

Via Email

November 3, 2021

Calgary Head Office
Suite 1000, 250 – 5 Street SW
Calgary, Alberta T2P 0R4
Canada

Deborah P. Bishop Professional Corporation

Lawson Lundell LLP

www.aer.ca**Attention: Debbie Bishop, Counsel****Attention: Shailaz Dhalla, Counsel**

Dear Mesdames:

**RE: Request for Regulatory Appeal by Fort McMurray Métis Local Council 1935
Canadian Natural Resources Limited**
Application Nos.: 1925574 Oil Sands Conservation Act (OSCA); 016-001-49968 and 004-0028044 Environmental Protection and Enhancement Act (EPEA); 005-00228047, 001-00457221, and 001-00457222 Water Act (WA)
Approval Nos.: 9725I OSCA; 00149968-01-05 EPEA; 00457221-00-00, 00457222-00-00 & 00228047-00-03 WA
Location: CNRL Lease 24 Integration Project
Request for Regulatory Appeal No.: 1932350

The Alberta Energy Regulator (AER) has considered Fort McMurray Métis Local Council 1935's (McMurray Métis) request under section 38 of the *Responsible Energy Development Act* (REDA) for a regulatory appeal of the AER's, January 18, 2021, decision to issue the Horizon South Lease 24 (Horizon South) Approval Nos. 9725I OSCA; 00149968-01-05 EPEA; 00457221-00-00, 00457222-00-00 & 00228047-00-03 WA (collectively, Approvals). The AER has reviewed McMurray Métis' submissions and the submissions made by Canadian Natural Resources Limited (CNRL).

For the reasons that follow, the AER has decided that McMurray Métis is not directly and adversely affected and, consequently, not eligible to request a regulatory appeal in this matter. Therefore, the request for a Regulatory Appeal is dismissed.

The applicable provision of REDA in regard to regulatory appeals, section 38, states:

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]

An appealable decision means, *inter alia*, a decision of the AER in respect of which a person would otherwise be entitled to submit a notice of appeal under section 91(1) of EPEA, section 115 of the *Water Act* or a decision of the AER that was made under an energy resource enactment, if that decision was made without a hearing (section 36(a) of REDA).

The term “eligible person” is defined in section 36(b) of REDA to include a person entitled to submit a notice of appeal under section 91(1) of EPEA or section 115 of the *Water Act* or a person who is directly and adversely affected by a decision made under an energy resource enactment.

McMurray Métis’ Request for Regulatory Appeal

McMurray Métis’ grounds for regulatory appeal are the following:

1. The AER misapprehended the information provided by McMurray Métis and as result made conclusions that were not supported by the facts.
2. The AER misapplied the test established by the Court of Appeal in *Dene Tha’* by finding that more evidence was required for the AER to find that the McMurray Métis were directly and adversely affected.
3. The AER did not fulfill its public interest mandate by discarding the clear issue that McMurray Métis have aboriginal rights that may be impacted and have not been considered in the approval process.

First Ground

McMurray Métis disagreed with the finding made in the AER’s letter not to hold a hearing that they are not directly and adversely affected by the application solely based on the fact that the applications relate to lands that are within Métis’ harvesting area without providing further factual connection evidence. In addition to the harvesting policy, submitted with their statement of concern (SOC), McMurray Métis have also provided a map that shows the areas they use for hunting and fishing, which areas were superimposed on the project site and the project site buffer area.

McMurray Métis stated that their SOC provided additional factual information, such as 94 Indigenous Knowledge and Use (IKU) intersections, including the categories of hunting, fishing, transportation, Indigenous knowledge and access. McMurray Métis harvesters identified key moose hunting sites around the Ells River upstream from the mouth of Athabasca River, as well as moose and bird hunting on the western banks of Athabasca River located between the river and the Horizon and Horizon South projects. Moose hunting has also been reported in the northwestern part of the project area, where trappers hunt on their way to the traplines in the north and northwest. McMurray Métis have also recorded fishing at the mouth of the Ells and Tar rivers, as well as fishing upstream on the Ells River on both sides of the bridge and at the mouth of Joslyn Creek.

Their SOC also stated that the McMurray Métis harvesters and trappers use the project area for transportation, including for passage through the center of the Horizon South project, and for travelling through the northern and eastern portions of the project to access harvesting areas and traplines. McMurray Métis trappers use the northern portion of the Horizon South area as staging area to access traplines to the northwest by using vehicles or snowmobiles, depending on the weather conditions.

In finding that the McMurray Métis are not directly and adversely affected, the AER used the two-stage test set out in *Dene Tha' First Nation vs. Alberta (Energy and Utilities Board)*, 2005 ABCA 68 (*Dene Tha'*). The *Dene Tha'* case establishes that an intervener must show a legal right to use the area that a project could impact and that there is a potential for that legal right to be impacted by the project.

The AER accepts that the McMurray Métis harvesting policy establishes a legal right that may be impacted by the project but suggests that the evidence provided in the SOC was insufficient to meet the second stage of the *Dene Tha'* test, stating that evidence for a further factual connection is required.

McMurray Métis are of the view that the AER misinterpreted the law in this regard. The provided map of traditional use and the detailed description of McMurray Métis members' cultural connection to the project area is sufficient to meet the *Dene Tha'* test.

Furthermore, the Court of Appeal, in *Kelly vs. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 349 (Kelly No. 1), held that the second arm of the *Dene Tha'* test should not be too onerous and that there is no requirement for them to establish a different or of a greater degree impact, compared to the general public.

In *Kelly vs. Alberta (Energy Resources Conservation Board)*, 2011 ABCA 325 (Kelly No. 2), the court dealt again with the second stage of the *Dene Tha'* test. The court found that the right to intervene under the act is designed to allow those with legitimate concerns to have input into the licensing of oil and gas wells that will have recognizable impacts on their rights, while screening out those who have only generic interest in resource development.

In *Kelly vs. Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19 (Kelly No. 3), the court overturned the strict evidentiary requirement introduced by the Energy Resource Conservation Board that hearing participants must show that the lands in which they had a legal interest would be affected in order to meet the directed and adversely affected test.

Based on the above, McMurray Métis submitted that their SOC includes the required factual connection in accordance with the applicable law discussed above. In support of their regulatory appeal request, McMurray Métis provided additional sworn statements from two of its members that explain the specific use of the project area.

Second Ground

The decision to dismiss the SOC was based on the AER's understanding that the impacts of the Horizon Oil Sands Mine and Processing Plant (Horizon) and Joslyn North Mine Oil Sands Project (JNM) projects on the McMurray Métis have been assessed through previous project approvals and that, because the Horizon South integration project will have smaller footprint, impacts will be minimized. These findings overlook the fact that McMurray Métis' concerns have never been before any decision maker since McMurray Métis have never been engaged by CNRL or Total E&P Canada Limited (Total). As a result, no traditional land use information was gathered in respect to the project areas for both, the Horizon and

JNM projects, and no Indigenous knowledge information was included in any of the applications, which in turn means that none of the McMurray Métis concerns in the SOC have been addressed.

The McMurray Métis' SOC raised the concern that CNRL did not work with them to do a traditional land use study that would inform the AER's decision making of the impacts on McMurray Métis. Consequently, the AER's finding that the project approval would mitigate the site-specific effect of cultural significance to McMurray Métis is not possible as the information was never gathered, let alone considered. There is simply no factual basis upon which this conclusion can be drawn.

Third Ground

In its letter, the AER found that it does not have jurisdiction to assess Crown consultation and that the Aboriginal Consultation Office (ACO) determined that no consultation was required on October 30, 2020. McMurray Métis are of the view that the AER has a public interest mandate and that *Directive 056: Energy Development Applications and Schedules* requires the proponent to engage with affected parties.

McMurray Métis advised the AER that consultation had not taken place and the AER interpreted this concern as a request for compensation. This was not a request for compensation and, in McMurray Métis view, it is clearly within the AER jurisdiction to ensure that the proponent has assessed the impact to Indigenous people who have rights to harvest in the project area when making a decision in the public interest.

The Alberta Court of Appeal, in *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 (*Prosper*), has also held that the AER should not limit its jurisdiction in relation to consultation matters and that section 21 of REDA does not remove the constitutional mandate of the AER to consider impacts to the right of Aboriginal people.

McMurray Métis requested the regulatory appeal be granted and the matter be set down for a hearing.

CNRL Regulatory Appeal Request Response Submission

Before responding to the request, CNRL provided some background in relation to both projects. The Horizon project was approved in January 2004 following a joint review panel hearing that included an environmental impact assessment (EIA) process, which found Horizon to be in the public interest.

The JNM project was initially approved in 2011 also by a joint review panel. That public hearing process involved a rigorous EIA, an extensive consultation and engagement process with Indigenous communities and interested parties. The joint review panel determined that JNM was in the public interest and that it was unlikely to result in significant adverse environmental effects, provided that the imposed mitigation measures were implemented.

In 2019, CNRL filed the Horizon South application after the 2018 acquisition of JNM. The application was approved in January 2021. The approval decision is unique because it approves the integration of two separately approved oil sands mines. It approves the integration of Horizon South into CNRL's existing

and approved operations at Horizon, considerably reducing the scope of activities on Horizon South that were already approved for JNM.

The Horizon South application does not propose a new project, any new activities or disturbance of any additional lands. Instead, it proposes an integration that will introduce significant environmental benefits compared to the environmental footprint of JNM, while simultaneously enhancing the sustainability and economic viability of the current operations at Horizon. Key benefits and advantages of the integration include:

- The processing of all ore with no ore sterilization occurring at the boundary of Lease 18 and L24;
- A reduction in disturbance area of approximately 25%, resulting in a reduction in impact on terrestrial and aquatic resources;
- Use of the existing central processing facility ("CPF") at Horizon avoiding the need for a new CPF on Horizon South L24 and resulting in no additional emissions from stationary combustion sources on Horizon South L24;
- No requirement to install and operate additional cogeneration units on Horizon South L24 resulting in the reduction of oxides of nitrogen emissions and the reduction in noise emitting equipment;
- No requirement for a separate external tailings facility ("ETF") on Horizon South L24 resulting in the reduction of risk for potential wildlife interaction, and fugitive emissions or odours;
- No requirement for a separate End Pit Lake ("EPL") thereby eliminating the EPL from the closure landscape for Horizon South L24;
- No need for camp facilities on Horizon South L24, which will be provided by existing Horizon operations;
- No additional demand on local and regional services or infrastructure as the Horizon workforce will remain at current levels; and
- Use of an existing landfill at Horizon resulting in no additional disturbance associated with construction of a new waste disposal facility on Horizon South L24.

According to CNRL, these benefits were conveyed to McMurray Métis by the AER in its letter dated January 18, 2021. The benefits associated with the integration and the reduced environmental footprint are further demonstrated by the natural regrowth that has been established on portions of Horizon South that will not be developed, which involves approximately 1800 hectares. This provides additional area for the exercise of traditional land uses what would have not been available if JNM had gone ahead, as approved.

The AER's approval of the integrated applications followed an extensive regulatory approval process that included engagement with McMurray Métis during which CNRL was willing to discuss the nature and scope of the application and the benefits associated with the proposed integration.

CNRL agrees that the decision is an “appealable decision” in accordance with section 36 of REDA since issued without a hearing pursuant to OSCA, EPEA, and the *Water Act*. However, section 36 of REDA also requires a demonstration of a direct and adverse effect from an appealable decision for a regulatory appeal to be granted, which has been confirmed by the Alberta Court of Appeal in *O’Chiese First Nation v Alberta Energy Regulator*, 2015 ABCA. The Kelly No. 2 decision held that the purpose of the “direct and adverse effect” threshold is to screen out interventions in the regulatory process whose rights are not materially affected by the appealable decision.

In order to meet this test, McMurray Métis must demonstrate “a degree of location or connection” between the approval of the application and its asserted rights that it alleges may be affected, as required by the *Dene Tha’* decision. To do so it must adduce detailed and specific evidence demonstrating how its rights may be directly and adversely affected as required by a previous AER’s letter decision to McMurray Métis dated December 4, 2017.

In this case, McMurray Métis must demonstrate a reasonable possibility that the integration of JNM into Horizon will cause harm to its particular rights or interests by the approval challenged on appeal. McMurray Métis must show that the magnitude of risk posed by Horizon South to its rights or the harm that it may suffer has a sufficient degree of materiality, as required by the Kelly No. 2 decision.

CNRL notes that, the AER has previously held that, if the activity in question involves the integration of two previously approved projects, the assessment of direct and adverse effect focuses only on the additional risk or harm, if any, posed by the integration.¹ Any effects attributable to previously assessed and approved projects should not be taken into consideration as those effects are approved to proceed. The asserted impacts must arise as a direct result of the current decision because to allow a regulatory appeal now would amount to a collateral re-examination of the initial approvals.²

With regard to the renewal of the EPEA and *Water Act* approvals and licenses for Horizon, the concerns or potential effects that are relevant to these approvals are those that arise from a change in the activities and facilities that were originally considered and approved, which concerns should be governed by the authorizations that are sought in the present applications. This approach, however, does not invite a full review of the projects’ potential effects. That kind of review is beyond the scope of the applications in accordance with section 6.2(2)(b) of the *Alberta Energy Regulatory Rules of Practice* (Rules).³

This is consistent with Supreme Court of Canada (SCC) decisions on the duty to consult. The SCC was clear that the adverse effect must be assessed by examining the current government conduct or decision in question and that past wrongs, speculative impacts and adverse effects on a First Nation's or Métis' future

¹ Letter Decision from the *AER to Shell Canada Corporation and Michael Judd* Re: Request for Regulatory Appeal No.: 1916724, at p. 5.

² Letter Decision from *AER to Canadian Natural Resources Limited and ISH Energy Ltd.* Re: Request for Regulatory Appeal No.: 1910998, dated July 31, 2019 at p. 2, para. 3 (*ISH Energy* decision)

³ Letter Decision from the *AER to Athabasca Chipewyan First Nation Industrial Relations Corporation* Re: Statement of Concern No. 29070, at p. 2-3.

negotiating position will not suffice. The adverse impact to be considered is confined to adverse impacts flowing from the specific proposal at issue and not from larger adverse impacts of the project.⁴

Given the above, McMurray Métis must demonstrate that they are directly and adversely affected by the decision to approve the integrated development of the bitumen resource on Horizon South relative to the JNM Project being developed on a stand-alone basis.

According to CNRL, the three grounds identified by McMurray Métis fail to address the AER's test for eligibility and do not demonstrate that McMurray Métis is directly and adversely affected by the decision. Eligibility to request a regulatory appeal requires the requester to demonstrate that it is "directly affected" under EPEA and the *Water Act* or "directly and adversely" affected under REDA.

With regard to the first ground, CNRL submitted that, while McMurray Métis members may be engaged in traditional use activities in the area, the assertions of use in the SOC and the request are non-specific and general in nature and do not establish the requisite degree of "location or connection" that is required to demonstrate that McMurray Métis is directly and adversely affected. The submissions made in the SOC and the request do not explain why the integration of the two projects will cause harm and do not show new impacts to McMurray Métis' rights, interests or use of the area that were not assessed in the previous approvals.

Horizon South proposes a reduction in approved activities, which means a reduction in surface disturbance, in environmental footprint and in potential impacts to McMurray Métis' traditional uses when compared to the currently approved JNM. The application for project integration is not for a greenfield development and it does not propose a new project or activity that was not previously assessed or approved. McMurray Métis failed to establish a factual connection between the traditional land use activities and the integration of JNM into existing operations at Horizon. The request also fails to identify any novel impacts from the decision that were not already previously assessed for JNM. The decision will only produce a net positive effect when compared to the approved JNM, given the reduction in approved activities and associated reduction in environmental footprint.

With regard to the second ground, CNRL stated that McMurray Métis' objections about a lack of engagement or involvement in the original regulatory approval processes for Horizon or JNM in 2004 and 2011, respectively, are outside the scope of the current applications. Granting the request based on objections with previous decision-making processes amounts to a collateral re-examination of the initial approval, a matter that the AER has equivocally denied as a sufficient basis for regulatory appeal requests in its ISH Energy decision.⁵

In response to the third ground, CNRL submitted that its decision to decline funding for a TLU study was reasonable given the nature and scope of the application and the fact that integration of the two projects will only lessen any potential impacts on McMurray Métis' traditional land uses.

⁴ *Rio Tinto Alcan Inc. vs. Carrier Sekani Tribal Council*, 2010 SCC 43.

⁵ *ISH Energy* decision, p. 2, para. 3

The AER did not fail its public interest mandate by advising McMurray Métis that it does not have the jurisdiction to assess the adequacy of Crown consultation since it is the ACO that determines if consultation is required and adequate. In *Prosper*, the court was focused on the AER's public interest mandate as it related to various constitutional matters beyond the duty to consult. The court specifically noted that the AER's jurisdiction to consider issues of constitutional law was explicitly removed by virtue of section 21 of REDA where the adequacy of Crown consultation was concerned. The ACO determined that consultation was not required with any Indigenous groups in relation to the application. McMurray Métis' dissatisfaction with the ACO's decision does not establish that they are directly and adversely affected by the decision and, consequently, does not establish eligibility to request a regulatory appeal.

CNRL is of the view that the request should be dismissed because McMurray Métis are not directly and adversely affected by the decision and therefore ineligible to request a regulatory appeal. Alternatively, the grounds in the request are without merit, and should be dismissed pursuant to section 39 of REDA and section 31 of the Rules.

McMurray Métis' Reply to CNRL Submission

According to the requesters, CNRL has a history of not engaging McMurray Métis and its submission in this regulatory process proves that CNRL does not intend to engage with McMurray Métis, making a hearing the only way for engagement to occur.

The requesters assert that CNRL's position that McMurray Métis' objections about a lack of engagement or involvement in the original regulatory approval processes for Horizon or JNM are outside of the scope of the approval process demonstrate that CNRL does not understand the purpose or the importance of engagement with Aboriginal groups regarding potential impacts to Aboriginal rights in the regulatory scheme. The impacts to rights cannot be defined or explained by the Aboriginal group in a vacuum and the Aboriginal group cannot be expected to detail the impacts without engagement and some capacity to understand the project. It is not reasonable to expect specific evidence relating to an impact from a project that they have no information about.

It is the job of Alberta, the AER, CNRL and McMurray Métis to ensure that the impacts to McMurray Métis' aboriginal rights are mitigated. McMurray Métis can be expected to participate in the process and provide a report of their land use and special sites if they are provided with resources to catalogue use in the project area. However, the analysis of how the project will impact these rights and the development of mitigation measures must be a joint endeavor.

CNRL relies on an approval issued a decade ago while at the same time neglecting to mention that it does not intend to follow the commitments and conditions that Total made to the regulator and the intervenors when the project was first approved.

In the current application, CNRL requested an extension to the end of life of JNM mine without including any environmental assessment of the change in the temporal boundaries of the project. Both, CNRL and the AER, incorrectly assume the only impacts are resulting from land disturbance and not the duration of

the land disturbance. The end-of-life proposed in the application is extended by 29 years, which nearly doubles the mine life approved for JNM. The approved mine operating life with JNM was 26 years and CNRL requested to change this timeline to a 46-year operating life. There is no consideration in the project application of the change in timeline and associated impacts of the mine activities continuing for 29 years more than what was approved.

With regard to CNRL's claim that additional area of approximately 1800 hectares will be available for the exercise of traditional uses, it is not clear how CNRL is interpreting that the vegetation cover and structural stages shown in the map as "additional area for the exercise of traditional uses." No information is provided regarding the species composition, access or safety of this 1800-hectare area that would support opportunities for McMurray Métis members to exercise constitutionally protected rights to hunt, trap or fish.

Many of the mitigation measures Total committed to and were issued as conditions to the approval in 2011, CNRL requested to be removed from the JNM original approval, which was granted by the AER's decision.

Furthermore, McMurray Métis have become aware that the AER met with CNRL repeatedly and listened to presentations from CNRL on the environmental benefits from the project. These meetings were held without notice or invitation for McMurray Métis or any other interested party to participate. McMurray Métis could not have known what CNRL was saying to the AER in secret and could not have known what case they had to meet.

The AER, as a quasi-judicial decision maker, must balance the rights of all parties. The process conducted by the AER violates the rules of procedural fairness. There must be a regulatory appeal hearing to allow McMurray Métis to have an opportunity to test the evidence CNRL has already provided to the AER.

A written SOC process without the benefit of *Directive 31: REDA Energy Cost Claims* costs or any engagement with McMurray Métis is procedurally unfair and creates insufficient record for a fair decision making. The AER needs to ensure that, before CNRL can move forward with the project approval, the AER has the information it needs for mitigation of McMurray Métis' concerns. This is a requirement of the AER's public interest mandate.

McMurray Métis members have rights that will be impacted by the project, which rights existed in 2004 even though Alberta did not recognize its duty to consult at that time. There is no limitation date on the honor of the Crown.⁶ The AER has not met its public interest mandate as the public interest test includes the constitutional imperative and a project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest.⁷ In *Prosper*, the court recognized that the AER has a duty in accordance with the constitution to address impacts to Aboriginal rights and cannot simply hide behind section 21 of REDA.

⁶ *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14 (CanLII).

⁷ *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069.

Most of the correspondence itemized in Schedule B to CNRL's response submission is actually correspondence between CNRL and McMurray Métis debating whether CNRL is required to consult with McMurray Métis. Letters to McMurray Métis refusing to engage with them provided in an engagement record is not proof of meaningful engagement.

McMurray Métis does not consider the Tailings Forum as meaningful engagement as their participation has been through a technical representative. There was no funding provided for community input or a technical expert to report back to the community.

CNRL did provide some funding, \$5000.00, for McMurray Métis and Fort McMurray First Nation to attend an information session on CNRL's 2019 Life of Mine Closure Plan. The representative who was hired on behalf of the Aboriginal participants advised CNRL the following:

“The budget offered did not provide sufficient funds to conduct a detailed review of the LMCP (155 pages) with community members, to support technical review of the subject matter in Addendum A (101 pages) and subsequent workshop discussion, or to complete a validation session of the memorandum to be submitted to CNRL with workshop participants as per the CEMA's Traditional Knowledge Research Guidelines – Revised Edition 2012 recommended methodologies of conducting community engagement.”

McMurray Métis are of the view that the submissions in this process raise sufficient doubt that the AER ought to rely exclusively on the information provided by CNRL to decide that AER has met their constitutional duty to McMurray Métis. As a result, The AER should hold a hearing to assess the project, the engagement to date and allow McMurray Métis an opportunity to present their concerns to the AER before the project is approved.

Reasons for Decision

1. The approval is an appealable decision

CNRL concedes that the decision is an appealable decision and the AER agrees that the approval is an appealable decision under section 36(a) of REDA, since it was approved pursuant to the OSCA, EPEA and the *Water Act* without a hearing.

2. McMurray Métis is not an eligible person

For McMurray Métis to be eligible for a regulatory appeal, they must demonstrate that they are directly and adversely affected by the AER's decision to issue the approvals. The AER has determined that McMurray Métis have not done that for the reasons that follow.

McMurray Métis are basing their concerns with the decision on two broad grounds. The first ground is a direct and adverse effect on its traditional rights by the decision under appeal and the second ground is the failure to be consulted in relation to the Horizon and JNM projects, including their integration, at the time they were approved to date. This ground involves prior breaches.

The Project

The AER notes that the decision approves the integration of two separately approved oil sands mines. Horizon was approved in January 2004 following a joint review panel hearing that included an EIA process. JNM was approved in 2011, also by a joint review panel, after a public hearing process that involved an EIA, an extensive consultation and engagement process with Indigenous communities and interested parties.

Horizon South does not involve a new project, any new activities or disturbance of any additional lands. Instead, it proposes an integration that would introduce significant environmental benefits compared to the environmental footprint of JNM, while simultaneously enhancing the sustainability and economic viability of the current operations at Horizon.

The decision subject matter of this regulatory appeal approves the incorporation of Horizon South into CNRL's existing and approved operations at Horizon. The integration is intended to considerably reduce the scope of activities on Horizon South, which were already approved for JNM.

The approval for the integrated project was granted following a comprehensive review of the information provided. The disposition included updating the conditions for construction, operations, and mine closure that CNRL is required to follow.

The Law

As the Alberta Court of Appeal has held, mere assertion of an Indigenous or treaty right is not sufficient and some degree of location or connection between the proposed project and the right asserted is reasonable, which degree is a question of fact for the AER to determine.⁸ According to the *Kelly No. 2* decision, the AER must consider the specific facts of the case and decide whether the magnitude of risk is such that the person in question has become directly and adversely affected.

In relation to prior consultation, the Supreme Court of Canada has held that the claimant must show a causal relationship between the decision in question and a potential adverse impact on the Aboriginal rights and that past wrongs, including previous breaches of the duty to consult, do not suffice.⁹ Furthermore, the direct and adverse effect must be as a result of the decision in question and, prior and continuing breaches (including prior failure to consult) will only trigger a duty to consult if the decision under consideration has the potential of causing a novel impact on an existing right.¹⁰

⁸ *Dene Tha' First Nation v. Alberta (Energy and Utilities Board)*, (2005) ABCA 68, at para. 14.

⁹ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 (*Rio Tinto*), at para. 45.

¹⁰ *Rio Tinto*, at para. 49.

To assess those impacts in this process would amount to a collateral re-examination of the initial approvals¹¹ since the previous potential effects from Horizon and JNM were considered at the time those projects were approved in 2004 and 2011, respectively.

Application of the Law

As a result, the scope of this regulatory appeal is limited to assessing the direct and adverse effects on McMurray Métis that are the result of the approvals under appeal. In other words, the main question is what direct and adverse effects this integration will have on McMurray Métis and whether there is sufficient evidence provided on the record to establish a degree of connection between the proposed project and the right asserted.

The AER finds that McMurray Métis have not provided sufficient evidence on the record in this process to establish the required degree of location or connection between the proposed project and the impacts on their rights in the vicinity of the project. This is mainly because the integration project does not involve a new project, new activities, or disturbance of any additional lands. In other words, the integration approved by the decision does not create additional magnitude of risk to make McMurray Métis directly and adversely affected by the decision. Assessing any potential prior breaches would amount to a collateral re-examination of the initial approvals of the Horizon and JNM projects, which is outside of the scope of this regulatory appeal.

Finally, in reaching its decision on this regulatory appeal, the AER has taken into account the fact that the ACO has determined that that consultation was not required with any Indigenous groups in relation to the application. CNRL does not dispute the fact that the areas, as described by the requesters, are used by McMurray Métis to exercise their traditional rights. The question for this regulatory appeal is whether the approved project created additional impacts on those rights.

Given the above, the AER finds that McMurray Métis are not directly and adversely affected by the decision. Consequently, the request for regulatory appeal is dismissed pursuant to section 39(4)(c) of REDA as not properly before the AER.

Sincerely,

<Original signed by>

Paul Ferenowicz
Principal Regulatory Advisor

¹¹ *ISH Energy* decision, p. 2, para. 3

<Original signed by>

Gary Neilson
Senior Advisor, Crown Liaison

<Original signed by>

Michael Bevan
Senior Advisor, Water

cc: Jody Butt, Aboriginal Consultation Office
Anita Sartori, CNRL
Michelle MacDonald, CNRL