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May 31, 2024

Alberta Energy Regulator
Suite 1000, 250 – 5th Street
Calgary, AB T2P 0R4

Attention: Hearing Services

RE: Regulatory Appeal of Application No. 31097955 and Pipeline Licence No. 62559
Regulatory Appeal 1935549
AER Proceeding 417

AMENDED Motion pursuant to section 44 of *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013

TAKE NOTICE THAT an application in writing is hereby made on behalf of Michael Judd (the Applicant) before the Alberta Energy Regulator (**AER**), for an Order granting the Applicant disclosure and access to information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management*, in relation to a holistic licensee assessment of Pieridae Alberta Production Ltd. and its associated companies (**Pieridae**), which is relevant and material to the issues set for determination in Regulatory Appeal 1935549;

AND FURTHER TAKE NOTICE THAT in support of this application the Applicant has filed an Affidavit of Michael Judd dated October 11, 2022;

AND FURTHER TAKE NOTICE THAT the Applicant relies on the following:

(a) *Responsible Energy Development Act*, SA 2012, c R-17;
(b) *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013;
(c) *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013;

(d) *Pipeline Act*, RSA 2000 c P-15;

(e) *Pipeline Rules*, Alta Reg 125/2023;

(f) AER Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals*;

(g) AER Directive 088 - *Licensee Life-Cycle Management;*

together with such further and other material as counsel may advise or the AER may require.

AND FURTHER TAKE NOTICE THAT the grounds upon which the Applicant makes this Motion are the following:

(a) The Applicant is directly and adversely affected by Application No. 31097955 and Pipeline Licence No. 62559, pursuant to the *Responsible Energy Development Act*, SA 2012, c R-17.3 and AER letter decision dated January 19, 2022;[1]

(b) Alberta courts have interpreted Alberta legislation to clearly establish that a person who is directly affected by a resource development decision is provided with an enhanced suite of procedural rights to facilitate natural justice and procedural fairness in the context of a regulatory hearing;[2]

(c) The common law imposes a duty of procedural fairness on the AER when making a decision which affects the rights, privileges or interests of an individual;[3]

(d) The duty of procedural fairness requires the AER to implement a fair, open, and transparent process which provides a directly affected person with a full and complete opportunity to know and meet the case against them, with disclosure that enables a

[1] AER letter decision dated January 19, 2022 is attached as Exhibit A to the Affidavit of Michael Judd dated October 11, 2022 previously filed in support of this Amended Motion.

[2] *Kelly v Alberta (Energy Resources Conservation Board)*, 2012 ABCA 19, at paras 33 - 34, attached as Exhibit 1 to this Amended Motion.

[3] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 20, attached as Exhibit 2 to this Amended Motion.

directly affected person to review and consider the relevant facts, and prepare to challenge those facts with evidence, questioning or otherwise;

(e) The duty of procedural fairness is heightened in cases where the decision-making process resembles an adversarial, trial-like process, is determinative such that further requests for review cannot be submitted, and has a significant and adverse impact on a directly affected person;[4]

(f) The legal obligation of the AER to ensure that its decisions are reasonable and justifiable within a given legal and factual context requires the AER to assess and evaluate all evidence relevant to the matter before it in an open and transparent manner, and this obligation is heightened in cases where the decision has a significant and adverse impact on a directly affected person;[5]

(g) The Applicant does not have access to information that is essential to fully evaluate the extent of the direct and adverse impact of Application No. 31097955 and Pipeline Licence No. 62559 on him, and therefore the Applicant cannot fully exercise his procedural rights in this hearing without disclosure of information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management* in relation to a holistic licensee assessment of Pieridae which is relevant and material to the issues set for determination in Regulatory Appeal 1935549;

(h) Information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management*, which is relevant

[4] *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 - 25, attached as Exhibit 2 to this Amended Motion.
[5] *Normtek Radiation Services Ltd v Alberta Environmental Appeal Board*, 2020 ABCA 456 at paras 129 - 137, attached as Exhibit 3 to this Amended Motion.

and material to the issues set for determination in Regulatory Appeal 1935549, must be disclosed to the Applicant;[6]

(i) The Notice of Hearing for this Regulatory Appeal 1935549 states that the purpose of this hearing is to determine whether the AER should confirm, vary, suspend, or revoke its decision to approve Application No. 31097955 and issue Pipeline Licence No. 62559, and the issues to be determined in Regulatory Appeal 1935549 are the following:

a. the determination of the Emergency Planning Zone for the pipeline, including methodology used and the application of AER modelling requirements;
b. emergency preparedness and proposed public protection measures;
c. the construction and operation of the pipeline, including the design and monitoring of the pipeline and the pipeline Integrity Management Program; and,
d. the potential effects of the pipeline on the environment;

(j) The Applicant submits that information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management* is relevant and material to the issues set out in b., c., and d., as stated above, on grounds which include, but are not limited to, the following determinations made by the AER in accordance with Directives 067 and 088, as well as AER Manual 023, and as is reflected in a Licensee Capability Assessment:

a. the assessed level of financial distress and ability of Pieridae to meet its regulatory and liability obligations throughout the energy development lifecycle, which obligations would include integrity monitoring, emergency response, and public protection in relation to an incident, all in relation to a pipeline carrying highly sour gas near the residence of the Applicant in a field

[6] *Judd v Alberta Energy Regulator*, 2024 ABCA 154 at paras 13 – 26, attached as Exhibit 4 to this Amended Motion.

with a demonstrated history of pipeline incidents, as well as remediation and reclamation obligations in relation to the pipeline;

b. Pieridae's commitment to safe and responsible operations, history of regulatory compliance, responsiveness to addressing noncompliances, and recent incidents (e.g., spills and releases), which commitments, history and responsiveness would relate directly to Pieridae's ability to properly construct and operate a pipeline carrying highly sour gas near the residence of the Applicant in a field with a demonstrated history of pipeline incidents;

c. the ability of Pieridae to provide reasonable care and measures to prevent impairment or damage in respect of a pipeline, which ability also relates directly to Pieridae's ability to properly construct and operate a pipeline carrying highly sour gas near the residence of the Applicant in a field with a demonstrated history of pipeline incidents;

(k) The *Alberta Energy Regulator Rules of Practice* set out a framework under which confidential information can be disclosed in the context of a regulatory proceeding.

Sincerely,

Shaun Fluker
Legal counsel to Michael Judd

cc.

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EXHIBIT 1

In the Court of Appeal of Alberta

Citation: Kelly v Alberta (Energy Resources Conservation Board), 2012 ABCA 19

Date: 20120123
Docket: 1003-0333-AC
Registry: Edmonton

Between:

Susan Kelly, Linda McGinn, and Lillian Duperron

Appellants

- and -

Alberta Energy Resources Conservation Board and Grizzly Resources Ltd.

Respondents

- and -

Alberta Surface Rights Group

Intervener

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Madam Justice Donna Read

Memorandum of Judgment

Appeal from the Decision of the
Alberta Energy Resources Conservation Board
Dated the 22nd day of October, 2010

that the Court of Appeal knew the wells had already been drilled when it ordered a rehearing. Another relevant circumstance is that as a result of the decision of the Court of Appeal on standing, the Board adjusted the computer model that generates the Protective Action Zone around a well: see ***Kelly v Alberta (Energy Resources Conservation Board)***, 2011 ABCA 325 at para. 5.

[31] In normal civil litigation costs generally go to the "winner". Civil litigation occurs in a fully adversarial context, and costs awards are designed to encourage settlement, and reasonableness and efficiency in litigation, and to partly compensate the winning party for the expenses of the action. While there are certainly some adversarial aspects to the hearings before the Board, the Board processes are not primarily directed towards identifying "winners and losers"; as the Board notes in its factum, its hearings are directed at the public interest. In ascertaining and protecting the public interest, there are, in one sense, no winners or losers. It follows that it is unreasonable to award costs in Board proceedings solely or primarily on some measure of perceived "success" of the intervention. Since one of the primary purposes of public hearings is to allow public input into development, all interventions are "successful" when they bring forward a legitimate point of view, whether or not the ultimate decision fully embraces that point of view. The process of the hearing is an end of itself.

[32] The wording of ss. 26 and 28 supports the view that "success" of the intervention is not an overriding issue. Both of the sections anticipate development that "may" cause an adverse effect. At the end of the substantive hearing it will be known whether the Board found any adverse effect. If a costs award is to be primarily based on the "success" of the intervention, there would be no need to consider if the hearing "may" disclose such an effect. The use of the word "may" is inconsistent with the idea that hindsight should be a primary factor in awarding costs. Further, an intervener should not have to predict correctly at the time of intervention what the ultimate outcome of the hearing will be. As this hearing demonstrated, all the evidence, and its full impact, are never completely known until the hearing is over. It is sufficient if, at the beginning of the process, it is reasonable to believe that the evidence "may" disclose an adverse effect: *Re Glacier Power Ltd.*, Energy Cost Order 2003-09 at p. 3.

[33] The respondent Board argues in its factum that its mandate is to "ensure the orderly and efficient development of the province's resources". It argues that its functions are not "thwarted simply because every party who appears before the Board may not be entitled to reimbursement" of costs of participation. Orderly and efficient resource development is undoubtedly the objective of the *Act* in a global sense, but the purpose of the standing and hearing sections of the *Act* is to allow people to be heard. The development of Alberta's natural resources enriches the province as a whole, and provides significant economic benefits to the companies that develop those resources. Resource development can, however, have a disproportionate negative effect on those in the immediate vicinity of the development. The requirement for public hearings is to allow those "directly and adversely affected" a forum within which they can put forward their interests, and air their concerns. In today's Alberta it is accepted that citizens have a right to provide input on public decisions that will affect their rights.

[34] In the process of development, the Board is, in part, involved in balancing the interests of the province as a whole, the resource companies, and the neighbours who are adversely affected: *Re Suncor Energy Inc.*, Energy Cost Order 2007-001 at pp. 10-11. Granting standing and holding hearings is an important part of the process that leads to development of Alberta's resources. The openness, inclusiveness, accessibility, and effectiveness of the hearing process is an end unto itself. Realistically speaking, the cost of intervening in regulatory hearings is a strain on the resources of most ordinary Albertans, and an award of costs may well be a practical necessity if the Board is to discharge its mandate of providing a forum in which people can be heard. In other words, the Board may well be "thwarted" in discharging its mandate if the policy on costs is applied too restrictively. It is not unreasonable that the costs of intervention be borne by the resource companies who will reap the rewards of resource development.

[35] The third question can be answered by stating that any reasonable decision of the Board respecting costs is not subject to appellate review. However, it is not reasonable to require physical damage to the lands to establish eligibility for costs, nor is it reasonable to make an award of costs overly dependent on the outcome of the hearing.

Conclusion

[36] In conclusion, costs decisions of the Board will only be disturbed on appeal if they contain an unreasonable decision on a point of law. There is a certain lack of transparency in the reasons of the majority of the Board, because it is not clear how much weight was placed on the need for physical damage to the property, nor how important the Board felt was the outcome of the hearing.

[37] In the circumstances, the appropriate remedy is to allow the appeal and remit the application for costs back to the Board for reconsideration, in a manner consistent with these reasons. For clarity, a potential adverse impact on the use and occupation of lands is sufficient to trigger entitlement to costs. Further, while the amount of costs to be awarded lies within the discretion of the Board, the actual outcome of the hearing, and the absence, with hindsight, of any actual adverse effect does not of itself disentitle an applicant to costs.

Appeal heard on January 12, 2012

Memorandum filed at Edmonton, Alberta
this 23rd day of January, 2012

Slatter J.A.

EXHIBIT 2

Mavis Baker *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees, and the Charter Committee on Poverty Issues *Interveners*

INDEXED AS: BAKER *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION)

File No.: 25823.

1998: November 4; 1999: July 9.

Present: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache and Binnie JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Immigration — Humanitarian and compassionate considerations — Children's interests — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Application denied without hearing or formal reasons — Whether procedural fairness violated — Immigration Act, R.S.C., 1985, c. I-2, ss. 82.1(1), 114(2) — Immigration Regulations, 1978, SOR/93-44, s. 2.1 — Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Arts. 3, 9, 12.

Administrative law — Procedural fairness — Woman with Canadian-born dependent children ordered deported — Written application made on humanitarian and compassionate grounds for exemption to requirement that application for immigration be made abroad — Whether participatory rights accorded consistent with duty of procedural fairness — Whether failure to provide reasons violated principles of procedural fairness — Whether reasonable apprehension of bias.

Mavis Baker *Appelante*

c.

Le ministre de la Citoyenneté et de l'Immigration *Intimé*

et

Le Conseil canadien des églises, la Canadian Foundation for Children, Youth and the Law, la Défense des enfants-International-Canada, le Conseil canadien pour les réfugiés et le Comité de la Charte et des questions de pauvreté *Intervenants*

RÉPERTORIÉ: BAKER *c.* CANADA (MINISTRE DE LA CITOYENNETÉ ET DE L'IMMIGRATION)

Nº du greffe: 25823.

1998: 4 novembre; 1999: 9 juillet.

Présents: Les juges L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache et Binnie.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Immigration — Raisons d'ordre humanitaire — Intérêts des enfants — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Demande rejetée sans audience ni motifs écrits — Y a-t-il eu violation de l'équité procédurale? — Loi sur l'immigration, L.R.C. (1985), ch. I-2, art. 82.1(1), 114(2) — Règlement sur l'immigration de 1978, DORS/93-44, art. 2.1 — Convention relative aux droits de l'enfant, R.T. Can. 1992 nº 3, art. 3, 9, 12.

Droit administratif – Équité procédurale — Mesure d'expulsion contre une mère d'enfants nés au Canada — Demande écrite fondée sur des raisons d'ordre humanitaire sollicitant une dispense de l'exigence de présenter à l'extérieur du Canada une demande d'immigration — Les droits de participation accordés étaient-ils compatibles avec l'obligation d'équité procédurale? — Le défaut d'exposer les motifs de décision a-t-il enfreint les principes d'équité procédurale? — Y a-t-il une crainte raisonnable de partialité?

situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

ment de situations où il existe des liens familiaux de dépendance, et soulignent que l'obligation de quitter le Canada pour présenter une demande de l'étranger peut occasionner des difficultés à certains membres de la famille proche d'un résident canadien, parents, enfants ou autres proches qui n'ont pas de liens de sang avec le demandeur. Elles précisent que dans de tels cas, il faut aussi tenir compte des raisons pour lesquelles la personne n'a pas présenté sa demande à l'étranger et de la présence d'une famille ou d'autres personnes susceptibles de l'aider dans son pays d'origine.

C. *Procedural Fairness*

C. *L'équité procédurale*

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

Comme premier moyen pour contester la décision de l'agent Caden, l'appelante allègue qu'elle n'a pas bénéficié de l'équité procédurale. L'appelante estime que l'obligation d'agir équitablement exige le respect des procédures suivantes quand des parents ayant des enfants canadiens présentent une demande fondée sur des raisons d'ordre humanitaire: une entrevue orale devant le décideur, un avis de la tenue de cette entrevue aux enfants et à l'autre parent, un droit pour les enfants et l'autre parent de présenter des arguments au cours de cette entrevue, un avis à l'autre parent de la tenue de l'entrevue et du droit de cette personne d'être représentée par un avocat. Elle allègue également que l'équité procédurale exige que le décideur, soit l'agent Caden, motive sa décision, et que les notes de l'agent Lorenz donnent lieu à une crainte raisonnable de partialité.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

En traitant des questions d'équité, j'examinerai d'abord les principes applicables à la détermination de la nature de l'obligation d'équité procédurale, et ensuite les arguments de M^me^ Baker sur l'insuffisance des droits de participation qui lui ont été accordés, sur l'existence d'une obligation de motiver la décision et sur la crainte raisonnable de partialité.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Director of Kent Institution,*

Les deux parties admettent que l'obligation d'équité procédurale s'applique aux décisions d'ordre humanitaire. Le fait qu'une décision soit administrative et touche «les droits, privilèges ou biens d'une personne» suffit pour entraîner l'application de l'obligation d'équité: *Cardinal c.*

[1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: *Sobrie v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; *Said v. Canada (Minister of Employment and Immigration)* (1992), 6 Admin. L.R. (2d) 23 (F.C.T.D.); *Shah v. Minister of Employment and Immigration* (1994), 170 N.R. 238 (F.C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight*, at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J.

Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

Directeur de l'établissement Kent, [1985] 2 R.C.S. 643, à la p. 653. Il est évident que la décision quant à savoir si un demandeur sera dispensé des exigences prévues par la Loi entre dans cette catégorie, et il est admis depuis longtemps que l'obligation d'équité s'applique aux décisions d'ordre humanitaire: *Sobrie c. Canada (Ministre de l'Emploi et de l'Immigration)* (1987), 3 Imm. L.R. (2d) 81 (C.F. 1re inst.), à la p. 88; *Said c. Canada (Ministre de l'Emploi et de l'Immigration)* (1992), 6 Admin. L.R. (2d) 23 (C.F. 1re inst.); *Shah c. Ministre de l'Emploi et de l'Immigration* (1994), 170 N.R. 238 (C.A.F.).

(1) Les facteurs ayant une incidence sur la nature de l'obligation d'équité

21 L'existence de l'obligation d'équité, toutefois, ne détermine pas quelles exigences s'appliqueront dans des circonstances données. Comme je l'écrivais dans l'arrêt *Knight c. Indian Head School Division No. 19*, [1990] 1 R.C.S. 653, à la p. 682, «la notion d'équité procédurale est éminemment variable et son contenu est tributaire du contexte particulier de chaque cas». Il faut tenir compte de toutes les circonstances pour décider de la nature de l'obligation d'équité procédurale: *Knight*, aux pp. 682 et 683; *Cardinal*, précité, à la p. 654; *Assoc. des résidents du Vieux St-Boniface Inc. c. Winnipeg (Ville)*, [1990] 3 R.C.S. 1170, le juge Sopinka.

22 Bien que l'obligation d'équité soit souple et variable et qu'elle repose sur une appréciation du contexte de la loi particulière et des droits visés, il est utile d'examiner les critères à appliquer pour définir les droits procéduraux requis par l'obligation d'équité dans des circonstances données. Je souligne que l'idée sous-jacente à tous ces facteurs est que les droits de participation faisant partie de l'obligation d'équité procédurale visent à garantir que les décisions administratives sont prises au moyen d'une procédure équitable et ouverte, adaptée au type de décision et à son contexte légal institutionnel et social, comprenant la possibilité donnée aux personnes visées par la décision de présenter leur points de vue complètement ainsi que des éléments de preuve de sorte qu'ils soient considérés par le décideur.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), at p. 118; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at p. 896, *per* Sopinka J.

La jurisprudence reconnaît plusieurs facteurs pertinents en ce qui a trait aux exigences de l'obligation d'équité procédurale en common law dans des circonstances données. Un facteur important est la nature de la décision recherchée et le processus suivi pour y parvenir. Dans l'arrêt *Knight*, précité, à la p. 683, on a conclu que «la mesure dans laquelle le processus administratif se rapproche du processus judiciaire est de nature à indiquer jusqu'à quel point ces principes directeurs devraient s'appliquer dans le domaine de la prise de décisions administratives». Plus le processus prévu, la fonction du tribunal, la nature de l'organisme rendant la décision et la démarche à suivre pour parvenir à la décision ressemblent à une prise de décision judiciaire, plus il est probable que l'obligation d'agir équitablement exigera des protections procédurales proches du modèle du procès. Voir également *Vieux St-Boniface*, précité, à la p. 1191; *Russell c. Duke of Norfolk*, [1949] 1 All E.R. 109 (C.A.), à la p. 118; *Syndicat des employés de production du Québec et de l'Acadie c. Canada (Commission canadienne des droits de la personne)*, [1989] 2 R.C.S. 879, à la p. 896, le juge Sopinka.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

Le deuxième facteur est la nature du régime législatif et les «termes de la loi en vertu de laquelle agit l'organisme en question»: *Vieux St-Boniface*, précité, à la p. 1191. Le rôle que joue la décision particulière au sein du régime législatif, et d'autres indications qui s'y rapportent dans la loi, aident à définir la nature de l'obligation d'équité dans le cadre d'une décision administrative précise. Par exemple, des protections procédurales plus importantes seront exigées lorsque la loi ne prévoit aucune procédure d'appel, ou lorsque la décision est déterminante quant à la question en litige et qu'il n'est plus possible de présenter d'autres demandes: voir D. J. M. Brown et J. M. Evans, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), aux pp. 7-66 et 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its

Le troisième facteur permettant de définir la nature et l'étendue de l'obligation d'équité est l'importance de la décision pour les personnes visées. Plus la décision est importante pour la vie des personnes visées et plus ses répercussions sont

impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty

grandes pour ces personnes, plus les protections procédurales requises seront rigoureuses. C'est ce que dit par exemple le juge Dickson (plus tard Juge en chef) dans l'arrêt *Kane c. Conseil d'administration de l'Université de la Colombie-Britannique*, [1980] 1 R.C.S. 1105, à la p. 1113:

> Une justice de haute qualité est exigée lorsque le droit d'une personne d'exercer sa profession ou de garder son emploi est en jeu. [. . .] Une suspension de nature disciplinaire peut avoir des conséquences graves et permanentes sur une carrière.

Comme le juge Sedley (maintenant Lord juge Sedley) le dit dans *R. c. Higher Education Funding Council, ex parte Institute of Dental Surgery*, [1994] 1 All E.R. 651 (Q.B.), à la p. 667:

> [TRADUCTION] Dans le monde moderne, les décisions rendues par des organismes administratifs peuvent avoir un effet plus immédiat et plus important sur la vie des gens que les décisions des tribunaux et le droit public a depuis l'arrêt *Ridge c. Baldwin* [1963] 2 All E.R. 66, [1964] A.C. 40, reconnu ce fait. Bien que le caractère judiciaire d'une fonction puisse élever les exigences pratiques en matière d'équité au-delà de ce qu'elles seraient autrement, par exemple en exigeant que soit présenté et vérifié oralement un élément de preuve contesté, ce qui le rend «judiciaire» dans ce sens est principalement la nature de la question à trancher, et non le statut formel de l'organisme décisionnel.

L'importance d'une décision pour les personnes visées a donc une incidence significative sur la nature de l'obligation d'équité procédurale.

26 Quatrièmement, les attentes légitimes de la personne qui conteste la décision peuvent également servir à déterminer quelles procédures l'obligation d'équité exige dans des circonstances données. Notre Cour a dit que, au Canada, l'attente légitime fait partie de la doctrine de l'équité ou de la justice naturelle, et qu'elle ne crée pas de droits matériels: *Vieux St-Boniface*, précité, à la p. 1204; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 557. Au Canada, la reconnaissance qu'une attente légitime existe aura une incidence sur la nature de l'obligation d'équité envers les personnes visées par la décision. Si le demandeur s'attend légitimement à ce qu'une certaine procédure soit suivie, l'obliga-

EXHIBIT 3

In the Court of Appeal of Alberta

Citation: Normtek Radiation Services Ltd v Alberta Environmental Appeal Board, 2020 ABCA 456

Date: 20201211
Docket: 1801-0385-AC
Registry: Calgary

Between:

Normtek Radiation Services Ltd.

Appellant
(Applicant)

- and -

Alberta Environmental Appeals Board, Secure Energy Services Inc. and Director of Alberta Environment and Parks

Respondents
(Respondents)

The Court:

The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Jo'Anne Strekaf
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.R. Ashcroft
Dated the 21st day of November, 2018
Filed on the 18th day of December, 2018
(2018 ABQB 911, Docket: 1701 00469)

was reasonable. We disagree; but in any event, Normtek did present evidence which linked the economic impact on it back to the environment. That evidence was not dealt with by the Board.

Failing to Consider Relevant Evidence

[129] The Board dismissed much of Normtek's evidence as not being relevant to the issue of whether Normtek was directly affected by the Director's decision. The Supreme Court in *Vavilov* suggested that the failure to consider relevant evidence may be an indicator of unreasonableness. To quote the Board's decision at paragraph 10:

> In its written submissions, the Appellant identified a number of environmental concerns it has with the disposal of NORM waste in the Approval Holder's Landfill, Most of these environmental concerns relate to the potential merits of the appeal. The *Court* decision states the determination whether an appellant is directly affected is a preliminary matter and must be determined before hearing the substantive issues. The Board cannot hear submissions related to the substantive merits of an appeal and then, based on those submissions, determine whether an appellant has standing to bring the appeal. It is necessary for an appellant to provide evidence along with its arguments, but the evidence presented needs to demonstrate the effect of the decision being appealed on the person seeking standing.

[130] A further quote from the Board's Decision illustrates the Board's disregard for Normtek's evidence:

> Much of the Appellant's written submissions consisted of argument relating to the validity of the Director's decision. These arguments may be relevant in a hearing on the merits of the appeal; however, they are not relevant for the purposes of determining if the Appellant is directly affected. At this point in the Board's process, the Board is only determining a preliminary matter, namely whether the Appellant is directly affected by the decision to issue the Amending Approval.
>
> The Appellant provided argument on several issues that were more appropriate for consideration at a hearing on the merits of the appeal, including:
>
> 1. whether the Minister and Director contravened EPEA by not developing formal policies, procedures, and regulations concerning radioactive material or whether best practices were followed;
>
> 2. whether the Approval Holder misled or downplayed the long-term hazards of high activity radioactive waste;
>
> 3. the acceptable limits for waste to be accepted at the Landfill;

4. who the Director should have consulted to determine the potential impacts of his decision; and

5. the classification of the waste as low-level waste.

None of these matters relate to the issue of whether the Appellant is directly affected. [emphasis added]

The Board did not explain why these matters did not relate to the issue of Normtek's "directly affected" status. Clearly some of the evidence presented to the Board with respect to the foregoing matters was relevant to the issue of direct affect. Whether that evidence was sufficient to demonstrate that Normtek was potentially adversely affected by the Director's decision remains a matter for the Board to determine. But the Board's summary dismissal of this evidence and its failure to deal with the arguments based on it undermines the reasonableness of its conclusion that Normtek was not directly affected by the Director's decision.

[131] As the Supreme Court stated in *Vavilov*, reasonableness requires the decision-maker to consider the evidence which bears on its decision. The Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 stated that reasonableness requires an approach which is justified, transparent and intelligible. What the Board did was focus on what was a restrictive and unjustified definition of "directly affected" and in so doing failed to deal with the merits of the appellant's main argument. It was simply not reasonable to disregard relevant evidence on the basis of an unjustifiable restriction on the discretion conferred upon the tribunal by the legislature.

[132] Normally, the issue of standing is a preliminary matter to be determined at the outset. But that does not mean that a tribunal can ignore the merits of an appellant's appeal when those merits go to the issue of whether the appellant is directly affected. The Board treated these two issues as separate and distinct, never the twain to meet. Two silos, so to speak. That too was unreasonable. We would echo Justice McIntyre's comment in *Court*: "a review of the case law generated by the Board discloses that it would be unusual for an issue of standing not to be inextricably linked, more or less, to the substantive issues of an appeal" (para 68).

[133] The Board misinterpreted the law. The law is not, as the Board stated in paragraph 133, that the determination of whether an appellant is directly affected must be determined before hearing any of the substantive issues as if to say the determination of whether an appellant is directly affected must be determined without reference to the substantive issues. The law is simply that standing is a preliminary matter to be dealt with, if it can be, at the outset of the proceeding. Sometimes it cannot be.

[134] Determination of a preliminary *issue* just means that the issue has to be decided first, before the merits can be decided. It does not necessarily mean that a separate hearing and decision occur before any of the merits are heard. Rather, in the appropriate case, the Board may hear all the evidence, and as a matter of logical sequence, address the preliminary issue first. Again, how the

Board chooses to proceed will depend on the context of the case before it, but it should not place artificial, formalistic, constraints on its ability to address the issues before it in a reasonable manner.

[135] The issue of whether an appellant is directly affected by a proposed activity necessarily requires a consideration of the nature and merits of the appellant's objection (i.e. the substantive issues), especially if the basis of the appellant's objection is the "adverse effect" (defined as impairment of or danger to environment, human health, safety or property) of the Director's decision on it. Determining whether an appellant is directly affected may require the Board to consider whether the approval is sufficiently protective of the interests of the appellant which he or she alleges are being adversely affected (health, safety, property) or whether the conditions of the approval sufficiently mitigate what the Act defines as adverse effects such that the appellant may reasonably be found not likely to be directly affected. Such determination may also involve a consideration of what the Act refers to as "the environmental, social, economic and cultural consequences" of the proposed activity (s 40(c)) if those consequences directly affect the would-be appellant.

[136] If the ground for objecting to an approval or a Director's decision is that the approval or Director's decision adversely affects the appellant, then the merit of the objection is directly tied to whether or not the appellant is in fact adversely affected. Often that is the only issue which the Board has to determine. The directly affected issue and the substantive issues are often effectively the same. In such cases, the issue of whether the appellant is directly and adversely affected is really not finally determined until after the hearing of the appeal is completed and the Board has made its decision and reported to the Minister (ss 98 and 99). The Board may summarily dismiss an appeal by an appellant whose appeal is based on anticipated adverse effects of the Director's decision on it where the Board is of the view that the appellant is not directly affected; but such summary dismissal can only be made after there has been some consideration of the merits of the appellant's appeal. Here the Board expressly ruled that the appellant's submissions with respect to the merits of the Director's decision were "not relevant for the purpose of determining if the appellant is directly affected." To quote the Board further:

> The Board cannot hear submissions related to the substantive merits of an appeal and then, based on those submissions, determine whether an appellant has standing to bring the appeal.

[137] The appellant's submissions with respect to the merits of the Director's decision were all about the impacts of that decision on the appellant's business and the regulation of the appellant's industry. To summarily dismiss these impacts as speculative or too remote without dealing with them, at least in a preliminary way, makes assessing the reasonableness of the Board's decision to dismiss the appellant's appeal without a hearing impossible. In this case, the Board's actions precluded judicial review. The Board's reasons were not transparent enough to enable proper judicial review.

EXHIBIT 4

In the Court of Appeal of Alberta

Citation: Judd v Alberta Energy Regulator, 2024 ABCA 154

Date: 20240513
Docket: 2301-0144AC
Registry: Calgary

Between:

Michael Judd

Appellant

- and -

Alberta Energy Regulator and Pieridae Alberta Production Ltd.

Respondents

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Bernette Ho
The Honourable Justice Alice Woolley

Memorandum of Judgment

Appeal from the Decision of
the Alberta Energy Regulator
Dated the 19th day of May, 2023

Memorandum of Judgment

The Court:

[1] The appellant, Michael Judd, appeals a decision of the Alberta Energy Regulator ("AER") denying a pre-hearing motion in a regulatory appeal of a pipeline licence issued to Pieridae Alberta Production Ltd. ("Pieridae"). The motion sought disclosure of information held by the AER under two of its directives: *Directive 067: Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* ("*Directive 067*") and *Directive 088: Licensee Life-Cycle Management* ("*Directive 088*").[1]

Background

[2] In 2021, Pieridae applied to the AER under the *Pipeline Act*, RSA 2000, c P-15 and in accordance with the AER's *Directive 056: Energy Development Applications and Schedules* ("*Directive 056*") for a licence to construct and operate a 0.64 km pipeline to transport sour natural gas with a hydrogen sulfide (H_2S) concentration of 32% from an existing wellsite to an existing pipeline tie-in point. The AER approved Pieridae's application and issued Pipeline Licence No. 62559 (the "Licence") to Pieridae.

[3] The appellant filed a request for a regulatory appeal of the AER's decision to issue the Licence: *Responsible Energy Development Act*, SA 2012, c R-17.3 [*REDA*], ss 36 and 38; *Alberta Energy Regulator Rules of Practice*, Alta Reg 99/2013 [*AER Rules*], s 30. The appellant argued that the pipeline, located approximately 1.02 km from his residence, posed a risk to his health and that his land should have been included in the pipeline's Emergency Planning Zone. He also claimed there was a possibility the pipeline would not be reclaimed if Pieridae became insolvent.

[4] In January 2022, the AER found that the appellant was "directly and adversely affected" by the AER's decision to issue the Licence "due to the possibility that he may have to shelter-in-place should an emergency come to pass, and, because in the event of evacuation, his evacuation route passes through the pipeline emergency planning zone, which may put him in harm's way in the event of a sour gas release". The AER granted the appellant's request for a regulatory appeal.

[5] The panel assigned to the regulatory appeal (the "Panel") will have the power to "confirm, vary, suspend or revoke" the Licence: *REDA*, s 41(2). The Panel determined that the appeal would address the following four issues (the "Scoping Decision") (*REDA*, s 39(3); *AER Rules*, s 31(2)):

1. The determination of the Emergency Planning Zone for the pipeline, including methodology used and the applications of AER Modelling requirements;

[1] References are to *Directive 067* as it was published on April 13, 2023 and to *Directive 088* as it was published on February 13, 2023.

2. Emergency preparedness and proposed public protection measures;

3. The construction and operation of the pipeline, including the design and monitoring of the pipeline and the pipeline Integrity Management Program; and

4. The potential effects of the pipeline on the environment.

The Panel rejected four additional issues as framed by the appellant:

A. Liability – legal uncertainty on the allocation of liability in the case of an H2S release event, as well as abandonment, reclamation and other clean-up costs.

B. Directive 067 Information – disclosure of information received by the AER under Directives 067 and 088 in relation to the application for the Pipeline, and the AER's evaluation of that information.

C. Pieridae's Financial Capability – Pieridae's financial capacity to safely and responsibly manage the proposed Pipeline and the associated infrastructure or to address the current and future abandonment and reclamation liabilities associated with the Foothills Assets and their other assets.

D. Shell – Pieridae Sale Agreement – consent from Shell to construct and operate the pipeline.

[6] The appellant did not appeal or seek judicial review of the Scoping Decision, nor did he apply under s 42 of the *REDA* to have the AER reconsider it.

[7] After granting the appellant's request for a regulatory appeal, the AER provided the parties with its Record of Decision Maker, which included Pieridae's licence application, background material, information requests, and responses. The appellant then brought a motion pursuant to s 44 of the *AER Rules* seeking an order for further disclosure. The appellant argued the Record of Decision Maker contained no information about Pieridae's financial and operational capabilities or its eligibility to acquire and hold a licence for energy development in Alberta, and that this information was relevant to the regulatory appeal. The appellant sought an order for:

> … disclosure and access to all information collected, received, assessed, compiled or produced by the AER under Directive 067 - *Eligibility Requirements for Acquiring and Holding Energy Licences and Approvals* and Directive 088 – *Licensee Life-Cycle Management*, in relation to Application No. 31097955 and Pipeline Licence No. 62559 and in relation to a holistic licensee assessment of

> [Pieridae] and its eligibility to acquire and hold a licence for energy development in Alberta.
>
> (the "Motion")

[8] The appellant argued this information was essential to fully evaluate the extent of the direct and adverse impact of the Licence on him, and necessary for him to exercise his procedural rights at the regulatory appeal.

Decision Under Appeal

[9] On May 19, 2023, the Panel denied the appellant's Motion on the basis that the information requested was not relevant and material to the regulatory appeal ("Motion Decision"). The Panel held that the issues to be addressed in the regulatory appeal did not include "the AER's decision to grant Pieridae licence eligibility, Pieridae's ongoing licence eligibility requirements or related regulatory filings with the AER, or any application currently or previously before the AER or a regulatory appeal of any AER decision issued in respect of the transfer of licences to Pieridae". The Panel reasoned that the determination of licence eligibility under *Directive 067* and the holistic licensee assessment under *Directive 088* are separate regulatory processes from deciding an application for a new licence under the *Pipeline Act*. The Panel concluded by stating that:

> Mr. Judd's motion seeks the disclosure of information on the record of this regulatory appeal that is in respect of Pieridae and other regulatory processes concerning Pieridae, but not in respect of the decision to issue the Licence. …
>
> …
>
> It appears to us that the information Mr. Judd seeks extends far beyond the Application, the Licence, and this proceeding. We do not see the relevance of this information to the issues for the hearing or our decision on this regulatory appeal. Mr. Judd has not convinced us that the information he seeks to have disclosed on the record of this regulatory appeal is relevant and material to this regulatory appeal.

[10] The appellant was granted permission to appeal the Motion Decision under s 45(1) of the *REDA* on the following question of law (*Judd v Alberta Energy Regulator*, 2023 ABCA 296 at para 12):

> [W]hen the panel considered whether the information requested by Mr. Judd was relevant and material to the issues in the regulatory appeal did they err in law by effectively confining themselves to the information obtained by the AER under *Directive 056*?

[11] The Panel adjourned the regulatory appeal pending this Court's decision.

Standard of Review

[12] Questions of law are reviewed on the standard of correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37.

Analysis

[13] The mandate of the AER extends to regulation of all aspects of the energy industry in Alberta. The AER is given considerable latitude as to how it will discharge this complex task. It is therefore open to the AER to regulate in "silos", by treating separately applications for licensee eligibility, reviews of the capabilities of licensees to meet their obligations, and applications for specific licences. Absent an error of law, its decisions are not subject to interference on appeal.

[14] In our view, the Panel misinterpreted the legislative scheme when it treated the separation of its regulatory processes as determinative of what was relevant and material to the regulatory appeal. The Panel's emphasis on the separation of the application process under *Directive 056* from the licence eligibility and holistic licensee assessments under *Directive 067* and *Directive 088* misdirected its analysis causing the Panel to wrongly conclude that the information sought by the appellant was not relevant and material to the issues outlined in the Scoping Decision. The appellant was entitled to records relevant and material to the issues in the Scoping Decision that were held by the AER, regardless of which "silo" caused them to be in the possession of the AER.

[15] In effect, the Panel treated the information obtained under each of these directives as silos, with information obtained under one being irrelevant to proceedings under another. But that is not what the legislative scheme provides. As demonstrated by the purpose and wording of *Directive 067* and *Directive 088*, there is information gathered by the AER under these directives that could be relevant and material in the context of other AER proceedings, including regulatory appeals of a decision to issue a new licence.

[16] To be eligible for a pipeline licence, an applicant must meet the licence eligibility requirements set out in *Directive 067*: *Pipeline Act*, s 21(1); *Pipeline Rules*, Alta Reg 125/2023, s 6(1).[2] *Directive 067* requires applicants for licence eligibility to meet certain residency and insurance requirements, submit a complete financial summary with financial statements, and not pose an "unreasonable risk". If an applicant meets the requirements of *Directive 067* to the satisfaction of the AER, the AER may grant licence eligibility subject to any restrictions, terms or conditions it considers appropriate: *Pipeline Rules*, s 6(2).[3] For instance, it may restrict the number of licences a licensee may hold, or require additional scrutiny when it applies for a pipeline licence: *Directive 067*, s 3.

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[2] The *Pipeline Rules* replaced the now repealed *Pipeline Regulation*, Alta Reg 91/2005, as of November 15, 2023. The *Pipeline Regulation* was in force at the time of the Motion Decision issued May 19, 2023. Section 6 of the *Pipeline Rules* is identical to section 2.1 of the *Pipeline Regulation*.

[3] See *Pipeline Regulation*, s 2.1(2).

[17] Licensees under the *Pipeline Act* must also comply with the requirements of *Directive 088*: *Pipeline Act*, s 21(1); Pipeline *Rules*, s 4(1)(c).[4] *Directive 088* is broadly worded and introduces a holistic approach to assessing "the capabilities of licensees to meet their regulatory and liability obligations throughout the energy development life cycle": *Directive 088*, s 2. The holistic assessment considers various factors to identify risks posed by a licensee, including (i) those listed in *Directive 067* for determining whether a licensee poses an unreasonable risk, and (ii) additional "licensee capability assessment" factors: *Directive 088*, s 2.

[18] In assessing whether a licensee poses an unreasonable risk, section 4.5 of *Directive 067* provides that the AER may consider such things as a licensee's: compliance history, experience, and "assessed ability…to provide reasonable care and measures to prevent impairment or damage in respect of a pipeline".

[19] *Directive 088* provides that the holistic assessment will be supported by a "licensee capability assessment" (LCA). The results of the LCA are intended to inform "regulatory decisions regarding the licensee":

> The results from the LCA will feed into the broader assessment of the licensee, which will inform regulatory decisions regarding the licensee, including licence eligibility under *Directive 067* and decisions under the programs described in this directive.

[20] Section 2.1.1 of *Directive 088* provides that the following factors are used in an LCA to identify risks posed by a licensee:

- financial health
- estimated total magnitude of liability (active and inactive), including abandonment, remediation, and reclamation
- remaining lifespan of mineral resources and infrastructure and the extent to which existing operations fund current and future liabilities
- management and maintenance of regulated infrastructure and sites, including compliance with operational requirements
- rate of closure activities and spending and pace of inactive liability growth
- compliance with administrative regulatory requirements, including the management of debts, fees, and levies

[4] This requirement was formerly in s 1.2(1) of the *Pipeline Regulation*.

Each of these LCA factors consist of "various parameters" listed in the AER's *Manual 023: Licensee Life-Cycle Management* ("*Manual 023*"). *Manual 023* provides that an LCA assesses, among other things, a licensee's commitment to safe and responsible operations in relation to other licensees with similar attributes. The AER measures a licensee's commitment to safe and responsible operations "in terms of regulatory compliance, responsiveness to addressing noncompliances (e.g., noncompliance follow-up rate), and recent incidents (e.g., spills and releases)": *Manual 023*, s 2.1.2.5.[5]

[21] The AER was entitled to limit the parameters of the appeal in the Scoping Decision. Just because some aspects of the regulatory process may be "holistic" does not mean that every appeal must be holistic. The Scoping Decision makes clear that the scope of the regulatory appeal is narrower than the AER's consideration of the original pipeline licence application. In addition, the regulatory appeal is not a holistic review of Pieridae and its eligibility to hold a licence. The Panel decided that this appeal would proceed on the assumption that Pieridae was eligible to hold a licence. The Panel already determined the four issues to be considered in the regulatory appeal through the Scoping Decision. When considering whether information is relevant and material to the regulatory appeal, the Panel is entitled to consider the issues that have been included, as well as those that were expressly excluded. For the purposes of record production, the issues that were specifically excluded from the Scoping Decision are as important as the issues included.

[22] That said, just because the regulatory appeal is not a holistic review of Pieridae does not mean the information gathered for the purpose of a holistic review of Pieridae is irrelevant to the four issues to be determined at the regulatory appeal. The test is whether the records are relevant and material to the issues in the Scoping Decision, not whether they originated in a "holistic" process.

[23] As long as any assessment of the relevance and materiality of records is conducted in accordance with the Scoping Decision, then the appellant's request for disclosure of further records does not constitute a collateral attack on the Scoping Decision. To this end, we note that the appellant acknowledged that the Scoping Decision will limit the Panel's consideration to the four issues it identified. Further, the appellant confirmed during oral argument that he does not intend to revisit Pieridae's eligibility to hold a pipeline licence in the regulatory appeal.

[24] We also observe that the appellant's original Motion sought an unduly broad order for disclosure. While we understand the appellant's position that he does not have a fulsome understanding of the records held by the AER, the AER should not be the subject of unnecessary "fishing expeditions".

[25] The appellant's affidavit in support of the Motion included an example of a one-page document titled "Licensee Capability Assessment" that was prepared by the AER in 2022 for an unnamed licensee as an example of the type of record he says is responsive to the Motion. The

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[5] *Manual 023* dated April 9, 2024.

Panel must determine whether records such as the LCA pertaining to Pieridae include information that is relevant and material to the issues outlined in the Scoping Decision. Information relevant and material to the four issues identified in the Scoping Decision, regardless of whether that information was obtained under *Directive 056*, *Directive 067* or *Directive 088*, should be produced by the AER. In this respect, we do not accept Pieridae's argument that the AER has no obligation to disclose the information the appellant is requesting in the regulatory appeal process. At the hearing of this appeal, counsel for the AER confirmed that it has statutory obligations to produce information and the AER did not share Pieridae's position that the AER should not be placed in the position of having to disclose its own records upon reasonable request.

[26] In sum, we conclude the Panel erred by dismissing the appellant's Motion on the basis that *Directive 067* and *Directive 088* are entirely separate processes within the regulatory and legislative scheme.

Conclusion

[27] In conclusion, the appeal is allowed. The answer to the question on which permission was granted is that the Panel did err by confining itself to information it had received under *Directive 056*. We refer the matter back to the Panel for further consideration and redetermination in accordance with s 45(7)(c) of the *REDA*. The appellant is entitled to production of records that are relevant and material to the issues set out in the Scoping Decision regardless of the process by which the AER received them.

Appeal heard on April 10, 2024

Memorandum filed at Calgary, Alberta
this 13th day of May, 2024

Authorized to sign for: Slatter J.A.

Ho J.A.

Woolley J.A.

Appearances:

S.C. Fluker
for the Appellant

D.F. Brezina
J.P. Jamieson
for the Respondent, Alberta Energy Regulator

E.B. Mellett, KC
D.K. Naffin (no appearance)
T.W. Myers
A.J. Williams (no appearance)
for the Respondent, Pieridae Alberta Production Ltd.