Alberta Energy Regulator

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October 22, 2015

VIA EMAIL

To: Alexander First Nation, Pembina Pipeline Corporation, and the Minister of Justice and Solicitor General of Alberta

RE: NOTICE OF QUESTIONS OF CONSTITUTIONAL LAW
PEMBINA PIPELINE CORPORATION
APPLICATIONS NO. 1806873 ETC. (PROPOSED PROJECT)

The Alberta Energy Regulator (AER) received a Notice of Questions of Constitutional Law (NQCL) from the Alexander First Nation (Alexander) dated September 25, 2015. The panel provided the participants in this proceeding and the addressees of the NQCL with a process to provide written submissions with regard to matters that may bear on the panel's jurisdiction over or consideration of the questions presented in the NQCL. The panel also gave Alexander an opportunity to provide submissions in reply to those filed.

On October 2, 2015, the AER received a submission from the Attorney General of Canada (Canada), stating that Canada did not intend to intervene on the constitutional issues at this stage of the proceedings. Counsel for Gunn Métis Local 55 (GML), the Minister of Justice and Solicitor General of Alberta (Alberta), and Pembina Pipeline Corporation (Pembina) filed written submissions on October 9, 2015. Counsel for Driftptile First Nation (Driftpile) filed a written submission on October 13, 2015. Alexander was required to provide reply submissions on October 16, 2015. However, Alexander requested an extension of time and this was given to October 19, 2015.

Alexander's NQCL posed five detailed questions that are set out below. The relief sought by Alexander may be summarized as:

1. That a Joint Review Panel be established to coordinate the regulation of the approval process for the Proposed Project; and,
2. That the Crown be directed to engage with Alexander in good faith and in a manner consistent with the honour of the Crown to jointly and fully determine, at minimum, the

existence and scope of the duty to consult that it owes to Alexander and to report the joint findings (including consideration and analysis of several factors as described in the NQCL) to the Joint Review Panel within a reasonable time before the commencement of the hearing.

After reviewing the submissions of the parties the panel has made the following decision in relation to the NQCL filed by Alexander:

1. The specific notice requirements of the Administrative Procedures and Jurisdiction Act (APJA) have not been met in respect of any of the questions.

2. The NQCL does not provide sufficient particulars for Questions 1, 2 and 5.

3. Regardless of whether the requirements of the APJA have been met in respect of questions 3 and 4 the AER does not have the jurisdiction to consider those questions by virtue of section 21 of the *Responsible Energy Development Act* (REDA).

4. The AER does not have the jurisdiction to grant the relief sought.

As a result, the AER will not consider any of the five questions set out in Alexander's NQCL.

For the purposes of clarity and completeness, the panel notes that in its reply submissions Alexander raised a wholly new argument regarding the ordering of a stay that it could have raised in its original submissions but did not. Pembina objected to the introduction of a new issue that is not in the nature of reply and asked that the panel disregard those portions (paragraphs 72 – 91) of Alexander's reply. The panel has not had regard to those portions of Alexander's reply in arriving at its decision.

The reasons for the panel's decision are set out below.

Legal Framework

The APJA and its *Designated Constitutional Decision Maker Regulation* (DMR) govern the ability of the AER to consider questions of constitutional law. The APJA and the DMR set out two threshold tests that must be met before the AER may consider and determine a constitutional question. First, the question must come within the definition of "question of constitutional law" in subsection 10(d) of the APJA:

(d) "question of constitutional law" means

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

Second, section 12 of the APJA and Schedule 2 of the DMR require the filer of a NQCL to provide to Alberta and Canada specific information including:

- The grounds to be argued and reasonable particulars of the proposed argument, including a concise statement of the constitutional principles to be argued, references to any statutory provision or rule on which reliance will be placed and any cases or authorities to be relied upon;
- The law in question, the right or freedom alleged to be infringed or denied or the aboriginal or treaty right to be determined, as the case may be;
- The material and documents that will be filed with the decision maker; and
- A list of witnesses intended to be called to give evidence before the decision maker and the substance of their proposed testimony.

The provisions of the APJA and the DMR are mandatory. The panel has no discretion to cure defects in the NQCLs provided to Alberta, Canada or any other party entitled to the notice. The legislation is clear that a notice meeting all of the foregoing criteria must be given to the panel, Pembina, Alberta and Canada.

The notice requirements in the APJA are intended to ensure that all affected parties are able to fully consider and respond to the constitutional issues being raised. As submitted by Alberta: "The requirement of notice is to ensure that governments have a full opportunity to support the constitutional validity of their legislation, or to defend their action or inaction, and to ensure that courts have an adequate evidentiary record in constitutional cases."[1]

In the panel's view, a further purpose of the strict requirements of the APJA and DMR is to ensure that designated decision makers consider constitutional questions within a clearly defined factual matrix where the questions and the facts fall within their area of expertise and necessarily arise from matters that their enabling legislation empower and or require them to consider. Designated decision makers are not, for example, empowered to grant declarations on the basis of assumed facts for the purpose of clarifying the law on a point.

[1] *R. v. Aberdeen,* 2006 ABCA 164 at paras. 9, 11-12.

Overarching Considerations

The Driftpile and GML submissions are succinct. Both assert that the AER has the jurisdiction to consider the questions posed by Alexander. GML argues that the AER must decide the questions at the outset of the hearing. Driftpile argues that the questions ought to be referred to the court and that the hearing ought to be adjourned in the meantime.

Both Pembina and Alberta raise concerns regarding the adequacy of notice. Alberta submitted that the NQCL is inadequate to meet the mandatory requirements of the APJA and the DMR. Alberta cites an incomplete list of witnesses, a failure to indicate the substance of the proposed witness testimony as well as a failure to provide reasonable particulars of the proposed argument. Pembina echoes this argument with respect to Questions 1, 2, and 5. Pembina also submits that Questions 1 and 2 are not valid questions of constitutional law as defined in the APJA.

The NQCL lists two witnesses to be called, Collette Arcand and "Expert Witness". The expert is never identified. There is no indication of who from Alexander, if any one, will be providing oral evidence submissions in addition to Colette Arcand although there are references in the materials suggesting there may be others – e.g. "oral evidence submissions of the Alexander First Nation". Furthermore there is no summary or other description of the evidence to be provided by each witness as required.

While the filing of Collette Arcand's affidavit and the Atkins Consulting Canada Ltd. report go some way to meeting the requirement of substantial compliance that designated decision makers and courts have established, Alexander should have provided a summary of evidence or will say statements within its notice. In addition and in any event, it remains unclear, even after reviewing Alexander's reply, whether there would be witnesses in addition to Ms. Arcand and who will represent the expert (there is in fact still no notice of which individual would speak to the expert's report) and what they would be expected to say. For these reasons alone the AER may not exercise jurisdiction over the questions posed in the NQCL. However, for all of the reasons set out below the panel's decision does not rest solely on this technical point.

The Specific Questions in the Notice

Question 1

> "By reason of the doctrine of federal paramountcy and dual compliance, are elements of, *inter alia*, the *Responsible Energy Development Act*, the *Pipeline Act*, the *Water Act*, the *Public Lands Act*, and the *Environmental Protection and Enhancement Act*, along with rules, regulations and policies made under those acts, granting the AER Board (the "Board") the jurisdiction and powers to make a decision pertaining to the Proposed Project, constitutionally inoperative or irrelevant in respect of:
>
> (a) the community of Alexander;

(b) Alexander Reserve No. 134Main;
(c) Alexander Indian Reserve No. 134A;
(d) Alexander Indian Reserve No. 134B;
(e) the airspace above Alexander Indian Reserve No. 134Main;
(f) the airspace above Alexander Indian Reserve No. 134A;
(g) the implementation of the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
(h) the bed and shores of Deadman's Lake;
(i) the lands held in trust by the AFN TLE Land Corp. for the benefit of the Members of the Alexander First Nation pursuant to the terms of the Alexander First Nation Treaty Land Entitlement Settlement Agreement; and/or
(j) the Future Purchase Lands identified in the Alexander First Nation Treaty Land Entitlement Settlement Agreement;

due to the fact that the federal government has also validly exercised its legislative powers by regulating portions of the proposed project dealing with (a) – (g) above through, *inter alia*, the *CEAA, 2012* and the *NEB Act* and the *Indian Act* and associated regulations?"

This question as set out in the notice raises issues of "federal paramountcy and dual compliance". Pembina argues that Question 1 does not raise a "question of constitutional law" as defined in the APJA because there is no federal law engaged in this process and because no conflict between a particular federal enactment and a particular provincial enactment has been identified or alleged.

In the materials provided, there is no evidence to suggest that the federal government has also exercised powers or that there is a conflict. No federal authority or agency is alleged to be engaged in considering Pembina's proposed pipeline project or aspects of it. There is no factual basis to support a question of constitutional law that raises the issue of federal paramountcy and dual compliance in this case.

Reading Question 1 in the context of the remedies sought, the Arcand affidavit and Alexander's reply (except paragraphs 72 – 91), it appears that what Alexander is really seeking is an order or declaration that would cause the Canadian Environmental Assessment Agency (CEAA) to engage in this review process. The question of whether CEAA must engage or be engaged is not a "question of constitutional law".

Even if Question 1 is a "question of constitutional law", both Alberta and Pembina argue that insufficient particulars have been provided to meet the requirements of the APJA. The panel agrees.

Question 1 sets out a lengthy list of provincial and federal enactments but does not challenge the applicability of a specific provincial enactment, or of sections of a specific provincial enactment, resulting from a specifically identified conflict with provisions of a federal enactment. In Alberta

the courts require this level of specificity.[2] Pembina argues that it is not reasonable to expect the respondents to understand the more detailed questions subsumed in Question 1 without greater particularity as to how the paramountcy doctrine is engaged in this case. It is not possible to discern from Question 1, or the particulars provided, what conflict Alexander is alleging. Alberta makes this point in its submissions.

For these reasons the panel finds it does not have jurisdiction to consider Question 1.

Question 2

> "By reason of the doctrine of interjurisdictional immunity, are elements of, *inter alia*, the *Responsible Energy Development Act*, the *Pipeline Act*, the *Water Act*, the *Public Lands Act*, and the *Environmental Protection and Enhancement Act*, along with rules, regulations and policies made under those acts, granting the AER Board (the "Board") the jurisdiction and powers to make a decision pertaining to the Proposed Project, constitutionally inapplicable in respect of:
>
> (a) the community of Alexander;
> (b) Alexander Reserve No. 134Main;
> (c) Alexander Indian Reserve No. 134A;
> (d) Alexander Indian Reserve No. 134B;
> (e) the implementation of the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
> (f) the bed and shores of Deadman's Lake;
> (g) the lands held in trust by the AFN TLE Land Corp. for the benefit of the Members of the Alexander First Nation pursuant to the terms of the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
> (h) the Future Purchase Lands identified in the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
>
> due to the federal government's exclusive jurisdiction over "Indians, and Lands reserved for the Indians" pursuant to, *inter alia,* section 91(24) of the *Constitution Act, 1867,* 30 & 31 Vict., c 3?"

Question 2 as set out in the NQCL alleges that an issue of "interjurisdictional immunity" arises. As with Question 1 a list of federal and provincial legislation is given with no reference to specific provisions or a factual matrix. The particulars provided for Question 2 amount to a general statement regarding section 91(24) of the Constitution Act, 1867 and a reference to the Supreme Court of Canada's decision in *Derrickson v. Derrickson* [1986] 1 S.C.R. 285.

Pembina argues that the question stated is not a "question of constitutional law" or in the alternative that Alexander has failed to provide reasonable particulars. Alberta argues that it does not have the ability to properly respond to this question without any particulars provided to explain how the provincial laws challenged are alleged to violate the principle of interjurisdictional immunity, nor how any of the impugned provincial legislation allegedly impairs aboriginal or treaty rights.

[2] See eg. *R. v. Morrow*, 1999 ABCA 182 paragraph 12.

Pembina's argument does conflate the issues of whether Question 2 is a "question of constitutional law" and whether sufficient particulars have been provided. But because the particulars provided are insufficient in that they are both not specific enough and somewhat unclear it is not possible to understand what, specifically, is being asked. For example, as the proposed argument relies on a portion of *Derrickson* that has been superseded by the Supreme Court of Canada's decision in *Tsilhqot'in*[3], it is not possible to determine what specific question Alexander seeks to have answered in Question 2. As a result, it is not possible to find that there is a "question of constitutional law".

In addition and in any event, as submitted by Alberta, the notice provides no particulars about how any of the listed provincial statutes is alleged to impair aboriginal or treaty rights. Alberta would not be able to meaningfully respond in any detail. The notice is lacking sufficient particulars to sufficiently inform the respondents and the panel of what specific issues are at play.

For these reasons the panel finds it does not have the jurisdiction to consider Question 2.

Questions 3 and 4

#3 "Does the Alberta Aboriginal Consultation Office's failure to consider, at any point prior to the commencement of the Hearing:

(a) the community of Alexander;
(b) Alexander Reserve No. 134Main;
(c) Alexander Indian Reserve No. 134A;
(d) Alexander Indian Reserve No. 134B;
(e) the implementation of the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
(f) the bed and shores of Deadman's Lake;
(g) the lands held in trust by the AFN TLE Land Corp. for the benefit of the Members of the Alexander First Nation pursuant to the terms of the Alexander First Nation Treaty Land Entitlement Settlement Agreement;
(h) the Future Purchase Lands identified in the Alexander First Nation Treaty Land Entitlement Agreement;
(i) the traditional territory of the Alexander First Nation outside of the Green Area; and
(j) the Aboriginal and Treaty rights of the Alexander First Nation, excluding the site-specific concerns identified within the Green Area;

in its determination of: (a) the existence and/or
(b) the scope

of the duty to consult with respect to the Proposed Project, constitute a breach of Alexander's constitutional rights pursuant to section 35 of the *Constitution Act, 1982*?

#4 "Does the Crown's failure to:

(a) negotiate in good faith and/or
(b) in a manner consistent with the Honour of the Crown,

[3] *Tsilhqot'in Nations v. British Columbia* 2014 SCC 44. See especially paragraph 140

at any point prior to the commencement of the Hearing, constitute a breach of Alexander's constitutional rights pursuant to section 35 of the *Constitution Act, 1982?*

Alberta and Pembina correctly point out that Section 21 of REDA provides that the AER does not have the jurisdiction to assess the adequacy of Crown consultation associated with the rights of aboriginal peoples. Alexander acknowledges this point in reply.

Both Questions 3 and 4 in the NQCL would require the panel to assess the adequacy of Crown consultation. The questions cannot be answered otherwise. As a result, the AER cannot entertain Question 3 or 4 regardless of whether they meet the requirements of the DMR.

In its reply submissions Alexander attempts to parse adequacy of consultation and argues that the courts have established a three step process when the question of crown consultation arises. The first is the determination of whether there is an obligation to consult, second is a determination of the scope of consultation required and finally, if the question arises, whether there has been adequate consultation. Alexander then says that section 21 of REDA deals only with the third step and that the AER has the jurisdiction to determine and must determine whether there is an obligation to consult and the scope required.

The case law referred to by Alexander in support of this argument does not support the proposition that in the face of section 21 of REDA the AER may determine whether consultation should have occurred and whether it did. The cases cited by Alexander[4] dealt with the process to be followed by a crown decision maker with either the primary or delegated responsibility to ensure consultation occurs. As section 21 of REDA and Ministerial Orders 105/2014 and 53/2014[5] make clear, the AER has no such responsibility.

Further, it is the view of the panel that in light of the remedies sought by Alexander, determining whether a duty exists and whether any consultation has been carried out for the purpose of considering the remedies sought by Alexander cannot be parsed from assessing the adequacy of consultation.

In Alberta, for energy resource projects, consultation and engagement with First Nations occurs pursuant to:

- Directive 56 – where project proponents are required to engage with potentially affected parties; and
- the ACO process

[4] e.g. *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73.

[5] Energy Ministerial Order 105/2014; Environment and Sustainable Resource Development Ministerial Order 53/2014

The AER has jurisdiction over the former but not the latter. The *Den Tha'*[6] and *Standing Buffalo*[7] decisions cited by Alberta confirm this position. Section 21 of REDA gives those decisions statutory force.

In addition and in any event, in this case, the facts are that the ACO identified potential adverse impacts of the proposed project on the continued exercise of Alexander's Treaty rights and/or traditional uses[8]. The Arcand affidavit clearly reveals that there has been ongoing communication between the ACO and Alexander. Alberta's consultation process is ongoing. In correspondence dated October 16, 2015 the Aboriginal Consultation Office confirms that it will attend the relevant portions of the hearing to observe and monitor what occurs and to provide a hearing report to the AER. Even if it had jurisdiction to consider Questions 3 and 4, the panel finds that any consideration of the Crown's consultation process would be premature at this time.

Finally, Alexander also makes reference in its reply argument to "non-site specific" and "non green area" rights. It is not clear at all what is meant by those terms. In any event, regardless of what gives rise to the obligation to consult, the AER does not have the jurisdiction to assess Crown consultation.

For these reasons, the panel finds it does not have jurisdiction to consider Questions 3 and 4.

Question 5

"Would the approvals sought by the Applicants, result in a disproportionate effect on the members of the Alexander First Nation who reside on:

(a) Alexander Indian Reserve No. 134Main, or
(b) the lands held in trust by the AFN TLE Land Corp. for the benefit of the Members of the Alexander First Nation pursuant to the terms of the Alexander First Nation Treaty Land Entitlement Settlement Agreement,

based on their membership in an enumerated or analogous group under section 15 of the Canadian Charter of Rights and Freedoms?
If "yes" to the infringement question, is the infringement justified under section 1 of the Charter?"

Question 5 asks whether the approvals sought by Pembina would result in an infringement of Alexander's section 15 Charter rights. Question 5 is not a "question of constitutional law" because it does not ask for a determination of a right as required in subsection 10(d) of the *APJA*. The question proceeds from the basis of established rights.

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[6] *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, 2005 ABCA 68.
[7] *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308.
[8] ACO Report addressed to Ken S. Arcand and the AER dated March 26, 2015

Both Alberta and Pembina argue that insufficient or no particulars are provided in the NQCL to enable them to understand which part or parts of the three part section 15 test is or are offended and how they are offended.

The panel finds that the NQCL provides insufficient particulars in respect of Question 5. As with question 2, the particulars provided do not assist in identifying the specific question being asked. For example, as pointed out by Pembina, the NQCL does not elaborate on how approval of the project results in different impacts resulting from Alexander First Nation members "Aboriginality-residence". If question 5 does raise a "question of constitutional law", the Notice does not provide sufficient particulars to enable the respondent Crown to know the essential sub questions that would be raised.

In addition and in any event, if question 5 is a "question of constitutional law" and if it is sufficiently particular, it is, as argued by Pembina, premature. As noted above, designated decision makers are not meant to decide questions of constitutional law in the abstract or a factual vacuum. It would be inappropriate for the AER to speculate at this stage about what it may or may not do in respect of Pembina's application and then consider what, if any, effects there may be on Alexander's section 15 rights – assuming those rights would even be impacted.

If the ultimate decision raises concerns about potential impacts to Alexander's section 15 rights then they will have the opportunity to pursue the appropriate relief in the appropriate forum against a developed factual backdrop.

For these reasons the panel finds it does not have jurisdiction to consider Question 5.

Relief Sought

Alberta submits that the AER does not have the jurisdiction to grant the relief sought by Alexander in the NQCL, and therefore lacks jurisdiction over the NQCL entirely.

The panel agrees that in this case, the AER does not have the jurisdiction to order any of the relief sought. The AER has no authority or jurisdiction to establish or require the establishment of a Joint Review Panel. The AER does not have the jurisdiction to direct the Crown to engage with Alexander – or anyone. The AER does not have the jurisdiction or authority to provide any direction in respect of the findings of a joint review panel. The AER cannot unilaterally, as suggested by Alexander in its reply, establish a cooperative review with a federal entity. Making a declaration that the legislation it administers and implements is not applicable in respect of

some (unspecified) elements of Pembina's proposed project would not serve any purpose except to create uncertainty for all including Alexander.

Conclusion

The panel does not have jurisdiction to entertain any of the questions posed in the NQCL for the reasons given above.

The Panel

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Presiding Hearing Commissioner
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