
- b. The Protocol Agreement compelled consultation in relation to planning matters and that the duty was not fulfilled.
- c. The *Clyde River* case noted that the duty to consult had a legal as well as a constitutional component and as a result, the imposition of the duty to this case was not constitutional. In any event, Appellant 2 argued that under the definition of "constitutional question" found in section 10(d) of the *Administrative Procedures and Jurisdiction Act*, the question was not a constitutional question, so the Board had jurisdiction to answer this question.
- d. *Clyde River* overturned the *Paul* and *Kappo* cases, which in Appellant 2's view are no longer good law.

[92] By contrast, Appellant 1 argued:

- a. the Development Authority did not have a duty to consult. The Development Authority went above and beyond the duties set out in the MGA and the LUB, through the extended notification and engagement process which it conducted in 2023. The Board does not have a role in the duty to consult.
- b. The Protocol Agreement is non-binding, and the references to planning matters does not compel consultation.
- c. The *Clyde River* case expressly notes that the duty to consult is a constitutional question. Under section 2 of the Designation of Administrative Decision Makers Regulation, this Board is not listed as having the ability to determine questions of constitutional law.

- d. *Clyde River* overturned the *Paul* and *Kappo* cases, which in Appellant 2's view were no longer good law.

[93] The Development Authority stated:

- a. Based on *Neskonlith*, municipalities do not have a duty to consult.
- b. The Development Authority met and exceeded the duties set out in the MGA and the LUB, through the extended notification and engagement process which it conducted in 2023.
- c. The duty to consult is a constitutional question and the Board is not authorized to answer questions of constitutional law.
- d. The Protocol Agreement is non-binding.

[94] The Board will examine the questions which arise.

Is the Board a constitutional decision maker capable of determining questions of constitutional law, such that it must assess the duty to consult?

[95] In considering this question, the Board first looked to the *Administrative Procedures and Jurisdiction Act*. The Board notes that this act contains a list of constitutional decision makers in Schedule 1 of the *Designation of Constitutional Decision Makers Regulation*, which does not include the Board. The Board found this strong evidence that the Board is not constitutionally competent to make a decision on the sufficiency of consultation.

[96] In further considering this matter, the Board considered the argument put forward by Appellant 2 that the "question" was not a constitutional question as defined in section 10(d) of the *Administrative Procedures and Jurisdiction Act*. The Board carefully examined the definition.

10(d) "question of constitutional law" means

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

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

[97] *While the issue of the sufficiency of consultation does not fall under section 10(d)(i), it does appear to fall under section 10(d)(ii). Appellant 2 argued that Treaty 8 includes a right to be free from intoxicating substances. Paragraph 19 of Clyde River states:*

The duty to consult has both a constitutional and a legal dimension Its constitutional dimension is grounded in the honour of the Crown (Kapp, at para. 6). This principle is in turn enshrined in s. 35(1) of the Constitution Act, 1982, which recognizes and affirms existing Aboriginal and treaty rights And, as a legal obligation, it is based in the Crown's assumption of sovereignty over lands and resources formerly held by Indigenous peoples (Haida, at para. 53).

- [98] This paragraph (quoted by all parties to the Board) notes the constitutional component of the duty to consult. Based on this comment from the Supreme Court, the Board is persuaded that the determination of the question about the duty to consult is a determination of a right under the Constitution of Canada under section 10(d)(ii) and therefore out of the scope of the Board's jurisdiction under the *Administrative Procedures and Jurisdiction Act*.
- [99] Appellant 1 raised the *Paul* case and the *Kappo* case, citing them for the proposition that the issue of the Board's jurisdiction in relation to the duty to consult has been decided by the Court of Appeal. Based on those cases, Appellant 1 argued that this Board has no jurisdiction to consider Appellant 2's argument about the sufficiency of the duty to consult. Appellant 2 argued that *Clyde River* overturns those cases so the Board is no longer bound by them.
- [100] In considering this question, the Board notes that the *Paul* and *Kappo* cases are from the Court of Appeal and are directly on this point. At paragraph 12, *Kappo v. Subdivision and Development Appeal Board (Municipal District of Greenview No. 16)*, 2003 ABCA 146 states:

[12] *There is nothing in the MGA which gives the SDAB the power to determine constitutional issues nor is there a general power given to SDABs to determine issues of law. In Cuddy Chicks Ltd. v. Ontario (Labour Relations Board), 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5, 81 D.L.R. (4th) 121 (Cuddy Chicks), the Supreme Court held that an administrative tribunal which has been given power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. Section 52(1) of the Constitution Act neither specifies which bodies may rule on constitutional issues nor confers jurisdiction on an administrative tribunal. Jurisdiction over the parties, subject matter and remedy sought must be conferred on the administrative body by its enabling legislation.*

- [101] In *Paul First Nation v. Parkland (County)*, 2006 ABCA 128, the Court states:

[12] *I conclude that there is no duty on the part of the SDAB to consult with the Paul Band, nor need the SDAB ensure that Burnco consult with the Paul Band as there is no obligation on the part of Burnco to consult with it: See Haida, para. 52-56. First, a SDAB does not possess the authority to decide constitutional issues. In Paul v. British Columbia (Forest Appeals Commission), 2003 SCC 55, [2003] 2 S.C.R. 585, the Supreme Court determined that inferior tribunals could decide constitutional issues provided they had the jurisdiction to decide general issues of law. However, SDABs do not have the jurisdiction to decide general issues of law: Kappo v. SDAB (Municipal District of Greenview No. 16), 2003 ABCA 146, sub nom. Sturgeon Lake Cree Nation v. Greenview (Municipal District) No. 16, 14 Alta. L.R. (4th) 250, leave to appeal to S.C.C. refused (2004), 361 A.R. 200 (“Kappo”). Therefore, SDABs are precluded from deciding constitutional issues. The issues presented by the Paul Band are constitutional.*

[13] *Even if the reasoning in Kappo is incorrect, recent provincial legislation that is now in force restricts most inferior tribunals from deciding constitutional questions: Designation of Constitutional Decision Makers Regulation, Alta. Reg. 69/2006. SDABs are not included in the category of decision makers that enjoy the jurisdiction to decide constitutional issues. Therefore, if this matter was referred back to the SDAB, it could not entertain the issues posed by the Paul Band.*

[102] These cases expressly provide specific direction that subdivision and development appeal boards do not have the jurisdiction to determine constitutional issues. The *Paul* case also confirms that the Board itself does not have a duty to consult.

[103] While the Board recognizes that *Clyde River* is a Supreme Court of Canada case, it does not mention either of the above 2 cases. In light of the binding nature of the two Alberta Court of Appeal cases, and the fact that *Clyde River* does not mention the two Alberta cases, and does not expressly overrule them, the Board is not persuaded that these cases have been overruled. The Board therefore concludes that it is bound by the two Alberta cases which confirm the Board has no jurisdiction to decide questions of the sufficiency of the duty to consult.

Does the Municipality and thus the Development Authority have a duty to consult?

[104] In light of the Board’s conclusion that it does not have jurisdiction to answer constitutional questions, it is not necessary for the Board to answer this question. If the Board were required to answer this question, the Board provides its comments, below.

- [105] The first argument raised by Appellant 2 was that the Municipality has a duty to consult which is delegated by the Province when it established the Municipality, and through the Municipality's creation of the Development Authority and Board, to them. Appellant 2 did not provide any case authority in support of its argument but stated that the Province could not rid itself of the duty to consult by delegating powers. In contrast, the Development Authority referenced the *Neskonlith* case.
- [106] The only case authority before the Board on this question is the *Neskonlith* case from British Columbia, which is not a binding precedent. However, cases from other jurisdictions can be persuasive, particularly when there are no legal authorities on point from Alberta. The Board notes that *Neskonlith* specifically addresses whether the duty to consult extends to municipalities. In light of the fact that case is directly on point to the issue raised by the parties, the Board finds the case to be persuasive. In the absence of any express recognition from any other court that there is a duty to consult on municipalities, the *Neskonlith* case provides direction that municipalities do not have a duty to consult.

Did the Protocol Agreement obligate the Development Authority and on appeal this Board to consult?

- [107] Appellant 2 argued that the Protocol Agreement created, if not legal obligations, then a legitimate expectation of consultation by the Development Authority in relation to development permits.
- [108] Appellant 1 and the Development Authority indicated that the Protocol Agreement was non-binding.
- [109] In order to determine whether there was some form of "non-constitutional", but legal obligation to consult, the Board has considered Appellant 2's argument that the Protocol Agreement imposes that obligation on the Municipality, and thus the Development Authority.
- [110] In examining the Protocol Agreement, the Board notes that section 3.1(d) of that Agreement references that the purpose of the Agreement is to "formalize an engagement process with the MCFN **on municipal projects, programs policies or decisions** that are of interest to, or may have impact on the MCFN." Read purposively, the Board is of the view that this section is a recognition that the intention was to deal with municipal projects, rather than private projects on private land. This reading is supported by the evidence of Mr. Bowers (see paragraph [79]) which indicated that the Municipality had previously engaged with MCFN on other municipal projects. There was no evidence that the Protocol Agreement had been previously used to engage with MCFN on private development. The Board is therefore not persuaded that the MCFN had a reasonable expectation that the Protocol Agreement would be used to impose engagement obligations in relation to private development on private lands.

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- [111] Further, the Board notes that section 13.1 of the Protocol Agreement indicates that the Agreement is not binding and not intended to be actionable. The Board understands section 13.1 to mean that the MCFN would not be able to sue on the Agreement. By extension, the Board interprets section 13.1 to mean that Appellant 2 cannot use the Agreement as the basis for an appeal.
- [112] In considering whether the Development Authority met the obligations of the MGA and the LUB for notification, the uncontradicted evidence before the Board was that the LUB requires notification of 100 m from the proposed development. The LUB obligation is only notification, and does not require the Development Authority to do more, such as take into account any comments received. The evidence here was that the notices were sent to each address in the hamlet, which the Board interprets as well beyond the 100 m of the LUB. Since the LUB only requires notification of 100 m and the Development Authority provided notices to the whole hamlet, the Board finds that the Development Authority met its statutory obligations for notices.
- [113] The Board also notes that Appellant 2 argued that there was an obligation on the Development Authority to provide reasons for its approval. The Board notes section 642(4) of the MGA which requires a development authority to provide reasons, but only if the application is refused. In this case, the application was not refused; it was approved with conditions. In the absence of any statutory or regulatory requirement to provide reasons for approval, the Board finds there is no such obligation on the Development Authority.

c. If no, what is the nature of the use of the proposed development and is the use authorized under the LUB as a permitted or discretionary use?

- [114] Even though the Board does not have jurisdiction to consider the duty to consult, that is not the end of the appeal. Appellant 1 agreed that Appellant 2 could still argue the merits of the planning case. The Board then needs to assess the planning merits of the appeals.
- [115] The first question then is what is the nature of the proposed development? Appellant 1 applied for a Liquor Store, Office and Warehouse. There was no dispute among the parties that the proposed development fell within the definitions for these uses, and as a result of that consensus, the Board finds as a fact that the uses are Liquor Store, Office and Warehouse.
- [116] The Board notes that the uncontradicted evidence before the Board is that these uses are discretionary in the Hamlet Commercial District and based on that uncontradicted evidence, the Board finds so as a fact.

d. Given the nature of the use under the LUB, is the use compatible with neighbouring uses?

[117] Since the use is discretionary, the Board must consider the compatibility of the proposed development with neighbouring uses.

[14] The object and purpose of a discretionary use is to allow the development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses.¹

[118] Although the above quote speaks to “adjacent uses”, the Board interprets the word “adjacent uses” as requiring an assessment of the compatibility of the proposed development with the uses in the area. Using a purposive interpretation, the Board believes that interpreting the words “adjacent uses” to mean only the uses immediately adjacent to the proposed development would be contrary to the purpose of part 17 as noted in section 617 which seeks to achieve orderly, economical and beneficial development without infringing on the rights of individuals for any public interest except to the extent necessary for the overall greater public interest.

[119] The Board understands that in coming to a determination of whether the proposed development is compatible, it must weigh the interests of Appellant 1 in its development permit against the impacts of that development on the community.

[120] In this case, the question is how broad that community is. The Board notes that the Development Authority sent notices of the development to the entire hamlet. The Board infers from the Development Authority’s broad notification that the Development Authority considered that the entire hamlet would be affected by the proposed development. The evidence before the Board was that Fort Chipewyan is a unique community. There was no disagreement that it is geographically isolated, and is accessible only by plane, or, in winter, by winter road. In the Board’s view, given these circumstances (the geographic location, its isolation and the broad notification by the Development Authority), the Board must examine the impact of the proposed development on the entirety of the hamlet, and not a subset of it.

[121] The Board has examined the evidence put forward by both Appellants regarding the question of compatibility.

[122] The Board understood Appellant 1 to argue that the imposition of condition 26 (decreased hours of operation) would not achieve the result of less effect of alcohol.

¹ Rosedale Community League (1974) v. Edmonton (Subdivision and Development Appeal Board), 2009 ABCA 261.

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- [123] Appellant 2 provided evidence of crime statistics linked to alcohol and provided survey results which provided comments about the impact of alcohol on various members of the community.
- [124] At page 1055/1104, Appellant 2 provided a letter from the RCMP indicating that as of October 21, 2024, the RCMP received 697 occurrences in 2024, of which 328 were alcohol related (the breakdown of occurrences is listed, but not repeated here). The RCMP also advised that in 2024, the detachment lodged 87 prisoners of which 69 were intoxicated by alcohol. The evidence before the Board is that the population of Fort Chipewyan is approximately 1,000 people. In the Board's view, the number of alcohol-related occurrences as compared to the local population is high. The impact of alcohol on the community was also evident in the evidence of Chief Tuccaro, Councilor Tuccaro and K. Ceretzke, and the survey results provided by Appellant 2.
- [125] The Board considers safety considerations to be a valid planning consideration for the Board to consider when making a determination about compatibility. The evidence presented by Appellant 2 indicates that alcohol is, at least, a factor in the occurrences occurring in the community. The Board presumes that at least some of the alcohol comes from the existing liquor store in the community. Based on these statistics, the Board infers that if the presence of one liquor store causes or contributes to these statistics, there is no reason to believe that a second liquor store would not cause or contribute to further occurrences. The Board draws the inference that the proposed development would be at least a factor in creating or contributing to safety concerns in the hamlet.
- [126] The Board has also considered the evidence presented from the letters in support of Appellant 1 and the survey presented by Appellant 2. The Board finds the evidence of Appellant 1 less persuasive, as the letters in support are form letters. Appellant 2's evidence by contrast included the survey results listed at page 1078: individual responses, which speak to the impact of liquor sales. The Board finds the individualized responses more persuasive than a form letter where the person need only sign their name, but did not express a view of compatibility which was individual to that person.
- [127] The Board also considered the time period when the letters were drafted and collected. The Board is less persuaded by the form letters submitted by Appellant 1 because they were submitted only in response to the appeal. The survey submitted by Appellant 2 were prepared in 2023. The Board is of the view that the survey results express comments of the community generally since they were submitted before the development permit application was approved.
- [128] The Board is aware that there were 78 respondents to the survey and Appellant 1 provided 128 form letters. The Board is not persuaded merely by the numbers. As noted above, the Board finds the individual responses more persuasive than the mere signing of a person's name on a form prepared by someone else.

[129] The Board noted the argument put forward by Appellant 1, that the Board should not consider a proliferation argument. The Board does not consider Appellant 2's argument to be an argument based on proliferation and the Board does not consider the potential of a second liquor store to be one where there is a "proliferation" of liquor stores. Rather, the Board notes the evidence provided by Appellant 2 of the impact of alcohol sales and is of the view that the proposed development would have a similar impact on the community, causing safety concerns. As a result of those safety considerations, the Board concludes that the proposed development is not compatible with the adjacent uses.

e. In relation to condition 26, should the condition be confirmed, revoked or varied?

[130] The final question for the Board to consider is whether the imposition of condition 26, regarding a restriction on the hours of operation would address the incompatibility such that the Board could affirm the imposition of condition 26, and thus find that the proposed development is compatible.

[131] The Board recognizes that the Development Authority imposed condition 26 in an attempt to address the concerns identified by the community about the proposed development. However, the Board notes that the Development Authority did not include in the hearing package the results of its environmental scan from other jurisdictions. As a result, the Board has no evidence to base any conclusion about the effectiveness of condition 26.

[132] The Board has also considered the argument that there is no evidence that the reduction of operating hours would assist in addressing the safety concerns (which was advanced by Appellant 1).

[133] By contrast, Appellant 2 urged the Board to conclude that the way to address the incompatibility is to revoke the development permit.

[134] There was no evidence before the Board about the efficacy of imposing condition 26 and whether reducing the hours of operation would decrease the impact on safety. The statistics from the RCMP did not identify whether the occurrences were in the evening (which might be impacted by reduced operating hours) or whether they were during the day.

[135] In the absence of more specific information, the Board does not have tools to refine the impact of the incompatibility. The Board notes that Appellant 1 has suggested that there is no evidence that condition 26 will address the concerns. In the absence of this evidence, the Board is of the view that it is left with a "black or white" choice. Appellant 1 suggests that condition 26 won't ameliorate the impact from alcohol sales. The Board was not presented with any other argument or suggested conditions which might address the incompatibility which the Board has found arises from the proposed development. In the absence of any other presented options or conditions, the Board concludes that there is no condition it could impose to address the incompatibility, and condition 26 would not

appear to be effective in doing so.

[136] As a result of the above, the Board finds that condition 26 does not address the incompatibility of the proposed development.

[137] Without any solutions proposed to the Board to address the incompatibility, the Board finds that the proposed development is incompatible.

[138] As a result of the Board's conclusion that the proposed development is incompatible with the neighbouring uses, the Board denies appeal 1 and upholds appeal 2. The development permit is revoked.

Dated at the Regional Municipality of Wood Buffalo in the Province of Alberta, this 19th day of November 2024.

FOIP section 17(1)

CHAIR:

Dean Cleaver

APPENDIX "A"

DOCUMENTS RECEIVED AND CONSIDERED BY THE SDAB:

Exhibit #	Description	Filing Date
	Subject Area Map	2024-09-08
P1.	Request for Postponement	2024-08-12
P2.	Merit Hearing Availability – Orlagh O’Kelly (1 page)	2024-09-19
1.	Notice of Appeal – Daniel Roy (2 page)	2024-08-22
2.	Development Permit (6 pages)	2024-08-22
3.	Commentary in Support of the Appeal – Beverly Tourangeau (1 page)	2024-09-10
4.	Written Letters of Support re: Liquor Store – Appellant (97 pages)	2024-09-12
5.	Evidence Disclosure – Planner’s Report (15 pages)	2024-09-13
6.	Notice of Appeal – Orlagh O’Kelly (9 pages)	2024-09-19
7.	Written Submission re Hours of Operation – Orlagh O’Kelly (1 page)	2024-09-19
8.	Municipality Email Correspondence re: Oral Presentation time limitations (3 pages)	2024-09-25
9.	Appellant R. Homersham re Oral Presentation time limitations (1 page)	2024-09-27
10.	Appellant O. O’Kelly re Oral Presentation time limitations (2 pages)	2024-09-27
11.	Written Submission – Mary Kutschke (1 page)	2024-10-04
12.	Planner’s Report re: 2023-DP-00125 (60 pages)	2024-10-15
13.	Written Letters of Support re: Liquor Store – Appellant (31 pages)	2024-10-18
14.	Evidence Disclosure - Applicant D. Roy vs. Mikisew Cree First Nations (616 pages)	2024-10-21
15.	Evidence Disclosure -Appellant D. Roy vs. RMWB (129 pages)	2024-10-21
16.	Evidence Disclosure – Appellant O. O’Kelly (124 pages)	2024-10-22

APPENDIX “B”

REPRESENTATIONS

Person Appearing	Capacity
Chris Davis	Legal Counsel, Regional Municipality of Wood Buffalo
Nabil Malik	Development Officer, Regional Municipality of Wood Buffalo
Shailesh Makwana	Development Authority Supervisor, Regional Municipality of Wood Buffalo
Robert Homersham	Legal Counsel, Appellant 1
Daniel Roy	Appellant 1
Guy Thacker	Fort Chipewyan Resident
Charlie Frazer	Fort Chipewyan Resident
Bruce Inglis	Fort Chipewyan Resident
Orlagh O’Kelly	Legal Counsel, Appellant 2
Chief Billy-Joe Tuccaro	Mikisew Cree First Nation
Councilor Paul Taccaro	Mikisew Cree First Nation
CEO Keri Ceretzke	Mikisew Cree First Nation
Mitchel Bowers	Mikisew Cree First Nation