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REGULATORY LAW CHAMBERS

ENERGY REGULATORY REPORT

Regulatory Law Chambers *is a Calgary-based boutique law firm dedicated to excellence in energy regulatory matters. We have expertise in oil and gas, electricity, including renewable energies and commercial matters, tolls and tariff, compliance and environmental related matters. We frequently represent clients in proceedings before the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC"), the National Energy Board ("NEB"), all levels of the Courts, and in energy related arbitrations and mediations.* ***Our advice is practical and strategic. Our advocacy is effective.***

This monthly report summarizes matters under the jurisdiction of the AER, the AUC and the NEB and proceedings resulting from AER, AUC and NEB decisions. For further information, please contact Rosa Twyman at Rosa.Twyman@RLChambers.ca or John Gormley at John.Gormley@RLChambers.ca.

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ALBERTA COURT OF APPEAL

Bokenfohr v Pembina Pipeline Corp. (2017 ABCA 40)
Leave to Appeal – Delegated Authority – Uncertain Decision – Procedural Fairness

AER Pipeline Approval Decision

Pembina Pipeline Corp. ("Pembina") applied to the AER for permits to construct two pipelines from Fox Creek to Namao, Alberta (the "Pipelines"). The AER approved Pembina's pipeline application in AER Decision 2016 ABAER 004, and accordingly, issued licences to construct and operate the Pipelines to Pembina (the "*AER Decision*").

Appeal to Alberta Court of Appeal ("ABCA")

In *Bokenfohr v Pembina Pipeline Corp.* (the "*ABCA Decision*"), the ABCA considered the Grassroots Alberta Landowner Association's (the "Association") application for permission to appeal the *AER Decision*. In the *ABCA Decision*, the ABCA dismissed the Association's appeal application on the basis that it failed to identify any pure question of law, on which permission to appeal could be granted.

Association's Concerns and Grounds of Appeal

The Association members collectively owned about one-third of the land along the proposed right-of-way for the Pipelines.

In the AER proceedings, the Association did not oppose the pipelines *per se*, but raised a number of specific concerns, including the width of the right-of-way, depth of cover, weed control, construction monitoring and precise routing.

The Association sought permission to appeal the *AER Decision*, on the grounds that the AER erred in law by:

(a) failing to exercise its delegated authority when granting the licences to Pembina (approving incomplete application);

(b) making a decision that caused uncertainty in its application and effect; and

(c) breaching procedural fairness at the hearing, resulting in an unfair effect on the Association.

Test for Permission to Appeal *AER Decision* to ABCA

Section 45(1) of the *Responsible Energy Development Act* ("*REDA*") provides for appeals from an AER decision to the ABCA on questions of law or jurisdiction. In order to bring an appeal, an applicant must first be granted permission to appeal from the ABCA. On an application for permission to appeal, the ABCA considers the following factors:

(a) Is the issue of general importance?

(b) Is the point raised of significance to the decision itself?

(c) Does the appeal have arguable merit?

(d) What standard of review is likely to be applied? and

(e) Will the appeal unduly hinder the progress of the proceedings?

(See permission to appeal test as also set out in *Highpine Oil & Gas Ltd., Re*, 2009 ABCA 158; *(Regional Municipality) v Alberta (Energy & Utilities Board)*, 2007 ABCA 192.)

Did the AER Fail to Exercise its Delegated Authority?

The Association submitted that the AER panel failed to exercise its authority, because it relied on "commitments", which it indicated it could not directly enforce, rather than on enforceable "conditions." The Association argued that by failing to include additional conditions, the panel effectively abdicated its responsibility to Pembina.

The ABCA rejected this argument, holding that what conditions should or should not be imposed is within the mandate of the AER. Rejecting some proposed conditions is an exercise of delegated authority, not a failure to exercise delegated authority.

The ABCA concluded that the first ground of appeal did not raise an issue of law for which appeal could be sought.

Did the AER Err by Making an Uncertain Decision?

The Association argued that by attaching an appendix to the approval containing numerous "commitments" (the "Commitments Appendix"), the panel rendered an uncertain decision.

The ABCA rejected this argument, holding that the fact that conditions or commitments might require some interpretation, does not render them so uncertain as to disclose an error of law. The ABCA characterized the attachment of the Commitments Appendix as a "particular method of providing its decision." The ABCA acknowledged that the method, chosen by the AER to provide its decision, may require some interpretation as to the precise meaning and effect of the Commitments Appendix. However, the ABCA noted that the same can be said of any licence with conditions.

Procedural Fairness

The ABCA also rejected the Association's third ground of appeal, asserting that the AER breached procedural fairness. The ABCA held that none of the concerns raised by the Association regarding procedural fairness demonstrated a viable issue that would justify granting permission to appeal.

ALBERTA COURT OF QUEEN'S BENCH

Kainaiwa/Blood Tribe v. Alberta (2017 ABQB 107)
Aboriginal Treaty Rights – Judicial Review - Mandamus

In this decision, the ABQB considered the Blood Indian Band's (the "Band") application to the ABQB seeking:

1. A *mandamus* order directing the provincial Crown to transfer to the Band certain subsurface land rights; or
2. In the alternative, judicial review, asking the ABQB to quash the provincial Minister of Energy's (the "Minister") refusal to transfer to the Band those subsurface land rights (the "Minister's Decision"), and to direct the Minister's reconsideration.

Mandamus is a judicial remedy that compels a servant of the Crown to exercise a statutory duty it owes, but has failed to exercise.

The ABQB denied *mandamus,* but granted the Band's request for judicial review. The ABQB quashed the Minister's Decision and remitted the matter back to the Minister for reconsideration.

History and Background

The Band signed Treaty Number 7 on September 22, 1877. Under the terms of Treaty 7 several reserves were set aside for the Blackfoot, Blood and Sarcee Bands along the Bow River near Blackfoot Crossing. The Band selected the land, which is the site of its current reserve (the "Reserve"), and then relocated there in 1880 and 1881.

While surveying the Reserve in 1882, the federal government became aware that a non-Indian man, David Akers, was living at its eastern extremity, at the confluence of the St. Mary's and Old Man rivers. Once Canada realized it had mistakenly sold several pieces of land contained within the Reserve to Mr. Akers, the federal government asked Akers to relocate. He refused.

The ABQB explained that, in light of Akers' refusal to relocate: "the only recourse for the Department of Indian Affairs was to obtain a surrender of the land from the Blood". Commissioner Hayter Reed was authorized to take the surrender. After requesting additional instructions regarding compensation, he was told "when taking the surrender you had better make the most favourable terms possible with the Indians, committing the Department as little as possible to any question of compensation, either in land or in any other way".

On September 2, 1889, the federal government obtained from the Band a surrender (the "Surrender") of its lands located between the Oldman and St. Mary's River, with an area of approximately 444 acres (the "Surrendered Land").

1st and 2nd Akers Settlement Agreements

In 1995, the Band made a claim under the federal *Specific Claim Policy,* alleging that it did not receive compensation for the Surrendered Land and that the Surrender itself was invalid.

In 1996, a settlement agreement was reached between the Band and Canada (the "1st Akers Settlement"). It was a full and final settlement of the Band's claim that Canada failed to pay compensation for the Surrendered Land. Canada paid $2,346,000 to the Band under the terms of that settlement.

After the 1st Akers Settlement, the Band continued to press its other claim that the Surrender was invalid. In 2004, Canada and the Band entered into a second settlement agreement (the "2nd Akers Settlement"). It was a full and final settlement of the Band's claim that the Surrender was invalid. Under the terms of the 2nd Akers Settlement, Canada paid to the Band an additional $3,555,000.

Under the 1st and 2nd Akers Settlements, the Band received a combined $5,800,000 and the option of purchasing up to 669 acres that could be added to the Reserve. In 2008 and 2009, the Band purchased surface rights to 6 parcels of land, totaling 664.8 acres (the "Purchased Lands"). The subsurface rights remained vested in the Provincial Crown. Portions of the subsurface rights of the Purchased Lands were subject to coal leases, an ammonite lease and oil and gas leases.

Test for *Mandamus*

The ABQB explained that *Mandamus* is a judicial remedy that compels a servant of the Crown to exercise a statutory duty it owes but has failed to exercise (see e.g. *Peter Lehmann Wines Ltd v Vintage West Wine Marketing Inc*, 2015 ABQB 481 at para 52).

The ABQB set out the applicable test, from the Federal Court of Appeal decisions in *Apotex Inc v Canada (Attorney General)*, [1994] 1 FC 742 (CA)). The ABQB explained that an applicant must satisfy the following three elements to be granted a mandamus remedy:

1. There must be a public legal duty to act;
2. The duty must be owed to the applicant; and
3. There must be a clear right to performance of that duty,

(the "Apotex Test").

Parties' Submission re Mandamus

The Band submitted that the Minister of Energy was required to convey to it the subsurface rights associated with the Purchased Lands, by virtue of Treaty 7, the *Natural Resource Transfer Act* ("*NRTA*") and the honour of the Crown. The Band submitted that each of these enactments required the Crown to transfer to the Band the subsurface rights for the Purchased Lands.

With respect to the *NRTA* and Treaty 7, the Band submitted that Alberta is obliged to consent to the transfer of the subsurface rights by operation of the *NRTA*. The Band referred to *NRTA* Section 1, whereby all public land within Alberta were transferred from the Federal Crown to the Provincial Crown, "subject to any trusts existing in respect thereof". The Band argued that the transfer of land from the Federal Crown to Provincial Crown was subject to the existing First Nation treaty rights, including the right to Reserve land under Treaty 7.

Specifically, the Band argued that in order to make the Band whole and to restore the Band to the position it was in prior to the 1889 Surrender, the Province must transfer the subsurface rights underlying the Purchased Lands to the Band.

Further, the Band pointed to s 10 of the *NRTA* to argue that Alberta has a duty to assist Canada in fulfilling its treaty obligations.

The Crown submitted that:

1. It was under no such legal obligation, constitutional or otherwise, and

2. the Minister's decision was discretionary, need only have been reasonable, and was reasonable.

ABQB Decision re *Mandamus*

The ABQB found that it was only after entering into the 1st and 2nd Akers Settlement that the Band acquired an interest in the Purchased Lands. Prior to that (and at the time the *NRTA* was enacted), the Band did not have any interest in or claim to the subsurface rights underlying the Purchased Lands. The ABQB found that on the coming into force of the *NRTA*, Alberta received the Purchased Lands, including the associated subsurface rights, unencumbered by any obligation to the Band.

Nor did the Band, in the ABQB's opinion, presently have any interest in the subsurface rights underlying the Purchased Lands. Accordingly, neither Treaty 7 nor the *NRTA* obligated Alberta to transfer to the Band the subsurface rights.

The ABQB held that *mandamus* did not lie against the Minister because Alberta was not under any legal obligation to transfer the subsurface property rights to the Band, and therefore the Band failed to meet the requirements of the Apotex Test.

Judicial Review

Even though the Minister had no legal obligation to authorize the transfer of the requested property to the Band, the ABQB found that he nevertheless had the authority to do so.

The ABQB found that the power to transfer the requested mineral rights was delegated to the Minister without any statutory limitations, guidance, criteria or considerations. The ABQB found that the range of acceptable outcomes therefore was very broad.

Adequacy of Minster's Reasons

The ABQB noted that the Minister's decision delivered to the Band consisted of the following single sentence:

> After careful consideration, the Government of Alberta is not prepared to transfer or sell the underlying mineral rights to the Blood Tribe.

The ABQB found that while the *NRTA* does not expressly require the Minister to provide reasons, their absence made the Court's task of gauging the reasonableness of the Minster's Decision "extraordinarily difficult."

The ABQB cited the Supreme Court of Canada's ("SCC") decision in *Montréal (City) v Montreal Port Authority*, 2010 SCC 14 at para 38, where the SCC stated:

> The concept of "reasonableness" relates primarily to the transparency and intelligibility of the reasons given for a decision. But it also encompasses a quality requirement that applies to those reasons and to the outcome of the decision-making process.

The ABQB found that even though the *NRTA* contains no mandatory considerations for such decisions, or limitations on the breadth of the Minister's discretion, the broader law does. Specifically, ABQB held that section 35 of the Constitution requires the Minister to consider whether, and if so how, any decision may advance or impair the process of reconciliation between Aboriginal peoples and the Crown.

The ABQB found that the Minister failed to consider the role the decision could play for the Band in the ongoing process of reconciliation. The ABQB found that the Minister's decision was unreasonable because of the deficiency in the intelligibility and rationality of the Minister's reasons, exacerbated by the Minister's failure throughout the decision making process to consider the opportunity for the decision to promote the process of reconciliation between the Crown and the Band, as the law requires.

The ABQB therefore quashed the decision and returned the Band's request to the Minister for reconsideration.

ALBERTA ENERGY REGULATOR

Shell Canada Limited - Application for Two Pipeline Licences and an Application for a Pipeline Agreement Ferrier Field (2017 ABAER 002)
Pipeline Application – Approved – Aboriginal Interests

Shell filed the following applications with the AER related to the Rocky 7 Pipeline Project (the "Project"):

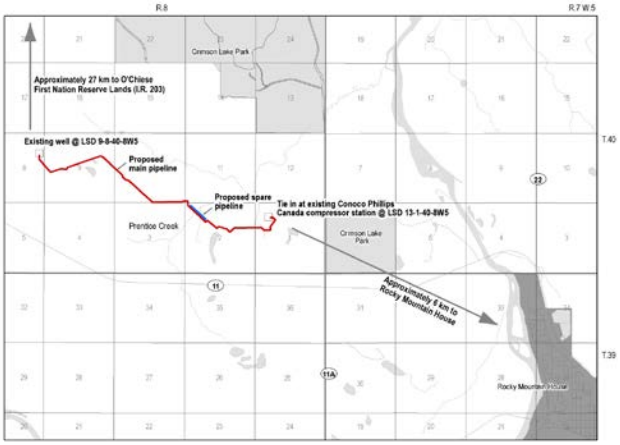
(a) On February 6, 2015, an application for a pipeline agreement under the *Public Lands Act* (the "PLA Application"); and

(b) On February 20, 2015, an application under the *Pipeline Act* for approval to construct and operate two pipelines consisting of a main pipeline and a spare pipeline (the "Pipelines") (the Pipeline Application"),

collectively referred to as the "Applications".

The Project is proposed to be located about 6 km northwest of Rocky Mountain House, Alberta, and about 27 km southeast of the O'Chiese First Nation ("OCFN") Reserve Lands (the "OCFN Lands"). A map of the project area is reproduced in Figure 1 below.

Figure 1: Map of Rocky 7 Pipeline Project



Need for the Project

Shell submitted that the main pipeline is needed to transport production from the Rocky 7 well located within the Duvernay Formation to the Centrica Canada Limited Ferrier gas plant. Shell stated that production from the Rocky 7 well would assist Shell in assessing the long-term viability of the Duvernay Formation.

No party contested Shell's evidence and the AER panel found that the main pipeline was needed.

With respect to the spare pipeline, the AER dismissed interveners' concerns regarding whether Shell may have plans for future development in the area. The AER held that matters relating to future (and not applied for) development projects were not within the scope of the proceeding considering the Applications.

Environment Impacts

The AER found that the Project's environmental effects would be minimal.

The AER found that Shell's proposed mitigation and reclamation measures for the Project minimized the adverse environmental effect. The AER held that the minimal environmental risk was acceptable when considering the Project benefits.

The AER also noted that Shell's proposed amendments would reduce the footprint of the Project and, therefore, further mitigate potential environmental impacts.

Aboriginal Matters

The OCFN is of a Saulteaux Ojibway culture. The OCFN Lands are located within Treaty 6 territory and are about 27km northwest of the proposed Pipelines. The OCFN Lands are occupied by about 1,300 people living in the OCFN community.

OCFN signed an adhesion to Treaty 6 on May 13, 1950. Treaty 6 sets out the rights of the OCFN to hunt and fish on unoccupied Crown lands within the Province of Alberta.

The AER acknowledged that the members of the OCFN have constitutionally protected aboriginal rights under Section 35 of the *Constitution Act*.

The OCFN presented evidence that its members continue to practice their constitutionally protected aboriginal rights in their traditional territory, which overlaps the proposed Project area. The OCFN presented evidence of historic and current use of the OCFN Lands for resource harvesting, travel, occupation, and ceremonial purposes.

The OCFN stated that the project area is important to its community and is currently used for practicing treaty and aboriginal rights, despite the existing industrial infrastructure and development activity in the area.

The OCFN expressed concerns that the proposed project would have negative environmental impacts and affect the ability of its members to practice their aboriginal and treaty rights in the project area. These concerns included:

(a) Increased traffic, light, dust, and noise due to construction activities;

(b) Destruction of wildlife habitat and vegetation;

(c) Decreased sense of solitude for OCFN harvesters during construction and operation activities;

(d) The inability of OCFN harvesters to hunt or gather in the area around Shell's pipeline projects during construction and operation due to safety concerns; and

(e) Restricted aboriginal and treaty rights because unoccupied Crown land would be lost and the OCFN hunters and gatherers' access to the pipeline ROW would be restricted.

With respect to potential access restrictions, the AER found that issuing a pipeline agreement to Shell would not give Shell the ability to restrict the access of OCFN members, unless such access conflicted with Shell's ability to use the lands for the purpose for which they were granted (i.e. the construction and operation of a pipeline).

The AER noted that the pipeline agreement is a right-of-way ("ROW") agreement and "conveys an interest in public land, but not exclusive right of access."

The AER noted Shell's confirmation that it will only restrict access to the lands during construction for safety reasons and for required maintenance or pipeline integrity purposes.

The OCFN also submitted that if a pipeline agreement were to be issued to Shell, the lands would no longer be unoccupied Crown lands.

Shell submitted that the lands would not be occupied as a result of the project. The OCFN would be able to continue to use the ROW uninhibited and Shell would not and could not restrict such use and access.

AER Findings

The panel found that there would be temporary limitations on the OCFN members' access to the lands. This would result in minimal impacts on their ability to exercise their rights. However, the AER noted the OCFN Lands were already affected by the presence of existing pipelines, a powerline, and a road in the immediate project area. The AER found that approving the Project would have minimal incremental effects on the ability of the OCFN to continue to practice aboriginal and treaty rights in the future as it is practicing them today.

Given that access limitations would be temporary and for short durations, the AER concluded that in balancing these effects, the benefits of the project outweighed the potential minimal restrictions on the OCFN's traditional use area.

Approval

The panel approved Shell's Pipeline Application and the PLA Application subject to the conditions set out in appendix 1 of the decision.

Decision Dismissing J. Winchester's Request for Regulatory Appeal of Petrus Resources Corp. Licences
Regulatory Appeal Request - Denied

In this decision, the AER considered Mr. Winchester's request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision to issue certain well and facility licences (the ("Licences") to Petrus Resources Corp. ("Petrus").

The AER denied the request for regulatory appeal on the grounds that Mr. Winchester was not an "eligible person" for the purposes of requesting a regulatory appeal under *REDA*.

REDA, section 38, states:

> 38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules.

"Eligible person" is defined in section 36 (b)(ii) as:

> A person who is directly and adversely affected by a decision referred to in clause (a)(iv).

Mr. Winchester outlined concerns with respect to noise, groundwater aquifer problems, flaring and alternate site locations with regard to Petrus' development located at the 1-8 site.

In response, Petrus submitted that it will adhere to the AER requirements in Directive 038: Noise Control. It further submitted that it will consider a noise barrier should this become necessary during the construction and completion of the development.

In regards to flaring concerns, the AER noted Petrus' statement that there would be no continuous flaring from the licenced projects and that it would comply with *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting*.

The AER characterized Mr. Winchester's concerns regarding his health and safety related concerns as "concerns only." The AER stated the Mr. Winchester did not provide information in support of how such concerns directly affected his health or safety. The AER held that Mr. Winchester failed to establish that he is or may be directly and adversely affected by the Licences.

The AER concluded that Mr. Winchester was not directly and adversely affected by the decision to issue the Licenses and therefore not an "eligible person" under *REDA* section 36(b)(ii).

Accordingly, the AER dismissed the request for regulatory appeal.

Bulletin 2017-03: Change to Submission of Emergency Response Plans under Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry Feb 02, 2017

In this Bulletin, the AER announced it is changing the process for filing emergency response plans ("ERPs"). Effective February 2, 2017, ERPs are to be submitted electronically, through the AER's Digital Data Submission ("DDS") system, rather than by hard copy.

Directive 071: Emergency Preparedness and Response Requirements for the Petroleum Industry has been revised to reflect this change. The February 2017 edition replaces the November 2009 edition, effective immediately.

Bulletin 2017-04 re First 2017/18 Orphan Fund Levy

In this Bulletin, the AER announced that it is prescribing an orphan fund levy in the amount of $15 million.

The Orphan Well Association ("OWA"), Canadian Association of Petroleum Producers ("CAPP"), and Explorers and Producers Association of Canada ("EPAC") approved a $30 million orphan fund levy to fund the OWA's budget for fiscal year 2017/18. This total levy is to be collected through two separate levies. The AER will collect the initial levy of $15 million in March 2017 and the second levy of $15 million in September 2017.

The AER explained that it will allocate the year's first orphan fund levy among licensees and approval holders included within the Licensee Liability Rating ("LLR") and Oilfield Waste Liability ("OWL") Programs based on the February 2017 monthly assessment.

Levy Formula

Each licensee or approval holder included within the LLR and OWL Programs will be invoiced for its proportionate share of the orphan fund levy in accordance with the following formula:

> Levy = A/B × $15 million,

where:

> A = the licensee's or approval holder's deemed liabilities on February 4, 2017, for all facilities, wells, and unreclaimed sites included within the LLR and OWL Programs; and
>
> B = the sum of the industry's deemed liabilities on February 4, 2017, for all facilities, wells, and unreclaimed sites included within the LLR and OWL Programs, as calculated in accordance with Directive 006, Directive 011, and Directive 075.

Each licensee's or approval holder's required orphan fund levy is based on its licensed and approved properties, according to AER records, as of February 4, 2017. Facilities included under the Large Facility Liability Management Program are excluded.

Bulletin 2017-06: Release of Directive 084: Requirements for Hydrocarbon Emission Controls and Gas Conservation in the Peace River Area

In this bulletin, the AER announced the release of *Directive 084: Requirements for Hydrocarbon Emission Controls and Gas Conservation in the Peace River Area* ("Directive 084").

The AER states that the new directive is intended to address odour and emissions concerns expressed by residents of the Peace River area.

The new Directive 084 resulted from an AER inquiry, followed by a report and recommendations. The inquiry panel released its report, Report of Recommendations on Odours and Emissions in the Peace River Area, on March 31, 2014 (the "AER Report"). Recommendations from the AER Report incorporated in Directive 084 include:

- Elimination of routine and nonroutine venting;
- Limitations on flaring activities;
- Increased gas conservation measures; and
- Limitations on emissions and odours from fugitive sources and from truck-loading and unloading activities.

The new Directive 084 becomes effective on April 1, 2017, and applies to heavy oil and bitumen operations in the Peace River area of Alberta (defined in figure 1 of the directive).

ALBERTA UTILITIES COMMISSION

Alberta PowerLine General Partner Ltd. Fort McMurray West 500-Kilovolt Transmission Project (Decision 21030-D02-2017)

Transmission Line – Aboriginal Consultation – AUC Jurisdiction re Adequacy of Crown Consultation

In this decision, the AUC considered Alberta PowerLine Ltd.'s ("APL") applications to construct and operate the proposed Fort McMurray West 500-Kilovolt transmission facilities (the "Project"). The Project consists of the following elements:

- A 500-kV single-circuit transmission line approximately 400 kilometres in length, designated as 12L41 from AltaLink Management Ltd.'s transmission line 1241L to the existing Livock 939S Substation. The transmission line also contains three optical repeater sites.
- A 500-kV single-circuit transmission line approximately 100 kilometres in length, designated as 12L44, from the existing Livock 939S Substation to the proposed Thickwood Hills 951S Substation.
- One 500-kV substation, including four 500-kV circuit breakers, at the existing Livock 939S Substation.
- One 500-kV substation, including one 500/240-kV transformer and three 500-kV circuit breakers, at the proposed Thickwood Hills 951S Substation.

AUC Jurisdiction to Consider Aboriginal Matters

In a preliminary ruling attached as an appendix to this decision, the AUC considered its jurisdiction over the questions raised in the Notices of Questions of Constitutional Law.

During Proceeding 21030, the AUC considered as a preliminary matter, Notices of Questions of Constitutional Law ("NQCL(s)") received from the Wabasca Métis Local 90, the Gunn Métis Local 55, the Fort McMurray Métis Local 1935/Fort McKay Métis Community Association, the Métis Nation of Alberta Association Lakeland Local Council 1909, the Beaver Lake Cree Nation ("BLCN") and the Sucker Creek First Nation ("SCFN").

In a preliminary ruling, dated October 7, 2016 (the "NQCL Ruling"), attached as an appendix the Project Approval Decision, the AUC considered its jurisdiction over the questions raised in the NQCLs.

The question before the AUC was whether the Crown had discharged its duty to consult with the various Aboriginal groups about potential adverse impacts on their respective Aboriginal rights.

The AUC noted that the Crown had not delegated to the AUC the Crown's duty to consult. Nor had the AUC itself engaged in direct consultation. The AUC also noted that there were no provisions in its governing legislation expressly providing for, or prohibiting, the AUC from making determinations on the adequacy of Crown consultation. However, the AUC noted that as a designated decision maker under *Procedures and Jurisdiction Act* and *Designation of Constitutional Decision Makers Regulation*, it is empowered to hear all questions of "constitutional law".

The AUC therefore had to determine whether its jurisdiction to consider a question of constitutional law included the question of whether the Crown had discharged its duty to consult with holders of relevant Aboriginal interests in relation to the applications before it.

The AUC held that its jurisdiction does not include decisions regarding the adequacy of Crown consultation, where the Crown is not a party in a proceeding before the AUC.

Legislative Framework re Transmission Project Approval

The AUC provided an overview of the two-stage approval process for a proposed new transmission project.

The first stage requires the AESO to file an application with the AUC for approval of the need for the transmission line ("Needs Application").

The AESO is responsible for preparing a needs application under Section 34 of the *Electric Utilities Act*. Section 11 of the *Transmission Regulation* (the "T-Reg") sets out the contents of a Need Application, including:

- an assessment of current transmission capacity;
- load and generation forecasts;
- studies and analyses that identify the timing and nature of the need for new transmission;
- a technical and economic comparison of the technical solutions considered by the AESO to address the need identified; and
- the AESO's preferred option or technical solution to address that need.

At the second stage, the AUC considers a transmission facility owner's ("TFO") application to construct and operate the proposed transmission facility ("Facility Application").

Critical Transmission Infrastructure

The CCA submitted that the Project did not meet the provisions of the *HEEA* with respect to the Project being designated as a critical transmission infrastructure under Section 4 of the Schedule to the *HEEA* (the "Schedule"). Section 4 of the Schedule describes transmission facilities that are designated as critical transmission infrastructure.

APL and the AESO submitted that the Project is part of the critical transmission facilities described as "two single circuit 500 kV alternating current transmission facilities from the Edmonton region to the Fort McMurray region, generally described as follows". The proposed project is for one of those transmission lines. The end-point subject to dispute is described in the Schedule as "the substation **at or in the vicinity of** the existing Brintnell 876S substation."

The CCA submitted that the end point of the project was not in compliance with Section 4 of the Schedule because it would end at the Livock 939S Substation, which is 38 kilometres away from the Brintnell 876S Substation.

With reference to statutory interpretation principles, the AUC rejected the CCA's argument. The AUC held that all the words used in a legislative provision are to be considered in the interpretation of that provision, unless an absurd consequence results by doing so. The AUC considered that the legislature intended for the words, "or in the vicinity of" to provide the AESO flexibility in determining the end point.

Public Consultation

APL's participant involvement program consisted of the following stages:

- Program initiation – early discussions with government agencies and industry.
- Public notification and open houses – preliminary route options announced, input sought.
- First round consultations – personal consultations on preliminary route options.
- Public notification of refined route options.
- Second round consultations – further consultations on refined route options.
- Resolution of concerns – route adjustments identified, mitigation options discussed.
- Notification of proposed route and facility application.

The AUC acknowledged that there remained some specific unresolved concerns of individual interveners. However, the AUC noted that for a project of such magnitude, proponents will inevitably fail to satisfy the expectations of some parties. The AUC held that its consideration of the adequacy of public consultation must assess the fundamental components of the participant involvement program as a whole, in light of the nature and scope of the project at hand, and determine whether the overall program satisfies the requirements of Rule 007.

The AUC found the APL successfully demonstrated that it undertook a comprehensive participant involvement program. The AUC noted that APL conducted multiple rounds of consultation, refining its project with each iteration and providing updates on the changes. The AUC considered that APL utilized effective communication tools including direct consultation, mail notifications, public open houses and community meetings.

Route Selection

In its application, APL identified a west route option, preferred west variant option, an east route option and an east route variant option.

The Figures on the following page show the options set out in the Application.

Figure 1: Applied-for Routing

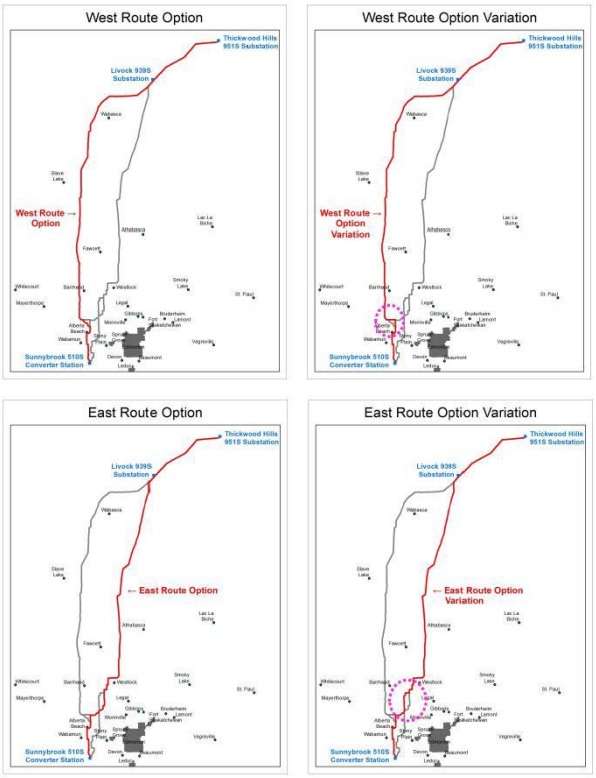


Figure 2: Final Applied-for Routing

The AUC found that overall, the south common route and the west route option for transmission would result in lower social, economic and environmental impacts. The reasons for this determination are summarized below.

<u>APL's Route Assessment Methodology</u>

APL used the following criteria to assess the options and determine a preferred route:

- Minimize impacts on other land uses, such as residences, built-up areas, oil and gas facilities, and airstrips.
- Utilize existing linear developments to minimize new disturbance and clearing, and follow existing power lines where practical.
- Follow existing roads, where practical, for access, to reduce new clearing, and to avoid impacts to the environment.
- Follow quarter and section lines wherever practical to minimize impact to agriculture.
- Keep routes as straight as reasonably possible, to reduce line length, workspace requirements, and costly corner structures.
- Minimize length through environmentally-sensitive areas, such as watercourses, recreation areas, parks, campgrounds, and wildlife habitat. Minimize length through wet areas and steep slopes for better access and to reduce environmental impacts.
- Ensure all electrical system constraints and considerations are respected.

The AUC explained that its objective in assessing route selection includes considerations re social, economic and environmental impacts of the proposed and alternative routes. Specifically, the AUC assessed the following routing criteria: agricultural impacts, residential impacts, visual impacts, electrical considerations, environmental impacts and cost (collectively, the "Routing Criteria").

The AUC found that overall, APL's approach and methodology in seeking viable routes was reasonable. The AUC held that APL ably applied the Routing Criteria in assessing the initial study area and in identifying preliminary route options and alternatives. The AUC agreed with APL's assessment that the west route option and east route option along with the common portions of the routes, were the best alternatives among the available options.

<u>Impact on Residences</u>

With respect to impact on residences, the AUC noted that there were more residences within 150 metres of the

transmission line on the west route option than on the east route option. On the other hand, the AUC noted there were fewer residences within 800 metres of the west route option. In addition, the AUC found that there were only incremental impacts on many residences along the west route option, as those residences were already effected by other existing transmission lines.

Given the large size of the proposed transmission line structures and the small number of residences within 150 metres, the AUC placed more weight on the "residences within 800-metres" metric rather than the "residences within 150 metres" metric.

The AUC concluded that the west route option was the most favorable route option from a residential impacts perspective.

Environmental Impacts

The AUC found that the Environmental Assessment report and the supplementary assessments completed by CH2M and Matrix (the "EA Report") adequately addressed the anticipated impacts through the proposed mitigation measures.

In its application and submissions, APL committed to finalize and implement the environmental protection plan for the Project outlined in the EA Report.

With respect to the relative impact of the alternative routes, the AUC found that the west route option would have fewer potential residual environmental effects than the east route option. The AUC supported this finding with reference to the west route option scoring better on 6 of the 9 metrics used in the EA Report.

Caribou

The Commission agreed with APL's submission that a caribou habitat restoration offset program would be most effective if directed by a provincial agency such as Alberta Environment and Parks.

As such, the AUC did not require APL to restore habitat as a condition of the Project's approval.

To ensure the implementation of the proposed mitigation measures, the AUC included, as part of the Project's approval, the following conditions

- APL shall abide by the caribou protection plan as approved by Alberta Environment and Parks for the project.
- Throughout the construction, APL shall engage in ongoing discussions with the AEP about the impacts of the Project on woodland caribou, and incorporate any additional mitigation measures recommended by Alberta Environment and Parks into the caribou protection plan.

Birds

The AUC found that the Project will negatively impact birds.

However, the AUC recognized that APL had committed to installing bird line markers every 20 metres for the portions of the transmission line located within 150 metres of significant open waterbodies or where important nesting sites had been previously identified.

The AUC also noted that APL had committed to conducted supplemental wildlife field surveys, in addition to those already conducted as part of the Environmental Assessment, in areas where the route had been realigned.

The AUC concluded that given the above mitigation measures, APL had made reasonable efforts to limit the impact on wildlife and wildlife habitat.

Aboriginal Consultation

The AUC cited Decision 2011-436, where the Commission made the following comments with respect to effective consultation under Rule 007:

> … In the Commission's view, effective consultation achieves three purposes. First, it allows parties to understand the nature of a project. Second, it allows the applicant and the intervener to identify areas of concern. Third, it provides a reasonable opportunity for the parties to engage in meaningful dialogue and discussion with the goal of eliminating or mitigating to an acceptable degree the affected parties concerns about the project. If done well, a consultation program will improve the application and help to resolve disputes between the applicant and affected parties outside of the context of the hearing

With respect to Aboriginal consultation regarding the Project, the AUC found that APL's consultation with Aboriginal groups met the three objectives identified in Decisions 2011-436 above.

The AUC found that APL engaged in a dialogue with Aboriginal groups in an attempt to identify and potentially mitigate their concerns with the Project.

The AUC considered that the withdrawal of concerns by the majority of Aboriginal groups consulted by APL supported the AUC's finding that APL made reasonable efforts to engage with Aboriginal groups in discussions about their members' concerns.

Approval

The AUC found approval of the Project to be in the public interest, having regard to the social and economic effects of the facilities, and their effects on the environment.

Accordingly, the AUC approved the Project along the west route option.

ATCO Gas and Pipelines Ltd. (South)West Calgary Connector Pipelines Project (Decision 21591-D01-2017)
Pipelines – ATCO Gas and Pipelines Ltd. - Urban Pipeline Replacement Project

In this decision, the AUC considered ATCO Gas and Pipelines Ltd. (South) ("ATCO")'s application (the "Application") for new high-pressure pipelines in west Calgary, primarily within the existing Calgary transportation and utility corridor ("TUC"). The proposed pipelines, referred to as the West Calgary Connector Pipeline Project (the "WCC Project" or "Project"), would be about 20 km in length. The WCC Project is part of the Urban Pipeline Replacement Project ("UPRP"). The AUC previously approved the need for the UPRP in Decision 2014-010.

Landowner Concerns

Many of the interveners expressed safety and environmental concerns regarding the proximity of the proposed pipeline to their respective lands and homes.

The AUC found that ATCO had taken significant and effective steps to mitigate such concerns, by proactively designing the proposed pipelines to the most stringent safety standards. The AUC also noted other steps ATCO had taken to mitigate safety concerns, including: designing the project so that the Pipelines would be constructed primarily within an existing transmission right-of-way with limited third-party access.

Gravel Operator Concerns

Burnswest Corporation and Burnco Rock Products ("Burnwest") raised concerns that the proposed pipelines could interfere with its gravel operations located on lands it owned adjacent to the TUC and lands Burnwest leased within the TUC.

Specifically, Burnwest was concerned about the potential for gravel sterilization on its property located adjacent to the TUC and that approval of the Project might impair its ability to access its leased TUC lands.

With respect to gravel sterilization, the AUC noted that Section 535(1)(d) of the *Occuptational Health & Safety Code* prohibits excavations within 30 metres of a pipeline or other utility corridor – whether or not a pipeline is approved or not. Therefore, a 30-metre setback from the TUC boundary is in effect, regardless of whether or not the proposed Project was approved.

The AUC found that any potential sterilization of the gravel reserves underlying the Burnwest lands could be directly or exclusively attributed to the proposed WCC project pipelines. The AUC noted that, in any event, it had no jurisdiction to address matters of compensation arising from sterilization (or otherwise).

The AUC acknowledged that Burnswest's circumstances were unique, in that it has an interest in land within the TUC that is adjacent to lands that it owns outside of the TUC.

The AUC considered that approval of the Project should not result in limiting Burnswest's access between its two properties. Accordingly, the AUC directed ATCO, as a condition of any approval, to ensure that the WCC Project is constructed to accommodate Burnsewest's heavy vehicles crossing at a specified location.

Order and Conditions

The AUC decided that approving the WCC Project was in the public interest, subject to the following conditions set out in the approval order:

> (1) ATCO shall obtain written consent from the Minister of Infrastructure for the construction and operation of the WCC project within the Calgary TUC and provide the Commission with written confirmation of that consent. Upon receipt of that consent, the Commission will issue the necessary licences.
>
> (2) ATCO shall implement and adhere to its environmental protection plan. If ATCO determines that any material changes to the measures set out in the environmental protection plan are required, ATCO must advise the Commission in writing of such changes and the reason for the changes. Following completion of the project, including any necessary reclamation, ATCO shall confirm to the Commission in writing, by a post-approval filing in this proceeding, that it has implemented all necessary and required mitigation measures set out in the environmental protection plan.
>
> (3) ATCO shall ensure that the WCC project is designed and constructed to accommodate the crossing of heavy haul vehicles at a specified, suitable, well-marked location between Burnswest/Burnco's Lowry and TUC properties.

NATIONAL ENERGY BOARD

Letter Decision Approving AltaGas Application to Abandon the John Lake Pipelines (Hearing MHW-003-2016)
Pipeline – Abandonment

AltaGas Holdings Inc. on behalf of AltaGas Pipeline Partnership ("AltaGas") applied to the NEB (the "Application") requesting leave to abandon the John Lake Pipelines.

In its application AltaGas proposed to abandon in-place approximately 2.80 km of the North John Lake Pipeline and 2.40 km of the South John Lake Pipeline (the "Pipelines") located within Onion Lake Cree Nation's ("OLCN") Reserve Land.

The Pipelines to be abandoned are located approximately 60 km east of Elk Point, Alberta.

AltaGas proposed to abandon the Pipelines in-place. Once the abandonment activities are completed, AltaGas will maintain the easement for the abandoned Pipelines.

Environmental Impact

The Project was not subject to the requirement of an Environmental Assessment under *Canadian Environmental Assessment Act, 2012* as it is not a designated project under that Act.

AltaGas submitted that the Pipelines' right-of-way (RoW) are located entirely on Crown land, and that abandonment activities will be carried out entirely within AltaGas' existing RoWs. AltaGas stated that the land use in proximity to the RoWs is primarily oil and gas activity with no additional land access being required for abandonment activities.

The NEB noted that previously disturbed lands provide only limited wildlife habitat. All the proposed abandonment work is to take place along the existing disturbed AltaGas Right of RoW.

AltaGas requested that it be permitted to file its Environmental Protection Plan ("EPP") after the commencement of work. The NEB denied AltaGas' request, noting that the purpose of the EPP is to communicate AltaGas' Project-specific environmental protection commitments, procedures, and mitigation measures during abandonment activities. Accordingly, the NEB directed AltaGas to file the EPP prior to commencing abandonment activities.

The NEB determined that, subject to the conditions contained in the NEB order approving the application, carrying out the abandonment of the Pipelines is not likely to cause significant environmental and socio-economic effects.

Public Consultation

The NEB noted that AltaGas did not initiate consultation with potentially affected persons or groups until after it filed the Application.

However, the NEB determined that ultimately, anyone potentially affected by the Project was given notice of the Project and had the opportunity to voice their concerns to AltaGas or the NEB.

The NEB held that the consultation program was appropriate for the scale of the Project.

Aboriginal Matters

The NEB noted concerns raised by OLCN related to contamination of lands arising from the proposal to abandon the Pipelines in-place. Although AltaGas submitted that there is no known contamination on the RoWs, the NEB considered it necessary to include a condition to provide assurance that any contamination (historic or unknown) would be identified and reported before AltaGas commences abandonment activities.

OLCN also submitted that appropriate reclamation standards, outcomes, and methodology should be developed in conjunction with OLCN. OLCN submitted that the abandonment and reclamation plans should include community-based monitoring informed by Indigenous knowledge.

In a subsequent letter from OLCN to the NEB, OLCN stated that it had discussed the Project with AltaGas, and based on those discussions and the mitigation options agreed to by AltaGas, OLCN did not object to the Project.

with the implementation of AltaGas' mitigation measures and the inclusion of the NEB's conditions, the NEB found that any potential Project impacts on Aboriginal groups were likely to be minimal. To facilitate continued consultation efforts between AltaGas and OLCN, the NEB included conditions to that effect. Specifically, conditions of the Project's approval included requirements that AltaGas:

(a) confirm that a copy of the Phase I ESA has been provided to OLCN (as part of Condition 4);

(b) confirm that the results of the Phase II ESA, or a statement indicating that it was not required, has been provided to OLCN (as part of Condition 5);

(c) if the results of the Phase II ESA identify that remediation is required, to file a Remediation Action Plan, including summaries on consultations with OLCN. In its summaries, AltaGas must provide a description and justification for how it has incorporated the results of its consultation, including any recommendations from OLCN into the Plan;

(d) provide OLCN a copy of AltaGas' plan describing participation by OLCN in monitoring of Abandonment Activities for the Project (as part of Condition 7); and

(e) confirm that a copy of the Post-Abandonment Report has been provided to OLCN (as part of Condition 8).

Decision

The NEB concluded that subject to the conditions set out in the Order, approving the Application was in the public interest. The NEB therefore granted AltaGas leave to abandon the Pipelines.