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 National Energy Board ("NEB") and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the RLC Team.

Regulatory Law Chambers is a Calgary based boutique law firm, specializing in energy and utility regulated matters. RLC works at understanding clients' business objectives and develops legal and business strategies with clients. RLC follows a team approach, including when working with our clients and industry experts. Visit our website to learn more about RLC.

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ALBERTA ENERGY REGULATOR

Request for Regulatory Appeal by Martin Hillmer - Shell Canada Limited (AER Regulatory Appeal No.: 1913546)

Request for Regulatory Appeal - Granted

In this decision, the AER considered a request by Mr. Martin Hillmer for a regulatory appeal of Reclamation Certificate No. 151150 issued to Shell Canada Limited ("Shell"). The AER granted the request and determined that a hearing into the regulatory appeal would be held as the legislative tests for granting an appeal were met.

In his request for regulatory appeal, Mr. Hillmer raised concerns regarding the site's bare ground and the fact that he was not given the opportunity to present his concerns prior to the issuance of the reclamation certificate. Shell was of the view that the site met or exceeded the criteria.

The AER set out that section 91(1)(i) of the *Environmental Protection and Enhancement Act* (*"EPEA*") and section 36 of the *Responsible Energy Development Act* ("*REDA*") operate to grant the owner of lands subject to a reclamation certificate, that is in receipt of a copy of the reclamation certificate, an automatic right of regulatory appeal barring no extraordinary and obvious circumstances militating against that right. The AER found that no such circumstances existed in this case.

The AER concluded that the tests for appealable decision and eligible person were met in this case. The AER further determined there was no justification for dismissing the regulatory appeal request under section 39(4) of *REDA*.

Request for Regulatory Appeal by Michael Judd of Pipeline Licence Issued to Shell Canada Corporation (AER Regulatory Appeal No.: 1916723)

Request for Regulatory Appeal - Pipeline Licence - Granted

In this decision, the AER considered Michael Judd's request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision to approve and issue to Shell Canada Corporation ("Shell") Pipeline Licence No. PL23800-99 (the "Pipeline Licence").

The AER granted Mr. Judd's request for Regulatory Appeal of the Pipeline Licence, based on its finding that Mr. Judd was an "eligible person" to request a regulatory appeal under section 38 of the *REDA*.

Legislative Scheme

Section 38(1) of *REDA* provides:

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

The test has three components:

(a) the request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice* (the "*Rules*");

(b) the decision must be an appealable decision; and

(c) the requester must be an eligible person.

Reasons for Decision

The AER found that:

(a) Mr. Judd's request for regulatory appeal was filed in accordance with the Rules; and

(b) the decision to issue the Pipeline Licence was an appealable decision since it was a decision under the *Pipeline Act*, which is an energy resource enactment, and it was made without a hearing.

Eligible Person

For energy resource enactment decisions, an eligible person is a person who is directly and adversely affected by a decision made under an energy resource enactment without a hearing (*REDA,* section 36(b)(ii)).

The key question then was whether Mr. Judd was a person who may be directly and adversely affected by the decision to issue the Pipeline Licence.

The AER noted that the Pipeline Licence was for a 638 metre, new build pipeline (the "Pipeline"). The Pipeline would carry gas with 320 mol/kmol H_2S. Mr.

Judd's residence was located approximately 1.45 km from the Pipeline right-of-way.

Based on the proximity to the Pipeline, the AER found that Mr. Judd was a person who may be directly and adversely affected by the decision to issue the Pipeline Licence. Therefore, Mr. Judd was an eligible person for under *REDA*.

Summary

The AER found that Mr. Judd was an eligible person as required by the test set out in section 38(1) of the *REDA* in respect of the decision to issue the Pipeline Licence. Therefore, the AER granted the request for regulatory appeal.

Request for Regulatory Appeal by Michael Judd of Resume Drilling Licence Issued to Shell Canada Corporation (AER Regulatory Appeal No.: 1916724)

Request for Regulatory Appeal - Dismissed - Resume Drilling Licence

In this decision, the AER considered Michael Judd's request under section 38 of the *Responsible Energy Development Act* ("*REDA*") for a regulatory appeal of the AER's decision to approve Licence No. 235273, issued to Shell Canada Corporation ("Shell"), approving the resumption of drilling of Well CR74 (the "Resume Drilling Licence").

The AER dismissed the request for regulatory appeal.

Legislative Scheme

Section 38(1) of *REDA* provides:

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

The test has three components:

(a) the request must be filed in accordance with the *Alberta Energy Regulator Rules of Practice* (the "*Rules*");

(b) the decision must be an appealable decision; and

(c) the requester must be an eligible person.

Reasons for Decision

The AER found that:

(a) Mr. Judd's request for regulatory appeal was filed in accordance with the Rules;

(b) the decision to issue the Resume Drilling Licence was an appealable decision, since it was a decision under the *Oil and Gas Conservation Rules*, which is an energy resource enactment, and it was made without a hearing; and

(c) the decision to issue was a decision under an energy resource enactment and it was made without a hearing. Therefore, it was an appealable decision.

Eligible Person

The AER accepted that the location of a person's residence in the Emergency Planning Zone ("EPZ") was in itself evidence indicating that a person may be directly and adversely affected. However, the AER found that neither Mr. Judd's lands nor residence was within the EPZ for the CR74 Well, but that his only route of egress (Seven Gates Road) did pass through the EPZ.

Mr. Judd's residence was approximately 2.57 km from the centre of the well and was not within the EPZ of 2.37 km. The AER considered that any increase in risk to Mr. Judd must be considered relative to Mr. Judd's distance from the well. The AER found that the decision to issue the Resume Drilling Licence might present an increased risk of a sour gas release which could impact Seven Gates Road. The AER found that Seven Gates Road itself was within a number of existing Shell EPZs for sour gas facilities and any increase in risk to Mr. Judd's route of egress posed by the re-entry of the CR74 well was an incremental risk.

The AER concluded that, in the circumstances, the magnitude of the incremental increase in risk to Mr. Judd was not sufficient to establish that he may be directly and adversely affected. The AER noted that:

(a) the Resume Drilling Licence did not approve or change the surface location of the CR74 Well, which was approved as a result of *Decision 2000-17*; and

(b) the H_2S release rate was identical to that of the previous 02/05-20-006-02W5/2 well leg drilled from that wellbore.

Further, the AER was satisfied that Shell's emergency planning, including its efforts to ensure viable shelter in place for Mr. Judd, was effective to mitigate risk to residents in the area that might need to use Seven Gates Road as a route of egress in the event of an emergency.

The AER found that Mr. Judd did not establish that he may be directly and adversely affected by the decision to issue the Resume Drilling Licence. Therefore, the AER determined that Mr. Judd was not an eligible person for the purposes of *REDA*.

Summary

The AER found that Mr. Judd was not an eligible person as required by the test set out in section 38(1) of *REDA*. Therefore, the AER dismissed the request for a regulatory appeal of the Resume Drilling Licence.

AER Bulletin 2019-09: 2019/20 Orphan Fund Levy

Orphan Fund Levy

In this bulletin, the AER announced that, in accordance with Part 11 of the *Oil and Gas Conservation Act*, the AER was prescribing an orphan fund levy in the amount of $60 million.

The Orphan Well Association ("OWA"), Canadian Association of Petroleum Producers ("CAPP"), and Explorers and Producers Association of Canada ("EPAC") approved a $60 million orphan fund levy to fund the OWA's budget for fiscal year 2019/20. The AER explained that the total levy would be collected through one levy of $60 million in May 2019. The AER will allocate the year's orphan fund levy among licensees and approval holders included within the Licensee Liability Rating ("LLR") and Oilfield Waste Liability ("OWL") programs based on the April 2019 monthly assessment.

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

Levy = A/B x $60,000,000

where

- *A* is the licensee's, or approval holder's deemed liabilities on April 6, 2019, for all facilities, wells, and unreclaimed sites included within the LLR and OWL programs; and
- *B* is the sum of the industry's deemed liabilities on April 6, 2019, for all facilities, wells, and unreclaimed sites included within the LLR and OWL programs.

Each licensee or approval holder's required orphan fund levy was based on its licensed and approved properties, according to AER records, as of April 6, 2019. Facilities included under the Large Facility Liability Management Program were excluded.

A licensee or approval holder may review its deemed liabilities in the LLR and OWL programs at any time through the Digital Data Submission system on the AER website.

Failure to pay the full invoiced amount by June 3, 2019, will result in a penalty of 20 percent of the original invoiced amount being assessed to the licensee or approval holder pursuant to section 74(2) of the *Oil and Gas Conservation Act*. Additional compliance measures may apply in accordance with the AER's compliance assurance program.

AER Bulletin 2019-10: New Manual for Coal Mine Pit Wall Abandonment

Coal Mine Pit Wall Abandonment

In this bulletin, the AER announced that on May 8, 2019, it had released *Manual 17: Coal Mine Pit Wall Abandonment*. The AER confirmed that no regulatory requirements changed as a result.

The manual provides details regarding the application process, submission requirements, and evaluation methodologies for coal mine pit wall abandonment under section 12 of the *Coal Conservation Rules*.

Manual 017 is available on the AER website.

AER Bulletin 2019-11: Public Land Disposition Applications Moving to OneStop

Public Land Disposition - OneStop

This bulletin announced that as of May 30, 2019, new, amendment, and renewal applications for the following public land disposition types must be submitted through OneStop:

- mineral surface lease ("MSL");
- miscellaneous lease ("MLL");
- pipeline agreement ("PLA");
- pipeline installation lease ("PIL");
- licence of occupation ("LOC");
- vegetation control easement ("RVC"); and
- regulator temporary field authorization ("RTF").

The following public land submission must also be submitted through OneStop:

- site entry notifications;
- no-entry cancellations;
- plan replacements; and
- submission of digital plans and shapefiles for land use activities.

The AER indicated a new spatial energy development planning tool would be made available to users in order to conduct their landscape-level planning. This tool will accept a shapefile and then produce a report listing existing stakeholders and environmental restrictions within the given boundaries.

The AER also noted that the Government of Alberta would be releasing a new edition of the *Enhanced Approval Process Manual*. The manual identifies the types of *Public Lands Act* applications for which the AER may make an expedited decision. The manual will be available on the open government portal.

Further information on the new online submission process for public land disposition applications will be available on the AER website.

AER Bulletin 2019-12: New Subsurface Order Institutes New Monitoring, Setback, and Response Requirements to Manage the Risk of Induced Seismicity Near the Brazeau Reservoir

Hydraulic Fracturing

On May 2, 2019, the AER released Subsurface Order No. 6, which established new monitoring, reporting, and setback requirements to manage the potential hazard of induced seismicity from hydraulic fracturing near the Brazeau Reservoir, Alberta.

The order prohibits hydraulic fracturing operations within five kilometres of the Brazeau dam infrastructure if operations are targeting the Duvernay Formation or below it. It also prohibits hydraulic fracturing within three kilometres of the Brazeau dam infrastructure if operations are targeting formations above the Duvernay Formation.

The order also established a mandatory traffic light protocol for hydraulic fracturing operations in the formations above the Duvernay within five kilometres from the Brazeau dam. Under the traffic light protocol, licensees must implement seismic monitoring and response procedures to manage the hazard of induced seismicity before, during, and after any hydraulic fracturing activity. Any seismic events greater than 1.0 M_L must be reported and mitigated. If an event 2.5 M_L or greater is detected, the fracturing operations must cease until authorized by the AER to restart.

The AER will continue to evaluate the risk of induced seismicity in the region to ensure that the Brazeau dam setback distances are protective of Albertans.

AER Bulletin 2019-13: New Alberta Environment and Parks Surface Water Allocation Directive

Water Licence - Environmental Effects

In this bulletin, the AER announced that Alberta Environment and Parks ("AEP") released the *Surface Water Allocation Directive*. This directive provides guidance when allocating water from rivers, lakes, and wetlands at locations where a water management plan, framework, or other prescriptive guidance does not exist. It applies to new water licence applications and temporary diversion licences. It does not affect existing licences but may be applied to term licences when they are renewed.

The AER indicated that operators applying for a term licence are still expected to evaluate the environmental effects of granting the licence. The AER also indicated that operators applying for temporary diversion licences must follow the current process and may choose not to submit any documentation on the environmental effects, but they should use the directive to evaluate water availability to avoid potential delays in the review process.

ALBERTA UTILITIES COMMISSION

Evergreen Gas Co-op Ltd. - Franchise Agreement with the Town of Drayton Valley (AUC Decision 24257-D01-2019)

Gas – Franchise Agreement – Section 45 of the Municipal Government Act – Unreasonable Discrimination

In this decision, the AUC considered an application by Evergreen Gas Co-op Ltd. (the "Co-op") for approval of a natural gas franchise agreement with the Town of Drayton Valley (the "Town") pursuant to section 45 of the *Municipal Government Act*.

The AUC found that Clause 5(a)(ii) in the proposed franchise agreement relating to franchise fees was discriminatory and therefore not in the public interest. On that basis, the AUC declined to approve the franchise agreement as filed.

Jurisdiction and Nature of the AUC's Review

The AUC's authority to approve franchise agreements derives from section 45 of the *Municipal Government Act*. Subsection 45(1) provides that: "A council may, by agreement, grant a right, exclusive or otherwise, to a person to provide a utility service in all or part of the municipality, for not more than 20 years." Subsection 45(3) requires approval by the AUC "… [b]efore the agreement is made, amended or renewed."

The AUC noted that while the *Municipal Government Act* requires AUC approval of a franchise agreement, it does not specify the basis for granting it. Based on similar provisions from the *Gas Utilities Act*, *Gas Distribution Act*, and previous AUC decisions, the AUC affirmed that the purpose of the AUC reviewing franchise agreements is to determine whether "the privilege or franchise is necessary and proper for the public convenience and properly conserves the public interests."

Franchise Fee Payable Only by New Customers Constitutes Unreasonable Discrimination

Section 5(a) of the proposed franchise agreement provided that the franchise fee would only be payable by new customers from and after the initial 10-year term.

The AUC set out the following principles regarding its consideration of what constitutes unreasonable discrimination in any service charge, rate or toll between utility customers:

(a) Discrimination in utility regulation can arise in two circumstances:

  (i) first, when a utility fails to treat all users of a public utility equally where no reasonable distinction can be found between those favoured and those not favoured; and

  (ii) second, when a utility treats all its users equally where differences between users would justify different treatment.

(b) In considering whether different treatment constitutes unreasonable discrimination, the AUC will consider:

  (i) the presence or absence of any rationale or logic underlying the charges imposed to determine whether a reasonable distinction exists between customers to support their differential treatment; and

  (ii) whether the differential charges between customers are supported by sufficient rationale or logic and fact-based evidence justifying the distinction.

In this case, The AUC found that:

(a) while the expressed intention explained why no franchise fee was payable within the initial 10-year term of the proposed franchise agreement, the Co-op did not offer a reasonable rationale or fact-based justification for the differential treatment of the two customer groups (existing and new) after the expiry of its initial 10-year term; and

(b) further, the Co-op failed to demonstrate that the point in time at which a customer takes service from a natural gas supplier, on its own, afforded sufficient justification for the differential imposition of the franchise fee.

Conclusion

The AUC concluded that the Co-op failed to satisfy that a reasonable distinction existed between new and existing customer groups supporting their differential treatment concerning the payment of franchise fees after the expiration of the initial 10-year term of the proposed franchise agreement. On that basis, the AUC found that Clause 5(a)(ii) in the franchise agreement allowed the imposition of discriminatory rates and was, therefore, not in the public interest. Consequently, the AUC declined to approve the franchise agreement as filed.

AltaLink Management Ltd. - Decision on Preliminary Question - Application for Review of Decision 22612-D01-2018 AltaLink L.P. Transfer of Specific Transmission Assets to PiikaniLink L.P. and KainaiLink L.P. and the Associated 2017-2018 General Tariff Applications (AUC Decision 24240-D01-2019)

Review and Variance – Sale of Transmission Assets – No-harm Test

In this decision, the AUC considered an application (the "Review Application") by AltaLink Management Ltd. ("AltaLink" or "AML"), in its capacity as general partner of each of AltaLink, L.P. ("ALP"), PiikaniLink L.P. ("PLP") and KainaiLink L.P. (KLP), requesting a review and variance of specific findings in:

(a) Decision 22612-D01-2018: AltaLink L.P. Transfer of Specific Transmission Assets to PiikaniLink L.P. and KainaiLink L.P. and the Associated 2017-2018 General Tariff Applications ("Transmission Asset Decision"); and

(b) Decision 23902-D01-2018: AltaLink L.P. Transfer of Specific Transmission Assets to PiikaniLink L.P. and KainaiLink L.P. and the Associated 2017-2018 General Tariff Applications Costs Award ("Costs Decision").

The AUC denied the Review Application, based on finding that AltaLink failed to demonstrate that an error of fact, law, or jurisdiction was apparent on the face of the Transmission Asset Decision or the Costs Decision or otherwise existed on a balance of probabilities.

Transmission Asset Decision

The Transmission Asset Decision approved applications from AltaLink for the transfer of specific AltaLink assets to PLP and KLP, created PLP and KLP as new transmission facility owners ("TFOs"), and approved associated interim tariffs for PLP and KLP for the 2017 and 2018 test years. The AUC applied its no-harm test in considering the applications. While the AUC determined that the transaction contemplated by AltaLink did not meet the no-harm test, it imposed conditions to mitigate the financial harm and approved the applications subject to those conditions.

AltaLink sought a review of the Transmission Asset Decision requesting that the decision be varied to eliminate these conditions, namely:

(a) the removal of allowances for audits and funding of hearing cost reserves from the revenue requirements of the proposed PLP and KLP tariffs;

(b) the disallowance of any unreasonable or undue financial risk to ratepayers arising from the repayment terms in the financing of the proposed transfers from the ALP tariff; and

(c) the deferral of a decision to approve the establishment of deferral accounts for payments in lieu of taxes and annual structure payments for the PLP and KLP tariff.

(collectively, the "Conditions").

AUC Review Process

The AUC's authority to review its own decisions is provided under section 10 of the *Alberta Utilities Commission Act*. AUC Rule 016: *Review of Commission Decisions* ("Rule 016") 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.

The review process has two stages. In the first stage, the AUC review panel must decide whether there are grounds to review the original decision (also referred to as the "preliminary question"). If the review panel decides that there are grounds to

review the 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.

Section 4(d) of Rule 016 requires an application for review to set out the grounds for the review, which may include the following:

(a) the AUC made an error of fact, law or jurisdiction; or

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

Section 6(3) of Rule 016 provides that, in the case of an application made on the grounds of an error of fact, law, or jurisdiction, the applicant must demonstrate "the existence of an error of fact, law or jurisdiction is either apparent on the face of the decision or otherwise exists on a balance of probabilities that could lead the AUC to materially vary or rescind the decision."

Claimed Grounds for Review

In its Review Application, AltaLink claimed that the AUC made several errors of fact and/or law that would result in ALP, KLP and PLP and their respective shareholders incurring costs beyond what was reasonable in the circumstances. More specifically, AltaLink asserted that the AUC made the following errors by finding that:

(a) the no-harm test was a forward-looking exercise, so the $32 million in savings enjoyed by ratepayers into the future as a result of routing the SW Line across the lands of the Piikani Nation and the Kainai Nation had no bearing on its approval of the Transfer Applications;

(b) future benefits flowing from the transfer of assets to PLP and KLP to AML and the Alberta utility industry, in general, were not sufficiently evidenced to establish that they would materialize and when;

(c) the terms of the loans between AML and PLP and AML and KLP would result in harm to ratepayers; and

(d) in relation to annual structure payments ("ASPs") and payments in lieu of taxes, the Piikani Nation and Blood Tribe might have an incentive to seek increases in annual structure payments and payments in lieu of taxes, "at least theoretically."

Application of No-Harm Test

No-Harm Test Is a Forward-looking Exercise

AltaLink argued that in its application of the no-harm test, the AUC hearing panel should have considered the benefits of routing the SW Line, which it claimed resulted in a $32 million savings, and that not doing so constituted an impermissible fetter on the AUC's discretion and a failure to appropriately apply the no-harm test.

The review panel rejected this ground for review, finding that the hearing panel had not committed an error of law or fact in its finding not to apply the benefits asserted to arise from the routing of the portions of the SW Line through the Piikani Nation and the Blood Tribe lands, as an offset to the increased financial costs to ratepayers resulting from the creation of two new TFOs.

The review panel found that there was no reason for the hearing panel to consider the routing of the Line as an offset to its finding of financial harm because the subsequent asset transfer was not a condition reflected in the facility and need identification document ("NID") approvals. The review panel found that:

(a) the hearing panel had to evaluate no-harm in the context of constructed facilities that were owned and operated by the existing utility, AltaLink; and

(b) this required the hearing panel to assess the no-harm test in the circumstances which existed subsequent to the completion of the facilities.

Consideration of Cost Savings

AltaLink claimed that the evidence was clear that there was a savings of $32 million.

The review panel found that based on the documents referenced by AltaLink in Proceeding 22612 and in the Review Application, AltaLink had only provided evidence of AltaLink asserting that there would be a savings of this magnitude, and that the incremental costs related to running the SW Line through the First Nations lands and creating two new utilities would be only a moderate increase when compared to the $32 million in savings.

The review panel found that the hearing panel made conclusions based on the evidence in the transmission asset transfer proceeding. Absent an obvious or palpable error, it is not the role of the review panel to re-examine findings of fact by the hearing panel. The review panel did not consider that an obvious or palpable error was demonstrated by AltaLink in this instance.

The AUC review panel concluded that:

(a) the application of the no-harm test by the hearing panel was consistent with prior AUC practices and the evidence before it; and

(b) therefore, there was no error of law or fact that was either apparent on the face of the decisions or otherwise existed on the balance of probabilities that could lead the AUC to materially vary or rescind the Transmission Asset Decision or the Costs Decision on this ground.

Future Benefits to AltaLink and the Alberta Utility Industry Were Not Sufficiently Evidenced to Establish That They Would Materialize and When

AltaLink argued that it put forward clear evidence of benefits to AltaLink, the Alberta utility industry, and ratepayers generally, including:

(a) access to First Nations demographics for workers;

(b) having strong relationships with Alberta First Nations and access to government programs;

(c) having access to a pool of personnel from the First Nations to meet human resource needs;

(d) benefits from the First Nations' relationships with other First Nations in Canada, to expand existing or initiate new projects that may involve other First Nations' resources;

(e) strengthening AltaLink's relationships with the First Nations; and

(f) aligning the interests of the First Nations and AltaLink for the long-term safe and reliable operation of the utility assets located on their reserve lands.

The AUC review panel noted that:

(a) the hearing panel specifically requested evidence from AltaLink to substantiate its claimed intangible benefits; and

(b) the hearing panel made it clear in the Transmission Asset Decision that this issue was considered, finding that:

(i) AltaLink had failed to provide sufficient evidence to establish that the asserted benefits are likely to materialize and, if so, when and to what extent; and

(ii) AltaLink also failed to provide sufficient evidence that the asserted benefits, if realized, could be objectively quantified as cost savings to ratepayers, offsetting the ongoing incremental costs resulting from the proposed transfers.

The AUC review panel found that:

(a) the hearing panel considered both financial and non-financial aspects in its determination of the no-harm test;

(b) the hearing panel specifically considered issues on the continuity of safe and reliable service of the assets that would be transferred to each of PLP and KLP; and

(c) AltaLink was attempting to reargue an issue that the hearing panel had clearly decided upon.

The review panel concluded that there was no error of law or fact that was either apparent on the face of the decisions or otherwise existed on the balance of

probabilities that could lead the AUC to materially vary or rescind the Transmission Asset Decision.

The AUC Erred in Finding That the Loan Terms Result in Harm

The review panel rejected AltaLink's claimed ground for review that the AUC hearing panel erred in finding that the loan terms resulted in harm, finding that the hearing panel's decision was based on the facts put into evidence by AltaLink.

The review panel found that the hearing panel was concerned about the structure of the loans to previously unknown entities that could not achieve the same financing arrangements independently of AltaLink, arrangements which could not be shown to be consistent with conventional or reasonable lending practices. Given the public interest mandate of the AUC, and the evidence presented, the review panel found that AltaLink failed to demonstrate an error of law or fact that was either apparent on the face of the decisions or otherwise existed on the balance of probabilities that could lead the AUC to materially vary or rescind the Transmission Asset Decision or the Costs Decision on this ground.

The AUC Erred in Deferring Its Decision on Deferral Accounts for Payments in Lieu of Taxes and Annual Structure Payments

In the Transmission Asset Decision, the hearing panel deferred consideration of the request to provide approval for the creation of a deferral account for the payments in lieu of taxes account and annual structure payment account for each of the PLP and KLP tariffs.

The review panel found that:

(a) at best, the request for a review on this ground was premature, given that the hearing panel made no final decision on whether to ultimately grant the requested deferral accounts; and

(b) the hearing panel raised its concern with payment in lieu of taxes and annual structure payments in information requests and was not satisfied with the evidence filed, finding "that its concerns may be addressed in future PLP and KLP GTAs when the actual payments in lieu of taxes and annual structure payments are tested."

The AUC review panel concluded that AltaLink had not demonstrated that the hearing panel's finding was incorrect in fact and/or law. Accordingly, AltaLink failed to demonstrate an error of law or fact that was either apparent on the face of the decisions or otherwise existed on the balance of probabilities that could lead the AUC to materially vary or rescind the Transmission Asset Decision or the Costs Decision on this ground.

Decision

In answering the preliminary question, the review panel found that AltaLink had not met the requirements for a review of the findings of the hearing panel in Decision 22612-D01-2018 imposing conditions to mitigate harm to customers, or the findings of the hearing panel in Decision 23902-D01-2018 to disallow the hearing costs applied for by AltaLink.

The AUC review panel, therefore, dismissed AltaLink's application for review of these decisions.

NATIONAL ENERGY BOARD

Enbridge Pipelines Inc. and Westover Express Pipeline Limited Joint Application for Sale and Purchase of Line 10 (NEB Letter Decision)

Leave to Sell - Leave to Purchase

In this decision, the NEB considered a joint application (the "Application") for sale and purchase of the Line 10 pipeline (the "Pipeline") by Enbridge Pipelines Inc. ("Enbridge") and Westover Express Pipeline Limited ("Westover Express") pursuant to paragraphs 74(1)(a) and (b) of the *National Energy Board Act* ("*NEB Act*").

The NEB approved the Application, granting Enbridge leave to sell, and Westover Express leave to purchase, the Canadian portion of the Pipeline.

Line 10 Pipeline

Together, the Canadian and American portions of the Pipeline comprise approximately 143 km of NPS 12 (324 mm) and NPS 20 (308 mm) pipe that transport crude oil from Enbridge's terminal in Westover, Ontario to United's Kiantone Pipeline in West Seneca, New York to supply United's approximately 70,000 barrel-per-day ("bpd") refinery in Warren, Pennsylvania.

At issue in this Application was the Canadian portion of the Pipeline. It is approximately 105.41 km in length within Ontario. It crosses under the Niagara River and terminates at the international border.

Operations Matters

The NEB noted that the Pipeline was already regulated by the NEB and was previously determined to have been constructed and operated in a safe and environmentally sound manner, and was required for the present and future public convenience and necessity. Similarly, the NEB previously made a determination to allow the decommissioning of certain Line 10 segments in place.

The NEB further noted that Line 10 would continue to be regulated by the NEB, and lifecycle oversight over the Pipeline would continue. Conditions previously imposed by the NEB on Enbridge regarding the Pipeline would continue to apply to Westover Express. Westover Express would be subject to the NEB's regulatory framework, including abandonment funding and financial resource requirements. Westover Express would be responsible for the decommissioned portions of Line 10, and the future abandonment of the facilities.

The NEB found that operating conditions or circumstances would not change as a result of the transaction. Line 10 would remain in operation subsequent to the transaction. The NEB indicated that the safety and environmental risks associated with excavating and removing the decommissioned Pipeline from the ground remained.

Consultation and Socio-Economic Matters

The NEB found that the public and landowner consultation activities undertaken by Enbridge for the purposes of the sale were adequate. The NEB was satisfied with the design and implementation of Enbridge's consultation activities, as well as its commitment to continued consultation activities.

Westover Express' Ability to Finance the Pipeline

As a lifecycle regulator, the NEB assesses the ability of a prospective pipeline owner to finance the Pipeline over its entire life. This includes the day-to-day operations of the Pipeline, financial resources to address a possible incident on the Pipeline, and its ability to finance the eventual abandonment of the Pipeline.

The *NEB Act* and its regulations include financial resource requirements for companies, to cover the costs of an unintended or uncontrolled release from their pipelines.

NEB-regulated pipeline companies must have a mechanism in place that will provide adequate funds to pay for pipeline abandonment. Companies are required to file an Abandonment Cost Estimate for NEB approval. The NEB regularly reviews company abandonment mechanisms to verify that material changes to a pipeline are reflected in the Abandonment Cost Estimate and an appropriate level of funds is set aside.

The NEB found that the regulatory requirements for financial resources and abandonment funding addressed the concerns related to Westover Express' ability to finance costs associated with the Pipeline. Westover Express would be required to comply with the NEB's requirements for setting aside

funds for abandonment and for demonstrating sufficient financial resources.

The NEB approved the applicants' proposed method for the establishment of the Line 10 trust to be established initially with Enbridge as the contributor and beneficiary. The NEB authorized the transfer of funds between trusts as described in the Application. Westover Express would be responsible for discharging the beneficiary's reclamation obligations related to Line 10 upon closing of the sale and the issuance of the amending orders.

The NEB also noted Westover Express' commitment to file tolls prior to the effective date of the transfer. The *NEB Act* requires that a company must not charge any tolls except tolls that are specified in a tariff that has been filed with the NEB and is in effect.

Ongoing Financial Regulation

Pipeline companies regulated by the NEB are divided into two groups, Group 1 or Group 2 companies, for financial regulation purposes. Group 1 companies are generally those with extensive systems under the NEB's jurisdiction. Any pipeline company regulated by the NEB, which is not a Group 1 company is a Group 2 company.

The NEB decided to regulate Westover Express as a Group 2 company on a complaint basis for financial regulatory purposes.

The NEB advised that it is the responsibility of a Group 2 company to provide its shippers and interested parties with sufficient information to enable them to determine whether the tolls and transportation requirements were reasonable or whether a complaint was warranted.

Summary

The NEB issued Order MO-014-2019, which required Enbridge and Westover Express to file confirmation with the NEB once the sale and purchase of Line 10 are complete. On receipt of this notification, the NEB will take the appropriate steps to vary the Certificates and Orders.

BRITISH COLUMBIA COURT OF APPEAL

Reference re Environmental Management Act (British Columbia) (2019 BCCA 181)

TransMountain Pipeline Expansion (TMX) - Environmental Regulation - Federalism - Separation of Powers

In this reference, the British Columbia Court of Appeal ("BCCA") considered which level or levels of government may regulate the planned TransMountain pipeline expansion ("TMX").

The five-member BCCA panel unanimously found that it was not within the legislative authority of the Legislature of British Columbia ("Province" or "BC") to enact a proposed amendment to the *Environmental Management Act* dealing with "hazardous substance permits."

The Constitutional Reference

In April 2018, the new government formulated a proposed amendment to the *Environmental Management Act* consisting of a new Part 2.1 dealing with "hazardous substance permits." It was this proposed legislation that was the subject of the reference made by BC on April 25, 2018, pursuant to the *Constitutional Question Act*, *1867*.

The substance of the reference was the Province's assertion that it may regulate the pipeline in the interests of the environment. The Province's stated intention was not exclusive regulation but to the extent that it may impose conditions on, and even prohibit, the presence of "heavy oil" in the Province unless a director under the *Environmental Management Act* issued a "hazardous substance permit" under the proposed Part 2.1.

The three questions referred by the Province to the BCCA for hearing and consideration were as follows:

1. Is it within the legislative authority of the Legislature of BC to enact legislation substantially in the form set out in the proposed addition of Part 2.1 to the *Environmental Management Act*?
2. If the answer to question 1 is yes, would the legislation be applicable to hazardous substances brought into BC by means of interprovincial undertakings?
3. If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the legislation inoperative?

Parties' Submissions

The Province submitted that the purpose of the proposed legislation was not to regulate an interprovincial pipeline but to regulate the release of hazardous substances into the environment. It asserted that the expansion and operation of the Pipeline as a carrier of heavy oil would have a disproportionate effect on the interests of British Columbians. The Province submitted that the proposed addition to the *Environmental Management Act* as relating to "Property and Civil Rights in the Province" or "Matters of a merely local or private nature" fell under section 92 of the *Constitution Act, 1867*.

Canada submitted that its jurisdiction under sections 91(29) and 92(10)(a) of the *Constitution Act, 1867* include the regulation of the construction and operation of the Pipeline, its route and contents, and the management of risks of environmental harm. Canada asked the BCCA to find BC's proposed amendment *ultra vires* or inoperative, and thus to eliminate the uncertainty (or some of it) that now hangs over a project of importance to Canada as a whole.

Constitutional Framework

Sections 91 and 92 of the Constitution Act, 1867

The BCCA explained that, in Canada, the distribution of legislative power between the federal Parliament and the provincial legislatures is mainly set out in sections 91 and 92 of the *Constitution Act, 1867*. Section 91 lists the kinds of laws that are competent to the federal Parliament, and section 92 lists the kinds of laws that are competent to the provincial legislatures. Both sections use a distinctive terminology, giving legislative authority in relation to "matters" coming within "classes of subjects."

The BCCA set out the following relevant heads of power for the purpose of this reference:

(a) Federal legislative powers:

(i) Section 91(1): Navigation and shipping;

(ii) Section 92(10)(a): Interprovincial works and undertakings; and

(iii) Section 92(10)(c): Such works, although wholly situated within a Province, are declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces;

(b) Provincial legislative powers:

(i) Section 92(13): Property and Civil Rights in the Province; and

(ii) Section 92(16): Generally all matters of a merely local or private nature in the Province.

The BCCA noted that "environmental protection" is not a head of power allocated to either level of government. Valid environmental protection legislation is on the books of all provinces and of Canada.

In such cases, the court must determine the pith and substance of the impugned law, and to which of the enumerated powers it relates.

Courts will consider both the purpose and effects of legislation in identifying its pith and substance. In considering the purpose of legislation, a court may consider "intrinsic" evidence (the text of the law itself) and "extrinsic" evidence (such as the circumstances in which the law was adopted).

The BCCA suggested that the effects of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention. These effects may be legal ones such as effects on the rights or obligations of citizens; or practical ones, especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly.

Where only a part or parts of a statute are challenged, the challenged portions should first be considered on their own rather than in the context of the overall statute.

Occasionally, a law may fairly relate to two matters, one provincial and one federal. Where this happens, and where both "aspects" are of roughly equivalent importance, the law may be upheld at either level. This is the so-called "double aspect" doctrine.

The BCCA noted that the double aspect principle had been found to apply to traffic laws; securities regulation; the maintenance of spouses and children and custody of children; entertainment in taverns; and gaming.

Paramountcy and Interjurisdictional Immunity

Paramountcy applies where the validly enacted laws of two levels of government conflict or the purpose of the federal law is 'frustrated' by the operation of the provincial law. Where this occurs, the provincial law will be rendered inoperative to the extent necessary to eliminate the conflict or frustration of purpose.

Interjurisdictional immunity applies when a valid law of a province trenches upon or impairs the "core" of, a matter under exclusive federal jurisdiction. In later cases, the doctrine was modified to require the impairment of a vital part of an undertaking. More recently, however, the Alberta Court of Appeal noted that the difficulties inherent in applying the doctrine led the Supreme Court to suggest in *Canadian Western Bank (2007)* that it should be used "with restraint" in future.

Existing Environmental Legislation

The Federal Scheme

The BCCA explained that there is in place a complex web of federal statutes and regulations that apply to all aspects of interprovincial pipelines, including environmental assessment, operational oversight, spill and accident responses, and financial liability and compensation for harm done by spills. The BCCA noted that the 'polluter pays' principle was clearly an important part of these laws. The BCCA also noted that the Province did not contend that any of the federal environmental laws may be constitutionally invalid or inapplicable to the Pipeline.

The BCCA set out several federal statutes and regulations that regulate the interprovincial

transportation of petroleum in Canada, including the following:

(a) the *National Energy Board Act*, which establishes the NEB having general oversight over the approval, construction, and operation of interprovincial and international pipelines;

(b) the *National Energy Board Onshore Pipeline Regulation*, which imposes various obligations on pipeline companies, many of which relate to environmental protection and the minimization of spills;

(c) the *Oil and Gas Regulations*, which set out the information that applicants seeking such export orders and licences must provide to the NEB, and the terms and conditions that the NEB may impose on export orders and licences; and

(d) the *Canadian Environmental Act, 2012* ("*CEAA 2012*"), under which the NEB is responsible for conducting Environmental Assessments ("EAs") in accordance with *CEAA 2012* for projects that are prescribed as designated projects thereunder.

The Provincial Scheme

The BCCA went on to set out various provincial statutes aimed at environmental protection, the leading one being the *Environmental Management Act*. Permits are issued by a director under the *Environmental Management Act*, who may attach conditions to permits that are “intended to address concerns or risks posed by a proponent’s proposed activities, or which ensure that commitments made by proponents are carried out.”

The *Environmental Assessment Act* is more specific legislation dealing with "reviewable projects" in the Province, which includes new transmission pipelines as defined in the *Reviewable Projects Regulation*. Such a project requires either an environmental assessment certificate or a determination of the executive director that such a certificate is not required because the project will not have significant adverse environmental, economic, social, heritage, or health effects.

Where an assessment certificate is required, the provincial Environmental Assessment Office prepares an assessment report concerning its recommendations, which are then forwarded to the Minister of the Environment and the Minister of Natural Gas Development. After they have considered the assessment report and any other matters relevant to the public interest, the ministers may issue a certificate with or without conditions, refuse to issue the certificate, or order further assessment.

The BCCA further noted that the Environment Assessment Office and the NEB entered into an “equivalency agreement” in which they agreed that any assessment by the NEB of a project would constitute an equivalent assessment under the provincial *Environmental Assessment Act*. The agreement contemplated that the governments would promote a coordinated approach to "achieve environmental assessment process efficiencies with respect to such Projects."

<u>The Trans Mountain Pipeline Expansion Project</u>

The BCCA explained that the TMX project involves 'twinning' the existing Trans Mountain Pipeline and modifying and expanding pump stations, storage tanks, and dock facilities. It will increase the capacity of the existing Pipeline, which has been in operation since 1953 and now transports about 300,000 barrels per day of mainly light and medium crude oil, and refined and semi-refined petroleum products from Sherwood Park, Alberta. After the expansion, the Pipeline will transport about 890,000 barrels of petroleum products per day, including approximately 540,000 barrels per day of heavy crude and blended bitumen.

Heavy crude and blended bitumen are not consumed in British Columbia. All volumes shipped are exported.

To support the increased capacity of the Pipeline, Trans Mountain intended to construct approximately 987 km of additional pipeline, to increase the capacity of the Burnaby tank farm by almost 300 percent, and to update and expand existing dock facilities at the Westridge Marine Terminal in Burnaby. The additional products were expected to be exported to Washington state via pipeline and other Pacific destinations such as California, Hawaii, and Asia by tanker.

The BCCA noted that the project had the potential to result in a seven-fold increase in tanker traffic off the south coast of BC.

BCCA Findings

Based on its review of the relevant authorities, the BCCA found that the first task in determining the constitutional validity of legislation was to determine its "true character" or "dominant characteristic." That determination was not to be conflated with deciding whether the law "impairs" a "vital part" of the federal jurisdiction over interprovincial undertakings. If the law relates in substance to a federal head of power, that is "the end of the matter."

The BCCA held that the proposed Part 2.1 of the *Environmental Management Act* was legislation that in pith and substance related to, and related only to, what makes the Pipeline "specifically of federal jurisdiction."

This conclusion was based on the following:

(a) by definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders;

(b) unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated;

(c) the proposed Part 2.1 crossed the line between environmental laws of general application and the regulation of federal undertakings; and

(d) even if it was not intended to 'single out' the TMX pipeline, the proposed legislation had the potential to affect (and indeed 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil.

The BCCA found that, in this case, the pith and substance of the subject legislation was the end of the matter, and it was unnecessary to continue on to paramountcy or interjurisdictional immunity.