REGULATORY LAW CHAMBERS

ENERGY REGULATORY REPORT

This monthly report summarizes matters under the jurisdiction of the Alberta Energy Regulator ("AER"), the Alberta Utilities Commission ("AUC") and the Canada Energy Regulator ("CER") and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the RLC Team.

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IN THIS ISSUE:

FEDERAL COURT OF APPEAL

Coldwater First Nation v. Canada (Attorney General), 2020 FCA 34

Indigenous Consultation

This case involved applications for judicial review of the second approval by the Governor in Council ("GIC") of the Trans Mountain Pipeline Project (the "Project") following a reconsideration hearing before the National Energy Board ("NEB"). Four applicants sought to challenge the second approval on environmental grounds and on the alleged continued failure of the duty to consult. The Federal Court of Appeal ("FCA") dismissed the applications.

Background

In November 2016, the GIC approved the Project. Several applicants successfully challenged the approval in *Tsleil-Waututh Nation v. Canada (Attorney General),* 2018 FCA 153 ("*TWN 2018*"), with the Federal Court of Appeal finding two fundamental defects: the impermissibly under-inclusive nature of the environmental assessment that formed part of the basis for the approval and the Crown's failure to fulfil its duty to consult with Indigenous peoples. The FCA remitted the matter back to the GIC in order for these flaws to be addressed and for re-decision.

A reconsideration hearing was ordered to take place before the NEB. The GIC again approved the Project. Several parties sought to challenge the second approval. Six were granted leave, and two of those discontinued their applications, leaving four applicants before the FCA: Coldwater Indian Band ("Coldwater"), Squamish Nation ("Squamish"), Tsleil-Waututh Nation ("Tsleil-Waututh") and Aitchelitz, Skowkale, Shxwhá:y Village, Soowahlie, Squiala First Nation, Tzeachten and Yakweakwioose (Ts'elxwéyeqw). Applications for judicial review were restricted to duty to consult issues.

Opening Observations

The FCA began by noting that the applicants had argued their case very much as if this was the first time that their case was adjudicated, when in fact, the task of the Court, in this case, was much more limited.

The FCA went on to note *TWN 2018* examined the consultation process that preceded the first Project approval in exhaustive detail, finding many aspects of that process to be adequate. The FCA in *TWN 2018* found that the execution of one part of the consultation, Phase III, was deficient.

TWN 2018 did not require that the consultation process begin anew. Instead, it required focused consultation to address the shortcomings it identified. While the flaws were significant, they were restricted to precise issues within the overall consultation process.

Standard of Review

The FCA noted that the Supreme Court case in *Canada (Minister of Citizenship and Immigration) v. Vavilov* ("*Vavilov*") did not materially change the standard of review in this litigation. Given that this case was a statutory judicial review and not a statutory appeal, the presumptive standard of reasonableness applied.

The FCA further noted that in *Vavilov*, the Supreme Court held that questions as to the scope of Aboriginal and treaty rights under section 35 of the *Constitution Act, 1982* require a final and determinate answer from the courts and, thus, must be reviewed for correctness. However, all parties agreed on the scope of the duty to consult under section 35, and that was, therefore, not an issue for the Court.

Was the GIC's Decision Reasonable?

In the FCA's view, the GIC's decision was reasonable. It was acceptable and defensible in light of both the outcome reached on the facts and the law and the justification offered in support.

In this case, the GIC's key justifications for deciding as it did were fully supported by evidence in the record. The evidentiary record showed a genuine effort in ascertaining and taking into account the key concerns of the applicants, considering them, engaging in two-way communication, and considering and sometimes agreeing to accommodations, all very much consistent with the concepts of reconciliation and the honour of the Crown.

Notwithstanding requests from the FCA to focus on the GIC's decision and to address the standard of review, the applicants focused on the merits of the decision. In light of the Court's analysis and given

the applicants' failure to focus on a review of the decision of the GIC in accordance with the governing standard of review, the FCA concluded that the decision of the GIC was reasonable.

The FCA then responded to the applicants' detailed submissions. It wrote that such a response was not required by the analysis of reasonableness it was to follow under *Vavilov.* However, the shortcomings on which the applicants were asked to comment pursuant to the Leave Order were detailed and specific in nature and, to that extent, may have led the applicants to adopt a more merit-based approach than that sanctioned in *Vavilov*. The FCA also noted that it was important to defuse any suggestion that the FCA did not consider the applicants' submissions.

Response to the Applicants' Specific Submissions

The FCA found that even if it was reviewing the GIC's decision on the basis of correctness, it would still not be persuaded that interference with the GIC's decision was warranted.

It noted that the applicants' submissions were essentially that the Project could not be approved until all of their concerns are resolved. The FCA noted that if it were to accept those submissions, as a practical matter there would be no end to consultation, the Project would never be approved, and the applicants would have a de facto veto right over it. The FCA then went through a detailed analysis of each applicant's concerns.

Coldwater

The focus of Coldwater's concerns was on the potential impact of the Project on the aquifer from which it draws its drinking water supply.

The FCA did a detailed review of the issues raised in *TWN 2018* related to the aquifer and found that these issues had been resolved.

The FCA also noted that Coldwater's "strong preference" for a West Alternative that imposed no risk to its aquifer or drinking supply began to shift during the consultation that occurred after *TWN 2018*. When it became apparent that the West Alternative could provide a realistic solution to its aquifer concerns, Coldwater began to take the position that no route was safe enough. The FCA noted that this was not an issue that had ever been previously raised by Coldwater, and cited authority suggesting that Coldwater's position essentially amounted to seeking a veto.

Squamish

Squamish's primary concerns with the Project were the risk of spills of the diluted bitumen that would be carried by the pipeline and the consequences of a spill for Squamish's rights and interests.

TWN 2018 identified three specific shortcomings in the earlier consultation between Canada and Squamish on these subjects. The first was that there was no meaningful response from Canada to Squamish's concern that too little was known about how diluted bitumen would behave if spilled to permit approval of the Project. The second was that there was nothing in Canada's response to show that Squamish's concern about diluted bitumen was given real consideration or weight. The third was that there was nothing to show that any consideration was given to any meaningful and tangible accommodation measures.

The FCA found that these shortcomings were addressed. It found that the record demonstrated that in the renewed consultation process, Canada meaningfully responded to Squamish's concerns through, among other things, discussion, the exchange of expert scientific opinion, and the provision of relevant information and documentation. Canada also proposed accommodation measures that could contribute to mitigating the impacts with which Squamish was concerned.

The FCA found that the proposed accommodation measures were meaningful and tangible; that Canada did not withhold necessary information; and that allegations of bias, which were rejected in the leave decision, were not properly before the Court.

Tsleil-Waututh

TWN 2018 concluded that the Crown's initial consultation with Tsleil-Waututh was inadequate. Tsleil-Waututh's main concern was marine shipping. Canada's response to this concern was characterized as "generic and vague", and as devoid of "concrete measures". More specifically, *TWN 2018* identified as shortcomings Canada's failure to consult with Tsleil-Waututh or accommodate its concerns respecting: (1) the NEB's exclusion of Project-related marine shipping from the Project definition; (2) the inadequacy of the conditions imposed by the NEB to address Tsleil-Waututh's

concerns about marine shipping; (3) the likelihood of oil spills in Burrard Inlet; (4) spill response capabilities; (5) the ability to recover spilled oil; and (6) marine shipping impacts on Tsleil-Waututh's title, rights, and interests.

The FCA examined Tsleil-Waututh's contentions that: (1) Canada made "consultative errors" in relation to Tsleil-Waututh's concerns about Project-related marine shipping impacts; (2) Canada took an incorrect and unreasonable approach to accommodation; (3) Canada withheld necessary information until the end of the consultation process; and (4) Canada's mandate was unreasonably constrained.

The FCA found that the record did not support Tsleil-Waututh's characterization of the re-initiated consultation process. Rather, the record demonstrated that Canada adequately consulted Tsleil-Waututh in relation to its concerns about Project-related marine shipping impacts and reasonably approached accommodation. There was also no evidence to suggest that Canada withheld necessary information from Tsleil- Waututh. Nor did the record support the contention that Canada's mandate was inappropriately constrained. While the record did show that Tsleil-Waututh's conduct during the re-initiated consultation process hindered Canada's consultation efforts, Canada nonetheless succeeded in addressing the shortcomings identified in *TWN 2018*. Therefore, Tsleil-Waututh failed to show that the GIC's assessment of the consultation with and accommodation of Tsleil-Waututh was unreasonable.

Ts'elxwéyeqw

In *TWN 2018*, six shortcomings were pointed to in support of the conclusion that Canada's initial consultations with the Stó:lō (including Ts'elxwéyeqw) were not meaningful. First, Canada failed to give due consideration to the 89 recommendations contained in the Integrated Cultural Assessment for the Proposed Trans Mountain Expansion Project ("ICA"), a detailed technical submission prepared by the Stó:lō concerning potential impacts of the Project. Second, Canada failed to address the Stó:lō's position that Lightning Rock is a "no go" area. Third, Canada failed to ensure that the Stó:lō cultural sites were incorporated into the Project's alignment sheets (documents showing the exact route proposed for the pipeline). Fourth, Canada failed to accommodate the request for Indigenous groups to select Indigenous monitors. Fifth, Canada failed to guarantee that Trans Mountain would be held accountable for its commitments. Finally, Canada did not succeed in explaining how the Stó:lō's constitutionally protected right to fish was accounted for during the consultation process.

In this application, the Ts'elxwéyeqw advanced four contentions as follows: (1) Canada failed to adequately engage with the ICA, and the 89 recommendations; (2) Canada's accommodation measures are generic, conceptual, not specific, and rely heavily on future commitments; (3) Canada failed to re-initiate consultations in a timely manner and then truncated their execution; and (4) Canada failed to consider the infringement of its established fishing right.

The FCA noted that a review of the arguments made in support of these contentions showed that Ts'elxwéyeqw lost sight of the fact that this was a judicial review application. The arguments essentially invited the FCA to consider the overall conclusion reached by the GIC to the effect that the duty to consult was adequately met, weigh the evidence that bears on this question, and come to a different conclusion. Notably, Ts'elxwéyeqw made no mention of the reasons given in support of the issuance of the Order in Council or the Explanatory Note that accompanied it.

The FCA found that after considering the reasons given by the GIC in support of its conclusion and the record, insofar as it pertained to Ts'elxwéyeqw's four contentions, it became clear that the four contentions were without merit. The FCA further noted that when reviewing the record to test Ts'elxwéyeqw's four contentions against Canada's responses, Canada's account of the consultation process was to be preferred.

With regard to the last alleged legal flaw regarding Canada's failure to make any mention of the Stó:lō's constitutionally protected right to fish, and show how this constitutionally protected right would be taken into account, the FCA found that the record showed unequivocally that during the renewed consultation process, Canada acknowledged Ts'elxwéyeqw's constitutionally protected Aboriginal right to fish and took this right into account in assessing Project impacts.

<u>Disposition</u>

The applications for judicial review were dismissed with costs to the respondents.

ALBERTA COURT OF APPEAL

Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta, 2020 ABCA 85

Stay Pending Appeal - Party Status

In this case, the Alberta Court of Appeal ("ABCA") granted a stay pending appeal of a mandatory interim injunction that had been granted by the Court of Queen's Bench. The interim injunction directed the Alberta Cabinet ("Cabinet" or "Alberta") to make a decision in ten days on whether to authorize a project by Prosper Petroleum Ltd. ("Prosper") under section 10 of the *Oil and Gas Conservation Act* ("*OGCA*").

The Fort McKay First Nation ("First Nation") was added as an intervenor to the appeal.

Background

Prosper applied in November 2013 to the AER for approval of its Rigel oil sands project (the "Project"), located near the Fort McKay First Nation's Moose Lake Reserve. Pursuant to s 10(3)(a) of the *OGCA*, the AER may grant approval on any terms and conditions that it considers appropriate "if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council." In June 2018, the AER found the Project to be in the public interest and approved it, subject to Cabinet authorization. Cabinet had not yet made a decision on the Project.

The Interim Mandatory Injunction

In January 2020, approximately 19 months after the AER rendered its decision, Prosper brought an application for an interlocutory mandatory injunction to compel Cabinet to decide whether it would authorize the Project to proceed. The chambers judge granted that application on February 18, 2020 (the "Decision") and directed that Cabinet make a decision on the Project within ten days. Alberta appealed that Decision and sought a stay pending determination of the appeal.

Grounds of Appeal

Alberta appealed on the ground that the chambers judge committed the following errors in granting the injunction:

(a) finding that Cabinet, when acting under section 10 of the *OGCA*, is acting as an agent of the legislature and not an agent of the Crown and, therefore, is not immune from coercive court orders;

(b) reading into the *OGCA* an implied duty on Cabinet to make a decision within a reasonable time;

(c) interpreting Cabinet's discretion under the *OGCA* as other than "unfettered, absolute, permissive, or unqualified" and thus subject to *mandamus*;

(d) finding that Cabinet had engaged in an abusive delay that was ultra vires its authority under the *OGCA*;

(e) finding that Prosper had satisfied its onus of showing irreparable harm;

(f) failing to apply the presumption that Cabinet is acting in the public interest; and

(g) giving only ten days from the date of the Decision for Cabinet to comply.

Stay Pending Appeal

The ABCA noted that the test for a stay pending an appeal may be ordered if the applicant satisfies the court:

(a) that there is a serious question to be determined on appeal;

(b) that the applicant will suffer irreparable harm if the stay is not granted; and

(c) that the balance of convenience favours granting the stay.

Serious Question

The ABCA found that the test that Alberta must meet to satisfy the first step of the test for a stay pending appeal is the lower standard generally applied on such applications, that is, that the appeal raises a serious issue that is not frivolous. The ABCA found that Alberta met the onus of establishing that the appeal raises a serious question.

Irreparable Harm

The Court noted that irreparable harm would generally be established when a refusal to grant a stay might render an appeal nugatory. Alberta satisfied that aspect of the test.

Balance of Convenience

The ABCA wrote that the exercise of determining the balance of convenience requires the court to compare the impact on Alberta if a stay was refused with the impact on Prosper if the stay was granted. The impact on Alberta if a stay was denied was that the substance of its appeal, that *mandamus* should not have been ordered, would be rendered nugatory, and it would be required to deliver a decision on the Project by February 28, 2020. The effect of denying a stay would effectively determine the appeal against Alberta, even if it would have ultimately succeeded had the appeal proceeded.

The impact on Prosper if a stay was granted was that, if the stay was granted and the appeal dismissed, Prosper would still be entitled to the benefit of the substance of the order obtained, subject to any delay occasioned by the appeal.

The ABCA found that the balance of convenience favoured granting the stay so that the appeal would not be rendered nugatory. The delay inevitable with an appeal could be reduced by having the appeal proceed on an expedited basis.

The Decision was stayed pending appeal on the condition that the appeal proceed on an expedited basis.

Party / Intervenor Status for the First Nation

The First Nation sought to be added as a respondent to the appeal, or alternatively to be added as an intervenor. The ABCA noted that to be added as a party, the test is whether or not the applicant has a legal interest in the outcome of the proceeding. To be added as an intervenor, the applicant should be specially affected by the decision or have some special expertise or fresh perspective to bring to bear on the issues.

The ABCA noted that the subject matter of this appeal was not the substantive decision that would ultimately be made by Cabinet to authorize the Project or not. The appeal dealt only with whether the court can and should issue a mandatory injunction requiring a decision be made and within a certain time frame. The First Nation's legal interests may arguably be affected by the former, but not the latter. However, the First Nation clearly had an interest in relation to the Project and in these proceedings, and the Court found that its perspective should be before the Court on the appeal.

The First Nation's application to be added as a party to this appeal was denied, and its application to be added as an intervenor was granted.

Conclusion

The ABCA granted Alberta's application for a stay pending appeal of the Decision on the condition that the appeal be prosecuted on an expedited basis. The appeal was set to be heard on April 27, 2020, in Edmonton, Alberta.

***Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74**

Constitutional Law - Jurisdiction to enact Environmental Legislation

In this decision, a majority of the Alberta Court of Appeal (the "Majority") found that the federal government's *Greenhouse Gas Pollution Pricing Act* (the "*GGPPA*") was unconstitutional. One justice concurred in the result of the Majority, while another dissented.

Overview of the *GGPPA*

There are two main Parts to the *GGPPA* relating to greenhouse gas ("GHG") pricing. Part 1 establishes a "fuel charge" on 22 GHG producing transport and heating fuels sold and consumed in listed provinces. This is characterized as a demand side charge because it is expected the fuel charges will be passed on to consumers.

Part 2 establishes an output-based pricing system ("OBPS") for industrial GHG emitters. The federal Minister of Environment sets different output-based standards for different industries along with different stringency levels for different industries, all of which are subject to change at the Governor in Council's discretion. Those whose GHG emissions are priced under Part 2 are exempt from paying the fuel charge under Part 1.

Each Part only applies to a "listed province". The *GGPPA* allows the Governor in Council to "list" a

province in respect of Part 1 or Part 2 or both. This feature of the *GGPPA* is sometimes referred to as the "backstop" because the federal standards are only imposed in a given province if the stringency of the province's pricing mechanism for GHG emissions under either Part is not satisfactory to the federal government or if the province does not have a carbon pricing plan.

The Majority noted that since Alberta no longer has a carbon tax, it is subject to Part 1 of the *GGPPA* as of January 1, 2020. Alberta was not subject to Part 2 of the *Act* since the Governor in Council accepted Alberta's OBPS — its Technology Innovation and Emissions Reduction ("TIER") system — as being sufficiently stringent with regards to large emitters.

Relevant Provisions of the Constitution

The Majority set out the federal government's Peace, Order and Good Government ("POGG") power under section 91 of the *Constitution Act, 1867,* and then highlighted provincial powers under section 92, including "all matters of a merely local or private Nature in the Province."

The Majority also highlighted a number of provisions from the *Constitution Act, 1982,* including section 92A, which gives provinces jurisdiction over the development, conservation, and management of non-renewable natural resources.

History of the Prairie Province's and Ownership of Their Natural Resources

The Majority outlined the history of prairie provinces' ownership over natural resources, from the time that Manitoba entered confederation in 1870, to the constitutional amendments that led to the repatriation of Canada's Constitution in 1982.

The Majority took particular note of section 92A, which provided for *exclusive* provincial jurisdiction in three areas: (1) the development, conservation, and management of non-renewable natural resources; (2) the export of resources from the province; and (3) taxing powers over resources.

International, Interprovincial and Alberta Efforts to Address Climate Change

The Majority provided an overview of steps that had been taken by the federal government and provinces since 1992 to address GHG emissions. This included the *United Nations Framework Convention on Climate Change,* which was ratified in 1994; the *Kyoto Protocol* in 2002, the *Copenhagen Accord* in 2009 and the *Paris Agreement* in 2015. Recent federal and provincial efforts to address climate change in Canada were also examined. Finally, the Majority outlined in detail the steps that Alberta has taken since 2002 to address climate change.

References in other Appellate Courts

The Majority briefly summarized the constitutional reference cases from Saskatchewan and Ontario, where majorities had found the *GGPPA* constitutional.

Saskatchewan

In Saskatchewan, a majority found that the national concern doctrine of Parliament's POGG power served as a valid constitutional basis for the *GGPPA:*

> Parliament ... [has] authority over a narrower POGG subject matter — the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area.

The Saskatchewan majority also considered whether the charges constituted a "tax" and concluded that both Part 1 (fuel charge) and Part 2 (OBPS) of the *GGPPA* impose a "regulatory charge" rather than a "tax" as that term is understood in law.

In a Saskatchewan Court of Appeal dissent, two justices concluded that both Part 1 and Part 2 of the *GGPPA* were invalid. Part 1 was invalid because the fuel levy constituted a "tax" that ran afoul of the requirement in section 53 of the Constitution that taxes be passed by Parliament rather than delegated to the Executive. And while the OBPS levy was not a "tax", it was nevertheless not authorized under section 91, including the national concern branch of Parliament's POGG power.

Ontario

In Ontario, the majority upheld the constitutionality of the *GGPPA* on the basis it was a valid exercise of Parliament's power to legislate in the national concern. It found that while the environment was,

broadly speaking, an area of shared constitutional responsibility, "minimum national standards to reduce GHG emissions", the pith and substance of the *GGPPA*, were of national concern:

> The application of the "provincial inability" test leaves no doubt that establishing minimum national standards to reduce GHG emissions is a single, distinct and indivisible matter. While a province can pass laws in relation to GHGs emitted within its boundaries, its laws cannot affect GHGs emitted by polluters in other provinces — emissions that cause climate change across all provinces and territories.

In dissent, an Ontario Court of Appeal justice rejected the theory that the national concern doctrine authorized federal law-making authority wherever there was an "intense, broadly based concern" across the country. He recognized the sweeping magnitude of the *GGPPA's* impact on provincial heads of power, and that carbon pricing is not the only way to reduce GHG emissions. He found both Part 1 and Part 2 of the *Act* were invalid.

Section 92A and Provinces' Proprietary Rights and the Other References

The Majority noted that neither appellate court generally considered the provinces' powers to regulate their natural resources and, in particular, the: (1) provinces' exclusive powers to make laws relating to the development and management of non-renewable natural resources under section 92A; and (2) the provinces' proprietary rights as owners of their natural resources.

Foundational Constitutional Principles

Federalism

The Majority noted that federalism is not merely an interpretive aid to a reading of our Constitution; it is a foundational feature of Canada's constitutional architecture and defining characteristic of Canada as a nation. The courts must appreciate that an expansive interpretation of one level of government's law-making authority will have an immediate and direct impact on the scope of the other level of government's competing law-making authority. Courts need to maintain an appropriate balance between federal and provincial heads of power.

The Majority noted that the environment and federalism are not a comfortable fit. Nevertheless, understandable collective concerns about climate change do not justify overriding federalism.

Subsidiarity

The Majority highlighted the importance of subsidiarity in federalism, noting that subsidiarity can be described as the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.

The Majority further noted that the principle of subsidiarity also reflects the political realities of Canada's geographically large country whose population is concentrated in certain provinces. Subsidiarity is a counterbalance to centralism and majoritarianism. The Majority quoted former Alberta Premier Peter Lougheed:

> The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.

Conclusion

The Majority concluded that both federalism and subsidiarity must weigh heavily in its analysis of whether the *GGPPA* falls within the national concern doctrine. Where a doubt arises about the classification of a challenged law, the subsidiarity principle, which is an essential aspect of federalism, should weigh in favour of provincial jurisdiction.

Division of Powers Framework

The Majority wrote that there are two stages in any division of powers analysis: (1) characterization; and (2) classification.

The characterization stage requires that a court characterize the "matter" of the challenged law. The matter is the law's "dominant or most important characteristic", "main thrust" or "essential character", or "pith and substance". In searching for the "pith

and substance" of a challenged law, a court will look at both its purpose and effects.

The classification stage requires the court to assign the "matter" to one of the heads of legislative powers, or more accurately, to determine "whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity."

The Majority noted the importance of keeping these two steps separate. That is, the "matter" should be determined without regard to the head(s) of legislative competence, which are to be looked at only once the 'pith and substance' of the impugned law is determined. Unless the two steps are kept distinct, there is a danger that the whole exercise will become blurred and overly oriented towards results.

The Majority wrote that when considering POGG, the classification step cannot simply consider the POGG head of power in the same manner as one would the enumerated classes of subjects under section 91. While peace, order and good government is the first head of power identified in section 91, it is a residuary power. Hence, Parliament's POGG power only applies where the "matter" does not fall within one of the heads of powers assigned exclusively to the provinces.

National Concern Doctrine

History and Scope

The Majority outlined the judicial history of the national concern doctrine, highlighting Supreme Court findings that limited Parliament's encroachment on provincial jurisdiction.

The central underlying premise of the national concern doctrine is that a "matter" originally of "local" concern within a province may be "transformed" into a national one where it has become "the concern of the Dominion as a whole". In the Majority's view, the disagreement about the scope of the doctrine has arisen because of a lack of clarity as to what matters may be "transformed" from a matter of local concern to a matter of concern to the Dominion as a whole.

Section 92(16) grants the provinces the power to make laws in relation to "Generally all Matters of a merely local or private Nature in the Province." This residuary power is the corollary to Parliament's residuary power under the introductory words of section 91.

The Majority concluded that only when the "matter" would originally have fallen within the provinces' residuary power under section 92(16) does the national concern doctrine have any potential application. It rejected the proposition that the national concern doctrine opens the door to the federal government's appropriating every other head of provincial power under section 92, section 92A or under provincial proprietary rights under section 109.

R v Crown-Zellerbach Canada Ltd, [1988] 1 SCR 401 ("*Crown-Zellerbach*") and *the Test*

The Majority then summarized the four-part test set out by the Supreme Court in *Crown-Zellerbach:*

(a) the national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is necessarily legislation of a temporary nature;

(b) the national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of a national emergency, become matters of national concern;

(c) for a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution; and

(d) in determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

Characterization of the "Matter" Under the *GGPPA*

The Majority made note of Canada's changing positions on defining the "matter" of national concern. It noted that all ten judges in the other

References declined to extend the federal government's powers under the national concern doctrine to GHG emissions generally. The majorities in the *Saskatchewan Reference* and the *Ontario Reference* attempted to limit the subject matter in an effort to confine the *GGPPA* to a realm of constitutional acceptability.

The Majority found that approach fundamentally flawed. Courts have no ability to confine or pre-limit the scope of the *GGPPA* by such pronouncements while at the same time clearing it constitutionally in its entirety. Validating the *GGPPA* means that each and every provision in the *GGPPA* is fully operational. In turn, all exercises of discretion and manners of administration of the *GGPPA* provided therein are thereby constitutional. Canada would be entitled to claim legitimacy by the Executive — and succeed — for any actions taken under the *GGPPA,* providing the language of the *GGPPA* so permits.

The Majority concluded that the "matter" of the *GGPPA* is regulation of GHG emissions, which was confirmed by examining its purpose, legal, and practical effects.

Classification of the Subject Matter of the *GGPPA*

Federal Jurisdiction

The Majority held that the *GGPPA* did not fall within any of Parliament's enumerated heads of power under s 91. The only basis on which Canada defended the validity of the *GGPPA* was under the national concern doctrine.

Provincial Jurisdiction

The Majority found that the regulation of GHG emissions falls squarely under provincial powers. This is shown by the fact the federal "backstop" only comes into effect if the provinces have not implemented carbon pricing or one to the federal government's satisfaction.

Provincial governments can turn to several heads of power to impose on industries or end users of fuel products in their province a scheme to regulate GHG emissions, including carbon pricing. This includes the *Resource Amendment*, being section 92A of the Constitution. Under this section, provinces possess the exclusive power to develop and manage their natural resources. That power includes determining the terms and conditions under which industry will exploit those resources in the province.

The Majority wrote that in addition to section 92A, the provinces have proprietary rights under section 109 of the Constitution as owners of their natural resources. These rights extend to regulation of resources after recovery from the ground. Other heads of provincial power include provincial powers over property and civil rights (section 92(13)), local works and undertakings (section 92(10)), and direct taxation (section 92(2)). The *GGPPA* and its regulations interfere with classes of matters which have invariably been held to come within exclusive provincial jurisdiction.

The Majority found that the provinces' jurisdiction over the regulation of GHG emissions does not rest on section 92(16), and the national concern doctrine, therefore, could not apply.

Why the National Concern Doctrine Does Not Apply to the *GGPPA*

The Majority found that even if it was incorrect in its view that the national concern doctrine cannot intrude on provincial jurisdiction under enumerated heads of power outside of s 92(16), it nevertheless concluded that the *GGPPA* could not be saved under the national concern doctrine.

The "Matter" Fails the Singleness, Distinctiveness and Indivisibility Criteria

The Majority found that the "matter" of this *GGPPA* is an aggregate of powers — virtually all provincial. The regulation of GHG emissions within a province falls within provincial powers under section 92A, section 109 and a number of heads of power under section 92.

Further, simply because GHG emissions transcend provincial boundaries does not make their regulation an "indivisible" subject matter. In *Crown-Zellerbach*, the Supreme Court made it clear that the mere fact a polluting substance crossed a provincial border would not be sufficient to invoke the national concern doctrine. The problem in *Crown-Zellerbach* that justified adding "marine pollution" as a federal head of power was the *inability to detect the source of the pollution*. No such problem exists with respect to GHG emissions within a province.

The subject matter of the *GGPPA*, the regulation of GHG emissions, and all variations on this theme do not meet the requirements of the national concern doctrine for singleness, distinctiveness and indivisibility.

Provincial Inability

The Majority noted that analysis of "provincial inability" involved two key questions:

(a) "Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it?" and

(b) "Would a failure to include one or more of the provinces or localities in the scheme jeopardize the successful operation in other parts of the country?"

The first question goes to "jurisdictional" inability, not risk of inaction. Regarding the second question, inaction alone (a province's choice not to be included in the scheme), would not suffice. The question is whether that inaction (not participating in the scheme) goes so far as to "jeopardize" the successful operation of the scheme in other provinces. The test cannot be met by an affirmative answer to the simplistic question: "Is there a risk a province might fail to participate in a national scheme?"

The Majority also held that there was no evidence on the record that anything any one province does or does not do regarding the regulation of GHG emissions will cause any measurable harm to any other province now or in the foreseeable future. The atmosphere is affected largely by what is being done or not being done in other countries. Four large countries or groups of countries, the United States, China, India and the European Union, generate, cumulatively, 55.5 percent of the world's GHG emissions. Canada generates 1.8 percent.

Why the Proposed New Head of Power Is Not Reconcilable with the Division of Powers

The Majority noted that for a "matter" to qualify as a matter of national concern, it must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. If not, the national concern doctrine cannot be successfully invoked.

The Majority held that the scale of impact was not reconcilable. It interferes with the provinces' *exclusive* jurisdiction over the development and management of their natural resources, including the oil and gas sector under sections 92A and 109 of the Constitution. This intrusion effectively deprives the provinces of their right to balance environmental concerns with economic sustainability.

Second, the regulation of GHG emissions intrudes deep into the provinces' exclusive jurisdiction over property and civil rights. There would be almost no aspect of the daily lives of the citizens of a province that would not be affected and areas into which the federal government could not intrude.

Third, the *GGPPA* purports to be neutral but has a disproportionate negative impact on certain provinces and their citizens.

Fourth, if minimum national standards for pricing of GHG emissions or any variation on this were permitted, then, on this theory, the federal government could impose minimum national standards on innumerable areas under provincial jurisdiction: roadways, building codes, public transit, home heating and cooling.

Fifth, granting the federal government the new head of power over GHG emissions and any variations on this theme would negatively impact federalism.

Sixth, the final decision of the courts that a newly claimed power of the federal government falls within the national concern doctrine binds everyone in accordance with the Rule of Law. Thus, courts should be slow to judicially expand federal heads of power under the national concern doctrine since this effectively bypasses provinces' rights and protections under section 38(3) of the Constitution (the right to dissent from a constitutional amendment that derogates from the province's legislative powers or proprietary rights).

Conclusion

The Majority found Part 1 and 2 of the *GGPPA* unconstitutional in their entirety.

ALBERTA COURT OF QUEEN'S BENCH

Prosper Petroleum Ltd v. Her Majesty the Queen in Right of Alberta, 2020 ABQB 127

Test for Injunctive Relief; Mandamus

In this decision, the Alberta Court of Queen's Bench ("ABQB") granted an application by Prosper Petroleum Ltd. ("Prosper") for a mandatory interim injunction and an order of *mandamus* and directed that a decision on Prosper's Rigel oil sands project (the "Rigel Project") be made by Cabinet within ten days. (*Note: a stay of this Court decision was subsequently granted by the Court of Appeal. See herein: Prosper Petroleum Ltd. v Her Majesty the Queen in Right of Alberta, 2020 ABCA 85).*

Facts

In June 2018, the AER found the Rigel Project to be in the public interest and approved it subject to Provincial Cabinet approval.

The requirement of Cabinet authorization is set out in section 10(3)(a) of the *Oil Sands Conservation Act* ("*OSCA*"), which provides that:

> (3) The [AER] may ...
>
> (a) if in its opinion it is in the public interest to do so, and with the prior authorization of the Lieutenant Governor in Council, grant an approval on any terms and conditions that the [AER] considers appropriate.

More than 19 months after the AER's approval of the project, the Provincial Cabinet had not issued a decision. An Order in Council would be required to enable the Rigel Project to proceed. Prosper, therefore, applied for an order compelling a decision.

Prosper applied for an interlocutory injunction or order of *mandamus* directing the Provincial Cabinet to issue a decision regarding the Rigel Project within ten days.

Is the Crown Immune from an Order of Injunction or Mandamus?

The ABQB noted that historically, the remedy of injunction was not available against the Crown. However, in modern law, the answer depends on whether the party sought to be enjoined is acting as a servant of the Crown or an agent of the legislature. The ABQB cited authority holding that a mandatory injunction was available against a Minister of the Crown who had failed to perform a public duty because the injunction was not sought against the Crown itself. Further, if a statute imposing a public duty designates a particular Crown servant to perform the duty, *mandamus* will lie against the designated person.

The ABQB found that the *OSCA* provides in section 10 that Prosper could only proceed with its project with the authorization of the Lieutenant Governor in Council. By granting Cabinet the power to approve the project, the legislature imposed by implication a duty to exercise that power.

The ABQB concluded that Cabinet was subject to an implied duty to make a decision on the availability of an Order in Council and that Cabinet was acting as an agent of the legislature and must respond to the implied duty assigned to it under the act.

Is the Scope of the Crown's Discretion Sufficient to Make it Immune from Mandamus?

The ABQB noted that Prosper did not argue that Cabinet does not have discretion in making its decision: Prosper argued that it does not have the discretion to fail to make a decision.

The ABQB further wrote that section 10 of the *OSCA* does not use the words "in the absolute discretion of Cabinet". Failing to make a decision that one has a statutory duty to make is not a valid exercise of discretion. The scope of discretion to make a decision cannot extend to the discretion to refuse to make a decision, as that would render the duty to make a decision imposed by the statute meaningless.

The ABQB found that the Crown's argument conflated discretion over the content of the decision, which is not at issue, with the requirement to actually make a decision. The scope of the Cabinet's discretion under the *OSCA* is not so absolute as to make *mandamus* unavailable.

The Test for an Interlocutory Injunction

General Principles

The ABQB outlined the recent Supreme Court authority on the test for a mandatory injunction (*R. v. Canadian Broadcasting Corp.,* 2018 SCC 5). In that

case, the Supreme Court outlined a modified *RJR-MacDonald* test:

(a) the applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law, and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;

(b) the applicant must demonstrate that irreparable harm will result if the relief is not granted; and

(c) the applicant must show that the balance of convenience favours granting the injunction.

A Strong Prima-Facie Case

The ABQB found that there was no question that the Provincial Cabinet must make a decision regarding the Rigel Project. There was also no question that Cabinet had failed to do so for over 19 months. Therefore, the question of whether Prosper had demonstrated a strong *prima facie* case depended on whether the 19 months of delay were reasonable or were a breach of Cabinet's duty to decide. In other words, "whether it is abusive delay, that is an abuse of power".

The ABQB noted that while the *OSCA* does not explicitly identify a deadline for issuing a decision, courts have implied a duty to provide a decision within a reasonable time.

In view of the evidence adduced by Prosper and in the absence of any evidence to explain the delay put forth by the Crown, the ABQB found that Prosper satisfied the onus to establish a strong *prima facie* case that would succeed in arguing that the Cabinet's delay in making a decision is a breach of its duty under section 10 of the *OSCA*.

Irreparable Harm

The ABQB noted that irreparable harm refers to the nature of the harm rather than its magnitude. It generally refers to harm that either cannot be quantified in monetary terms or that cannot be cured, usually because one party cannot collect damages from the other. Examples include instances where one party will be put out of business by the Court's decision.

By irreparable harm, it is not meant that the injury is beyond the possibility of repair by monetary compensation, but it must be of such a nature that no fair and reasonable redress may be had in the court of law and that to refuse the injunction would be a denial of justice.

The ABQB found that the potential of being put out of business is irreparable harm, and also noted that Prosper would not be able to recover the loss it suffers from delay by way of judicial review. The ABQB noted that harm that cannot be cured is irreparable harm and that Prosper had satisfied the onus of establishing it in this case.

Balance of Convenience

The ABQB noted that the balance of convenience test requires it to determine which of the parties will suffer the greater harm from the granting or refusing of an interlocutory injunction.

Prosper provided evidence of significant and irreparable harm. The Crown did not produce any evidence to demonstrate why the decision was delayed. The ABQB found that there was a strong public interest in encouraging a timely Cabinet decision.

Has Prosper Established that it is Entitled to Mandamus?

The ABQB noted that all of the principal requirements that must be satisfied before *mandamus* will be issued were satisfied in this case.

Proceedings Against the *Crown Act*, RSA 2000

The ABQB set out the statutory provisions regarding injunctions against the Crown but noted that such provisions are declaratory of the common law and therefore do not introduce any new restrictions on the availability of injunctions against Crown servants.

Conclusion

The ABQB granted Prosper's application for a mandatory interim injunction and an order of *mandamus* and directed that a decision on the Rigel Project be made by Cabinet within ten days.

ALBERTA ENERGY REGULATOR

Pure Environmental Waste Management Ltd. - Regulatory Appeal of Approval WM 211 for Pure Environmental Waste Management Ltd.'s Hangingstone Facility, 2020 ABAER 004

AER Regulatory Appeal

In this decision, the AER confirmed the decision to approve Pure Environmental Waste Management Ltd.'s (Pure's) application 1910941 for the Hangingstone waste management facility and issue waste management approval 211 (WM 211), subject to conditions.

Background

In June 2018, Pure filed an application for a new oilfield waste management facility in Legal Subdivision (LSD) 10, Section 25. The Hangingstone waste management facility ("Hangingstone Facility") is one part of Pure's Hangingstone waste management project (the "Hangingstone Project"). The Hangingstone Facility would accept, for disposal, third-party-generated waste. Waste would be disposed of into washed out solution-mined salt caverns, which would treat the waste through phase separation. Separated hydrocarbons would be recovered and sold. Brine recovered from the salt caverns would be treated before being injected into disposal wells.

The AER issued an approval for the Hangingstone Facility on January 30, 2019. On February 27, 2019, Suncor Energy Inc. ("Suncor") filed a request for regulatory appeal for the Hangingstone Facility. The AER granted the request for regulatory appeal, and a hearing on the regulatory appeal followed a full hearing that was held for the Hangingstone Project.

There Is a Need for the Hangingstone Facility and It Will Provide Some Benefits to Albertans

The AER found that an oilfield waste management facility that can handle a wide range of oilfield waste was needed in the region. It accepted that having a waste management facility in the area will reduce the need to truck oilfield waste to distant waste facilities, thereby improving road safety and reducing GHG emissions. Smaller producers, who are close to Highway 63 and do not have an on-site waste disposal system, could benefit from probable cost savings resulting from a nearby oilfield waste management facility that can handle a wide range of oilfield waste.

In addition to the waste volumes generated by small producers in the vicinity of the Hangingstone Facility, the AER acknowledged that there are significant volumes of waste generated within the Athabasca Oil Sands Area and that this is expected to continue for the foreseeable future. Additionally, Pure's evidence indicated some potential growth in bitumen production in the region, as well as growth in waste volumes from ageing plays, which was not contested by Suncor. The AER noted that it is more likely than not that any potential increase in bitumen production would result in increased waste generation. Building one facility that is large enough to handle current waste volumes and any future growth in waste volumes, rather than building multiple smaller facilities, is consistent with the AER's mandate of orderly development.

The Potential for Surface Heave Does Not Pose a Significant Risk to the Hangingstone Facility

The AER noted that in steam assisted gravity drainage operations, the amount of surface heave or ground deformation that may occur depends on factors such as the depth of the reservoir; the vertical thickness of the bitumen-containing reservoir; the reservoir and overburden rock's thermal, hydraulic, and mechanical properties; and the temperature and pressure of steam injection.

The AER found that given the absence of any evidence enabling it to validate the modelled heave values provided by Suncor, it was more reasonable to rely on the publicly available data provided by Pure to evaluate the degree of surface heave that may occur at the Hangingstone Facility.

The AER agreed with the general proposition that heave is inversely proportionate to the true vertical depth of a reservoir; the deeper the reservoir, the less noticeable the surface deformation. Having regard to the evidence, the AER noted that it was reasonable to expect that heave at the location of the Hangingstone Facility would be more comparable to the 39 cm value measured at JACOS Hangingstone rather than the 84 cm value measured at MacKay River.

Both Pure and Suncor stated that reservoir thickness and operating pressure could also impact the

magnitude of surface heave. The AER noted that the evidence of lower operating pressures by Suncor at nearby operations, and a thinner reservoir beneath the Hangingstone Facility meant that any heave in the vicinity of the Hangingstone Facility would likely be closer to Pure's estimate.

With regard to slope change caused by surface heave, the AER found that the slope of heave in Section 25 would be modest.

Based on the foregoing, the AER found that the heave rate that may occur at the location of the Hangingstone Facility if Suncor steams the reservoir within Section 25 as part of its Meadow Creek West operations will be modest and close to Pure's estimate of 2 cm per year, with a maximum heave of 30 to 35 cm and a slope of 0.07 percent.

The AER also found that any risk to the Hangingstone Facility caused by the amount of heave estimated by Pure or even modelled by Suncor can be mitigated through engineering design. It accepted Pure's evidence that the Hangingstone Facility can and will be built to withstand the anticipated range of heave and that heave will not adversely affect the operation or integrity of the Hangingstone Facility.

The AER was satisfied that proper design and effective monitoring will sufficiently mitigate the risk surface heave may pose to the Hangingstone Facility. It noted that the development of heave is a slow process that will allow for intervention if needed. It, therefore, included conditions requiring Pure to ensure that the design of the Hangingstone Facility is sufficient to protect the facility from surface heave resulting from Suncor's operations and to monitor for any potential effects of surface heave on the integrity of the Hangingstone Facility should Suncor commence steam operations in the vicinity of the facility.

<u>The Hangingstone Facility Will Not Prevent Suncor From Recovering Bitumen in the Area or Cause Resource Sterilization</u>

There May Be Economically Recoverable Bitumen Beneath the Hangingstone Facility and in Section 25

Based on the evidence regarding pay thickness, bitumen saturation, and the presence of bottom water, the AER noted that it is currently unclear whether it would be economical to recover bitumen located in Section 25 and beneath the Hangingstone Facility.

The AER agreed with Suncor's submissions that as technologies advance, resources that have historically been challenging to recover might become more economical. While the production of bitumen in Section 25 and beneath the Hangingstone Facility may not currently be economical, it may become economically viable in the future.

The Location of the Hangingstone Facility Does Not Prevent Suncor From Acquiring Data to Characterize Bitumen and Evaluate Caprock

The AER accepted that to maximize resource recovery and optimize well and pad placement, Suncor must properly characterize the resource. It also acknowledged that to safely produce bitumen and contain the high-pressure steam within the reservoir, it is important to evaluate the reservoir's caprock integrity.

The AER made note of the constraints (both natural and manmade) and complexity of acquiring subsurface data, which requires long-term planning and execution, often stretching over decades. It also noted that the footprint of the Hangingstone Facility is a small fraction of the Suncor's Meadow Creek West project area, approximately 0.0153 per cent. Given the expansiveness of Athabasca oil sands leases and the time required to acquire data, the AER was of the opinion that it is not reasonable to expect to be able to rely on unconstrained surface access over the entirety of leases as a means of ensuring the acquisition of comprehensive data.

The AER found that while Suncor may not be able to use its preferred method of evaluation, it will still have viable options. The presence of the Hangingstone Facility does not prevent Suncor from sufficiently characterizing the resource and caprock. The AER also found it unlikely that the potential absence of data over one legal subdivision will prevent Suncor from having confidence in its interpretation of caprock integrity in Section 25.

The AER placed a condition on the approval, requiring that Pure must give Suncor a reasonable opportunity to place geophones, use vibroseis trucks, or do both within the boundaries of Pure's miscellaneous lease to allow Suncor to obtain seismic data.

The Hangingstone Facility Would Not Lead to a Material Loss of Economic Benefits to Suncor and the Public

The AER noted that nearly half of the legal subdivisions within Section 25 have other infrastructure in place, including a pipeline corridor and Highway 63. This infrastructure will affect Suncor's ability to recover bitumen within Section 25. In comparison with the footprints of the highway and pipeline corridor, the footprint of the Hangingstone Facility is small, 0.35 per cent of the section. If the presence of the highway and pipeline corridor does not make the production of bitumen within Section 25 uneconomical, it is unlikely that the Hangingstone Facility (which has a relatively small footprint and is located close to the highway and pipeline corridor) will prevent Suncor from extracting the bitumen beneath it or from selecting the most efficient pad location.

The AER was satisfied that given the small amount of bitumen that Suncor may not be able to extract because of the presence of the Hangingstone Facility, resource conservation and sterilization/ waste are not a concern. Not recovering absolutely all bitumen is unavoidable and permitted so long as it is not excessive.

Disposal Capacity

The AER noted that it was necessary to have regard for the Hangingstone Project as a whole in considering this appeal. This was complicated by the fact that the applications for the disposal wells that will support Pure's operations at the Hangingstone Facility and this appeal are being considered in separate hearings with separate records. Nonetheless, the AER stated that it must have regard for the overall Hangingstone Project. It stated that if the Hangingstone Project is not needed or cannot succeed, it is difficult to see how the Hangingstone Facility can be in the public interest.

The AER stated that there is no requirement that disposal capacity be proven prior to approval of the Hangingstone Facility. However, if there was no prospect of Pure obtaining disposal capacity, this would be relevant to the overall viability of the Hangingstone Facility and the Hangingstone Project.

While Pure had not demonstrated that it had proven disposal capacity, the AER noted that there was nothing on the record of this proceeding demonstrating that it will not be able to secure the required capacity. Irrespective of the outcome of the proceeding for Pure's Hangingstone Project, the AER did not have evidence to demonstrate that Pure could not obtain sufficient disposal capacity and saw no basis for rescinding the approval because disposal had not yet been proven.

The AER noted that the issue of disposal capacity also raised the issue of how Pure made its applications for the Hangingstone Project. Pure's decision to file its applications for the Hangingstone Project in a staggered manner caused considerable regulatory inefficiency. The AER noted that it encouraged applicants to bundle their applications whenever possible. Considering and deciding on related applications together creates a more effective process that allows the AER, applicants, and the public to address a proposed development as a whole. The result is a more efficient use of public resources and greater transparency within the AER's proceedings.

Approval of the Hangingstone Facility Is Consistent With the AER's Regulatory Mandate and is in the Public Interest

The AER found that that approval of the Hangingstone Facility is consistent with the AER's mandate and in the public interest. It, therefore, confirmed AER Authorizations' decision to approve application 1910941 and issue approval WM 211, subject to the conditions outlined in its decision report.

***Pure Environmental Waste Management Ltd. Applications for the Hangingstone Project*, 2020 ABAER 005**

Disposal Wells

In this decision, the AER approved an application for the disposal scheme associated with Pure Environmental Waste Management Ltd.'s ("Pure's") existing 1-24 well, subject to a condition, and denied five other facility applications; two mineral surface lease ("MSL") applications; and two licence of occupation ("LOC") applications.

Background

Pure filed ten applications as part of its Hangingstone waste management project (the "Hangingstone Project") located about 25 km south of Fort McMurray. The applications all related to three disposal wells and a single pipeline that would connect one of the disposal wells to Pure's

previously-approved Hangingstone waste management facility (the "Hangingstone Facility").

The Applications included the following:

Application	Purpose
1918260	Single injection well 4-32
1919152	Single injection well 1-36
MSL 181075	Well site for 4-32 well
LOC 181213	Class V frozen-access road for 4-32 well
MSL 190384	Well site for 1-36 well
LOC 190487	Class V frozen-access road for 1-36 well
1918189	Disposal into the 4-32 well
1919312	Disposal into the 1-36 well
1920277	Disposal into the 1-24 well
934887	B120 pipeline

The AER received requests to participate in this proceeding from Suncor and Alberta Agriculture and Forestry ("AAF"). In its request to participate, Suncor stated that it was concerned that Pure's proposed disposal wells and pipeline would be in the area of Suncor's Meadow Creek East and West in situ oil sands projects. Suncor submitted that Pure's applications would directly and adversely impact Suncor's ability to access and extract bitumen at the Meadow Creek East and West in situ projects. The panel granted Suncor and AAF full participation rights in the hearing.

Regulatory Framework

The AER noted that the applications required the AER to consider provisions under the *Responsible Energy Development Act,* the *Oil and Gas Conservation Act,* the *Pipeline Act,* and the *Public Lands Act.* The AER also had to consider the *Lower Athabasca Regional Plan* and any sub-regional plans that are in force. Finally, given Suncor's participation and its concern about the impact of Pure's applications on Suncor's Meadow Creek East and Meadow Creek West in situ oil sands projects, the AER considered the purposes of the *Oil Sands Conservation Act*.

There Is a Need for Disposal Wells and Access to Disposal Capacity to Support the Hangingstone Project

The AER noted that Pure initially took the position that the applications for the disposal wells and pipeline were separate from and independent of the approved Hangingstone Facility, which was the subject of a regulatory appeal. However, in its hearing submission for this proceeding, Pure confirmed that the proposed disposal wells and pipeline form an integral part of the Hangingstone Project. Pure acknowledged that its approved Hangingstone Facility could not operate without sufficient disposal capacity to allow solution mining (washing) and operation of the salt caverns.

The AER found that while the magnitude of the benefits resulting from transportation cost savings, increased traffic safety, and emission reductions are subject to some uncertainty, having a locally available waste management solution would generally be of benefit to oil sands producers and in the public interest, assuming regulatory requirements are satisfied, and potential adverse effects on other activities are considered and appropriately mitigated.

With respect to the need for the disposal wells and disposal scheme that are the subject of the applications, the AER noted that solution mining and operation of the salt caverns at the approved Hangingstone Facility requires access to sufficient disposal capacity to accommodate brine and waste fluids generated from the washing and operation of the caverns. The AER found that there is a need for disposal wells and disposal capacity to support the construction and operation of Pure's approved Hangingstone Facility.

Crown Mineral Activity Authorizations Do Not Limit the AER's Authority to Consider the Applications

Pure and Suncor both obtained Crown Mineral Activity ("CMA") authorizations to dispose into the Keg River Formation from Alberta Energy. Pure's CMA authorizations allow it to dispose into the Keg River Formation from its existing 1-24 disposal well and its proposed 1-36 and 4-32 disposal wells. Suncor's CMA authorizations allow it to dispose into the Keg River Formation from two existing disposal wells (the 3-31 disposal well and the 11-29 disposal well).

The AER noted that while a CMA authorization issued by Alberta Energy is a necessary prerequisite

for the approval of a disposal scheme, CMA authorizations do not provide any preferential right to the holder to access disposal capacity within a formation. The issuance of a CMA authorization does not constrain the AER's decision-making authority with respect to applications for disposal schemes.

The AER stated that if the disposal capacity in the Keg River Formation is not sufficient to accommodate both Pure's and Suncor's anticipated disposal volumes, then the disposal capacity should be allocated based on the relative benefits of Pure's and Suncor's projects and the potential for Pure's proposed disposal wells and disposal scheme to adversely affect bitumen recovery at Suncor's Meadow Creek East and West projects. These factors need to be considered and weighed to inform the AER's public interest determination and its decision on the applications.

The Disposal Capacity of the Keg River Formation in the Vicinity of Pure's Proposed 1-36 and 4-32 Disposal Wells Is Limited and Not Sufficient to Accommodate Both Suncor's and Pure's Anticipated Disposal Volumes

The AER outlined its assessment of evidence provided by experts for Pure and Suncor and found that the disposal capacity in the Keg River Formation, specifically in the vicinity of Suncor's 3-31 and 11-29 disposal wells and Pure' proposed 1-36 and 4-32 disposal wells, appears to be limited and not sufficient to accommodate both Pure's and Suncor's anticipated disposal volumes.

Pure's Proposed 1-36 and 4-32 Disposal Wells and Disposal Scheme May Result in Adverse Effects to Suncor's Meadow Creek Projects

The AER made note that Suncor has invested significant time and financial resources to develop the Meadow Creek projects. The AER found that should Suncor proceed with the Meadow Creek East and Meadow Creek West projects, the projects would provide significant economic benefits to Alberta through employment, capital and operational expenditures, taxes, and royalties.

The AER noted that its approval for the Meadow Creek East project includes conditional approval of the disposal scheme for Suncor's previously drilled 3-31 and 11-29 disposal wells and Suncor's planned but undrilled 4-12 and 5-36 disposal wells. Pure's proposed disposal wells at 1-36 and 4-32 are in close proximity to Suncor's conditionally approved disposal wells. The AER further noted that, based on the evidence presented, the disposal capacity in the Keg River Formation in the vicinity of Pure's proposed disposal wells appears to be limited and not sufficient to accommodate both Suncor's and Pure's anticipated injection volumes.

The AER found that Pure's proposed 1-36 and 4-32 disposal wells are likely to adversely affect Suncor's proposed Meadow Creek projects by significantly reducing the amount of available disposal capacity and that this could adversely affect the economics of bitumen recovery at Suncor's Meadow Creek projects.

In contrast, the AER found that there is little potential for interference between Pure's existing 1-24 disposal well and Suncor's conditionally approved disposal wells given that the 1-24 well is 14 to 16 km from Suncor's disposal wells and in an area that Suncor does not consider to be prospective for injection.

Other Disposal Options Are Available to Pure in the Hangingstone Area

The AER accepted that the Keg River Formation is the only viable subsurface disposal option in the Hangingstone / Meadow Creek area.

The AER noted that Pure's proposed disposal wells are 14 to 16 km from the approved Hangingstone Facility and would require an approximately 20 km pipeline to connect them to the facility. Given that Pure took the position in this proceeding that the Keg River Formation is an extensive reservoir with a very large disposal capacity, the AER noted that it does not seem necessary or optimal to locate its disposal wells so far away from the approved Hangingstone Facility and so close to Suncor's 3-31 well. If Pure's interpretation of the Keg River Formation's disposal capacity is correct, then Pure should be able to locate its disposal wells closer to the approved Hangingstone Facility and in an area where there is less potential to interfere with Suncor's approved disposal scheme.

Based on Pure's evidence, the AER found that Pure has options available to it other than the 1-36 and 4-32 wells to secure additional disposal capacity within the Keg River Formation for the approved Hangingstone Facility.

Approval of Pure's 1-36 and 4-32 Disposal Wells and Associated Disposal Scheme Is Not Consistent With Efficient and Orderly Development and Is Not in the Public Interest

The AER found that with respect to the applications for the 1-36 and 4-32 disposal wells and the associated disposal scheme, approval would not be consistent with the AER's mandate of efficient, economic, and orderly development or in the public interest. These proposed activities are likely to result in adverse effects to Suncor's Meadow Creek East and West in situ oil sands projects, potentially impacting bitumen recovery. As a result, the AER did not approve these applications.

While the AER found that there is a need for disposal capacity to support mining and operation of the salt caverns at the approved Hangingstone Facility, it found that Pure did not fully evaluate alternative disposal well locations before deciding to locate its 1-36 and 4-32 disposal wells immediately adjacent to Suncor's disposal wells. Based on the evidence provided by Pure, it appears that alternative disposal well locations are available to Pure.

While the AER found that Pure's Hangingstone Project would likely provide benefits to oil sands producers through reduced transportation costs and emissions and that this would be in the public interest, it also found that the expected magnitude of the economic benefits is relatively small when compared to the expected economic benefits to Alberta resulting from Suncor's Meadow Creek projects. The AER found that the potential benefits of Pure's Hangingstone Project are not sufficient to outweigh the potential risk to Suncor's Meadow Creek projects that could result from approval of the 1-36 and 4-32 disposal wells. The AER noted that its decision on these two wells is not a decision on the Hangingstone Project; it is a decision on the wells at these proposed locations. Pure may have other options for waste disposal, which may allow the Hangingstone Project to proceed.

Approval of the Disposal Scheme for Pure's 1-24 Disposal Well Is Consistent With Efficient and Orderly Development and Would Not Adversely Affect Suncor's Meadow Creek Projects

The AER approved application 1920277 for the disposal scheme for Pure's 1-24 disposal well, subject to a maximum wellhead injection pressure of 3550 kPa.

It accepted that Pure requires disposal capacity in order to operate its approved Hangingstone Facility. The 1-24 well is already drilled and is located at the approved Hangingstone Facility. In addition, the well is in an area that Suncor does not consider prospective for disposal and in an area where disposal operations are not likely to have an adverse effect on Suncor's conditionally approved disposal wells.

Applications MSL181075, MSL190384, LOC181213, LOC190487, and 934887

Pure applied for these applications because they would be necessary to construct, operate, and provide access to its proposed disposal wells, if approved.

The AER noted that the MSL and LOC applications relate to the surface well sites and access for the 1-36 and 4-32 disposal wells. As the AER decided to deny the applications for these disposal wells, there was no need for the mineral surface leases and associated access for these wells. The AER, therefore, denied applications MSL181075, MSL190384, LOC181213, and LOC190487.

Similarly, the AER noted that the applied-for pipeline licence relates to a pipeline that proposes to transport produced saline water from the approved Hangingstone Facility to the 4-32 well for disposal. As the disposal well applications are not being approved, the AER stated there is no need for the pipeline. The AER denied application 934887.

***Request for Regulatory Appeal by ISH Energy Ltd. - Canadian Natural Resources Limited*, AER Request for Regulatory Appeal No.:1919287**

AER Regulatory Appeal

In this decision, the AER considered a request from ISH Energy Ltd. ("ISH") under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision to approve Canadian Natural Resources Limited ("CNRL") application No. 1909395 (the "Application") and Approval No. 11475EE (the "Amended Approval") to allow the drilling and operation of a sixth steam assisted gravity drainage box ("KN06"). The AER determined that the Amended Approval is an appealable decision and that ISH established it is an eligible person. The AER also determined there is some merit to ISH's request for regulatory appeal.

Accordingly, the AER decided to grant the request and proceed to a hearing on the regulatory appeal.

Background

On May 11, 2018, CNRL submitted the Application to amend its approval for recovery of crude bitumen from the Wabiskaw-McMurray Deposit at its Kirby North project in the Athabasca Oil Sands Area. The proposed amendment was to allow the drilling and operation of a sixth steam assisted gravity drainage box, the KN06 box. The AER approved the Application and issued the Amended Approval on January 24, 2019.

ISH holds all petroleum and natural gas rights in the KN06 development area. ISH filed its request for regulatory appeal on February 21, 2019. The request raised concerns about the potential for CNRL's operations at KN06 to result in the contamination of ISH's resources in the overlying gas zones. ISH referred to a decision of the AER's predecessor, the Alberta Energy and Utilities Board, to shut in the gas over bitumen ("GOB") in the Kirby North area due to the potential absence of a sealing layer between the bitumen and the GOB. ISH stated that even if the sealing mudstone/shale layers are intact, the approved initial start-up injection pressure risks fracturing the barrier, which can result in direct communication between the bitumen and the overlying gas and contaminate the gas zone.

Reasons for Decision

The AER set out the test for a regulatory appeal and noted that the request for regulatory appeal was filed in accordance with the *AER Rules of Practice.* The Amended Approval was issued under an energy resource enactment, and because it was issued without a hearing, it is an appealable decision under section 36(a) of *REDA.*

The term "eligible person" is defined in section 36(b)(ii) of *REDA* to include:

> a person who is directly and adversely affected by a decision [made under an energy resource enactment] …

The AER noted that although section 36(b)(ii) defines an eligible person as "someone who is directly and adversely affected", the AER typically applies a may be directly and adversely affected test. To do otherwise would be to impose a near impossible threshold, since so often the actual effects of a decision, especially an approval, cannot be known with certainty in advance. The AER cited *Court v Alberta (Environmental Appeals Board)* 2003 ABQB 456 as authority for this position.

Based on the above, the AER found that the "is directly and adversely affected" requirement under section 36(b) of *REDA* does not impart a higher standard for demonstrating actual effect than section 32 does with respect to eligibility to file a statement of concern.

The AER was satisfied that ISH demonstrated it may be directly and adversely affected by the issuance of the Amended Approval. ISH holds the petroleum and natural gas rights directly above the KN06 development area. ISH provided information indicating there is some risk of CNRL's operations at the KN06 Pad interfering with ISH's rights to the natural gas in the drainage area. In particular, there is a risk that the approved start-up injection pressure will fracture the McMurray shale and Wabiskaw GOB zones overlying CNRL's bitumen, resulting in direct communication between the McMurray sand and the GOB zone. Such communication could impair ISH's ability to recover the gas in the GOB zone.

The AER determined that ISH has an arguable appeal on the merits, given the potential risk of the approved start-up injection pressure fracturing the McMurray shale and Wabiskaw GOB zone resulting in contamination of ISH's resources.

CNRL cited an AER dismissal of Request for Regulatory Appeal No. 1910998 that "the law in Alberta recognizes that bitumen mineral rights holders can extract minerals pursuant to those rights even if in so doing they interfere with and/or commit waste of another's minerals." The AER noted that this was in reference to several decisions from Alberta courts on the incidental production of evolved gas and initial gas-cap gas in the production of bitumen, and on the ownership of coalbed methane.

The AER responded by noting that those cases address the situation where interference with or wastage of another's minerals is reasonably necessary to "win, work, recover and remove" one's own minerals. Further, the cases have their genesis in an early decision of the Alberta Court of Appeal on a split-title dispute between holders of petroleum rights and natural gas rights, where the Court held that "the [petroleum rights holders] are entitled to extract all the petroleum from the earth, even if there is interference with and a wastage of [the natural gas rights holders'] gas, so long as in the operations

modern methods are adopted and reasonably used." An essential question here is whether the approved start-up injection pressure for KN06 is reasonable in the circumstances.

Conclusion

The AER determined that ISH may be directly and adversely affected by the Approval, and there is some merit to the requested appeal. Accordingly, the AER granted the request for regulatory appeal and will request that the Chief Hearing Commissioner appoint a panel of hearing commissioners to conduct a hearing of the regulatory appeal.

***Request for Regulatory Appeal by Robert A. Shields - Vantage Point Resources Inc. Reclamation*, AER Request for Regulatory Appeal No.: 1924500**

AER Regulatory Appeal

In this decision, the AER considered a request for regulatory appeal by Robert A. Shields raising concerns about crop contamination due to planting of seed that did not conform to the remainder of the field and issuance of the reclamation certificate. The AER granted the request for regulatory appeal.

In its letter dated October 29, 2019, the AER's Reclamation Programs Group advised that by operation of sections 91(1)(i) of the *Environmental Protection and Enhancement Act* ("*EPEA*") and section 36 of the *Responsible Energy Development Act* ("*REDA*"), the tests for appealable decision and eligible person appeared to have been met. Further, the AER determined there was no justification for dismissing the regulatory appeal request at this stage under section 39(4) of the *REDA*.

In short, *EPEA* grants the owner of lands who is in receipt of a copy of a reclamation certificate in respect of the owner's lands an automatic right of regulatory appeal, barring extraordinary and obvious circumstances militating against that right. The AER found that no such circumstances existed in this case.

ALBERTA UTILITIES COMMISSION

Alberta Electric System Operator 2020 ISO Tariff Update – Interim, AUC Decision 25175-D01-2020

Rates - ISO Tariff - Interim

In Decision 2010-606, the AUC approved the Alberta Electric System Operator ("AESO")'s proposed methodology to complete annual tariff update filings between its major tariff applications. On January 31, 2020, the AESO filed an application (the "Application") with the AUC seeking approval of its 2020 Independent System Operator ("ISO") tariff update ("2020 Update") to reflect costs and billing determinants for the 2020 calendar year. The AUC approved the 2020 Update on an interim refundable basis.

The Application

The Application consisted of formulaic updates to:

(a) the AESO's annual revenue requirement, based on the AESO's updated forecast costs for 2020;

(b) rate, rider and maximum investment level amounts using the rate calculation methodology approved by the AUC in Decision 22942-D02-2019; and

(c) the investment amounts first approved in Decision 22942-D02-2019.

The AESO explained that the updates proposed in the Application were consistent with the tariff update methodology approved by the AUC in Decision 2010-606.

AESO's Annual Revenue Requirement

The AESO's revenue requirement consisted of costs related to wires, ancillary services, transmission line losses and the AESO's own administration, which included other industry costs and general and administrative costs.

The AESO's 2020 forecast costs represented an increase of $15.0 million (or 0.6 percent) over the 2019 forecast costs included in the 2019 ISO tariff. The increase was the result of the following:

(a) increase in wires costs of $82.1 million (4.5 percent);

(b) decrease in ancillary services costs of $56.0 million (or -17.8 percent);

(c) decrease in losses costs of $12.6 million (or -10 percent); and

(d) increase in administrative costs of $1.4 million (or 1.4 percent).

Rate Calculations and Billing Determinants

The AESO used the rate calculation methodology approved in Decision 3473-D01-2015 using the 2018 rate calculations included in Appendix B[H]25 of the AESO 2018 ISO tariff filing as the template for the 2020 rate calculations. The AESO provided the 2020 rate calculations in tables D-1 through D-16 of Appendix D26 to this application.

The AESO indicated that the rate calculations for the 2020 rates update were based on the AESO's forecast of billing determinants for 2020. Billing determinants changed from the 2019 forecast on which the currently approved rates were based. Consequently, the AESO's 2020 updated rates increased 5.7 percent overall from the approved 2019 rates.

2020 Maximum Investment Levels

The 2020 Update included updated investment amounts approved in the 2018 ISO tariff application and reflected an escalation factor based on a composite of specified recent inflation indices. The AESO applied the resulting 1.0473 escalation factor to the 2018 Rate demand transmission service ("DTS") maximum investment levels to determine the 2020 Rate DTS maximum investment levels, which resulted in an increase to the 2020 maximum investment levels.

AUC Findings

In Decision 2010-606, the AUC approved an approach that included filing comprehensive tariff applications every three years and, in conjunction with this, filing annual tariff updates. The AUC stated that it considered an annual revenue requirement and rate update may benefit customers by limiting potential misallocations that might occur if the AESO were to rely on Rider C exclusively to allocate periodic revenue and cost imbalances to its customers.

The AUC found that the AESO included the 2020 wires costs for transmission facility owners using the approach approved in Decision 2010-606, referred to in Decision 2014-242 and updated in Decision 22093-D02-2017. The AUC also recognized that the AESO's 2020 forecast for ancillary services, losses and administrative costs included in this application have yet to be approved by the AESO board as final. The AUC noted that the AESO has proposed to file a letter to advise the Commission of AESO board approval once it has been received.

The AUC agreed with the AESO's view that it is more appropriate and efficient for the 2020 tariff rates to be based on the rate calculations included in Appendix B[H]25 of the AESO 2018 ISO tariff filing. The AUC noted this would allow the AESO to implement the proposed 2020 tariff updates, consistent with the functionalization and classification of bulk, regional and point of delivery costs that were approved in Decision 22942-D02-2019.

The Industrial Customers noted that the AESO's modifications to the cost of service study are part of the review and variance application filed by the Industrial Customers in Proceeding 25086. The Industrial Customers argued that the AUC should consider the issues raised in Proceeding 25086 before allowing the AESO's proposed 2020 tariff to be implemented. The AUC rejected this suggestion. The AUC found that the functionalization and classification of bulk, regional and point of delivery costs approved in Decision 22942-D02-2019 are to be applied by the AESO unless Decision 22942-D02-2019 is varied.

The AUC approved the 2020 Update on an interim refundable basis, pending release of the AUC's final decision in this proceeding.

AltaGas Canada Inc. and PSPIB Cycle Investments Inc. Application for Transfer of Shares and Stock, AUC Decision 25089-D01-2020

Section 109 Public Utilities Act - Sections 26 and 27 Gas Utilities Act

In this decision, the AUC approved and authorized AltaGas Canada Inc. ("AltaGas Canada"), pursuant to section 27 of the *Gas Utilities Act* ("*GUA*"), to sell and transfer and to make on its books the transfer of all of its outstanding shares or capital stocks to PSPIB Cycle Investments Inc ("Cycle Investments"). The AUC also confirmed that it would request that the Lieutenant Governor in Council designate AltaGas Canada as an owner of a gas utility to which sections 26 and 27 of the *GUA* apply and as an owner of a public utility to which Section 109 of the *Public Utilities Act* ("*PUA*") applies. The AUC found the no-harm test was met.

Introduction

On October 20, 2019, AltaGas Canada and Cycle Investments agreed that Cycle Investments would acquire all issued and outstanding common shares of AltaGas Canada for $33.50 in cash per common share (the "Transaction"). On November 18, 2019, AltaGas Canada and Cycle Investments filed a joint application with the AUC pursuant to section 27 of the *GUA* seeking authorization and approval for the Transaction.

Background

AltaGas Canada indirectly and wholly, through AltaGas Utility Group Inc., owns AltaGas Utility Holdings Inc., which, in turn, directly and wholly owns AltaGas Utilities Inc., as well as other non-Alberta utility investments. AltaGas Utilities Inc. owns and operates natural gas utility facilities in Alberta. The operations of AltaGas Utilities Inc. are confined to Alberta, and as an operating gas utility, it is regulated by the AUC pursuant to the *GUA.*

Cycle Investments was formed by the Public Sector Pension Investment Board (the "Pension Board") on September 20, 2019, solely to complete the Transaction. The Alberta Teachers' Retirement Fund Board (the "Teachers' Retirement Fund") was also involved in the Transaction; and at the completion of the Transaction, it will, indirectly, through a holding company, hold an approximate 20 percent economic interest in Cycle Investments, while the Pension Board, indirectly, will hold an approximate 80 percent economic interest in Cycle Investments.

AltaGas Canada stated that it and Cycle Investments entered into an agreement where Cycle Investments will acquire all issued and outstanding common shares of AltaGas Canada for $33.50 per share. The Transaction implies an enterprise value for AltaGas Canada of approximately $1.7 billion.

AUC Findings

No-harm Test

The AUC noted it has historically applied the no-harm test in determining whether it will approve internal corporate reorganizations and asset dispositions, as well as external transactions that result in a change of ownership of an operating utility company.

In Decision 2014-326, the AUC examined the following factors in determining whether customers would be harmed if the sale of AltaLink Management Ltd.'s operating utility company, AltaLink, to Berkshire Hathaway was approved:

- the impact on the rates and charges passed on to customers; and
- the operational benefit or risk related to the acquiring party's utility experience, based on certain considerations.

The AUC also stated that the test involves the following additional considerations:

- protection of customers to the maximum extent;
- customers are not entitled to a level of post-transaction regulatory certainty they would not have realized if the transaction had not been approved; and
- after consideration of the potential positive and negative impacts of the proposed share transactions, customers are at least no worse off after the transaction is completed.

The AUC considered three basic factors in assessing whether there would be harm to customers from the share transaction: operational impacts on continued reliable service to customers; financial impacts to customer rates; and, sufficient regulatory oversight of the operating utility after the Transaction has been completed.

Operational Effects on Continued Reliable Service

AltaGas Canada submitted the following additional reasons as to why the Transaction would not cause harm to customers of AltaGas Utilities Inc.:

- following the completion of the Transaction, AltaGas Utilities Inc. would continue to own and operate its natural gas utility facilities on a stand-alone basis;
- upon the closing of the Transaction, the corporate structure of AltaGas Canada would be unaffected except that Cycle Investments will be its sole shareholder; and
- the Transaction would have no effect on the structure or management of AltaGas Canada, AltaGas Utilities Inc., or AltaGas Canada's other investments. The Transaction also would have no effect on the services provided by the affiliates of AltaGas Utilities Inc. Therefore, the level of managerial and operational expertise currently available through AltaGas Utilities Inc. through inter-affiliate services would remain unaffected.

The AUC found that approval of the proposed Transaction will not have a negative effect on the management and operation of AltaGas Utilities Inc. and that the current reliability of the service and integrity of the gas distribution system would most likely be unaffected.

Financial Effects on Customer Rates

AltaGas Canada submitted that there would be no negative financial effects as a result of the Transaction. AltaGas Canada submitted the following:

- the Transaction would not result in any changes to the management or operations of AltaGas Utilities Inc. and will not result in any impact to its rate base or operating costs;
- the subsidiaries of AltaGas Canada, including AltaGas Utilities Inc., would continue to receive debt financing from AltaGas Canada at the completion of the Transaction as its subsidiaries received previously;
- as of the date the application was submitted to the AUC, AltaGas Canada retained a credit rating of BBB (high) with a stable trend by DBRS Limited (DBRS Morningstar). On October 21, 2019, DBRS Morningstar issued a press release stating that it considered that the Transaction would not affect AltaGas Canada's credit rating; and
- upon the closing of the Transaction, the ownership of AltaGas Canada would change

from a publicly listed company to a privately held company with publicly traded debt. After the completion of the Transaction, AltaGas Canada would seek equity financing from Cycle Investments and, in turn, Cycle Investments would seek financing from the Pension Board and the Teachers' Retirement Fund as required. The strong financial position of the Pension Board and the Teachers' Retirement Fund would provide Cycle Investments and, in turn, AltaGas Canada, with dependable access to equity financing and would not negatively affect the financing costs of AltaGas Canada.

The AUC found that after consideration of the potential positive and negative effects associated with the Transaction, customers would be at least no worse off after the Transaction is completed when considering the future cost of debt, rate base and operating costs.

Regulatory Authority

The AUC stated that in Decision 23010-D01-2018, the AUC indicated it would recommend to the Lieutenant Governor in Council that AltaGas Utility Holdings (Pacific) Inc. (now AltaGas Canada Inc.) be designated as an owner of a utility under sections 26 and 27 of the *GUA* and section 109 of the *PUA*. The AUC noted that it continued to hold this view and would make this recommendation to the Lieutenant Governor in Council.

The AUC found that all of its considerations in the assessment of the no-harm test as a result of the Transaction were met, and the AUC approved the Transaction as applied for by AltaGas Canada.

***Amendments to AUC Rule 001 to Facilitate Exchange of Confidential Documents*, AUC Bulletin 2020-05**

Rules of Practice - Confidentiality

On February 3, 2020, the AUC approved amendments to *Rule 001: Rules of Practice*, with an effective date of February 8, 2020. This revision was intended to facilitate a major enhancement to the AUC eFiling System, supporting the exchange of confidential documents among AUC-authorized proceeding participants.

This eFiling System enhancement was released on February 8, 2020. Additional information regarding the new features that are part of the enhancement can be found in the AUC's November 13, 2019 announcement on the matter.

Specific changes to *Rule 001* included the following:

- amendment of certain terms, such as "requesting party" to "disclosing party," and "request" to "motion";
- simplification of certain subsections for greater clarity;
- removal of certain obsolete or redundant subsections;
- introduction of new subsection 28.8, regarding the application of a ruling on a confidential motion to associated proceedings, in order to improve efficiencies; and
- introduction of a new transitional clause (subsection 28.16) to recognize that the procedures for processing confidential information may vary based on the initial registration date of the proceeding that will contain the confidential information.

***ATCO Electric Ltd. Light-Emitting Diode (LED) Lighting Conversion – Maintenance Multiplier Filing for Five Municipalities*, AUC Decision 25251-D01-2020**

Rates - Light-Emitting Diode

In this decision, the AUC approved ATCO Electric Ltd.'s ("ATCO Electric") light-emitting diode ("LED") lighting conversion maintenance multiplier ("LED conversion multiplier") of 1.067 in 2019 and increasing to 1.073 in 2020 for the Town of Three Hills, the City of Lloydminster, the Village of Forestburg, the Town of Trochu and the Village of Kitscoty (collectively, the "Municipalities").

Background

In Decision 22667-D01-2017, the AUC accepted ATCO Electric's proposal to use a maintenance multiplier for a special request from its exterior lighting customers, such as a request for a level of service (maintenance or operations) that is higher than the standard service level, or a request for lighting fixtures that results in higher than average lighting costs. The AUC directed ATCO Electric to do the following in relation to reaching an agreement with a customer requesting a special service:

> 18. … upon preliminary agreement with a customer requesting any special service, to prepare an analysis and multiplier calculation that considers the specific and direct costs of providing that service. The analysis should demonstrate that (i) other customers will not subsidize the customer with the special request, and (ii) the customer with the special service request will not be double charged by way of the multiplier as they are already entitled to the standard level of service through their current rates.
>
> 19. … confer with a customer requesting any special service upon completion of the above-directed analysis and multiplier calculation, and to provide this analysis to that customer along with the estimated bill impact and information regarding the cost of the special service, and confirm customer acceptance. If the customer agrees with the multiplier proposal, the information (the multiplier calculation and analysis and the estimated bill impact and confirmation of customer acceptance) should be filed with the Commission as part of the maintenance multiplier application for that customer.

Issues

ATCO Electric requested the use of an LED conversion multiplier of 1.067 in 2019 and increasing to 1.073 in 2020 for the Municipalities. ATCO Electric included in its application signed customer acknowledgment letters that outlined the higher cost of service to be charged by way of an LED conversion multiplier and advised that the LED conversion multiplier calculation and associated charges to the customers requesting the higher service level may change over time.

The LED conversion multiplier was calculated based on the assumption that all eligible high-pressure sodium streetlight fixtures in ATCO Electric's service territory would be converted to LEDs, and the project would continue for the next three to five years.

AUC Findings

The AUC found that ATCO Electric complied, or had confirmed its future intent to comply, with each of the directions issued in the past LED maintenance multiplier decisions.

The AUC acknowledged and accepted ATCO Electric's LED conversion multiplier of 1.067 for 2019 and increasing to 1.073 in 2020 under its distribution tariff, to be applied to the Municipalities, and directed ATCO Electric to file any future changes to the LED conversion multiplier with the AUC.

The AUC also directed ATCO Electric to continue to provide fixture counts for each of its customers in its future applications.

***ATCO Gas, a division of ATCO Gas and Pipelines Ltd. 2020 Interim Transmission Service Charge (Rider T)*, AUC Decision 25283-D01-2020**

Rates - Rider T

In this decision, the AUC approved 2020 transmission service rider (Rider T) rates for ATCO Gas, a division of ATCO Gas and Pipelines Ltd., on an interim refundable basis effective March 1, 2020. The interim Rider T rates were approved as follows:

- low-use customers $0.762 per gigajoule ("GJ")
- mid-use customers $0.696 per GJ; and
- high-use customers $0.210 per day of GJ demand.

The AUC noted that if it ultimately approved a final Rider T that was different from the interim refundable rate rider approved in this decision, it would address the matter of reconciling the interim amounts collected with the final, approved amounts at that time.

Background

ATCO Gas flows through the rates charged by the transmission service provider, NOVA Gas Transmission Ltd. ("NGTL"), to customers. Rider T is the service charge used to collect forecast transmission costs and refund or collect any differences between the prior year's forecast and actuals. ATCO Gas forecasts its transmission expense based on NGTL's rates and charges applied to the contract demand quantity ("CDQ"). Any difference between what ATCO Gas collects through Rider T based on its forecast and what it ultimately pays to NGTL based on actuals is recorded in a deferral account and refunded to, or recovered from, customers as part of a subsequent Rider T.

Rider T Rates and Bill Impacts

ATCO Gas explained that assuming a March 1, 2020 implementation date, the total annual charges for a residential (low-use) customer in the south service territory that utilizes 115 GJ annually would decrease to $696 from $712, and a similar residential customer in the north service territory would see a decrease to $736 from $752.

AUC Findings

The AUC noted the parties' process submissions, in which ATCO Gas submitted that no further process was necessary for the AUC to reach its decision, and reiterated its request for a decision by February 20, 2020, to facilitate the proper testing and implementation of rate changes for billing effective March 1, 2020. The AUC also noted that the applied-for Rider T provides a reduction in customer rates across all rate groups for both ATCO Gas North and ATCO Gas South and that Rider T rates have typically been effective on March 1.

To permit ATCO Gas to test and implement the rate changes effective March 1, 2020 and retain the usual effective date of March 1 for consistency, the AUC considered it reasonable and efficient to approve Rider T as applied for on an interim refundable basis, effective March 1, 2020, pending a final determination in this proceeding. At that time, the AUC would address any necessary true-ups.

The AUC made no determination with respect to the merits of the application or the proposed quantum of the rider, all of which will be considered in the final determination.

***ATCO Gas and Pipelines Ltd. 2018 Depreciation Application*, AUC Decision 24188-D02-2020**

Rates - Depreciation Application

In this decision, the AUC considered ATCO Gas and Pipelines Ltd.'s ("ATCO Gas") 2018 depreciation application, which was supported by a depreciation study prepared by Concentric Advisors, ULC ("Concentric"). The AUC determined that the service lives, Iowa life-curves ("life-curves") and estimated net salvage percentages as proposed by ATCO Gas for its depreciation study accounts were reasonable, except for Account 475 Mains, where the proposed change for net salvage from negative 60 percent to negative 70 percent was denied.

The AUC also found that ATCO Gas complied with Direction 51 from Decision 2011-450. The segregation of Account 475 Mains into separate accounts for steel or plastic pipe will not be required at this time.

Background

In December 2018, ATCO Gas filed an application with the AUC requesting approval of its proposed depreciation parameters to be effective January 1, 2018. Specifically, ATCO Gas requested approval of:

- updated depreciation parameters as supported by the depreciation study conducted by Concentric; and
- interim approval of a change in net depreciation expense of $24.2 million to be collected as a Rider S effective March 1 to December 31, 2019. The amount to be collected was subsequently corrected to $21.3 million.

Rider S

For the reasons detailed in Decision 24188-D01-2019, the AUC approved a Rider S that would recover 25 percent of ATCO Gas' applied-for 2018 and 2019 depreciation expense shortfall, on a placeholder basis, effective August 1, 2019, to December 31, 2019, as well as a subsequent Rider S that would recover 25 percent of the estimated depreciation expense shortfall for the year 2020 on a placeholder basis, effective January 1, 2020, to December 31, 2020.

AUC-initiated Review and Variance

On May 29, 2019, the AUC initiated a review and variance ("R&V") proceeding, Proceeding 24609, to consider the method of accounting for new depreciation parameters and expense in rates under the 2018-2022 PBR term. The changes to depreciation parameters approved in this decision were approved on a final basis, to be reflected in rates in accordance with the directions in Decision 24609-D01-2020.

ATCO Gas's Depreciation Study

The 2018 depreciation study, prepared by Concentric for ATCO Gas, was based on ATCO Gas' plant in service as of December 31, 2017 (the "Depreciation Study").

ATCO Gas noted in its application that the net increase in depreciation expense, because of the applied-for changes to depreciation parameters, was $24.2 million (later corrected to $21.3 million), as compared to depreciation parameters approved in the 2011-2012 general rate application

Accounts for Which No Issues Were Raised by Interveners

Accounts for Which No Changes Were Proposed

The AUC was satisfied that a departure from the previously-approved service life, life-curve and net salvage rates for Account 471.01 Land Rights (Railway) and Account 487.00 Equipment on Customer Sites was not required.

Accounts for Which Changes Were Proposed

ATCO Gas proposed service life, life-curve and/or net salvage adjustments for 20 accounts. The AUC was satisfied that the proposed changes to the previously-approved service life, life-curve and/or net salvage rates for each of these accounts were reasonable.

Amortization of Contributions by ATCO Gas to Transmission Service Providers

The AUC considered ATCO Gas' proposal to amortize contributions over an average service life equal to that used for similar assets built by ATCO Pipelines to be reasonable, based on ATCO Gas' evidence that this would contribute to administrative efficiency while aligning the recovery of the original capital cost over the useful life of the assets.

Move to Amortization Accounting for Certain Accounts

ATCO Gas proposed to change the capital recovery methodology for certain accounts listed in the decision from the standard form of depreciation to capital recovery through amortization accounting. In the case of Account 471 (Land rights), a 100-R5 curve and for Account 496 (Specialized computer and office equipment), a 10-R4 curve was previously approved. Account 495 (Leaseholds) previously had a depreciation rate of zero.

The AUC found that amortization accounting was reasonable for these accounts, given the administrative benefits of applying a square Iowa curve ("SQ") amortization methodology.

Accounts for Which Changes Were Proposed and Issues Were Raised by Interveners

Accounts for Which Amortization was Proposed and Issues Were Raised

In Decision 20272-D01-2016, the AUC approved amortization periods of ten, seven and three years for similar ATCO Electric (transmission) software accounts. The AUC subsequently approved the same amortization periods for the same or similar accounts for ATCO Pipelines and for ATCO Electric (distribution). The AUC, therefore, accepted that the amortization periods proposed by ATCO Gas were reasonable.

The AUC approved the use of a 3-SQ life-curve for Account 499.00 (Software Desktop), a 7-SQ life-curve for 499.01 (Software Minor), and a 10-SQ life-curve for Account 499.02 (Software Major) for ATCO Gas.

Account for Which Issues were Raised Involving Service Life and/or Life-Curve Adjustments

Account 473 Services represents over 30 percent of distribution plant in service. In its application, ATCO Gas proposed to maintain the currently approved life-curve of 57-R2.5. In its evidence, the Utilities Consumer Advocate ("UCA") suggested a 59-R3 life-curve would be a better fit to the data.

The AUC found insufficient evidentiary support for the UCA's recommended use of the 59-R3 curve. The AUC approved the 57-R2.5 curve, as proposed by ATCO Gas.

Accounts for Which Issues Were Raised Involving Net Salvage

Gradualism

The AUC agreed that the principles of gradualism and moderation are important and should be included in the assessment of a depreciation study, especially in situations where a large change in a depreciation parameter or parameters has been proposed.

Alternative Accounting Approaches

The AUC agreed that an examination of alternatives to the traditional method of net salvage may be beneficial where there is a large gap between ATCO Gas' net salvage rates and those of its peers or

where the traditional approach to net salvage may result in atypical outcomes.

The AUC directed ATCO Gas, in its next depreciation study, to review and report on alternatives to the traditional approach to net salvage for: (a) any account in which ATCO Gas has proposed net salvage rates that are more negative than negative 60 percent; or (b) for which the mean net salvage percentage for the peer utility comparator group for ATCO Gas is more than 25 percent different from the net salvage rate proposed by ATCO Gas. ATCO Gas should explain in detail why the alternative was either adopted or rejected.

Accounts 472 (Structures and Improvements) and 474 (Regulator and Meter Stations)

The AUC noted that ATCO Gas applied gradualism to arrive at the proposed net salvage value of negative 65 percent value for Account 472. The AUC accepted the explanation of ATCO Gas that environmental considerations were driving the trend towards more negative net salvage for this account and considered the proposed net salvage rate of negative 65 percent to be reasonable.

ATCO Gas did not apply gradualism to Account 474 but rather, relied on historical indications, the comments from the operations and management staff, and indications from the peer comparison of Canadian utilities in support of the recommended change to a negative 60 percent net salvage for this account. The AUC accepted that net salvage for Account 474 was becoming more negative than the currently approved value of negative 30 percent and that the proposed value of negative 60 percent was reasonable.

Account 473 Services

ATCO Gas applied gradualism to this account to arrive at the proposed salvage value of negative 125 percent. The AUC accepted that the net salvage percentage for this account demonstrated an increasing trend (becoming more negative) and considered the proposed net salvage rate of negative 125 percent to be reasonable.

Account 475 Mains

With respect to ATCO Gas's request to a change in the net salvage rate for Account 475 Mains from negative 60 percent to negative 70 percent, the AUC found there was insufficient information on the record to conclude that this change was warranted.

The AUC denied ATCO Gas' proposed negative 70 percent net salvage rate for Account 475 Mains, and the current negative salvage value of minus 60 percent for this account was therefore retained.

ATCO Gas Response to Direction 51

This section considered ATCO Gas' compliance with Direction 51 of Decision 2011-450, which dealt with the segregation of the Mains Account (475) into plastic or steel pipe.

The AUC had directed that ATCO report on the feasibility of segregating significant accounts by material on a go-forward basis. ATCO committed to providing this information in a future application. It then provided a review of peer Canadian natural gas distribution companies, showing the majority (60 percent) of peer companies do not segregate their mains account by material.

ATCO Gas explained that segregating mains would require additional administrative burden as it did not have detailed retirement records by material type. It also noted that steel and plastic service lives are similar due to technological advances.

The AUC found the initial response of ATCO Gas to Direction 51 in its application materially inadequate. The AUC was particularly concerned over the unavailability of supporting background material given ATCO Gas' commitment to conduct a study and provide it to the AUC.

Notwithstanding this, the AUC found that ATCO Gas complied with Direction 51. The segregation of Account 475 Mains into separate accounts for steel or plastic pipe would not be required at this time as the evidence of ATCO Gas, and the UCA confirmed that steel and plastic service lives are considered to be similar due to technological advances.

Rate Shock

The AUC noted that in the current proceeding, it considered changes in depreciation parameters and depreciation expenses arising from the ATCO Gas application. The increase in rates as a result of these changes, particularly when evaluated cumulatively with a number of other changes to rates based on the other rate-related adjustments, was not an adequate basis to deny the application or otherwise

reduce a level of expense that the AUC otherwise found to be reasonable and justified. However, the impact of this decision on rates would be addressed in ATCO Gas' 2021 annual PBR rate adjustment filing. The AUC may evaluate the potential for rate shock during that proceeding and, if it finds that the rate adjustments may result in rate shock, it may consider one or more options to mitigate this concern at that time.

C&B Alberta Solar Development ULC Tilley Solar Project – Amendment, Time Extension, Ownership Transfer and Connection Order, AUC Decision 24434-D01-2020

Facilities - Amendment Application - Environment - Species at Risk, Wildlife Act

In this decision, the AUC considered applications from C&B Alberta Solar Development ULC ("CBA") to amend the previously-approved Tilley Solar Power Plant design, extend the construction completion date of the power plant, transfer ownership of the power plant to CS Tilley Solar GP Inc. and connect the power plant to the FortisAlberta Inc. electric distribution system ("Amended Project"). The AUC found that approval of the proposed amendment was not in the public interest. Having denied the application for amendment, it did not find it necessary to determine the remainder of the applications.

Background

CBA was granted approval to construct and operate the Tilley Solar Power Plant ("Power Plant") in the Brooks area, pursuant to Approval 22297-D02-2017.

CBA applied for approval of the Amended Project. An updated wildlife renewable energy referral report from Alberta Environment and Parks Wildlife Management ("AEP") was not included in the application. The AUC considered this a major deficiency, put the application in abeyance, and granted an interim extension of the approval until a final decision was issued.

CBA subsequently filed a letter from AEP, in which AEP advised of an amendment to its original referral report for the power plant.

Legislative Scheme

The AUC considered the applications under sections 11, 18, 19 and 23 of the *Hydro and Electric Energy Act* ("*HEEA*") and section 17 of the *Alberta Utilities Commission Act* ("*AUC Act*"). In accordance with section 17 of the *AUC Act*, the AUC noted it must assess whether approval of the applications is in the public interest, having regard to the social, economic and environmental effects of the proposed power plant with the changes proposed in the amendment application.

While the AUC is responsible for approving the construction and operation of solar power plants under the *HEEA*, AEP is responsible for the overall management and regulation of wildlife in Alberta. The AUC's *Rule 007* requires applicants for solar power plant approvals to file a referral report signed by an AEP wildlife biologist.

When assessing the environmental impacts of a project, the AUC considers an applicant's adherence to AEP's Wildlife Directive for Alberta Solar Energy Projects and other related AEP guidelines or standards, as well as AEP's assessment of the project's environmental impacts as reflected in referral reports.

Power Plant Amendment Application

CBA requested approval to reduce the total generating capability of the facility from 24 megawatts ("MW") to 21 MW and vary the design and equipment of the power plant. The proposed changes would occur within the previously-approved site boundary.

In the original AEP referral report for the power plant, dated December 20, 2016, and filed by CBA in this proceeding, AEP ranked the project as an overall moderate risk to wildlife and wildlife habitat on the basis that the project was proposed to be partially sited (11.22 hectares) on native grasslands and located 430 metres from the Tilley B Reservoir. AEP also considered the mitigation measures proposed by CBA.

CBA retained Stantec Consulting Ltd. to conduct wildlife surveys for the original and amended projects. Between April and October 2016, Stantec conducted pre-construction wildlife surveys that were provided to AEP and informed the original referral report. However, to ensure that "data adequately defines the risk of the [amended] project for wildlife," surveys are only considered current within two years of the last survey date. AEP requires that surveys be maintained as current until construction is complete. In the original referral report, AEP also stipulated that "[i]f a species of management concern is identified, AEP requires that

areas immediately adjacent to key wildlife habitats be avoided by appropriate setbacks as outlined in the *Recommended Land Use Guidelines for Protection of Selected Wildlife Species and Habitat within Grassland and Parkland Natural Regions of Alberta*."

Stantec updated its wildlife surveys between April and June 2019. The surveys identified two ferruginous hawk nests near the amended project – one located approximately 290 metres and another 1,345 metres from the project. In June 2019, Stantec provided the results of the updated surveys to AEP.

On November 15, 2019, AEP issued an updated referral report for the amended project based on the new surveys conducted by Stantec. In its updated referral report, AEP identified a number of concerns and assessed the amended project as a high risk to wildlife and wildlife habitat:

> AEP-WM has reviewed the changes detailed in the Project Update and concludes that the overall Project risk to wildlife has changed from the moderate risk ranking, as described in the Referral Report to a high risk.

The updated referral report referenced the new ferruginous hawk nest located 290 metres from the amended project area. Ferruginous hawks are listed as an endangered species under the Alberta Wildlife Act and as a threatened species under the federal *Species at Risk Act*.

CBA committed to implementing all mitigation measures recommended by AEP in its updated referral report.

In the updated referral report, AEP determined that the amended project, as proposed, represented a significant infringement of a setback specific to an endangered species. In addition, in correspondence between AEP and CBA, AEP stated that the proposed infringement of the setback from the nest of an endangered species is a significant risk.

AUC Findings

The AUC found that the amended project posed a significant risk to wildlife and wildlife habitat: it was partially sited on native grasslands, was in close proximity to the Tilley B Reservoir, and also infringed, for 710 metres, into the 1,000 metre setback of an active ferruginous hawk nest. In its updated referral report, AEP stated that the active ferruginous hawk nest is an important wildlife feature, as ferruginous hawks are listed as endangered under the *Alberta Wildlife Act* and as a threatened species under the federal *Species at Risk Act.* Furthermore, active ferruginous hawk nests are protected from disturbance under *Alberta's Wildlife Act*, and Standard 100.1.5 of the *Wildlife Directive for Alberta Solar Energy Projects* requires a setback of at least 1,000 metres from active nest sites.

The AUC acknowledged CBA's proposed mitigation and monitoring plans to reduce impacts to the nest, and in particular, CBA's commitment to "[twice-weekly] nest checks during project construction until June 10, 2020, or until the nest becomes active".

The AUC was not satisfied, however, that the proposed alternative mitigation and monitoring plans would adequately mitigate the specific risks to the nest site and wildlife habitat associated with the amended project.

Even if CBA implemented its suggested mitigation strategies and, in so doing, was successful in not disturbing the nest during the construction of the amended project, the AUC considers the potential impact on wildlife habitat located within the 1,000-metre setback to be unacceptably high.

Based on the evidence before it, the AUC found that CBA's proposed mitigation plan could not adequately mitigate the specific risks associated with the amended project. In reaching this determination, the AUC relied on AEP's decision to revise the overall project risk from a moderate risk ranking in the original referral report to a high risk ranking in the updated referral report, following consideration of the project amendment, which identified a new ferruginous hawk nest located 290 metres from the power plant.

The AUC was not satisfied that approval of the amendment was in the public interest and therefore denied this application.

The AUC's denial was without prejudice to any future application in which CBA proposes to construct and operate the power plant in a location where the environmental effects are reduced or can be adequately mitigated by measures proposed by CBA in consultation with AEP.

Time Extension, Ownership Transfer and Interconnection Applications

CBA applied for approval to extend the construction completion date of the Power Plant from March 31, 2019, to March 31, 2021. CBA also sought to transfer the approval for the Tilley Solar Power Plant to CS Tilley Solar GP Inc., a wholly-owned subsidiary of CBA. Lastly, CBA requested approval to connect the power plant to FortisAlberta Inc.'s 25-kilovolt distribution system.

AUC Findings

The current power plant approval included a condition that power plant construction must be completed by March 31, 2019. On March 28, 2019, the AUC granted an interim extension of that condition of approval until a final decision on the applications was reached. Because the AUC made a final decision not to approve the amended project proposed by CBA, the interim time extension also expired without construction having commenced. As a result, the construction completion date deadline expired without compliance, and the existing power plant approval was therefore considered to have expired and will be rescinded by the AUC.

Given the above findings, the AUC considered that it was unnecessary to determine the applications for the time extension, ownership transfer and connection order associated with the amended project.

Decision

The AUC found that approval of the amendment application was not in the public interest. The AUC denied the amendment application and consequently did not determine the associated applications for time extension, ownership transfer and the connection order.

Clarifying the use of "pristine area" in AUC Rule 012, *AUC* Bulletin 2020-04

Noise Control

The AUC indicated it is amending subsection 2.6(2) of *AUC Rule 012: Noise Control* to address an inconsistency in how the phrase "pristine area" is used in *Rule 012*. The "pristine area" concept is important when determining ambient sound levels and permissible sound levels under *Rule 012*.

Subsection 2.6(2), which was added to *Rule 012* in April 2019, states as follows:

> The average nighttime ambient sound level in rural Alberta is approximately 35dBA. Rule 012 does not require the use of a specific ambient sound level in a noise impact assessment. Applicants must assess the ambient sound level as part of a noise impact assessment, particularly where either noisy (i.e., nighttime ambient sound levels might be greater than 35dBA) or **pristine (i.e., nighttime ambient sound levels might be less than 35dBA) surroundings prevail.** [Emphasis added]

To promote consistency and certainty in the interpretation and application of the "pristine area" concept, the AUC has amended subsection 2.6(2) so that it reads as follows:

> The average nighttime ambient sound level in rural Alberta is approximately 35dBA. Rule 012 does not require the use of a specific ambient sound level in a noise impact assessment. Applicants must assess the ambient sound level as part of a noise impact assessment, particularly **in areas where there is non-energy industrial activity that would impact the ambient sound levels or where pristine (as defined in Appendix 1) surroundings prevail.** [Emphasis added]

"Pristine area" is defined in Appendix 1 of *Rule 012* as "[a] natural area that might have a dwelling but no industrial presence, including energy, agricultural, forestry, manufacturing, recreational or other industries that affect the noise environment."

The amendment came into force on March 2, 2020.

Direct Energy Regulated Services Extension Request for 2018-2020 Energy Price Setting Plan, AUC Decision 25357-D02-2020

Rates - Extension Application

On February 11, 2020, Direct Energy Regulated Services ("DERS") filed an application with the AUC requesting approval to continue operating under its current energy price setting plan ("EPSP"), as approved in Decision 24296-D01-2019.

In Decision 24296-D01-2019, the AUC approved DERS' EPSP with an expiry date of April 30, 2020. As DERS' application for a new EPSP has not yet

been filed, a decision approving a new EPSP would not be issued by April 30, 2020. Accordingly, the AUC accepted that April 30, 2020, was no longer viable for implementation of DERS' next EPSP and considered DERS' request to continue its current EPSP to be reasonable. The AUC granted DERS' proposal to continue the current EPSP until its next EPSP is approved by the AUC, or the AUC otherwise directs.

CANADA ENERGY REGULATOR

NOVA Gas Transmission Ltd. Application for 2021 NGTL System Expansion Project, CER Decision GH-003-2018

Gas Pipeline - System Expansion

In this decision, the CER considered an application from NOVA Gas Transmission Ltd. ("NGTL") to construct and operate the 2021 System Expansion Project (the "Project"). The CER recommended to the Governor in Council that a certificate be issued for the construction and operation of the Project pursuant to section of the *National Energy Board Act* ("*NEB Act*").

Background

The Project consists of approximately 344 kilometres of pipeline in eight pipeline section loops and three compressor station unit additions. The Project is located wholly in Alberta, near Grande Prairie and runs roughly south towards Calgary, mostly adjacent to existing rights of ways and facilities.

In its application, NGTL stated the Project was needed to transport natural gas from areas of increasing production in northwestern Alberta and northeastern British Columbia to intra-Alberta and export markets. If approved, NGTL indicated it planned to begin operating the Project by April 2021.

Legislative Framework

Section 36 of the transitional provisions of the *CER Act* states that applications pending before the National Energy Board immediately before the commencement day of the *CER Act* were to be considered by the CER in accordance with the *NEB Act* as it read immediately before the commencement day.

Section 52 of the *NEB Act* requires that a recommendation ("Recommendation") be made to the Minister responsible for the act (the Minister of Natural Resources) as to whether or not a certificate should be issued for all or any portion of the applied-for pipeline. Making the Recommendation considers whether the pipeline is and will be required by the present and future public convenience and necessity, and the reasons for that Recommendation.

CER Findings

Economic Feasibility and Need for the Project

The CER considered the economic feasibility of the proposed Project. Specifically, the CER had regard to the supply and markets available to the pipeline, transportation matters including the contracts underpinning the facilities, and NGTL's ability to finance the Project. The CER also considered the proposed tolling treatment and the economic benefits associated with the Project.

The CER found that the applied-for facilities were economically feasible. The CER indicated its finding was consistent with the long-term contractual commitments made by shippers to underpin the facilities. The CER also found that NGTL and TransCanada had the ability to finance the Project, including the construction, operation and abandonment of the facilities.

The CER found NGTL's proposal to roll in the cost of the Project's facilities to the rate base for the NGTL System and to apply the existing NGTL System toll methodology to be reasonable. The CER considered the degree of integration of the Project's facilities to the existing system and the nature of service provided on the Project's facilities. The CER found the Project to be sufficiently integrated into the existing system because the Project would be comprised of various pipeline loops and compressor station unit additions that expand the capacity of the NGTL System. Additionally, the transportation services provided through the facilities would be identical to those already offered on the NGTL System, and no party opposed NGTL's proposed tolling treatment.

The CER found that the Project would provide overall economic benefits to Canadians. The Project would allow for growth in both Canadian natural gas production and demand, which would provide economic benefits to Canadians in the form of tax revenues, royalties and jobs. As well, the Project would provide increased reliability to gas distributors, who could then more reliably serve communities, such as cities, towns, rural areas, and Indigenous communities across Saskatchewan and Alberta.

Facilities and Emergency Response Matters

The CER indicated it holds its regulated companies accountable so that Canadians and the environment are protected throughout the lifecycle of each pipeline or project. Using a risk-informed approach, the CER conducts compliance verification activities. The CER noted that the Project would be part of the existing NGTL System, which is subject to the CER's comprehensive regulatory oversight. The CER also indicated it was satisfied with NGTL's commitments to identify areas of high risk and to implement additional risk mitigation measures where needed.

Land Matters

The CER indicated it was satisfied that NGTL had proposed suitable mitigation to address the Project's potential land-related effects during the design, construction, and operation of the Project. The CER noted that NGTL's:

- route selection criteria minimized potential adverse effects, including avoiding sensitive environmental areas and minimizing environmental and social impacts and fragmentation as much as possible;
- route selection process and the criteria used to determine the route were reasonable and justified; and
- proposed route was appropriate.

Further, the CER found that NGTL's anticipated requirements for land rights and the process for the acquisition of these land rights was acceptable and was satisfied that the acquisition would meet the requirements of the legislation.

Public Engagement

The CER found that NGTL adequately and appropriately identified stakeholders and potentially affected landowners and developed appropriate engagement materials. The CER also found that NGTL's design and implementation of engagement activities for the Project were adequate, given the scope and scale of the Project.

The CER noted that it expects NGTL to continue its efforts to engage and maintain effective and timely engagement activities, as appropriate, throughout the lifecycle of the Project.

Matters Related to Indigenous Peoples

The CER found that there had been adequate consultation and accommodation of Indigenous peoples for the purpose of the CER's decision on this Project. The CER found that any potential Project impacts on the rights and interests of affected Indigenous peoples, after mitigation, and with the imposition of conditions imposed by the CER, were not likely to be significant and can be effectively addressed.

Overall, the CER was of the view that approval of this Project was consistent with section 35 of the *Constitution Act*, 1982 and the honour of the Crown.

Environment and Socio-Economic Matters

As the Project would be over 40 km in length, it was designated under the *Canadian Environmental Assessment Act*, 2012 ("*CEAA 2012*"), requiring an environmental assessment. The CER noted it also considers environmental protection as part of its broader mandate. When making its recommendations, the CER is responsible for assessing the environmental and socio-economic effects of the Project.

The CER found that after conducting an environmental assessment of the Project, it was of the view that overall, with the implementation of NGTL's environmental protection procedures and mitigation measures and the CER's recommended conditions, the Project was not likely to cause significant adverse environmental effects.

Infrastructure, Employment and Economy

The CER found that the measures planned by NGTL would adequately address the potential impacts of the Project on local infrastructure and services, including effects on traffic. Given the Project was spread across multiple locations and would require a relatively small outside workforce, the CER found that Project demands were unlikely to exceed the available capacity of community infrastructure and services or impact the quality of local services.

The CER found that the Project would benefit local, regional, and provincial economies. The CER further found that the socio-economic benefits related to the construction phase of the Project, through both direct and indirect employment, procurement and contracting opportunities, would benefit local

communities as well as workers from elsewhere in Alberta.