

**Proceeding 376**

July 09, 2019

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By email only

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Meaghan Conroy

MLT Aikins LLP

**Re: Concerns Raised by Fishing Lake Métis Settlement and Buffalo Lake Métis Settlement  
Imperial Cold Lake Expansion Project – Regulatory Appeal by Elizabeth Métis Settlement**

Dear Ms. Conroy:

The panel of hearing commissioners assigned to this proceeding (the panel) has reviewed the concerns raised in your letters of May 29, 2019, and June 12, 2019, submitted on behalf of Fishing Lake Métis Settlement (Fishing Lake Métis) and Buffalo Lake Métis Settlement (Buffalo Lake Métis). Those concerns are:

1. The determination of issues for the regulatory appeal hearing;
2. The role of the AER Authorizations Group (Authorizations) in the regulatory appeal hearing; and
3. Counsel for the panel.

The panel has considered the letters mentioned above and the response submission of Imperial Oil Resources Limited (Imperial) dated June 5, 2019. The panel's responses to matters 1 and 3 are below. The role of Authorizations in the regulatory appeal hearing will be addressed at a later date.

Background

By a letter dated May 3, 2019, the panel scheduled a prehearing meeting to occur on May 24, 2019, in Edmonton, Alberta. On May 9, 2019, the panel then asked the confirmed parties<sup>1</sup>, who are Imperial, Elizabeth Métis Settlement (Elizabeth Métis) and Authorizations, and the request to participate filers, including Fishing Lake Métis and Buffalo Lake Métis, not to make arrangements at that time to travel to

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<sup>1</sup> The panel uses the term “confirmed parties” to signify those persons who satisfy the definition of “party” found in 1 (j)(ii) of the *Rules* prior to this panel determining which additional persons will be participants.

Edmonton for the prehearing meeting because the panel was considering other options. As indicated in an email sent May 16, 2019, the panel decided not to proceed with a prehearing meeting at that time.

The panel decided that to ensure fairness to the confirmed parties (Imperial, Elizabeth Métis and Authorizations) and request to participate filers it should determine the issues to be considered in this regulatory appeal proceeding pursuant to sections 39(1) of the *Responsible Energy Development Act (REDA)* and 31(2) of the *Alberta Energy Regulator Rules of Practice (Rules)* prior to considering the requests to participate. This was communicated to the confirmed parties by way of a letter dated May 10, 2019. In that correspondence, the panel proposed a series of issues to the confirmed parties and gave them the opportunity to make submissions about the issues as proposed. On May 15, 2019, the panel received submissions from Elizabeth Métis and Imperial. Based on these submissions, the panel decided that the issues for this regulatory appeal proceeding would be as follows:

1. Will the Cold Lake Expansion Project, as approved in *EPEA* Approval No. 73534-01-02 and *OSCA* Approval No. 8558MM, directly and adversely affect Elizabeth Métis members' ability to exercise their Aboriginal harvesting rights, including traditional land use activities, on the lands and waters that will be impacted by the Cold Lake Expansion Project?
2. Will the Cold Lake Expansion Project, as approved in *EPEA* Approval No. 73534-01-02 and *OSCA* Approval No. 8558MM, directly and adversely affect Elizabeth Métis members' cultural connection to the lands and waters that will be impacted by the Cold Lake Expansion Project?
3. Can adverse effects identified in the first two issues be appropriately and adequately addressed through conditions?
4. If not, would confirming the approval of the Cold Lake Expansion Project be in the public interest?

The issues were communicated to the confirmed parties and request to participate filers in a letter dated May 22, 2019. In that letter, the panel provided the request to participate filers with an opportunity to provide additional written submissions indicating how their requested participation would fit within the specific issues for the hearing as set out above. The May 22 letter also established a submission process that included the opportunity for reply by the confirmed parties.

As part of that submission process, Fishing Lake Métis and Buffalo Lake Métis filed a joint submission on May 29, 2019, that raised concerns regarding the manner in which the panel determined the issues for this regulatory appeal hearing, and asserted that this gave rise to an error of law and jurisdiction and a breach of procedural fairness. Imperial and Authorizations responded to those concerns as part of their reply submissions, both dated June 5, 2019. Elizabeth Métis also filed a reply submission on June 5, 2019, stating that "it took no position with respect to the submissions made on behalf of the proposed interveners". On June 7, 2019, the panel provided Fishing Lake Métis and Buffalo Lake Métis with an

opportunity to respond to the reply submissions. Fishing Lake Métis and Buffalo Lake Métis filed a joint response on June 12, 2019, which raised additional concerns about Authorizations' role in this regulatory appeal proceeding and about the appropriateness of AER counsel advising the panel.

### The Determination of Issues for this Regulatory Appeal Hearing

In their joint submission of May 29, 2019, Fishing Lake Métis and Buffalo Lake Métis argued that:

- The panel should have determined participation in this hearing before determining the hearing issues;
- Fishing Lake Métis and Buffalo Lake Métis are entitled to hearing participation under section 40(2) of *REDA*, and are thus entitled to have a full hearing of their concerns about the Cold Lake Expansion Project;
- The panel's scoping of the issues effectively negates Fishing Lake Métis and Buffalo Lake Métis' ability to participate in this hearing; and
- The panel breached procedural fairness by deciding the issues without the participation of the request to participate filers, including Fishing Lake Métis and Buffalo Lake Métis.

#### *Process and Timing of Determination of Hearing Issues*

Fishing Lake Métis and Buffalo Lake Métis argued that hearing participation must be decided before the panel determines the issues in this regulatory appeal, and that the hearing issues must be scoped to address "the appealable decision's direct and adverse effect on all those entitled to be heard". Imperial submitted that the panel has broad discretion under *REDA* and the *Rules* to set issues in a regulatory appeal hearing in a manner the panel considers appropriate, and that *REDA* provides that those issues should arise from the matters raised in the request for regulatory appeal.

The legal framework for regulatory appeals is set out under *REDA*, the *Rules*, and the *Responsible Energy Development Act General Regulation (General Regulation)*. Section 39(1) of *REDA* explicitly provides that a regulatory appeal must be conducted in accordance with the *Rules*. When read together, these legislative instruments clearly indicate that the regulatory appeal framework is structured around the request for a regulatory appeal, and that the request informs the scope of the regulatory appeal.

The regulatory appeal process is engaged when a person files a request for regulatory appeal under section 38 of *REDA*. Upon receiving a request, the AER then determines whether to dismiss all or part of the request.<sup>2</sup> If the AER does not dismiss all of a request for regulatory appeal, the AER can then decide to conduct the regulatory appeal with or without holding a hearing, and can determine which matters included in the request for regulatory appeal will be examined in the regulatory appeal process.<sup>3</sup> Section 4 of the *General Regulation* states that the AER must conduct a regulatory appeal with a hearing if it appears to the AER that the concerns of the eligible person requesting the regulatory appeal have not been addressed through an alternative dispute resolution process or otherwise resolved by the parties. If the AER sets a regulatory appeal down for a hearing, the AER must identify the matters or issues to be considered in the regulatory appeal.<sup>4</sup>

These legislative provisions speak to the determination of issues to be considered in a regulatory appeal. They only address timing to the following extent: issues may be determined before a regulatory appeal is conducted and they must be identified before a hearing of a regulatory appeal.

The regulatory appeal framework must be interpreted to ensure that procedural fairness results. Procedural fairness requires that the parties in a hearing must know the case to be met,<sup>5</sup> which in the context of regulatory appeal hearings, can be framed as the issues to be heard.

It does not make sense to interpret the relevant provisions of *REDA* and the *Rules* in the manner advocated by Fishing Lake Métis and Buffalo Lake Métis because section 4 of the *General Regulation* ties a regulatory appeal hearing to the requester's concerns. Moreover, section 32.4 of the *Rules* indicates that issues identified for a regulatory appeal hearing should be those arising from the request for regulatory appeal and decision appealed from. That section provides that in the event the regulatory appeal requester withdraws their request, the AER "shall discontinue" the regulatory appeal. If the legislative framework contemplated the consideration of issues raised by request to participate filers in a regulatory appeal, and the regulatory appeal requester withdrew before the conclusion of the hearing process, then in order for the request to participate filers' issues to be addressed, the hearing would have to continue. The wording of section 32.4 of the *Rules* clearly indicates that is not what the legislative drafters intended.

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<sup>2</sup> *Responsible Energy Development Act*, SA 2012, c R-17.3, s 39(4) [*REDA*].

<sup>3</sup> *REDA*, ss 39(3), 40(1).

<sup>4</sup> *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013, s 31(2) [*Rules*].

<sup>5</sup> *Schulte v Alberta (Appeals Commission)*, 2015 ABQB 17 at para 193.

Finally, under the legal framework for regulatory appeals, a hearing panel has broad discretion regarding the manner in which it determines the issues for a regulatory appeal. The panel exercised its discretion to determine the hearing issues based on the matters raised in Elizabeth Métis' request for regulatory appeal. The panel did so at a point in the regulatory appeal process that would give potential participants the opportunity to consider the issues to be heard in the hearing of the regulatory appeal and explain whether or how they might be affected by the AER's decision on the regulatory appeal or of assistance to the panel in reaching that decision.

*Are Fishing Lake Métis and Buffalo Lake Métis Entitled to Hearing Participation and Full Consideration of Their Issues Pursuant to Section 40(2) of REDA?*

Fishing Lake Métis and Buffalo Lake Métis argued that they are entitled to participate in this regulatory appeal hearing by operation of section 40(2) of *REDA*, which states: "If the Regulator conducts a hearing in respect of a regulatory appeal, any person who is an eligible person in respect of the appealable decision is entitled to be heard at the hearing." They submitted that they will be directly and adversely affected by the Cold Lake Expansion Project and thus are "eligible persons" as defined in section 36 of *REDA*.

Imperial submitted that the regulatory appeal process is tied to and structured around the request for regulatory appeal and the party or parties that filed that request. Imperial also submitted that other persons can apply to participate in a regulatory appeal hearing by demonstrating that they will be directly and adversely affected by the decision on the regulatory appeal, as opposed to the appealable decision itself. Imperial indicated that the panel has broad discretion to decide whether a person will be permitted to participate and to determine the nature and scope of such participation. Imperial further stated that per section 32.4 of the *Rules*, the AER must discontinue a regulatory appeal if the requester withdraws their request for regulatory appeal regardless of whether other parties have been granted participant status. Imperial pointed out that Elizabeth Métis was the only person to file a request for regulatory appeal in relation to the Cold Lake Expansion Project, though other request to participate filers had the opportunity to file requests for regulatory appeal.

Only those matters listed as an "appealable decision" under section 36(a) of *REDA* may be appealed through the regulatory appeal process. Only a request for a regulatory appeal made by an "eligible person" may be granted. According to section 36(b) of *REDA*, the AER must determine whether the requestor is an "eligible person" based on information provided in accordance with section 30(1)(b) of the *Rules*. Further, section 39(4) of *REDA* and section 30(7) of the *Rules* grant the AER the authority to dismiss all or part of a request for regulatory appeal in certain circumstances.

After a request for regulatory appeal has been granted, the regulatory appeal process no longer refers to “eligible persons”, but rather to “parties”. In section 1(j)(ii) of the *Rules*, a “party” in a regulatory appeal is defined to mean the requester, the approval holder, the decision maker of the decision under appeal, and a participant.<sup>6</sup> This definition does not make reference to “eligible persons”. To become a participant in a regulatory appeal hearing, a person must file a request to participate in accordance with subsections 32.1(1) and (2) of the *Rules*. The request to participate must indicate why the person filing the request may be directly and adversely affected by a decision on the regulatory appeal, or if they will not be directly and adversely affected by a decision on the regulatory appeal, the nature of their interest in the matter and how their participation will materially assist the AER in deciding the regulatory appeal.

Filing a request to participate does not automatically qualify a person as a participant in a regulatory appeal. A hearing panel has broad discretion under section 32.1(3) of the *Rules* to refuse to allow a person to participate in a hearing on a regulatory appeal, and under section 32.2 of the *Rules* is required to specify the nature and scope of each party’s participation in a regulatory appeal hearing, including specifying the issues for which a party can make submissions, representations and argument.

The panel interprets section 40(2) of *REDA* as relieving persons who have (i) requested a regulatory appeal; (ii) been found to be an “eligible person”; and (iii) had their regulatory appeal request granted of the necessity of filing a request to participate in the regulatory appeal hearing under section 32.1 of the *Rules*. To interpret section 40(2) of *REDA* as automatically granting participation in a regulatory appeal hearing to request to participate filers on the basis of a direct and adverse effect from the appealable decision would render the provisions related to both requests for regulatory appeal (section 30 of the *Rules*) and requests to participate in regulatory appeal hearings (section 32.1 of the *Rules*) meaningless. It would also be unfair to the requester and the approval holder for the panel to apply section 40(2) of *REDA* to effectively give persons who did not file a request for regulatory appeal under section 38 of *REDA* a second opportunity to appeal the AER’s decision without satisfying the requirements set out in section 30(1) of the *Rules*.

In this matter, Elizabeth Métis was the only person to file a request for regulatory appeal. Both Fishing Lake Métis and Buffalo Lake Métis had the opportunity to file requests for regulatory appeal with respect to the Cold Lake Expansion Project approvals but chose not to do so. Section 40(2) of *REDA* does not address how hearing issues are to be determined. Even if section 40(2) were to be interpreted in the manner advocated by Fishing Lake Métis and Buffalo Lake Métis, that provision does not direct that their

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<sup>6</sup> This definition is broadened in the case of regulatory appeals under the *Public Lands Act* where a person who would be entitled to participate under section 212(4) of the *Public Lands Administration Regulation* has elected to participate.

issues should be included in the issues or matters to be determined in the regulatory appeal hearing. Moreover, since legislative provisions are presumed to form a rational, harmonious framework,<sup>7</sup> such a result does not make sense in light of section 32.4 of the *Rules*, which states that the AER shall discontinue a regulatory appeal if the requester withdraws its request for regulatory appeal.

*Does the Scoping of the Hearing Issues Negate Participation in this Hearing?*

Fishing Lake Métis and Buffalo Lake Métis argued that the issues established in this proceeding have been set in a way that would only enable Elizabeth Métis and Imperial to participate. They submitted that the issues identified for this hearing would require parties to present evidence with respect to the Cold Lake Expansion Project's impacts on Elizabeth Métis, effectively barring them from the proceeding because they would duplicate Elizabeth Métis' evidence.

Fishing Lake Métis and Buffalo Lake Métis premised their argument on this point on an interpretation of section 32.1 of the *Rules* that would see a party automatically barred from participation if it were expected to duplicate or repeat evidence. Section 32.1 focuses on the link between the person requesting participation and the decision on the regulatory appeal. A hearing panel has significant discretion to address participation in a regulatory appeal hearing, which enables the panel to tailor the hearing process to fit case-specific circumstances. Section 32.1(3) sets out the circumstances when a panel may exercise its discretion to refuse to grant participation rights, including where a request to participate filer has not demonstrated that it will not repeat or duplicate other parties' evidence. Section 32.2 of the *Rules* further provides that, in granting participation, a hearing panel must specify the nature and scope of participation, including specifying the issues a participant is allowed to address through its submissions, representations and arguments.

In this regulatory appeal, a person could be granted participation on the basis of how the mitigation of potential impacts on Elizabeth Métis might directly and adversely affect that person. Kehewin First Nation's (Kehewin) additional submissions filed in response to the panel's invitation in its May 10, 2019, letter are another example: Kehewin stated that it would participate to show how terms and conditions for mitigating impacts of in situ oil sands development are ineffective when it comes to Aboriginal rights. Based on these examples and a hearing panel's discretion to tailor participation under sections 32.1 and 32.2 of the *Rules*, the panel finds that the issues established for this hearing do not preclude the potential participation of persons other than Elizabeth Métis or Imperial.

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<sup>7</sup> *R v Jarvis*, 2019 SCC 10 at para 119.

*Was it Procedurally Unfair to Set the Hearing Issues Without the Participation of Fishing Lake Métis and Buffalo Lake Métis?*

The duty of fairness is flexible and variable, and depends on the applicable legislative context and the rights affected.<sup>8</sup> Fishing Lake Métis and Buffalo Lake Métis indicated in their submissions that they expected to be able to address the question of which issues should be identified for the hearing at the prehearing meeting the panel originally scheduled then cancelled. At this time Fishing Lake Métis and Buffalo Lake Métis are request to participate filers in this proceeding. The confirmed parties and request to participate filers were given the same notice of the panel's decision not to proceed with the prehearing meeting. To the extent Fishing Lake Métis and Buffalo Lake Métis anticipated that they would have a say in the issues for the hearing, there can be no expectation of something not supported by the relevant statutory framework.

In order to identify the issues for this regulatory appeal hearing, the panel applied the relevant provisions of *REDA*, the *Rules* and the *General Regulation* as described above and relied on submissions from confirmed participants. The panel did this to ensure fairness to confirmed participants and clearly establish the scope of this proceeding before deciding whether to grant participation to the request to participate filers.

Fishing Lake Métis and Buffalo Lake Métis were provided with two opportunities to make submissions to the panel about the basis on which they should be permitted to participate in the hearing of Elizabeth Métis' regulatory appeal. The first opportunity was before the panel had identified the issues for hearing and the second opportunity was after the panel had identified the issues and had communicated those issues to the request to participate filers. Any procedural unfairness created by the identification of the issues after the first opportunity to file requests to participate was addressed by giving the request to participate filers the second opportunity to respond with full knowledge of the issues to be heard.

The Role of Authorizations in this Regulatory Appeal Proceeding

Authorizations, as the decision maker in respect of the amendment applications authorizing the Cold Lake Expansion Project, is a participant in this regulatory appeal pursuant to section 1(j)(ii) of the *Rules*. Fishing Lake Métis and Buffalo Lake Métis raised concerns about the scope of Authorizations' participation in their June 12, 2019, joint submission and asked the panel to limit Authorizations' submissions to areas where Authorizations has special knowledge or expertise not held by the other participants and that knowledge or expertise is necessary to the panel's decision.

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<sup>8</sup> *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 22.



The panel will establish a process to receive and consider submissions from hearing participants on the scope of Authorizations' participation before making a decision on this request. The panel has not considered Authorizations' June 5, 2019, letter in dealing with any of the concerns addressed in this letter.

### Counsel for the Panel

In their June 12, 2019, joint submission, Fishing Lake Métis and Buffalo Lake Métis raised concerns related to the fact that AER Law Branch is providing separate counsel for both Authorizations and the panel. Fishing Lake Métis and Buffalo Lake Métis submitted that the panel should retain external legal counsel for this regulatory appeal.

Boards, agencies and tribunals are established with different structures. Under *REDA*, AER hearing commissioners conduct both application and regulatory appeal hearings on behalf of and in the name of the AER. *REDA* does not provide for the separation of the regulatory appeal process in the same way that, for example, the independent and separate Appeals Commission for Workers' Compensation hears appeals from the Workers' Compensation Board. Accordingly, the structure of the AER and the wording of *REDA* as it relates to the regulatory appeal process have historically required AER Law Branch to provide separate counsel for the decision maker and for the panel tasked with rendering a decision on a regulatory appeal.

AER lawyers are under the same ethical obligations regarding confidentiality and impartiality as all other members of the Alberta bar. Further, Fishing Lake Métis and Buffalo Lake Métis have not provided any evidence suggesting that counsel for Authorizations and counsel for the panel are unable to discharge these obligations in a manner that ensures the neutrality and fairness of this regulatory appeal proceeding. Accordingly, the panel does not believe that it requires external counsel at this time.

### Conclusion

As indicated above, the panel will establish a process to receive and consider submissions from hearing participants on the scope of Authorizations' participation in this regulatory appeal, and will advise participants of that process by separate correspondence.

The panel's full decisions on hearing participation will be communicated to Fishing Lake Métis and Buffalo Lake Métis, other request to participate filers and confirmed parties in separate correspondence.

C. Chiasson  
Presiding Hearing Commissioner

C. Low  
Hearing Commissioner

J. Daniels  
Hearing Commissioner

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