REGULATORY
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ENERGY REGULATORY REPORT

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

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SUPREME COURT OF CANADA

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Doctrine of Paramountcy - Bankruptcy - End-of-Life Obligations

In this decision, the Supreme Court of Canada ("SCC") considered an appeal from the Alberta Court of Appeal ("ABCA")'s decision in *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 (the "ABCA Decision").

The ABCA Decision upheld the decision of the Alberta Court of Queen's Bench declaring the definitions of licensee under the *Pipeline Act* and *Oil and Gas Conservation Act* ("*OGCA*") to be inoperable to the extent that those definitions frustrated the purpose of the federally enacted *Bankruptcy and Insolvency Act* ("*BIA*") under the doctrine of federal paramountcy.

Before the SCC, the AER and the Orphan Well Association ("OWA") were the appellants. Redwater Energy Corporation ("Redwater")'s trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), opposed the appeal.

In a split decision, the SCC allowed the appeal. The majority of the SCC (the "Majority") found that the AER's exercise of its statutory powers under the provincial legislation did not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. The Majority found the AER was not asserting any claims provable in the bankruptcy, and, therefore, did not frustrate the priority scheme in the *BIA*. Thus, in the Majority's view, no conflict was caused by GTL's status as a licensee under Alberta legislation.

The dissenting judges would have dismissed the appeal and affirmed the orders made by the Alberta Court of Queen's Bench ("ABQB"). The dissenting justices found that there was an operational conflict. The Alberta regime's failure to recognize the lawfulness of GTL's disclaimers frustrated the purpose of the federally enacted *BIA* by interfering with the *BIA*'s priority scheme.

Judicial History

Alberta Court of Queen's Bench Decision

GTL sought to disclaim certain of Redwater's non-producing wells pursuant to section 14.06 of the federally enacted *BIA*. Section 14.06 of the *BIA* permits a trustee in bankruptcy to renounce unprofitable assets without the responsibility for environmental abandonment and remediation work.

The AER and the OWA jointly applied for a declaration from the Court that the Receiver's renouncement of well assets was void and unenforceable, due to the environmental remediation work necessitated as a result of the well abandonment.

The AER and OWA sought an order compelling the GTL, the Receiver, to fulfill its obligations as a licensee under the *OGCA* and the *Pipeline Act* in relation to abandonment, reclamation, and remediation of Redwater's licensed properties.

In the ABQB decision, Wittman C.J. found that compliance with both the provincial legislation and the federal *BIA* was impossible. Therefore, the Chief Justice held that the doctrine of federal paramountcy was triggered. He declared the definitions of licensee under the *Pipeline Act* and *OGCA* to be inoperable to the extent that those definitions frustrated the purpose of the BIA. It followed that the remedies sought by the AER and OWA were denied.

Alberta Court of Appeal Decision

The AER and OWA appealed, and on June 29, 2016, the ABCA granted leave to appeal.

The ABCA dismissed the appeal, based on the majority's finding that the AER's claim under the provincial legislation interfered with the priority of distribution in the bankrupt estate.

The ABCA found that Redwater's obligation to remediate the wells arises directly from a cleanup order, or indirectly from a directive which imposes financial consequences on the transfer of assets. In either case, the ABCA found that the AER's policy on transfers essentially strips away from a bankrupt estate enough value to meet the outstanding environmental obligations. The ABCA found that the

AER was a creditor with a provable claim within the meaning of the *BIA.*

The ABCA held that the proper interpretation of the *BIA* does not entitle the AER to proceeds from the bankrupt Redwater's estate in satisfaction of the environmental claims in priority to the claims of the secured creditor. The ABCA held that to the extent that the interpretation of the provincial legislation leads to a different result, the paramountcy doctrine renders the provincial legislation of no force or effect.

Background

Redwater Bankruptcy

Redwater was the bankrupt company at the centre of this appeal. Its principal assets were 127 oil and gas assets - wells, pipelines and facilities - and their corresponding licences. A few of Redwater's licensed wells were still producing and profitable. The majority were spent and burdened with abandonment and reclamation liabilities that exceeded their value.

Redwater was first granted licences by the AER in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. On May 12, 2015, GTL was appointed receiver for Redwater. At that time, Redwater owed ATB approximately $5.1 million.

Position of the AER

Upon being advised of the receivership, the AER notified GTL of its position that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership." Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The AER stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations.

Federal *BIA*

The *BIA* is federal legislation governing the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. The *BIA* sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last.

Purpose of the BIA

The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

Section 14.06 of the *BIA* deals with various environmental matters in the bankruptcy context:

- The effect of section 14.06 of the *BIA* on the liability of a trustee includes that a trustee in bankruptcy is not personally liable for:

    (i) pre-bankruptcy environmental "conditions" or damage (*BIA*, section 14.06(2)(a));

    (ii) post-bankruptcy environmental "conditions" or damage, absent specified misconduct ("gross negligence or wilful misconduct") (*BIA*, section 14.06(2)(b)); or

    (iii) compliance with post-bankruptcy "orders", "notwithstanding anything in any federal or provincial law", so long as the trustee abandons or releases any interest in the "real property" that is "affected by the condition or damage" within the time specified (*BIA*, section 14.06(4)(a)).

- The bankrupt estate remains liable for environmental damage, including:

    (i) remediation costs for abandoned property do not rank in priority as

"costs of administration" (*BIA*, section 14.06(6)); and

(ii) claims by Canada or a province for "remedying any environmental condition or environmental damage" are a secured charge on the real property or any "contiguous" property "related to the activity" that caused the environmental damage (*BIA*, section 14.06(7)).

- An environmental claim is considered a deemed secured charge against the bankrupt estate, and ranks prior to any other claim or security against the property (*BIA*, section 14.06(7)(b)).

- Environmental claims are provable in bankruptcy under *BIA*, section 14.06(8), if sufficiently expressed in monetary terms.

Provable Claim and the AbitibiBowater Test

A central concept in the bankruptcy regime is "claims provable in bankruptcy" (*BIA*, section 121).

The SCC's decision in *Newfoundland and Labrador v. AbitibiBowater Inc.,* 2012 SCC 67 ("*AbitibiBowater*") set out the test to determine whether an environmental obligation is a provable claim under section 14.06 of the *BIA*. In *AbitibiBowater*, the SCC held that if the environmental obligation is framed in monetary terms, it will qualify as a provable claim. If it is not framed in monetary terms, it must be examined to see whether it will "ripen into a financial liability," having regard to the "factual matrix and the applicable statutory framework."

To determine whether an obligation not framed in monetary terms is a provable claim, the SCC, in *AbitibiBowater*, set out the following three-part test:

(a) there must be a debt, liability or obligation to a creditor;

(b) the debt, liability or obligation must be incurred at the relevant time in relation to the insolvency; and

(c) it must be possible to attach a monetary value to the debt, liability or obligation.

(the "*AbitibiBowater* Test").

The Doctrine of Paramountcy

To the extent of operational conflict between the Alberta regulatory regime and the *BIA*, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

Under the doctrine of paramountcy, the burden of proof rests on the party alleging the conflict.

No Operational Conflict or Frustration of Purpose

The majority of the SCC found that there was no operational conflict or frustration of purpose between sections 14.06(2) and 14.06(4) of the *BIA* and the Alberta regulatory scheme.

The Majority held that section 14.06(4) of the *BIA* does not empower a trustee to walk away from all responsibilities, obligations, and liabilities concerning "disclaimed" assets. Rather, it clarified a trustee's protection from environmental personal liability and made it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it could not walk away from them. In light of the proper interpretation of section 14.06(4), no operational conflict was caused by the fact that, under Alberta law, GTL, as a "licensee", remained responsible for abandoning the renounced assets using the remaining assets of the Redwater estate.

The Majority found that GTL retained both the protection afforded to it under the federal law (no personal liability) and the privilege to which it was entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL was not being asked to forego doing anything or to voluntarily pay anything. Nor was it urged that the AER could avoid conflict by declining to apply the impugned law during bankruptcy. In the Majority's opinion, this was a situation in which the provincial law could be - and was - applied during bankruptcy without conflict.

The *AbitibiBowater* Test: Is the Regulator Asserting Claims Provable in Bankruptcy?

The Majority affirmed the SCC's statements in *AbitibiBowater* that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules.

In this case, there was no dispute that the second part of the *AbitibiBowater* Test was met.

AbitibiBowater Test*:* Part 1: *AER Not a Creditor*

The Majority found that the AER was not a creditor of the Redwater estate. The end-of-life obligations the AER sought to enforce against Redwater were public duties. Neither the Regulator nor the Government of Alberta stood to benefit financially from the enforcement of these obligations. These public duties were owed, not to a creditor, but, rather, to the public, and were therefore outside the scope of "provable claims".

AbitibiBowater Test Part 3: *Not Sufficiently Certain that the AER Would Perform the Environmental Work and Advance a Claim for Reimbursement*

The Majority found that even if the AER had acted as a creditor in issuing abandonment orders, it could not be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the Court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass - in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

The Majority found that it was not established either by the chambers judge's factual findings or by the evidence that it was sufficiently certain that the AER would perform the abandonments and advance a claim for reimbursement. The claim was too remote and speculative to be included in the bankruptcy process.

Conclusion on the AbitibiBowater Test

In the Majority's view, the end-of-life obligations binding on GTL were not claims provable in the Redwater bankruptcy and they did not conflict with the general priority scheme in the *BIA*. Requiring Redwater to pay for abandonment before distributing value to creditors did not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Thus, in the Majority's view, the *BIA* explicitly contemplated that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage.

Dissenting Opinion

The dissenting justices found that Alberta's regulatory scheme failed to recognize the lawfulness of GTL's disclaimers, thereby frustrating the purpose of the *BIA*. The dissenting judges also found that it was sufficiently certain that the AER would complete the abandonment and reclamation work, therefore satisfying the *AbitibiBowater* Test. The dissenting judges would have held that the AER's abandonment orders were provable claims, meaning the AER could not compel Redwater or GTL to fulfill the end-of-life obligations.

Summary

The appeal was allowed.

The majority of the SCC held that there was no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy.

ALBERTA COURT OF APPEAL

Fort McKay First Nation v Prosper Petroleum Ltd., 2019 ABCA 14

Permission to Appeal - Granted

In this decision, the Alberta Court of Appeal ("ABCA") considered Fort McKay First Nation (the "First Nation")'s application for permission to appeal the following AER decisions:

(a) the decision refusing to consider the First Nation's amended Notice of Question of Constitutional Law, filed pursuant to section 12 of the *Administrative Procedures and Jurisdiction Act* ("*APJA*"); and

(b) the decision approving Prosper Petroleum Ltd. ("Prosper")'s Rigel oil sands project.

The ABCA granted the First Nation permission to appeal on the following question:

- Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the Moose Lake Access Management Program were completed?

Background

Prosper was the applicant for a bitumen recovery project (the "Project") that would be located approximately 64 km from Fort McKay, Alberta. If approved, the Project would operate within 10 km of two of the First Nation's reserves (known as the "Moose Lake Reserves"). The 10 km area around these reserves is referred to as the "Moose Lake Area" and the First Nation asserted Treaty 8 rights over this area.

The First Nation entered into a "Letter of Intent" with the Government of Alberta ("Alberta") to develop an access management plan for the Moose Lake Area, known as the Moose Lake Access Management Program ("MLAMP"). The Letter of Intent included a commitment by Alberta to implement the portion of the MLAMP relating to a buffer zone of land within 10 km of the Moose Lake Reserves by September 2015. The First Nation claimed that the purposes of the MLAMP included addressing the First Nation's concerns about the effect of cumulative oil sands development in the Moose Lake Area.

The AER determined that consideration of the MLAMP was outside its mandate and it was not considered at the approval hearing. The MLAMP was not yet completed or implemented and was the subject of ongoing negotiations. The ABCA noted that when the MLAMP was finalized, it was envisioned that it would be adopted as part of the Lower Athabasca Regional Plan ("LARP"). The LARP is a regional plan under the *Alberta Land Stewardship Act*. The LARP's purpose is "to provide a means to plan for the future, recognizing the need to manage activity to meet the reasonably foreseeable needs or current and future generations of Albertans, including Aboriginal peoples."

After a public hearing, the AER approved the Project, finding it to be in the public interest under the *Oil Sands Conservation Act* ("*OSCA*"). However, the Project cannot proceed without Cabinet approval and Cabinet had not yet issued its decision on the Project.

Grounds for Appeal

The First Nation applied for permission to appeal the AER's two decisions under section 45 of *Responsible Energy and Development Act* ("*REDA*"), on the following questions:

(a) Whether the AER committed a reviewable error of law or jurisdiction:

  (i) in its interpretation of the notice requirements of the *APJA*; and

  (ii) in its assessment of the types of constitutional questions excluded from its jurisdiction by section 21 of *REDA*;

(b) Whether the AER committed a reviewable error of law or jurisdiction in its decision to approve the Project:

  (i) by failing to take into account or comply with the honour of the Crown;

  (ii) in its interpretation and application of Treaty 8 rights; and

(iii) by failing to take into account the cumulative effects of development on the First Nation's Treaty 8 rights.

Test for Permission to Appeal

Permission to appeal may be granted on questions of law or jurisdiction only. When deciding whether to grant permission, the ABCA considers the following:

(a) whether the issue is of general importance;

(b) whether the issues are of significance to the decision itself;

(c) whether the appeal has arguable merit (which may include consideration of the applicable standard of review); and

(d) whether the appeal will unduly hinder the progress of the proceedings.

The burden remains on the applicant to meet this test based on its arguments and the materials it puts before the Court. Mere assertions of importance and arguable merit, for instance, are not sufficient.

ABCA Findings

Declining to Grant the Relief Sought in the First Nation's Notice of Questions of Constitutional Law

The First Nation submitted the AER erred in two principal respects when it declined the relief sought in the First Nation's Notice of Question of Constitutional Law:

(a) the AER misinterpreted the First Nation's constitutional notice as not seeking relief and not asking the AER to answer the stated questions; and

(b) the AER erred in interpreting all of the stated constitutional questions as raising the adequacy of the Crown's consultation with the First Nation, a subject matter outside the AER's jurisdiction.

The ABCA declined to grant permission to appeal on either issue related to the notice of constitutional questions.

The ABCA noted that the AER gave two independent reasons for refusing to consider the questions posed in the constitutional notice: the notice asked questions that were not within the AER's jurisdiction, and the notice did not comply with *APJA* requirements. The ABCA found that an appeal on the issue of compliance with the notice requirements would be academic, in the sense that it would have no impact on the AER's decision to decline the relief sought in the constitutional notice because the AER's other reason for the decision would still stand.

On the issue of the notice raising questions of adequacy of consultation, the ABCA found that this was not a question of law nor did the ABCA find it of general importance. In the ABCA's view, the interpretation of one particular constitutional notice, phrased in rather unclear language, was not a question of law. It had no precedential value or implications for other cases and was properly characterized as a question of mixed law and fact.

The ABCA also declined to grant permission to appeal the AER's finding that the notice failed to comply with the notice requirements of the *APJA*.

Failing to Consider the Honour of the Crown / Refusing to Delay Approval of the Project Until the First Nation's Negotiations With Alberta Were Completed and Implemented

The ABCA found that this issue raised a question of law of general importance. The ABCA found that the following question met the test for permission to appeal:

- Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP were completed?

The ABCA found that this proposed ground of appeal concerned the legal significance of the Letter of Intent entered into between Alberta and the First Nation in March 2015.

Interpretation and Application of Treaty 8 Rights

The ABCA accepted that the question of the proper interpretation of Treaty 8 rights was a question of law of considerable importance. However, the ABCA found that the First Nation failed to demonstrate an arguable case that Treaty 8 confers the rights it suggested.

The First Nation asserted that the AER gave an unduly narrow interpretation to the First Nation's Treaty 8 rights. It argued that the AER interpreted Treaty 8 as protecting against certain "physical" and "immediate" effects on Treaty 8 rights and not as protecting against "intangible effects" on those rights.

With respect to the First Nation's claim that the AER only addressed physical interferences with its Treaty 8 rights, the ABCA noted that the Supreme Court of Canada ("SCC") took the same approach in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* ("*Mikisew*"). In that decision, the SCC considered whether a federal road that would run through the Mikisew reserve would adversely affect the Mikisew Treaty 8 rights, thereby triggering the duty to consult. The SCC in Mikisew assessed the physical effects of the road on the Treaty 8 rights to hunt, trap and fish. The AER carried out the same analysis of physical effects of the Project on the First Nation's Treaty 8 rights in its traditional territories.

It was accepted that First Nation's sense of connection to its traditional land was important and a relevant consideration for the AER when assessing whether it was in the public interest to approve an oil sands project. However, the ABCA concluded that the First Nation did not demonstrate an arguable case that Treaty 8 confers a right against disruption to its sense of connection or relationship to its traditional lands. Accordingly, permission to appeal on this issue was denied.

Failing to Consider Cumulative Effects of Development on the First Nation's Treaty 8 Rights

The ABCA found that the AER's reasons showed that it considered and applied this test for infringement, concluding that the Project would not render the First Nation's Treaty 8 rights meaningless. The reasons disclosed no arguable error of law.

The First Nation submitted that the AER failed to consider the cumulative effects of oil sands development on its Treaty 8 rights when determining whether the Project was in the public interest. According to the First Nation, the AER assessed only the project-specific effects on its Treaty 8 rights.

The ABCA found that it was uncontroversial that the AER must consider the adverse effects of a project on treaty rights and that it cannot approve a project that infringed or will infringe treaty rights without justification because "[a] project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest [citing *Clyde River*]."

The ABCA found that any argument that the AER failed to fully or accurately take into account the existing state of oil sands development on the Moose Lake Area would be a question of mixed fact and law, for which no appeal was available.

Accordingly, the ABCA denied permission to appeal on this issue.

Summary

The ABCA granted the First Nation permission to appeal on the following question:

- Did the AER commit an error of law or jurisdiction by failing to consider the honour of the Crown and, as a result, failing to delay approval of the Project until the First Nation's negotiations with Alberta about the MLAMP were completed?

Fort McKay Métis Community Association v Alberta Energy Regulator, 2019 ABCA 15

Permission to Appeal - Denied

In this decision, the Alberta Court of Appeal ("ABCA") considered an application by the Fort McKay Métis Community Association ("Fort McKay Métis") for permission to appeal a decision of the AER dated June 12, 2018, approving Prosper Petroleum Ltd. ("Prosper")'s oil sands project.

The ABCA denied permission to appeal.

Background

Prosper applied for a bitumen recovery project (the "Project") that would be located approximately 64 km from Fort McKay. The Project would operate within 10 km of two of the Fort McKay First Nation's reserves (the "Moose Lake Reserves"). The lands that surround the Moose Lake Reserves, including the 10 km buffer around the reserves, is referred to as the "Moose Lake Area."

Prosper applied to the AER for approvals under the *Oil Sands Conservation Act* ("*OSCA*"), the *Environmental Protection and Enhancement Act*, ("*EPEA*"), and the *Water Act*.

Fort McKay Métis has 97 members, who live mostly in Fort McKay. Fort McKay Métis asserted that it has unextinguished, constitutionally protected Métis Aboriginal rights to hunt and harvest in its community harvesting area and in its traditional territory and that the Project would adversely affect these rights. The community used and continues to use lands on and near the Moose Lake Reserves for hunting, trapping, and fishing.

The AER Decision

The AER found that the Project was in the public interest and it granted conditional approvals of Prosper's *OSCA*, *EPEA*, and *Water Act* applications. However, the Project required Cabinet approval before it could proceed. When the application for permission to appeal was heard, Cabinet had not yet issued its decision on the Project.

For the purposes of the AER's decision, the AER considered Fort McKay Métis to be a rights-bearing community with the rights to hunt and harvest for subsistence purposes and to exercise incidental activities on the lands and waters extending from Fort McKay west to Moose Lake and south to lands included in the Prosper lease.

The AER accepted evidence from Fort McKay Métis and found that "some members of the community might be afraid to eat fish from Moose Lake if more oil sands development occurs in the Moose Lake Area". It noted that "[t]he fear expressed [by community members] [wa]s genuine," and that "oil sands development around Fort McKay has interfered with Fort McKay Métis community members' relationships with and connections to the land."

The AER concluded that there was no evidence that the Project "itself will cause a loss of connection and relationship" to the land in the Moose Lake Area. More specifically, it found that "no persuasive evidence was provided in this hearing to establish that it is probable that Prosper's project will result in harm to the fishery at Moose Lake." The AER also found no evidence to conclude that the Project would impair surface water quality in the Moose Lake Area.

Although the AER found it reasonable to expect that the Project's footprint would affect the wildlife use of habitat in the immediate vicinity of the Project land, there was no evidence that the Project would "result in fewer animals available for Fort McKay Métis to harvest." The AER found that the evidence did not demonstrate that the Project would interfere with Fort McKay Métis' ability to learn and pass on traditional knowledge and practices in the Moose Lake Area.

The AER found that the Project would not prevent Fort McKay Métis from continuing to exercise its Métis Aboriginal rights in its traditional territory.

The AER found the Project was in the public interest as required for an *OSCA* application, taking into account burdens on Fort McKay Métis and Fort McKay First Nation. It found that the Project "might limit Fort McKay Métis community members' choice of where and when to exercise their Aboriginal rights," and that "the possible limitation is significant enough to weigh in the public-interest balance but not significant enough to tip the balance against the Rigel project."

With respect to Prosper's *EPEA* application, the AER concluded that the Project was consistent with the statutory objective of protecting the environment and promoting sustainable resource development while considering economic growth. It approved the Project on the condition that Prosper would seek input from Fort McKay Métis concerning reclamation.

Alleged Grounds for Appeal

Fort McKay Métis sought permission to appeal on the following grounds under section 45(1) of the *Responsible Energy Development Act* ("*REDA*"):

(a) the AER erred in law and breached procedural fairness when it misapprehended the legal test to assess potential adverse impacts on rights protected by section 35 of the *Constitution Act*;

(b) the AER erred in its application of the test for assessing the public interest;

(c) the AER erred in law in reversing the burden of proof; and

(d) the AER erred in law in concluding that the Project was in the public interest due to Prosper's commitment to meet or exceed the minimum regulatory requirements.

Test for Permission to Appeal

The ABCA set out that permission to appeal may only be granted on questions of law or jurisdiction. When deciding whether to grant permission, the Court considers the following factors:

(a) whether the issue is of general importance;

(b) whether the issues are of significance to the decision itself;

(c) whether the appeal has arguable merit (which may include consideration of the applicable standard of review); and

(d) whether the appeal will unduly hinder the progress of the proceedings.

The burden is on the applicant to meet this test. Mere assertions of importance and arguable merit, for instance, are not sufficient. These have to be demonstrated to the ABCA on the record before it.

Do the Issues Raised Satisfy the Test?

The ABCA found that Fort McKay Métis' position was essentially reduced to three alleged legal errors which said resulted in unfairness. The AER erred:

(a) in its interpretation of rights protected by section 35 of the *Constitution Act*, 1982;

(b) in misapprehending the public interest test; and

(c) in incorrectly imposing what the applicant called "fabricated" evidentiary burdens.

Section 35 Rights

Fort McKay Métis submitted that:

(a) "[t]he AER failed to grasp that a negative effect on the exercise of a right is, objectively, an impact on the right itself";

(b) the avoidance of a water body used to exercise fishing rights was, in fact, an objective impact on a Métis Aboriginal right; and

(c) therefore, the AER misapprehended the legal test to establish an adverse impact on the exercise of rights protected under section 35 of the *Constitution Act*, 1982.

The ABCA rejected this argument. The ABCA determined that while the AER found the fear of contamination was genuine, the AER implicitly found that the fear was not justified. Therefore, there was no impact on Aboriginal rights to harvest, although the AER took members' fears into account when it weighed the public interest. The ABCA dismissed permission to appeal on this ground, based on the following findings:

(a) it was not arguable that the Métis Aboriginal right asserted here protected community members from fears arising from oil sands development, rather than from objectively demonstrated harms to wildlife and water, for example;

(b) none of the applicant's authorities supported the view that genuine fears about the effects of the Project, which were not objectively reasonable, were sufficient by themselves to constitute interference with a right protected under section 35 of the *Constitution Act, 1982*;

(c) the AER recognized that the Fort McKay Métis had subjective fears about the potential impact of the Project; and

(d) Fort McKay Métis did not raise an arguable case that avoidance of land and water resources by community members due to fear was a negative impact on Aboriginal rights.

Public Interest Test

The ABCA found that Fort McKay Métis did not show an arguable error of law. At best, the issue was one of mixed fact and law concerning the AER's overall weighing of the public interest.

The ABCA found that the AER's reasons disclosed that the panel considered not only Prosper's satisfaction of the relevant minimum statutory requirements but also its efforts to minimize the impacts of the Project to the hearing participants and others and the Project's substantial economic benefits. It weighed these with the Aboriginal rights and negative social effects.

In the ABCA's view, the applicant's complaint seemed to be one of mixed fact and law about whether the AER gave enough weight to Métis Aboriginal rights in the public interest balancing. Alternatively, the complaint was that the AER considered members' fears about the effect of the Project on the exercise of Métis Aboriginal rights under the heading "negative social effects", not as an infringement of rights.

Reversal of the Burden of Proof

Prosper was required to establish that the Project was in the public interest. Fort McKay Métis submitted that the AER erred in law by reversing the burden of proof; it claimed that the AER began by presuming that the Project was in the public interest and required the hearing participants to bring evidence to rebut this presumption. Specifically, the Fort McKay Métis argued that the AER wrongly put the burden on it to establish that the Project would adversely affect their Métis Aboriginal rights over their traditional territory. The applicant argued that it was never Fort McKay Métis' obligation to discharge this evidentiary burden.

The ABCA found that whether the AER incorrectly imposed an evidentiary burden on the Fort McKay Métis was a question of law. Normally, if a party asserted in the course of a hearing that its rights were adversely impacted, it has the burden of substantiating those assertions. Fort McKay Métis was in the best position to explain and establish the claimed impact on its rights.

Fort McKay Métis did not provide the ABCA with any relevant authority to suggest that the AER was responsible for gathering evidence about the likely impacts of the Project on Métis Aboriginal rights.

The ABCA concluded that the AER's finding of insufficient evidence did not amount to a reversal of the burden of proof. In any event, the AER's findings with regard to the sufficiency of evidence were findings of fact or mixed fact and law and did not raise a question of law.

Summary

The ABCA denied the application for permission to appeal.

Borgel v Paintearth (Subdivision and Development Appeal Board), 2019 ABCA 25

Permission to Appeal - Granted

In this decision, the Alberta Court of Appeal ("ABCA") considered an application by landowners on the County of Paintearth (the "County") for permission to appeal a decision of the Subdivision and Development Appeal Board ("SDAB"). The SDAB decision subject to appeal upheld ten development permits granted by the County's Municipal Planning Commission ("MPC") to Capital Power Generation Services Inc. for the proposed Halkirk 2 Wind Power Project (the "Wind Power Project").

The ABCA granted permission to appeal the decision of the SDAB.

Background

While its application to the AUC was pending, Capital Power applied to the County for development permits for its proposed Wind Power Project, located approximately 12 km north of the town of Halkirk. The County approved ten development permits for the Project.

The applicants appealed to the SDAB. Following a request by the County, the SDAB decided to separate the appeal into a preliminary hearing and a merits hearing. The SDAB indicated that the purpose of the preliminary hearing was "to determine and identify the matters which may be addressed by the SDAB pursuant to [section] 619 of the [*Municipal Government Act* ("*MGA*")] at the merits hearing."

The AUC approved the Project pursuant to sections 11 and 19 of the *Hydro and Electric Energy Act*, finding that it was in the public interest to do so, having regard to the Project's social, economic, environmental, and other effects. The AUC decision permitted Capital Power to construct and operate the Project.

The SDAB dismissed the appeals of the ten development permits. It stated that the applicants "did not identify any considerations or issues that have not already been considered and decided by the AUC and did not identify any inconsistency between the development permit applications before the SDAB and the development approved by the AUC." The SDAB cancelled the merits hearing on the basis that it was "no longer required."

Proposed Grounds of Appeal

The applicants sought permission to appeal the SDAB's decision on the grounds that it erred in law or jurisdiction. The applicants reached this conclusion on the basis that the SDAB:

(a) engaged in an incorrect statutory interpretation of section 619 of the *MGA* having regard to the ambit of its jurisdiction to undertake a review of the impugned Capital Power Halkirk 2 Wind Power Project development permit applications for compliance with the decision of the AUC;

(b) improperly fettered its discretion under section 619 of the *MGA* to determine whether the Halkirk 2 Development Permits that were approved by the County's MPC were consistent with the decision of the AUC;

(c) prematurely and improperly opined on the merits of the appeals before it when it was expressly agreed and represented to and by all parties at the preliminary hearing that the scope of the same would be confined to determining the scope of the merits hearing; and

(d) denied the applicants the opportunity to be fully heard in accordance with the principles of fairness and natural justice having regard to the appeals before it, despite representations by the SDAB to the contrary.

Test for Permission to Appeal

Under section 688(3) of the *MGA*, a single judge of the ABCA may grant permission to appeal a decision of the SDAB if the appeal "involves a question of law of sufficient importance to merit a further appeal and has a reasonable chance of success."

In exceptional cases, the adverse effect of an SDAB decision on the applicant(s) alone may amount to "sufficient importance."

ABCA Findings

Whether the SDAB Erred by Holding that Sections 619(2) and (4) of the MGA Required it to Approve an Application for a Development Permit if the Application was Consistent with the AUC Approval?

The ABCA found that this issue met the test for permission to appeal.

The ABCA found that the interpretation of section 619 of the *MGA* clearly raised a legal issue, as the proposed ground had implications for parties appearing before the SDAB on future appeals.

Whether the SDAB Erred by Failing to Hold That Sections 619(2) and (4) of the MGA Required the MPC to Wait for AUC Approval Before Issuing the Development Permits?

While there was a possibility that this question was moot, the ABCA granted permission to appeal.

The SDAB, in dismissing the appeal, acknowledged the applicants' argument that "the order of the proceedings" prevented the MPC from determining consistency with the AUC decision, which came after. This is because the MPC approved the development permits before the AUC issued its decision.

In this application, the applicants argued that the MPC could not have considered whether the development permits were consistent with the AUC decision when it approved those permits. As such, they contended that the permits were prematurely approved. The applicants submitted that on the correct reading of sections 619(2) and (4) of the *MGA*, the County's MPC should have waited for the AUC decision before approving the permits for the Wind Power Project. They suggested that in rejecting their arguments on this issue, the SDAB thereby adopted a contrary interpretation of section 619 of the *MGA*.

Whether the SDAB's Cancellation of the Merits Hearing Breached its Duty of Procedural Fairness to the Applicants?

The ABCA granted permission to appeal on this ground, finding that procedural fairness was a question of law.

The applicants submitted that the SDAB breached its duty of procedural fairness by cancelling the

merits hearing in its decision following the preliminary hearing. They invoked the principle of *audi alteram partem*, arguing that they were denied notice of, and the opportunity to record their position on, the cancellation of the merits hearing. Had the merits hearing taken place, they would have argued that the development permits were not fully consistent with the AUC decision. Also, the applicants submitted that had they known of the possibility of the merits hearing not occurring, they would have approached the preliminary hearing differently.

Summary

The ABCA granted permission to appeal on the following questions:

(a) Did the SDAB err in law or jurisdiction by concluding that the term "municipality" in sections 619(2) and (4) of the *MGA* included the SDAB as well as the MPC?

(b) Did the SDAB err in law or jurisdiction by failing to hold that sections 619(2) and (4) of the *MGA* required the County to wait for AUC approval before issuing the development permits?

(c) Did the SDAB's cancellation of the merits hearing breach its duty of procedural fairness, by denying the applicants a reasonable opportunity to make their case about the consistency of the development permits with the AUC decision?

ALBERTA COURT OF QUEEN'S BENCH

Alberta Energy Regulator v Lexin Resources Ltd (2019 ABQB 23)

Application for Lifting of Stay - Receivership

In this decision, the Alberta Court of Queen's Bench ("ABQB") considered an application by Midstream Canada Ltd. ("Midstream") requesting to lift the stay of proceedings in the receivership of Lexin Resources Ltd, 1051393 BC Ltd, 0989 Resource Partnership, LR Processing Ltd and LR Processing Partnership (collectively, "Lexin"). The request to lift the stay would allow Midstream to assume operatorship of certain gas facilities and gathering systems.

The ABQB denied the application to lift the stay on the basis that the prejudice to Lexin's Receiver (the "Receiver") of lifting the stay far outweighed the prejudice to Midstream, and it was therefore not equitable to lift the stay.

Background

Midstream applied to lift the stay imposed under the receivership order with respect to three gas facilities and gathering systems (the "Facilities").

The wells and Facilities were shut-in pursuant to an AER order dated February 15, 2017. At that time, the wells and facilities were co-owned by Lexin and Exxon Mobil Energy Canada and operated by Lexin.

On December 21, 2017, Midstream agreed to purchase Exxon's interest in the wells and Facilities. The sale included not only Exxon's interest in the 21 wells jointly owned with Lexin, but also 32 additional wells in which Lexin had no interest.

Midstream applied to the AER for approval of the transfer of the Exxon well licenses, but had not yet obtained such approval at the time of the application to lift the stay.

The three Facilities at issue were:

(a) the Hooker Gas Gathering System, in which Lexin owned a 75% interest;

(b) the Hooker East Compression and Gas Gathering System, in which Lexin owned a 75% interest in three of the four functional units and a 50% interest in the fourth functional unit, and therefore a 68.75% overall interest in the system; and

(c) the South East Hooker Compression and Gas Gathering System, in which Lexin owned an approximately 45% interest.

The receivership order imposing the stay was granted on March 20, 2017. Since July 2017, the Receiver had been marketing Lexin's assets, including the wells and Facilities at issue. The marketing materials specified that Lexin was the operator of the wells and Facilities. The sales process had been extended several times, due in part to complications arising from an unrelated claim.

On May 3, 2018, Midstream filed its application to lift the stay.

While Midstream may have been entitled by reason of its majority ownership to assert operatorship of the South East Hooker Facility, it required the operatorship of all three Facilities to commence moving product to market from the 32 wells in which Lexin had no interest.

The Facilities were governed by Construction, Ownership and Operation Agreements (the "CO&O Agreements"). These CO&O Agreements adopted the standard form model Petroleum Joint Venture Association 1999 Standard Operating Procedure (the "1999 PJVA").

The Test for Lifting the Stay

The ABQB set out the following:

- The test for lifting a stay imposed pursuant to a receivership order focuses on the totality of circumstances and the relative prejudice to the parties involved in the receivership.

- Guidance can be drawn from the provisions of section 69.4 of the *Bankruptcy and Insolvency Act*, as amended, in determining whether a stay in a receivership should be lifted. The Court should be satisfied that the party applying to lift the stay is likely to be materially prejudiced by the stay or that it would be equitable to lift the stay on other grounds. The burden is on the applicant.

- In order for a party applying to lift the stay to show material prejudice, it must show that it would be treated differently or some way unfairly or would suffer worse harm than other creditors if the stay is not lifted.

Application of the Test

Prejudice to the Receiver

The ABQB found that the most persuasive reason why the stay should not be lifted was that this would prevent the Receiver from relying on certain replacement of operator provisions in the relevant contracts. This would result in Midstream taking advantage of the insolvency process to appropriate operatorship rights that would not otherwise be available to it. Specifically, the ABQB found:

(a) lifting the stay would subject the Receiver to significant capital and operating expenditures which it could not realistically fund; and

(b) lifting the stay would introduce uncertainty into the sales process, particularly at this late state of the process, well after the bid deadline of October 2017.

Prejudice to Midstream

Midstream submitted that it suffered prejudice from its inability to rely on the *ipso facto* or operator insolvency contractual provisions.

The ABQB found that the mere existence of such contractual provisions was not in itself a sufficient basis to lift a stay. While they might be valid between contracting parties in the ordinary course of events, these provisions were void against a receiver on policy grounds.

The prejudice to a creditor seeking to rely on such a clause was no different from that suffered by other creditors by reason of the debtor's insolvency. Giving effect to such clauses would undermine the purpose of a stay in insolvency, to permit the orderly and equitable realization and distribution of the debtor's assets.

The ABQB observed that the insertion of *ipso facto* clauses in agreements relating to operation of oil and gas assets reflected operators dealing with funds on behalf of the non-operating parties, and that the insolvency of an operator can give rise to a risk that the operator will comingle funds and/or put a non-operator's share of revenues at risk. However, that risk ceases to exist when a receiver is appointed.

The ABQB further found that Midstream purchased its interest in the Facilities knowing that they were shut-in and that there was no risk that the Receiver would make any long-term investment or operational decisions that may not align with Midstream's interests. While it was possible that a third-party purchaser's interests may not align with those of Midstream, Midstream must surely have been aware of that possibility when it made the business decision to purchase the properties.

Midstream submitted that it wanted to restart the Facilities, and thus would suffer delay in its plans if the stay was not lifted. However, it was not clear to the ABQB that Midstream would be able to obtain the necessary license transfer and approvals to reopen the Facilities.

The ABQB observed that the insolvent operator provisions were not intended to be utilized strategically by co-owners or their assignees to obtain operatorship that would otherwise not be contractually available. Rather, they were intended to protect non-operators from the real risks and prejudices that can arise when an operator becomes insolvent.

Prejudice to Other Creditors

If the stay was not lifted, a purchaser of two of the three Facilities, the Hooker Gas Gathering System and the Hooker East Compression and Gas Gathering System, would have a contractual right to replace Lexin as operator of these Facilities.

If the stay was lifted prior to the conclusion of the sales process and Lexin was replaced as operator, Lexin and the eventual purchaser would not be able to rely on these operatorship rights. Thus, Midstream's suggestion that the stay could be lifted without prejudice to any rights a purchaser would acquire did not address the prejudice.

Summary

The ABQB determined that the prejudice to the Receiver and other creditors of Lexin if the stay was lifted outweighed the prejudice, if any, that would be suffered by Midstream if the stay was not lifted.

There were no equitable grounds that would otherwise justify the lifting of the stay.

ALBERTA ENERGY REGULATOR

AER Bulletin 2019-01: Directive 060 Annual Methane Emission Reporting in OneStop

Methane Emission Reports

This bulletin announced that, effective January 31, 2019, companies may submit annual reports of methane emissions (including vent gas and fugitive emissions).

A new edition of *Directive 060: Upstream Petroleum Industry Flaring, Incinerating, and Venting* was released on December 13, 2018, to support annual methane emission reporting. The first mandatory reporting year is 2019, and the first annual methane emission report is due June 1, 2020.

OneStop Prerequisites

To submit the reports, the following are required:

(a) a valid business associate code; and

(b) a valid Digital Data Submission ("DDS") system account (needed to log into OneStop).

DDS administrators must assign new roles to their DDS users, which may include consulting companies that are submitting on behalf of a DDS user. The new roles for Directive 060 methane submissions are as follows:

(a) submit report;

(b) save report; and

(c) search report.

Details regarding upcoming training sessions can be found on the AER events page.

ALBERTA UTILITIES COMMISSION

EQUS REA Ltd. Decision on Preliminary Question Application for Review of Decision 22164-D01-2018 Application for Orders Confirming Boundaries of FortisAlberta Inc. Exclusive Municipal Franchise Areas (AUC Decision 23870-D01-2019)

Review Application - Preliminary Question - Public Interest

In this decision, the AUC considered EQUS REA Ltd. ("EQUS")'s application for review of AUC Decision 22164-D01-2018 (the "Decision"). The Decision addressed an application from FortisAlberta Inc. ("FortisAlberta") under section 29 of the *Hydro and Electric Energy Act* for the alteration of service areas of certain rural electrification associations ("REA") to align with municipal franchise agreements ("MFAs") between FortisAlberta and various municipalities.

The AUC denied the Review Application, based on finding that EQUS did not demonstrate the existence of an error of fact, law, or jurisdiction that was either apparent on the face of the Decision or otherwise existed on a balance of probabilities that could lead the AUC to materially vary or rescind the Decision.

Background

FortisAlberta entered into MFAs with multiple municipalities which grant it the exclusive right to provide electric distribution service within those municipalities' corporate limits. As a result of annexations authorized by orders-in-council, the corporate boundaries of a number of municipalities expanded, resulting in circumstances where the franchise areas granted to FortisAlberta under those MFAs overlap with previously-approved REA service areas. EQUS is one of the REAs whose service area was affected by FortisAlberta's application for the remedial orders issued in the Decision.

The Review Application concerned findings in the Decision altering the service areas of affected REAs to correspond with the exclusive franchise areas granted to FortisAlberta under the MFAs and providing for the transfer of customers and facilities to FortisAlberta.

The AUC's Review Process

The AUC has a discretionary authority pursuant to section 10 of the *Alberta Utilities Commission Act* ("*AUCA*") to review its own decisions. Under that authority, the AUC established Rule 016: Review of Commission Decisions ("Rule 016"), which sets out the process for considering an application for review. A person who is directly and adversely affected by a decision may file an application for review within 60 days of the issuance of the decision, pursuant to section 3(3) of Rule 016.

Section 4(d) of Rule 016 requires an applicant to set out in its application the grounds it is relying upon in support of its application for a review. These grounds may include:

(a) an error of fact, law or jurisdiction made by the hearing panel;

(b) previously unavailable facts material to the original decision, which existed prior to the issuance of the original decision but were not previously placed in evidence or identified in the original proceeding and could not have been discovered at the time by the review applicant by exercising reasonable diligence; or

(c) changed circumstances material to the original decision, which occurred since its issuance.

Under section 6(3) of Rule 016, the AUC may grant an application for review where the review applicant demonstrates the existence of an error of fact, law or jurisdiction was either apparent on the face of the decision or otherwise existed on a balance of probabilities that could lead the AUC to materially vary or rescind the decision.

The review process typically has two stages. In the first stage, a review panel must decide whether there are grounds to review the original decision. This is sometimes referred to as the "preliminary question." If the review panel decides that there are grounds to review the original decision, it moves to the second stage of the review process where the AUC holds a hearing or other proceeding to decide whether to confirm, vary, or rescind the original decision.

The AUC indicated that the review process is not intended to provide a second opportunity for parties to reargue the issues in a proceeding, nor is it an opportunity to express concerns about a decision determining issues in a related proceeding.

Grounds for Review and Hearing Panel Findings

In its Review Application, EQUS submitted that the hearing panel erred in finding that alteration of the REA service areas, as requested by FortisAlberta, was in the public interest. EQUS submitted that the hearing panel's public interest considerations were premised on errors of law or improper interpretations or applications of relevant legal principles.

Review Panel Findings

Section 4(d)(i) Grounds (AUC Rule 016) - Errors of Fact, Law, or Jurisdiction

The review panel found that the hearing panel's assessment that granting FortisAlberta's application was in the public interest pursuant to section 29 of the *Hydro and Electric Energy Act* was a determination that, on its face or on a balance of probabilities, was reasonable.

The review panel concluded that EQUS did not demonstrate the existence of an error of fact, law, or jurisdiction that was either apparent on the face of the Decision or otherwise existed on a balance of probabilities that could lead the AUC to materially vary or rescind the Decision. Accordingly, EQUS' request for a review on this ground was denied.

Consideration of the Jurisdiction to Grant Municipal Franchises

EQUS took issue with the hearing panel's determination that it did not need to consider whether a REA fell within the definition of "utility service" under the *Municipal Government Act*. EQUS argued that this determination was a failure on the hearing panel's part to consider the municipal authority and jurisdiction to grant a franchise and the effect of that authority on the affected REAs. However, the review panel noted that the Decision specifically addressed the authority of municipalities to make decisions on a wide range of activities, including those related to public utilities.

The review panel was not satisfied that the issue of whether a REA provided "utility service" as defined in the *Municipal Government Act* was central to the matter before the hearing panel, such that determining that issue was a necessary prerequisite in determining the public interest. Moreover, had the hearing panel made a determination that REAs did not provide "utility service" under the *Municipal Government Act*, the review panel was not convinced that this determination could reasonably be expected to have altered the conclusion that the applied-for relief was in the public interest.

The review panel found that the decision by the hearing panel not to determine whether a REA provided a "utility service" did not invalidate the hearing panel's analysis and conclusions with respect to the public interest, nor did it result in an error that could lead the AUC to materially vary the decision.

Consideration of Legislation and Jurisprudence

EQUS' also advanced as a ground for review that the hearing panel failed to consider, or failed to "properly apply," applicable legislation and jurisprudence, including section 45 and 45.1 of the *Municipal Government Act*, the *Kozak*[1] decision, and other relevant and applicable jurisprudence.

The review panel noted that the applicable legislative provisions, including sections 45 and 45.1 of the *Municipal Government Act*, were expressly canvassed in the Decision, as they were in the Alberta Court of Appeal ("ABCA")'s decision in *Kozak*.

The review panel found that EQUS did not establish that the hearing panel failed to consider section 45 and 45.1 of the *Municipal Government Act* and the ABCA's guidance in *Kozak*.

With respect to EQUS' alternative ground that the hearing panel failed to properly apply the applicable legislative provisions and jurisprudence, the review panel was not persuaded that EQUS raised any error that could lead the AUC to materially vary or rescind its decision.

Fettering Discretion in Relation to Service Areas

The review panel found that EQUS failed to demonstrate that the hearing panel unlawfully fettered the AUC's discretion. The review panel noted EQUS raised the issue of the hearing panel fettering the AUC's discretion for the first time in the Review Application. The review panel affirmed that a Review Application is not an opportunity for parties to raise new or different arguments that could or

[1] *Kozak v Lacombe (County)*, 2017 ABCA 351 (:*Kozak*").

should have been raised in the first instance before the hearing panel. The review panel found that EQUS' argument of fettered discretion should fail on that basis. In any event, the review panel was not persuaded that EQUS' argument of fettered discretion constituted a ground for review. This is because it did not represent an error of fact, law, or jurisdiction that could lead the AUC to materially vary or rescind the Decision.

The review panel found that the decision to alter the affected REA service areas rested at all times with the AUC, in accordance with its statutory authority under section 29 of the *Hydro and Electric Energy Act*.

The review panel found no suggestion in the Decision that the hearing panel considered it had lost its discretion as a result of the existence of the MFAs. The Decision showed that the hearing panel sought to reconcile various statutorily-authorized exercises of discretion (including the AUC's authority in relation to service area approvals, and a municipal council's discretion in relation to the provision of utility service within its boundaries) in accordance with legislative intent and recent discussion on municipal utility service from the Alberta Court of Appeal in *Kozak*.

Lastly, the review panel did not accept EQUS' position that an order under section 32 of the *Hydro and Electric Energy Act* "[was] a jurisdictional pre-condition to the Commission ordering the transfer of any REA facilities." Section 32 of the *Hydro and Electric Energy Act* primarily addresses the transfer of service areas. It did not appear to the review panel that any transfer of service area was required. This is because FortisAlberta also had an approved right to provide electric distribution services in the subject areas pursuant to its service area approval.

Summary

In answering the preliminary question at the first stage of the review process - whether there are grounds to review the original decision - the review panel found that EQUS did not meet the requirements for review of the Decision. The Review Application was dismissed.

AltaLink Management Ltd. 2014 and 2015 Deferral Accounts Reconciliation Application (AUC Decision 22542-D02-2019)

Deferral Accounts

In this decision, the AUC considered AltaLink Management Ltd. ("AltaLink")'s 2014 and 2015 Deferral Accounts application requesting final cost approval for 202 transmission capital projects. AltaLink requested approval final approval of costs which would result in gross capital additions to its rate base of approximately $3.8 billion, net customer contributions.

Summary

The AUC found AltaLink to have prudently planned and executed the majority of these capital projects. These findings included approval of the majority of costs for AltaLink's major system projects, including the Western Alberta Transmission Line ("WATL") project, the Christina Lake projects, the Southern Alberta Transmission Reinforcement ("SATR") projects, the Foothills Area Transmission Development ("FATD") projects and the Red Deer Area Transmission Development projects. As well, the AUC considered final project costs for the Heartland project and the SATR Cassils to Bowmanton projects.

The AUC did not approve costs in the WATL project related to some of the charges for tower inspections. Regarding some of the other major projects, the AUC also found that a portion of AltaLink's execution costs relating to the use of access mats were not prudent and these costs were disallowed. The AUC also disallowed certain costs arising from the completion of AltaLink's resale of some of the properties acquired in the Heartland project.

Further, the AUC determined that a settlement agreement reached between AltaLink and its EPCm service provider, SNC-Lavalin ATP Inc. ("SNC-ATP"), regarding the services performed by SNC-ATP, was unreasonable and disallowed a portion of the agreed-to amounts that were the subject of this settlement.

The total amount of costs disallowed in the decision was approximately $30.5 million, which represented less than 1 percent of the total net capital additions requested.

The final costs approved by the AUC in this decision would result in an additional charge of approximately

$81.4 million to the Alberta Electric System Operator ("AESO").

The AUC ordered AltaLink to refile its 2014-2015 deferral accounts reconciliation application to reflect the findings, conclusions and directions set out in this decision in a compliance filing application by February 15, 2019.

Filing Requirements - Compliance with Direction 9

The AUC found the project summary reports prepared for the current application were extremely useful. In addition to providing essential descriptions and a high-level explanation of primary cost variances, the project summary reports provided linkages to AltaLink change notice and subcontract amendments evidence. The AUC directed AltaLink to continue to provide project summary reports in its next direct assign capital deferral account ("DACDA") application.

Decision and Order

As the AUC did not approve the full amount of the rate base addition amounts requested by AltaLink for all projects in the application, AltaLink was directed to file a compliance application to reflect the capital addition amounts approved by the AUC.

The AUC directed AltaLink to refile its 2014 and 2015 deferral accounts reconciliation application to reflect the findings conclusions and directions arising from this decision on or before February 15, 2019.

AUC Bulletin 2019-01: Revision to AUC Rule 020: Rules Respecting Gas Utility Pipelines

Pipeline Applications - Proposed Amendments

The AUC is seeking written feedback, comments, and suggestions regarding proposed changes to gas utility pipeline applications by March 1, 2019.

The AUC is responsible for approving new gas utility pipelines and amendments to existing gas utility pipelines under the *Alberta Utilities Commission Act*, the *Gas Utilities Act* and the *Pipeline Act*. In Alberta, gas utility pipelines are owned by ATCO Gas and Pipelines Ltd. ("ATCO") and AltaGas Utilities Inc. ("AltaGas").

While the AUC is the approving authority for gas utility pipelines, the AER includes all approved gas utility pipelines in its pipeline database. Accordingly, when the AUC approves a new gas utility pipeline or an amendment to an existing gas utility pipeline, the AER database must be updated to include the new pipeline or reflect the amendments to existing pipelines.

Currently, the AUC issues a decision report and a licence for each gas utility pipeline application, regardless of the scope or nature of the application. If the AUC approves an application, the AUC then initiates updates to the AER's pipeline database by filing an application through the AER's OneStop system.

Proposed Changes

The AUC proposed to make two material process changes to the AUC's application process for gas utility pipeline applications.

(a) The AUC will continue to issue a licence for all approved applications. However, the applications to update the AER database, through its OneStop system, for all AUC approved applications will be made by the owners of the gas utility pipeline, ATCO and AltaGas, and not by the AUC.

(b) The AUC will issue an updated licence but no decision report for pipeline amendment applications that address minor, administrative changes (Tier 1). Applications involving approvals for more significant changes will continue to receive both a decision report and a licence from the AUC (Tier 2).

Application Groups

The AUC proposed grouping gas utility pipeline applications into two tiers:

(a) Tier 1 applications relate to amendments for administrative changes necessary to ensure accurate and reliable pipeline records or applications for projects with no customer-cost implication; and

(b) Tier 2 applications relate to all other projects, including:

(i) applications for new projects; and

applications for amendments to existing projects that will have cost implications to customers and projects that involve ground disturbance and construction

activities, even if there is no cost impact to customers.