Court of King's Bench of Alberta

Citation: MEG ENERGY CORP v ALBERTA (MINISTER OF ENERGY), 2024 ABKB 592

2024 ABKB 592 (CanLII)

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Docket: 2201 14641
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Registry: Calgary

Between:

MEG ENERGY CORP

APPLICANT

\- and -

ALBERTA (MINISTRY OF TREASURY BOARD AND FINANCE) and **ALBERTA (MINISTER OF ENERGY)**

RESPONDENTS

Reasons for Judgment
of the
Honourable Justice James T Eamon

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I Introduction

[1] In this judicial review application, MEG is challenging audit determinations of the amount of royalties owing to the Crown on oil sands product from MEG's Christina Lake Oil Sands Project for the years 2014 and 2015. The issues arise from costs that MEG incurred in relation to service provided by Stonefell Terminal.

[2] The Project produces crude bitumen in north eastern Alberta. The bitumen is treated and blended with diluent to become a cleaned product that can be shipped by pipeline. The product is known as Access Western Blend.

[3] MEG transports Access Western Blend from the Project southward toward the Edmonton Alberta area on a pipeline known as the Access Pipeline, where it can be shipped onward to markets through other pipelines or rail transport. According to the Certified Record, the Access Western Blend is sold at market hubs in Edmonton, the United States, and international locations.

[4] Diluent is required for the Project operations, both at the Project site and at downstream locations along the Access Pipeline. It can be added as needed to the blend when it enters the Access Pipeline at the Project or at downstream locations along the pipeline, including at terminals known as Sturgeon Terminal and Stonefell Terminal, before arriving at the Edmonton hub.

[5] The Stonefell Terminal is located adjacent to the Access Pipeline toward its southern end. It consists of six huge tanks that can hold blended bitumen or unblended diluent, piping, pumps and equipment. In the years under review, MEG used four of the tanks to hold blended bitumen, and two of the tanks to hold diluent (the "**Diluent Tanks**").

[6] MEG pays a royalty on revenues realized from the sale of the Crown's royalty share of the bitumen calculated in accordance with regulations under the *Mines and Minerals Act*, RSA 2000, c M-17 ("***MMA***"). At its simplest level, royalties are assessed on a revenue minus cost approach.

[7] The royalty regulations provide for the deduction of various costs and charges from unit prices, project revenues, gross revenues or net revenues, including three types of costs described in the regulations which are in issue in the present judicial review:

(a) An "allowed cost" of the Project, which includes two categories of interest in the present case:

(i) "fundamental costs", which are defined as "costs incurred directly to recover, obtain, process or transport oil sands or oil sands products, or to market oil sands products, pursuant to the Project", with certain exceptions (*Oil Sands Allowed Costs (Ministerial) Regulation*, Alta Reg 231/2008 ("***ACR***") ss. 1(1)(h) and 4),

(ii) "specifically included costs" which are in respect of costs incurred in the years under consideration "those costs listed in, or those costs of activities listed in" column 1 of Schedule 1 of the *ACR* (*ACR*, ss. 1(1)(l)).

(b) The "cost of diluent" which is contained in the blended bitumen at or deemed to be at the royalty calculation point (*Oil Sands Royalty Regulation, 2009*, Alta Reg 223/2008 ("***OSRR2009***"), s. 22), and

(c) The "handling charges" which are defined as "the handling charges, export charges, pipeline tariff charges and charges of a similar nature that are paid to transport third party disposition quantities of a kind of oil sands product obtained pursuant to a Project that are disposed of in third party dispositions from the royalty calculation point for the product to the place where those dispositions occur", with certain exceptions (*OSRR2009*, s.32).

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[8] In calculating royalties due to the Government of Alberta from the Project for the years 2014 and 2015, MEG deducted the cost of services provided by Stonefell Terminal. MEG was the sole owner and user of the terminal in those years. It claimed that the costs were for transportation of oil sands product as "handling charges" and in the specific case of the Diluent Tanks, as "handling charges" or "allowed costs".

[9] The Minister of Energy and Minerals (the "**Minister**") has statutory authority under the *MMA* to audit the operator's statement of the amount owing and determine the actual amount owing. A group of auditors in the Government of Alberta, known as Alberta Energy Audit ("**AEA**") perform this function under delegated authority of the Minister.

[10] AEA disallowed or decreased some costs claimed by MEG including cost of the services provided by Stonefell Terminal. MEG objected in a review process under the royalty regime. In such a case, the Minister is responsible for the review and final determination of the audit. A delegate of the Minister known as the Director of Dispute Resolution (the "**Director**") rejected MEG's objections.

[11] There are three audit adjustments before the Court in the judicial review.

[12] First, MEG challenges the manner of determining the quantum of the costs for the Stonefell Terminal services.

[13] MEG initially quantified the costs of Stonefell Terminal's services in a "cost of service" calculation, rather than by assessing the fair market value of the services. To make the cost of service calculation you need to input a rate of return on capital. Two rates are available for assets off the oil sands project site. One applies to "non-basic pipelines" and is preferential in favour of the operator of the oil sands project. The other applies to assets other than non-basic pipelines and is a lower rate.

[14] Access Pipeline is a non-basic pipeline. MEG said the Stonefell Terminal is part of that pipeline under Alberta law and the preferential rate applies. AEA decided that the Stonefell Terminal is not a "pipeline" under the Alberta royalty regime and the lower rate applies. The Director agreed with AEA's conclusion.

[15] Second, MEG challenges the use of a cost of service calculation to assess the quantum of the costs of the Stonefell Terminal services.

[16] Although MEG initially submitted its royalty reports based on a cost of service calculation, it eventually advocated for a determination of a fair market value for the services.

[17] The AEA decided that fair market value for the services could not reasonably be determined and a cost of service approach should be used. The Director agreed with AEA's conclusion.

[18] Third, MEG challenges AEA's decision to disallow the costs of the Diluent Tanks.

[19] MEG claimed the costs of the Diluent Tanks were "handling charges" or "allowed costs" and, in the objection proceedings conducted by the Director, relied on a previous audit determination of another operator where AEA allowed costs of diluent tanks in a cost of service calculation as "allowed costs" or cost of diluent.

[20] Although AEA accepted that many of the costs of the Stonefell Terminal services were deductible as "handling charges", it denied the cost for the Diluent Tanks because MEG used them to store diluent off the Project site. The Director agreed with AEA's conclusion.

[21] In the judicial review, MEG generally says the audits were unfair, or unlawful (and therefore unreasonable) because they were not completed within the time period allowed under the *MMA*; the decision making process was unfair and subject to bias and unreasonable apprehension of bias; and, the substantive decisions relating to charges for the Stonefell Terminal were unreasonable.

[22] For the reasons set out herein, I have remitted the issue of the cost of the Diluent Tanks for redetermination and dismissed the remainder of MEG's application.

II General royalty regime and factual background

(a) Royalty regime

[23] MEG must pay royalties on the bitumen to the Crown, under the *MMA* and the *OSRR2009*.

[24] The system operates on a self-reporting basis. Section 39 of the *OSRR2009* requires MEG to prepare and submit to the Minister an annual report of its royalty calculation, known as an End of Period Statement ("**EOPS**").

[25] The Minister may review or audit the EOPS and determine to disallow or change components of the royalty calculation (*MMA*, s. 38). In practice the audits are conducted by auditors in the Department of Energy and a senior audit manager within the Ministry of Treasury Board and Finance holds delegated authority of the Minister to make the audit determinations (I have referred to these persons collectively as AEA).

[26] A party may seek review of the audit determinations under the *Mines and Minerals Dispute Resolution Regulation*, Alta Reg 170/2015 ("***DRR***"). The Minister is responsible to consider the merits of the objection and issue a final determination under s. 5 of the *DRR*. The Director holds delegated authority to exercise this function.

(b) The EOPS and the royalty audit

[27] MEG submitted EOPS for the calendar years 2014 and 2015. In calculating the costs deductible from unit prices or revenues to arrive at the royalty, MEG deducted charges relating to the Access Pipeline and Stonefell Terminal.

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[28] AEA conducted an audit of MEG's 2014 and 2015 EOPS. It disallowed or reduced certain costs relating to the Stonefell Terminal on June 1, 2021 (2014 EOPS) and November 8, 2021 (2015 EOPS), issuing written reasons for doing so.

[29] MEG invoked the objection process under the *DRR,* by delivering Notices of Objection for each of the 2014 and 2015 audit determinations under the *DRR*.

[30] The Director issued final decisions confirming the audit determinations on June 16, 2022 (2014 EOPS) and June 22, 2022 (2015 EOPS).

[31] Section 38 of the *MMA* prescribes time periods in which the audit must be completed. The time periods can be extended by the Minister (or delegate) under s. 8(1)(g) of the *MMA*.

[32] Both audits were conducted (with MEG's participation) beyond the maximum time periods prescribed by s. 38 of the *MMA*. Ministerial Orders were periodically issued to extend the s. 38 time periods. MEG was not informed that the orders were requested.

[33] MEG was not aware of the Ministerial Orders until the Certified Record and supplements thereto were delivered in this judicial review application.

[34] MEG did not raise the alleged non-compliance with the s. 38 time periods in its Notices of Objection to the Minister, though it admitted in the judicial review that it knew the time periods had expired before the audits were completed.

(c) Costs and charges of Stonefell Terminal and associated royalty rules

(i) Introduction

[35] During the audit several issues arose over the costs of the Stonefell Terminal. AEA had to ascertain whether and to what extent the charges were deductible in the royalty calculation, and how to value the deductible charges.

[36] Generally speaking, costs incurred in non-arms length transactions for non-basic services must be quantified at the lower of the amount paid and fair market value. If fair market value cannot reasonably be determined, a "cost of service" calculation is required and the cost is the lesser of the amount charged for the service and the cost of service of the person who performs the service. AEA decided to use the cost of service calculation, and in doing so applied the long term bond rate of return. The Director agreed with AEA.

[37] As to the cost of the Diluent Tanks, the revenue less costs approach generally recognizes that transportation costs associated with moving the blended product to market or transporting diluent to the Project site are costs that can be deducted. Storage off the Project site receives less generous treatment, but AEA accepts that some short term storage is a transportation cost that can be deducted. AEA found that the Diluent Tanks were storage costs.

[38] The Director did not assess MEG's arguments that the storage was short term and in substance a transportation cost because he concluded that storage of diluent whether or not short term could not be deducted at all. In the result, it is possible that costs of transporting diluent to the Project site were refused and MEG asserts *inter alia* that this is unreasonable.

[39] The substantive (as distinguished from procedural) matters asserted in the judicial review are that AEA and the Director:

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(a) Unreasonably decided that fair market value of the Stonefell Terminal services could not be determined.

(b) Alternatively, unreasonably decided that the non-basic pipeline rate of return on capital did not apply in a cost of service calculation for Stonefell Terminal.

(c) Unreasonably refused to permit the deduction of the cost of the Diluent Tanks.

MEG had also objected to certain calculations relating to waste or “slop” oil, but these were not in issue for the judicial review and further information about them is not required for an understanding of the decisions under review.

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(ii) The nature and function of the Stonefell Terminal

[40] The Stonefell Terminal is located adjacent to the Access Pipeline near its southern end.

[41] The Access Pipeline consists of two lines. The southbound line transports blended product from MEG’s Project at Christina Lake to its southern end at the Edmonton hub, where the product can be transferred to other pipelines to access buyers across North America. The smaller northbound line transports diluent from the Edmonton area (where MEG sources its diluent) to the Project.

[42] Stonefell Terminal was licensed under the *Pipeline Act*, RSA 2000, c P-15, as a pipeline installation known as the Enbridge Athabasca Stonefell Terminal effective December 13, 2007, under a permit/license granted by Alberta Energy and Utilities Board (“**AEUB**”). It is not located on the Project lands.

[43] At the material times, MEG was an equal owner of the Access Pipeline with another oil company. MEG was the sole owner and user of the Stonefell Terminal during the 2014 and 2015 EOPS periods.

[44] According to the Certified Record, MEG had acquired its interest in the pipeline and the Stonefell Terminal from another company. In 2013, it completed the construction of this terminal, thus significant amounts of cost arising from its use appeared in royalty calculations in the 2014 EOPS.

[45] The blended product and diluent can be transferred between the Access Pipeline and the Stonefell Terminal. Blended product and diluent can be held in tanks at the Stonefell Terminal -- four tanks for blended product and (at the time) the two Diluent Tanks.

[46] Blended product can be shipped in a pipeline from the Stonefell Terminal to the nearby Bruderheim terminal to be loaded onto rail transport or can continue on the Access Pipeline to the Edmonton hub. There is also provision for a diluent line between Stonefell and the rail terminal, but this was not in operation during the years under review.

[47] Some of the diluent at the Stonefell Terminal is added to blended product that is on its way to markets. MEG provided a schematic diagram and verbal presentation to AEA stating that about 89% of diluent was added at Christina Lake, 10% at the Sturgeon Terminal (located between the Project site and the Stonefell Terminal) and 1% at Stonefell Terminal.

[48] According to the Certified Record, MEG told the auditors that some quantities of the diluent (intended to go northbound to the Christina Lake Project site) were stored at Stonefell because there was insufficient storage capacity at the Christina Lake Project site to hold it there.

MEG also said that it used Stonefell to aggregate diluent that it purchased for shipment to Christina Lake and to ensure an uninterrupted supply of diluent at the Project.

[49] MEG claimed in the audit that the Stonefell Terminal acts as a "buffer" for the blended product. MEG says this arrangement allows it to manage its intermittent shipping commitments of blended product on the various downstream pipelines. MEG's assertions to AEA in the Certified Record include characterizing Stonefell Terminal as a "market transportation hub and not a storage facility".

[50] MEG also claimed in the Notices of Objection and the judicial review that Stonefell Terminal acted as a "buffer" for diluent and had strategic importance similar to the handling of blended product, and that transportation costs of diluent to the Project site are routinely allowed (eg, trucking and delivery of diluent to the Project site).

[51] MEG claimed throughout the audit that Stonefell Terminal was unique in function and service and there were no other comparable terminals from which one might derive a fair market value for its services.

[52] As described below, "handling charges" incurred for transportation of the blended product can be deducted under the *OSRR2009*. AEA accepts that some short-term storage associated with transportation of blended bitumen is part of a transportation process and therefore included in handling charges. However, it considers longer term storage charges as distinct from transportation.

[53] In its audit determinations, AEA acknowledged that Stonefell Terminal provided a variety of services relating to transportation and handling of the blended product (which it referred to as "terminalling services") as opposed to longer term storage. It found that "Tanks used for terminalling provide a flow-through asset and provide a strategic buffer for the transportation of oil sands products to third parties" and that "The Stonefell Terminal is used for tankage, diluent recovery, rail transshipment, and some pipeline operations."

[54] I pause to note in respect of AEA's statement that the terminal was used for diluent recovery, that the Certified Record indicates that MEG told AEA there had been plans to add a diluent recovery unit, but the record is not clear whether such a unit was added or operational during the periods under review. AEA might have been mistaken in saying the terminal was used for diluent recovery. In any event, the parties did not make an issue of AEA's finding that the terminal was used for recovering diluent.

[55] AEA determined the Diluent Tanks were for storage of diluent. AEA's reasons do not specifically address whether the storage was short term or long term, or respond to MEG's assertion that holding of diluent in the tanks was necessary for transporting or aggregating diluent.

[56] As to the function of Stonefell Terminal in relation to Diluent Tanks, the Director accepted that the tanks were used for storage of diluent. He did not determine whether the storage was short term or long term, nor the purpose of the storage.

(iii) MEG's sale of Stonefell Terminal to a third party

[57] On March 22, 2018 MEG sold its interests in the Access Pipeline and Stonefell Terminal to Wolf Midstream Inc in a $1.52 billion transaction. MEG informed AEA that Wolf is backed

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by Canada Pension Plan and is not affiliated with or related to MEG in any way, and independent advisors and counsel represented Wolf throughout the negotiations.

[58] MEG provided AEA with copies of the "**Wolf Agreements**": Purchase and Sale Agreement dated as of February 7, 2018, Access Pipeline Transportation Services Agreement dated March 22, 2018, and Stonefell Terminal Lease Agreement dated March 22, 2018.

[59] The transportation agreement provides for an "all in" shipping toll for transportation on the Access Pipeline. The lease agreement provided MEG possession of Stonefell Terminal in consideration of payment of rent calculated as a per barrel storage toll multiplied by the terminal's agreed on storage capacity. Under the lease, MEG continued to operate the terminal.

(iv) Handling charges

[60] A component of the royalty due to the Government of Alberta is based on a calculated unit price of the oil sands product at a defined point of transfer. In calculating the unit price, the operator may deduct "handling charges".

[61] Subsection 32(1)(a) of the *OSRR2009* defines this term as follows:

> (a) "handling charges" means the handling charges, export charges, pipeline tariff charges and charges of a similar nature that are paid to transport third party disposition quantities of a kind of oil sands product obtained pursuant to a Project that are disposed of in third party dispositions during a month or Period, as the case may be, from the royalty calculation point for the product to the place where those dispositions occur, but does not include
>
> (i) any charges that are allowed costs of the Project,
>
> (ii) any charges that are taken into consideration in determining a prior net cumulative balance in respect of the Project,
>
> (iii) any marketing costs or charges, brokerage fees or other like charges,
>
> (iv) any cost of diluent referred to in section 22(2) or 33(3)(a)(ii) or that is an allowed cost of the Project, and
>
> (v) any costs or charges arising in relation to a diluent recovery unit;
>
> (Underlining added).

[62] The royalty calculation point was at the plant gate custody transfer unit, where the blended product can enter the Access Pipeline.

[63] Alberta Energy published non-binding guidelines to assist oil sands lessees in determining, calculating and reporting royalty due to the Crown. The auditors, the Director, and the parties in the judicial review relied on the latest version of the guidelines, the *Alberta Oil Sands Royalty Guidelines, Principles and Procedures*, with Appendices, June 2018 (the "***Guidelines***").

[64] The *Guidelines* state at para 4.2.5.1 (page 59), that handling charges typically include pipeline tariffs, terminal and processing charges, and other related fees.

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(v) Quantification of handling charges

[65] The *ACR* provides an extensive set of technical rules to determine costs that can be deducted in royalty calculations, including determining the quantum of handling charges (s. 32 of the *OSRR2009*) or "allowed costs" (s. 3 of the *ACR*) that arise in non-arm's length transactions (*ACR*, s. 9).

[66] The Stonefell Terminal was not at non-arm's length to MEG in the years 2014 and 2015.

[67] The Stonefell Terminal charges arise from a so-called non-basic service. Where handling charges (or "allowed costs") are incurred for a service, other than a basic service, and arise from a non-arm's length transaction, the *ACR* provides the following methodology to determine their amounts:

(a) Where the Minister is satisfied that a fair market value can reasonably be determined for the good or service, the lesser of (i) the amount charged for the good or service, and (ii) the fair market value of the good or service, or

(b) Where the Minister is satisfied that a fair market value cannot reasonably be determined for the good or service, and that the service is performed without utilizing a capital asset or engineering system, the lesser of (i) the amount charged for the good or service, and (ii) the actual cost to produce the good or perform the service, incurred by the person who produced the good or performed the service.

(c) For any other service for which the Minister is satisfied that a fair market value cannot reasonably be determined and that is performed utilizing a capital asset or engineering system, the lesser of (i) the amount charged for the service and (ii) the cost of service of the person who performs the service.

(*ACR*, ss. 9(2), 12(1)(a), (b), 12(2)(b)).

[68] Section 10 of the *ACR* provides general rules for assessing fair market values. These include:

(a) Authorizing the Minister, without limiting any other method of determining fair market value, to adopt (a) published prices of comparable goods that are generally adopted by buyers and sellers, (b) prices for comparable goods prescribed or determined by law, or (c) the average of process paid in arm's length transactions for comparable goods (*ACR*, ss. 10 (2)).

(b) Authorizing the Minister to adjust a price referred to in ss. 10 (2) to reflect the most cost effective means of delivery (*ACR*, ss. 10 (3)).

(c) Authorizing the Minister to adopt certain regulated pipeline tariffs to determine the cost of transporting a substance by pipeline (*ACR*, ss. 10 (4)), and adjusting them to reflect differences between the terms of service (*ACR*, ss. 10 (5)).

[69] Section 20(2)(a) of the *OSRR2009* outlines a substantially similar approach as *ACR*, ss. 10(2).

[70] In assessing whether fair market value can be ascertained, ss. 2(3) and 2(4) of the *OSRR2009* deem certain transactions to be not at arm's length and permit the Minister to determine any transaction to be at arm's length or not at arm's length:

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> 2 (3) For the purposes of this Regulation, other than subsection (1)(a)(i), a transaction is, subject to subsection (4), a non-arm's length transaction if
>
> ...
>
> (c) the consideration for any party under the transaction is in whole or in part based on or tied to
>
> (i) any other contractual or other obligation with another party to the transaction, or
>
> (ii) any consideration under a contractual or other obligation described in subclause (i),
>
> ...
>
> but does not include any transaction to which the only parties are the Crown and another party.
>
> (4) Despite subsection (3), the Minister may, on application by the operator of a Project or on the Minister's own initiative, determine that a transaction is an arm's length transaction or a non-arm's length transaction.

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[71] If calculating a cost of service rather than ascertaining fair market value, one must choose the applicable rate of return on capital.

[72] The *ACR* provides that the rate for a non-basic service such as the terminalling services in the present case is the long term bond rate defined therein plus "... an additional amount, if any, specified by the Minister from time to time by order or otherwise ..." (*ACR*, ss. 2(2), 2(3), 12.1(1)(j)).

[73] According to the *Guidelines*, the only rate above the long term bond rate for non-basic services is a rate for "non-basic pipelines". In all other cases, the long term bond rate applies (*Guidelines*, paras 5.3.1.2, 6.2.2.1 "Return on Capital"). The specification of any additional amount in the rate of return does not require a formal Ministerial Order and none was suggested or provided in the present case.

[74] At the material times, the pipeline rate was preferential in favour of the operator.

[75] MEG claimed the Stonefell Terminal should be treated as part of the Access Pipeline to which the preferential rate applies because it was licensed as a "pipeline installation" by AEUB as depicted in the drawings attached to the permit/license reproduced as Tab 115 in the Certified Record.

[76] The parties agreed that the Minister has discretion to prescribe an amount under *OSRR2009*, s. 21 for a "handling charge" applicable to a non-basic pipeline:

> 21(1) If the Minister is of the opinion that a fair market value referred to in a provision of this Regulation, other than section 20, cannot reasonably be determined pursuant to section 20, the Minister may, employing engineering, economic or financial principles, determine a calculated value for the thing for which the provision contemplated the use of a fair market value.

> (2) If the Minister has determined a calculated value pursuant to subsection (1), the calculated value shall be used in the provision referred to in that subsection in place of the fair market value.

[77] During the audit, MEG proposed that if AEA did not accept that the terminal should be treated as a pipeline, then AEA should prescribe a rate to achieve the same economic outcome. AEA did not accede to this suggestion and MEG did not place that decision in issue with the Director.

(vi) Cost of Diluent Tanks

[78] In the review by the Director, and in this Court, MEG claimed *inter alia* that the tank costs were "fundamental costs", a type of "allowed cost", or a "handling charge".

[79] The *ACR* defines various "allowed costs" of an oil sands project. An "allowed cost" must satisfy the requirements of s. 3 of the *ACR* including:

(a) It is incurred to carry out Project operations.

(b) It is reasonable under the circumstances in which it is incurred.

(c) It is adequately evidenced in accordance with s. 6 and affirmatively established to the satisfaction of the Minister.

(d) It is a "specifically included cost," a "fundamental cost", or a cost approved by the Minister under s. 5 of the *ACR* (a "discretionary cost").

(e) It cannot be a "specifically excluded cost" listed in Schedule 1, Column 2 of the *ACR* (*ACR*, ss. 1(1)(k), 3(1)(c)).

(f) It must not be excluded under ss. 3(2).

[80] A "fundamental cost" includes "costs incurred directly to recover, obtain, process or transport oil sands or oil sands products, or to market oil sands products, pursuant to the Project" (*ACR*, ss. 1(1)(h), 4(1)(a)). However, "costs incurred in respect of ... (b) lands other than Project lands ..." are excluded from fundamental costs (*ACR*, ss. 4(2)(b)).

[81] "Specifically included costs" means, in respect of costs incurred in the relevant periods of the present case, "those costs listed in, or those costs of activities listed in, column 1 of Schedule 1" of the *ACR (ACR*, ss. 1(1)(l)).

[82] Quantifying "allowed costs" that arise from non-arm's length transactions are governed under section 10 of the *ACR* (described with respect to "handling charges" above). Similar to handling charges, the Minister has discretion under section 14 of the *ACR* to prescribe a value.

(d) Audit decisions

[83] As discussed in Part VII, case law requires a "reasons first" approach to judicial review. Reasons are essential and must also be read in the context of the Certified Record to ascertain whether they meet the requisite standard of review. AEA's decisions and the Director's decisions are not published. I therefore set them out at considerable length in the following paragraphs to assist the reader at the outset in understanding them.

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(i) Handling charges

[84] AEA determined that s. 32 of the *OSRR2009* includes the cost of offsite tankage charges for blending "as long as the tankage was considered to be necessary for the transportation of oil sands products, such as terminalling". In MEG's case, tanks used for terminalling "provide a flow-through asset and provide a strategic buffer for the transportation of oil sands products to third parties."

[85] The Director observed on review that "the general eligibility of the Terminal costs as handling charges was not disputed, only the method of inclusion and resulting amount to be claimed, and is consistent with paragraph 4.2.5.1 of the Alberta Oil Sands Royalty Guidelines...". In quoting from the *Guidelines*, the Director emphasized that the "handling charges" typically include terminal and processing charges:

> ... all charges incurred in moving the third party disposition quantities of the oil sands product from the royalty calculation point to the point of disposition. Handling charges typically include pipeline tariffs, <u>terminal and processing charges</u> and other related fees." [Emphasis added]
>
> (Underlining and "emphasis added" in the original decision).

(ii) Fair market value

[86] AEA decided that fair market value could not be determined:

> <u>Fair Market Value</u>
>
> - MEG consistently stated that a fair market value could not be determined.
> - Attempts by Alberta Energy and its auditors to identify a comparable fair market value pursuant to Section 20(2)(a) of the *OSRR'09* did not provide a reasonable estimate or comparability of services to allow for the use of another value.
> - The future years' service agreement with Wolf Midstream (after MEG divested the asset) is not satisfactory to use as a proxy in this case.
> - As a fair market value could not be determined, a cost of service was determined to be appropriate.

[87] The above quotation is from AEA's decision for 2014. In its decision for 2015, AEA stated the Wolf service agreement "is not considered arm's length, and is not satisfactory to use as a proxy ...". MEG suggests that the decisions are inconsistent on the issue whether the Wolf Agreements were not at arm's length. A working paper in the Certified Record (Tab 6) records there is a high risk the transaction was not at arm's length and handling charge valuation is an outstanding issue at the commencement of the 2015 audit.

[88] The Director commenced his analysis of the fair market value issue with MEG's claim that AEA failed to consider fair market value for over a year:

> 23. I do not agree with MEG that [AEA] "made no efforts for more than a year ...to determine the fair market value ("FMV") of the handling charges ..." or that they "wrongfully determined that there was no suitable comparable transaction from which to determine the FMV of the handling charges despite the existence

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> of arms-length third party agreements ..." From a review of the communications on the audit file, the audit commenced on August 10, 2018 and I noted several email exchanges and meetings related to the [AEA]'s examination of handling charges for the Terminal. Specifically, [AEA] sent audit query #4 on January 10th, 2019 and MEG responded to audit quarries [sic] #4 and #5 on February 2, 2019 and other documents clearly indicated an assessment of FMV and the unique nature of the Terminal was considered during the first month of the audit in August of 2018.

[89] Turning to MEG's submission that the Wolf Agreements should be used to determine fair market value, the Director cited ss. 2(3) of the *OSRR2009* and noted the purchase and sale agreement required the other agreements be made and that consideration of the purchase and sale agreement was tied to the transportation and lease agreements. Therefore, the purchase and sale agreement should be considered non-arms' length under ss. 2(3)(c) of the *OSRR2009* and it was inappropriate to use a non-arm's length agreement to establish fair market value (Decision at para 26).

[90] The Director elaborated on his conclusion as follows:

> 28. Since the Agreement was [non arm's length], the Terminal was a unique asset, comparable asset did not exist. Although MEG acknowledged that the asset was unique, MEG also asserted that a comparable transaction did exist at the February 24, 2020 meeting with [AEA]. In any case, it was difficult to assess how reflective the Wolf tariffs were of FMV especially given that the contract was signed in 2018 and the Objection relates to the 2014 production year. In summary, I concluded that [AEA] could not have reasonably determined FMV, and [AEA] was correct to follow sections 12(1)(b) of the *Oil Sands Allowed Costs (Ministerial) Regulation* ("OSACR").

[91] The comparable transaction mentioned by the Director in the above passage could only have been the Wolf transaction because MEG continued throughout the audit to contend that there was no asset comparable to the Stonefell Terminal (for example, Certified Record, Tabs 264 [email to Director], 268 [February 20, 2024 meeting minutes]).

(iii) Cost of service

[92] AEA decided that a cost of service approach applied, using the long term bond rate of return. It stated:

> <u>Cost of Service</u>
>
> • Since fair market value using comparable goods or arm's length transactions could not be used, Alberta Energy considered the actual cost incurred providing the blend terminalling services (*Section 20(2)(b)(iii), OSRR'09*). The cost of service methodology followed a throughput-based treatment and recognition of costs and a rate of return based on the long-term bond rate, and is consistent with past practices of Alberta Energy for terminalling services.
>
> - A higher rate of return in a cost of service calculation applies to non-basic pipelines. For other assets, the long term bond rate is used for cost of service calculations.

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- MEG's proposed treatments for the Stonefell Terminal are inconsistent with historical Alberta Energy practice in similar circumstances where tanks and terminals are considered separate assets from pipelines and does not align with a technical review and understanding of the purpose of the facility.

[93] AEA described the purpose of the facility. It noted that tanks used for terminalling of blended product "provide a strategic buffer for the transportation of oil sands products" and that the Stonefell Terminal "is used for tankage, diluent recovery, rail transshipment, and some pipeline operations".

[94] With respect to whether Stonefell Terminal was part of a non-basic pipeline, AEA focussed on the function of the terminal rather than its licensing under the *Pipeline Act*:

...

- When determining a cost of service methodology for pipelines, Alberta Energy uses a higher rate of return on capital (RORC) than it does for other assets. The intent was to encourage the development of pipelines by offering the higher RORC. This higher rate was applied to the Access pipeline. However, consistent with prior decisions, the higher RORC does not apply to tanks used for terminalling.

- MEG pointed out that the Stonefell Terminal was licenced as part of the Access Pipeline by the AER. It requested Alberta Energy apply the definition of a pipeline that is used by the AER to license facilities.

- However, the AER and Alberta Energy are different entities and what the AER considers a pipeline for regulation purposes is different then [sic] what Alberta Energy considers a pipeline for royalty purposes. In its July 2019 letter to the Department, MEG claims that Energy Audit used the definition of pipeline found in the *Pipeline Act* throughout the course of its 2014 audit. A reference to this was made in a letter Alberta Energy's Compliance and Assurance audit team sent to MEG. However, this was later clarified with MEG and with the audit team that the Pipeline Act is a licensing criteria, and not the determinant for royalty purposes.

- For royalty purposes, a pipeline is considered the pipe in the ground plus the pumping infrastructure core to pipeline operation. Tanks used for terminalling are not considered core to pipeline operation -- consistent with Alberta Energy's normal treatment of similar assets in the oil sands royalty system.

  - Infrastructure which is "incidental" to operations, such as tanks and terminals, is not part of a pipeline for royalty purposes, regardless of how this infrastructure was licensed by the Alberta Energy Regulator (AER).

[95] The Director opened his discussion of the pipeline issue by observing that he disagreed with MEG that AEA "initially correctly relied on the definition of a pipeline from the *Pipelines Act*" or that the AEA "wrongfully created a new definition of a pipeline for "royalty purposes ..." He reasoned that while it is true that AEA initially referred to the definition of pipeline in the *Pipeline Act*, he did not think that this definition applies in the royalty context.

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[96] The Director then turned to interpreting the Minister's intention in specifying an additional amount to the rate of return for non-basic pipelines. After setting out the modern approach to statutory interpretation the Director reasoned:

> 14. The OSRR-09 is a regulation under the MMA and not the *Pipeline Act*. Therefore, when considering how these terms within section 32 of the OSRR-09 are to be interpreted, they must be read harmoniously with the object of the MMA. When I consider the purposes of the Pipeline Act and the MMA, it is immediately apparent that the objects of these statutes are significantly different, and the use of a definition of a pipeline from the Pipeline Act is not appropriate to use in the context of the MMA or its regulations.
>
> 15. Whereas the *Pipeline Act* is a regulatory statute administered by the Alberta Energy Regulator, the MMA governs the royalty regime. The royalty regime is separate from the regulatory regime, with different purposes. A review of the various parts of these two sets of legislation supports these two statutes' descriptions and distinct nature on the Open Alberta website. It reflects the individual purposes (e.g. objects) of these statues [sic]:
>
> ...

[97] After adopting the descriptions of the general scope of the two statutes from a government internet site, the Director continued:

> 16. Despite the terminalling facilities' inclusion within the [sic] MEG's license to operate the Access Pipeline and Terminal under the *Pipeline Act* by the Energy Resources Conservation Board (now the Alberta Energy Regulator), it was not correct to assume that the definition of pipeline under the *Pipeline Act* was applicable or binding in the royalty context because the MMA was enacted for an entirely different purpose than the *Pipeline Act*. The scheme of the MMA strongly suggests that the Minister intends to make a distinction between pipelines and terminals for royalty purposes.
>
> 17. Considering the scheme of the MMA, the costs associated with terminals and pipelines are treated separately. Section 4.5.2.1 [sic] of the Guidelines lists "pipeline tariffs" and "terminal and processing costs" as separate cost items eligible for handling charges.
>
> 18. If a terminal were considered part of a pipeline for royalty purposes, there would be no need to list both pipeline tariffs and terminal costs as separate.
>
> 19. With this context in mind, I next turn to determine the meaning of the terms pipeline and terminal within the context of the MMA. Although interpretive approaches vary, a common and accepted means of choosing the "grammatical and ordinary sense of a term" when it is not defined in a statute is to use a dictionary.
>
> 20. The Oxford Canadian Dictionary defines the term "Pipeline" as "a long, usually underground pipe for conveying oil, gas, etc." and a "Terminal" as "an installation where grain, oil etc. is stored at the end of a rail line or pipeline, or at a port."

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> 21. I conclude that the Oxford Canadian Dictionary definitions of terminal and pipeline appears to read harmoniously with the object of the MMA because the definition of "terminal" distinguishes it from a "pipeline" and means "an installation ... at the end ... of a pipeline ..." which aligns with the statutes and Guideline references that strongly suggest that a pipeline was not a terminal. This context supports the conclusion that the Minister intended that these terms and the costs associated with these assets should be treated separately and differently within the royalty framework and for the determination of handling charges for the Project.
>
> 22. Accordingly, I concluded that it is not appropriate to use a pipeline definition within the *Pipeline Act*. Such a determination would incorrectly treat a pipeline and a terminal as the same asset, which would be incorrect in the context of the royalty regime. Despite the one reference to the *Pipeline Act* that was corrected shortly thereafter, [AEA] was correct in their final determination that the Terminal is not a pipeline.

[98] The Director later concluded (at para 31) that since the terminal is not a pipeline, the use of a rate of return for a non-basic pipeline to determine the amount of handling charges is not appropriate, and that the terminal is a distinct asset from the Access Pipeline and requires a different calculation to determine the eligible amount of handling charges. AEA's calculation was "reasonable".

(iv) Prescribed rate

[99] AEA considered whether to prescribe a rate for the services. After noting MEG's suggestion that "[a]lternatively, Alberta Energy should prescribe a rate that is materially similar to a non-basic pipeline cost of service and this charge should be applied to diluent and blend volumes", AEA found:

> <u>Prescribed Rate</u>
>
> • A prescribed rate (*under Section 21 of the OSRR'09*) was considered, however, the Stonefell Terminal service is not a unique situation. Alberta Energy has past decisions for other off Project handling charges relating to tankage and terminalling. The cost of service treatment proposed by Alberta Energy is consistent with the treatment of other similar assets, and therefore a prescribed rate was not needed in this case.

[100] The Director observed with respect to AEA's conclusion on prescribed rate:

> 33. Section 21 of the [*OSRR2009*] is a discretionary provision that the Minister may use when [fair market value] cannot be established. [AEA] was not required to use this provision to create a prescribed rate for the Stonefell Terminal costs. Accordingly, I conclude that [AEA]'s determination to not use a prescribed rate was reasonable under the circumstances.

[101] Overall, the Director summarized their conclusions on the matter of fair market value and cost of service matters as follows:

> 34. In summary, I agree with EA that the Stonefell Terminal is not a pipeline. I also agree that EA could not have reasonably determined [fair market value]

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> for the Terminal costs because the Wolf Agreements were [non arm's length] and there are no arms-length comparable transactions to provide a reasonable market value for the costs associated with the Stonefell terminal. I also found it was reasonable for the Minister not to exercise her discretion under section 21 of the [*OSRR2009*] to prescribe a rate to determine the amount of eligible Terminal costs with the handling charges for the Project. Further, [AEA] aligned its cost of service calculation and use of the [long term bond rate] determinations with the policy direction provided in Appendix J of the Guidelines for an asset that was not a non-basic pipeline.

(v) Cost of Diluent Tanks

[102] AEA refused the cost of the Diluent Tanks. It stated:

> Diluent
>
> - The Stonefell terminal is used for tankage, diluent recovery, rail transshipment, and some pipeline operations. It is not located on Project lands, is not a Project asset, and is not part of an oil sands royalty Project.
> - In accordance with the [*ACR*], offsite diluent tankage/storage is not an allowed cost because it is not a fundamental, discretionary, or specifically included cost.
> - The cost of diluent is prescribed as the weighted average cost per unit volume of that diluent calculated in accordance with the Minister's directions. Storage of diluent is not specifically included in the weighted average determination, and is not generally considered necessary for the transportation of diluent.
>   - The proposed cost of service does not apply to diluent.

[103] The Director found that the tankage costs were not a handling charge under s. 32(1)(a) of the *OSRR2009*. The Director stated that another operator identified by MEG was allowed tank cost of service as a "handling charge", using the long term bond rate of return, in a similar situation. However:

> 40. After reviewing the other notice and related audit materials, it appears that similar costs to the disputed costs had been included in [name redacted in Certified Record] Cost of service for eligible handling charges. In spite of the allowance of these costs as eligible handling charges within the other notice, I find that the inclusion of such costs is not consistent with the interpretation of the text of section 32(1) of the [*OSRR2009*], specifically the definition of the terms "*diluent*" and "*oil sands product*" under [*OSRR2009*].

[104] After noting that under ss. 32(1)(a) "handling charges" are paid to transport third party disposition quantities of an oil sands product, and that diluent is not such a product, the Director reasoned:

> 42. In general, short term storage costs incurred for the purpose of transporting third party volumes to the point of disposition are eligible handling charges. However, related to MEG's objection, it was clear from the definitions the

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> charges were paid for diluent which was not an "oil sands product". Therefore the charges paid to store diluent, even if the storage was short term, cannot be eligible handling charges under section 32(1) of [*OSRR2009*], because diluent is not an oil sands product and handling charges must relate to an oil sands product.

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III Issues and standard of review

[105] MEG raises the following issues:

(a) The audits were unreasonable or conducted in a procedurally unfair manner because they were not conducted or completed within the times prescribed by s. 38 of the *MMA*:

(i) The Ministerial Orders extending the time limitations were invalid;

(ii) AEA breached procedural fairness requirements owed to MEG by failing to inform it that extension orders would be requested or were made.

(b) AEA and the Director treated MEG unfairly by relying on prior audit decisions relating to other operators without disclosing them to MEG and allowing it an opportunity to respond.

(c) The Director treated MEG unfairly or was biased or created reasonable apprehension of bias by consulting AEA without MEG being informed or having an opportunity to respond, and by having AEA "pre-screen" the Director's final determinations.

(d) AEA and the Director unreasonably decided that fair market value of the Stonefell Terminal services could not be determined.

(e) Alternatively, AEA and the Director unreasonably decided that the non-basic pipeline rate of return on capital did not apply in a cost of service calculation for Stonefell Terminal.

(f) AEA and the Director unreasonably refused to permit the deduction of the cost of the Diluent Tanks.

[106] MEG states in its written brief that it filed applications to judicially review both AEA's decisions and the final determinations made by the Director. It states the parties agreed to the review of both in a combined hearing.

[107] The Crown asserted in oral submissions that the determinations under review are those of the Director. The Court should not conduct a judicial review of AEA's decisions, because the final decision was made by the Director.

[108] The Court has discretion to decline judicial review of a decision where an adequate alternative remedy exists and the circumstances make it appropriate to do so (***Alberta (Information and Privacy Commissioner) v Alberta Teacher's Association***, 2011 SCC 61 at para 22 - 26; ***Strickland v Canada (Attorney General)***, 2015 SCC 37 at para 42; ***Yatar v TD Insurance Meloche Monnex***, 2024 SCC 8 at para 3, 51 - 54, 64).

[109] Specifically with respect to decisions of AEA, "[i]n the normal course, a party should not be permitted to bring an application for judicial review in respect of an initial decision that is

subject to reconsideration at another level" (***Taylor Processing Inc v Alberta (Minister of Energy)***, 2023 ABKB 64 at para 69). There are exceptions where the circumstances warrant (*ibid* at para 71).

[110] I have paid close attention to the record of communications among the auditors and other branches of Alberta Energy, and with MEG, to see whether AEA's underlying decisions were flawed and whether any such errors tainted the Director's final determinations or shed light on the allegations of unfairness, bias and reasonable apprehension of bias. However, I see no utility in this case of laboriously reviewing AEA's decisions, followed by a review of the Director's decisions.

[111] I concluded it is appropriate to determine MEG's submissions about the validity and effect of the Ministerial Orders although MEG did not raise with AEA or the Director the issue of the expiry of the time periods in which to complete the audits. The Crown did not object to MEG's dealing with this issue in the judicial review. The matter is one of procedural fairness that can be addressed in the judicial review.

[112] I note that the Director did not address the standard of review that he applied (nor, so far as can be seen in the Certified Record, respond to MEG's inquiry of him about the standard he intended to apply). The Director appears to have conducted a correctness review though he sometimes used the words "reasonable" and "justified". Although the parties did not raise this matter in their arguments, the Director ought to inform participants in future cases of the standard(s) and reasons for adopting them.

[113] As to standard of review by the Court, questions of procedural fairness are not measured by whether they are "correct" or "reasonable," but rather "whether the proceedings met the level of fairness required by law" (***Cenovus TL ULC v Alberta (Energy)***, 2019 ABQB 301 at para 19 and authorities cited therein; ***R v Ferzli***, 2020 ABCA 272 at para 21).

[114] Questions pertaining to the merits of the decisions are presumptively assessed on the reasonableness standard (***Mason v Canada (Citizenship and Immigration)***, 2023 SCC 21 at para 7, 8, 56 - 77; ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 16 - 17). None of the established exceptions apply and the parties agreed that the reasonableness standard applies.

IV Statutory time period in which to complete the audits

(a) Introduction

[115] Section 38 of the *MMA* requires that the audits be completed within a certain time period. The Minister may extend the time periods under s. 8 of the *MMA* and has delegated this authority.

[116] In the present case, the time periods for the audits were extended by Ministerial Orders. However, MEG did not receive notice of the intention of the Minister's delegate to make the extension orders, nor notice that the orders were made.

[117] Both audits were completed within the extended time periods directed in the Ministerial Orders, but outside the time periods under s. 38 of the *MMA*.

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(b) Statutory provisions

[118] The provisions of the *MMA* establishing time periods in which an audit must be completed have been periodically amended. Each party asserted a different version of the statutory regime for the audit of the 2014 EOPS. Both assert the same regime for the 2015 audit.

[119] The Crown submits that the version of the time period in force for the audit of the 2014 EOPS allowed four years for completion of the audit (*MMA*, ss. 38(4)) prior to the amendments of the *Statutes Amendment Act, 2014*, SA 2014, c 8, s. 6). The Crown submits a fifth year is added for completion in the case of audits commenced in the fourth year (*ibid*, ss. 38(5)).

[120] Subsections 38(2), (4) and (5) and 47(5), prior to the 2014 amendments, provided in part:

> 38(2) Where the Minister considers it appropriate to do so, the Minister may, in accordance with this section, calculate, recalculate or make additional calculations of any of the following:
>
> (a) the Crown's royalty share of a mineral;
>
> (b) any royalty proceeds;
>
> (c) any credit or other deduction permitted by the regulations from the Crown's royalty share of a mineral or from royalty proceeds;
>
> ....
>
> (4) A calculation, recalculation or additional calculation of any amount referred to in subsection (2) may be made,
>
> (a) subject to subsection (6), within 4 years after the end of the calendar year in which
>
> > (i) the mineral that is the subject of the calculation, recalculation or additional calculation was recovered in a case to which subsection (2)(a) applies,
> >
> > (ii) the amount referred to in subsection (2)(b), (e), (e.1), (e.3) or (f), as the case may be, became owing, or
> >
> > (iii) the amount of any credit, deduction, reduction or exemption referred to in subsection (2)(c) or (d) was first determined by the Minister,
>
> .....
>
> (5) Subject to subsection (6), where the calculation, recalculation or additional calculation of any amount referred to in subsection (2) is made
>
> ...
>
> (b) as a result of an audit or examination under section 47(5),
>
> and ... the audit or examination is commenced in the 4th year as calculated under subsection (4)(a), that 4-year period is extended by one year.
>
> ...

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> 47(5) The Minister may at any reasonable time enter any place where a business is carried on by a person required to keep records under this Act, if the Minister does so for the purpose of auditing or examining records that are required to be kept under this Act.
>
> (Underlining added).

[121] MEG submits the applicable statutory version of the time period is that amended by the *Statutes Amendment Act, 2014.* This amended version allows five years after the end of the calendar year determined under the regulations (*MMA*, ss. 38(6) as amended). Both sides agree that for the audit of the 2015 EOPS, the applicable period is under the amended version, ie five years to complete the audit (*MMA*, ss. 38(6) as amended).

[122] The amended version provides in part:

> 38(5) The Minister may, in examining a record, conduct an audit of the submitted records or conduct any other form of examination determined by the Minister.
>
> (6) An examination referred to in subsection (5) must be completed no later than 5 years after the end of the calendar year determined under the regulations.
>
> (7) If, after the completion of an examination under subsection (5), the Minister determines that a calculation in respect of a prescribed matter is required, the Minister shall provide a notice of the Minister's determination to the reporting person whose record is the subject of the examination.
>
> (8) A calculation referred to in subsection (7), including any related interest and penalties, must be made no later than 5 years and 6 months after the end of the calendar year determined under the regulations.
>
> (Underlining added).

[123] The Crown is correct that the pre-amendment version applies to the 2014 EOPS and the amended version applies to the 2015 EOPS (*Statutes Amendment Act, 2014*, ss. 6(9); Proclamation, The Alberta Gazette, Part 1, Vol 111, No 23, December 15, 2015, proclaiming s. 6 of the *Statutes Amendment Act* coming into force pursuant to ss. 6(11) thereof).

[124] Both versions provide mechanisms for a payor to file an objection to a determination or recalculation decision, in which case the Minister may recalculate or make further calculations (*MMA*, s. 39).

[125] Section 8(1)(g) of the *MMA* permitted the Minister to extend the statutory time periods in s. 38:

> 8(1) The Minister may
>
> ...
>
> (g) if any provision of this Act, the regulations or an agreement requires or permits the doing of any act within a fixed period or at a fixed time, extend that period or fix another time by or at which that act is to be done, whether the period within which or the time by or at which the act ought to be done has or has not expired or arrived, as the case may be;
>
> ...

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(c) Facts

[126] The audit of the 2014 EOPS commenced September 10, 2018 and ended June 1, 2021. Both sides agree, though for slightly different reasons, that absent any extension the time period under s. 38 expired December 31, 2019.

[127] The audit of the 2015 EOPS commenced January 29, 2020 and ended November 8, 2021. Absent any extension the time period expired December 31, 2020.

[128] Extensions for the 2014 audit were issued under s. 8(1)(g) by Ministerial Order on December 3, 2019 (extension to December 23, 2020 (MO 808/2019)) and on December 22, 2020 (extension to December 23, 2021 (MO 554/2020)).

[129] An extension for the 2015 audit was issued under s. 8(1)(g) by Ministerial Order on December 22, 2020 (extension to December 23, 2021 (MO 569/2020)).

[130] During the extension periods, MEG continued to participate in the 2014 and 2015 audits including:

(a) Discussions about the functions of the Stonefell Terminal and quantifying the costs (whether a fair market value could be determined for its services) (January and February 2020).

(b) Provision and discussion of the Wolf Agreements for the purposes of determining whether a fair market value of the Stonefell Terminal services could be determined (August 2020).

(c) MEG's providing to AEA a recalculation of Stonefell Terminal costs based on rates obtained from the Wolf Agreements (September 2020).

(d) Issuance by AEA of 2014 and 2015 audit closure notices, MEG's responses, and AEA's responses (March, April, and May 2021).

(e) Additional communications with respect to the slop or waste oil credits in June 2021.

[131] MEG did not assert at any time during the audits that the time period for either audit had expired.

[132] MEG provided Notices of Objection to the audit determinations for both audits, under the *DRR*, on September 27/29, 2021 (2014 audit) and February 28, 2022 (2015 audit).

[133] MEG did not assert that the audit time periods had expired in its Notices of Objection.

[134] MEG states, through its counsel, that it was not notified of the Ministerial Orders and did not become aware of any of them until the Crown delivered the Certified Record and supplements thereto in the judicial review. I will accept this assertion, though not verified by affidavit because there is no record in the Certified Record showing that the Department of Energy informed MEG of these orders.

(d) Parties' positions

[135] MEG submits the Ministerial Orders were ineffective because they were not published and MEG was not informed of them. Further, if the orders were effective, then AEA denied MEG procedural fairness in making them without notice to MEG or telling MEG about them.

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[136] MEG asserted in verbal submissions that the Ministerial Orders are invalid either for lack of notice of intention to make the orders or lack of notice that the orders were made, or both. MEG's counsel stated that if the orders are ineffective, then the Court should find that AEA and the Director acted unreasonably in continuing the audits and issuing determinations. Further, if the orders are effective, then the Court should find that it was unfair for the Minister to make and rely on the orders without notice to MEG and this unfairness tainted the audit proceedings.

[137] The Crown asserts that the Minister had no duty to notify MEG, that the orders are not invalid, and that if they were invalid then MEG waived or acquiesced in the expiry of the time periods having extensively participated in the process. Finally, if the failure to provide notice is a breach of fairness, it is not sufficiently serious to invalidate the audit determinations.

[138] MEG responded that it was obliged to participate in the audit, therefore doing so was not a waiver.

(e) Decision

(i) Requirement to publish the Ministerial Orders

[139] Ministerial Orders are issued under a variety of Alberta statutes and regulations and are a common feature of regulatory schemes. It is well known that not all Ministerial Orders are published. Nor does the law require publication of all of them.

[140] As a general principle, "... In certain circumstances an order has to be published as a statutory instrument if it is of a legislative character but not if it is of an executive (i.e. administrative) character." (***Nova Scotia (Director of Assessment) v Canada Trustco Mortgage Company***, 1997 CanLII 9862 (NS CA), citing de Smith, *Judicial Review of Administrative Action* (4th Edition) p. 71).

[141] Most Ministerial Orders in Alberta fall within the definition of "regulation" in the *Interpretation Act*, RSA 2000, c I - 8, ss. 1(1)(c). If such regulation is of a "legislative nature" then it must be published in the required manner under the *Regulations Act*, RSA 2000, c R-14, ss. 1(1)(f) and 3, otherwise it is not valid as against a person who has not had actual notice of it (*ibid*, ss. 3(5)). The *Regulations Act* does not address the effectiveness of Ministerial Orders that are not of a legislative character.

[142] MEG points out that a fundamental tenet of the rule of law is that those who are governed by the law must have knowledge of its rules before acting (***R v Carriere***, 2013 ABQB 645 at para 57; ***R v Bengy***, 2015 ONCA 397 at para 43).

[143] MEG cites ***Re Michelin Tires Manufacturing (Canada) Ltd***, 1976 CanLII 2432 (NS CA) for the proposition that any Ministerial Order must be published in some way to become effective.

[144] In ***Michelin Tire*** a taxpayer challenged a Minister's direction purporting to narrow a previous ministerial direction concerning the scope of a tax exemption. The purported direction had not been published. The Court found that this direction was outside the Minister's powers, but some members of the panel in *obiter dicta* commented on publication requirements.

[145] Cooper JA stated that the Minister's exercise of a power to define an exemption should be published and the effect of a failure to do so when the power was exercised was, under the circumstances, a retroactive order that would not apply to an earlier transaction (***Michelin Tire*** at

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para 41). MacKeigan CJNS observed that publication of such a direction would be required for it to bind a person or make them open to prosecution (***Michelin Tire*** at para 57).

[146] MEG similarly relied on ***W.G. Knight & Associates Inc v Manitoba (Securities Commission)***, 1990 CanLII 11138, 71 Man R (2d) 183 (MB KB), where the Court found that a securities commission's decision to extend a policy governing retention of interest earned on clients' funds to independent mutual fund brokers/dealers, had to be promulgated before it could be enforced against such a dealer alleged to be in non-compliance of the policy.

[147] The orders and policies in the cases cited by MEG concern laws of general application or subordinate legislative actions: In ***Michelin***, the purported variation of a sales tax exemption, and in ***Knight***, a general securities requirement imposed by a regulatory authority.

[148] In some cases Courts have recognized a defence where it is impossible for the person charged to know of the Ministerial Order, either because it has not been promulgated or because it was not published in a satisfactory way so that its existence and contents could be known (***R v Ross***, 1944 CanLII 241 (BC SC); see also ***Corporation de l'École Polytechnique v Canada***, 2004 FCA 127 at para 39).

[149] As an example, in ***Ross*** the accused was convicted of entering a closed area for the purpose of hunting. The area had been closed by Ministerial Order. The order was not promulgated and Ross did not have actual notice of it nor could he have known of it. The Court allowed Ross' appeal from his conviction:

> I think it hardly compatible with justice that a person may be convicted and penalized, and perhaps lose his personal liberty by being committed to jail in default of payment of any fine imposed, for the violation of an order of which he had no knowledge or notice at any material time.

[150] The Ministerial Orders here, were made in the day-to-day administration of a statutory audit and were not legislative in nature.

[151] I accept that in cases of an alleged breach by a person of a Ministerial Order, whether or not legislative, the legal system is not likely to impose sanctions where the order was not adequately promulgated in some way.

[152] However, the present case is not one of enforcement of a duty imposed on MEG by an administrative order. It is simply an order to extend time in which to complete an audit.

[153] I find the Ministerial Orders were not invalid by reason of failure to publish or promulgate because there is no general requirement to do so.

[154] Nevertheless, the orders may be set aside if they were not made in compliance with any requirements of procedural fairness owed to MEG in respect of making them. Further, the audits may be set aside if the manner of obtaining the orders or failing to notify MEG of the orders violated procedural fairness in sufficiently serious circumstances to justify setting aside the process. I turn to the procedural fairness issues in part (ii) below.

(ii) Procedural fairness issues

[155] MEG says it was deprived of an opportunity to dispute the extensions. It submits that the "effect of inadequate or no notice is to render the ... decision void". In this regard, MEG relies on

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Sitler v Alberta (WCB), 2003 ABQB 277 and ***Edmonton Police Association v Edmonton (City of)***, 2007 ABCA 184 at para 9, 11.

[156] Is there a duty to inform MEG of an intention to make an extension order or inform it of the order?

[157] The content of procedural fairness owed to MEG in the audit is assessed under the approach in ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699 (SCC), [1999] 2 SCR 817, 174 DLR (4th) 193, where the Court outlines five non-exhaustive factors to consider: (1) the nature of the decision being made and process followed in making it; (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; (5) the choices of procedure made by the agency itself.

[158] As to the nature of the decision, MEG asserts throughout its arguments that the Ministerial Orders deprived it of the protection of a limitation period and of the opportunity to dispute the deprivation thereof. Further, the 2014 amendments added imperative wording, thereby indicating the legislators considered the amended provision to be mandatory.

[159] I do not agree that either version of s. 38 created a limitation period or that MEG was deprived of the protection of a limitation period in which audits must be completed.

[160] The question whether the failure of an administrative decision maker to decide a matter within a prescribed period is fatal or implies nullification in the event of disobedience, is a matter of statutory interpretation (***Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)***, 2010 ABCA 26 at para 22; rev'd on other grounds, ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*** (SCC), *supra*).

[161] The "words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (***Rizzo & Rizzo Shoes Ltd (Re)***, 1998 CanLII 837 (SCC) at para 21). The words "must" and "shall" are to be construed as imperative (*Interpretation Act*, RSA 2000, c I-8, ss. 28(2)(d),(f)) unless doing so is inconsistent with the context in which the word was used or would render the sections irrational or meaningless (***Lavallee v Alberta (Securities Commission)***, 2010 ABCA 48 at para 7).

[162] In discerning whether the legislature intended the omission to comply with a statutory time period to be fatal, the use of imperative words like "must" or "shall" is not determinative. Other considerations include: "(1) whether the duty being discharged is a public duty; (2) where lies the balance of inconvenience or prejudice; and (3) whether the statute provides for a penalty for failure to comply" (***McMahon v Canada (Attorney General)***, 2004 FC 540 at para 27; ***Rahman v Alberta College and Association of Respiratory Therapy***, 2001 ABQB 222 at para 25, 28, 29, 33 - 37, 52).

[163] In considering the language and objectives of the provision, one ought to consider the usual objectives of limitation statutes. Those are to promote certainty, avoid stale evidence, encourage diligence, and bring repose (***Markevich v Canada***, 2003 SCC 9 at para 17). Also, it is well known that limitation legislation should be clearly expressed (for a recent example, see ***Mema v Chartered Professional Accountants of Alberta (Complaints Inquiry Committee)***, 2022 ABCA 4 at para 43).

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[164] Both versions of s. 38 encourage the timely and diligent completion of audits but do not confer the usual guarantees of a limitation period such as repose because (1) the Minister has broad discretion to extend the time, even retroactively, under ss. 8(1)(g) of the *MMA*, and (2) neither version prescribes the consequences of missing the time period, nor expresses the time period as a typical limitation period.

[165] It is notable that in each version, s. 39.1 provided for limitation periods in which the Crown could commence a claim in Court, demonstrating the legislature comprehended the difference between a limitation period preventing proceedings and a time limit in which to carry out a public duty.

[166] In contrast to s. 39.1, neither version of s. 38 provides, for example, that "no audit decision shall be issued after the expiry of ....". For a case similar to the amended s. 38 where mandatory language was under consideration and the Alberta Court of Appeal found the statute did not impose a limitation period, see ***Mema*** at para 43.

[167] Sections 38 and 8(1)(g) of the *MMA* regulate the performance of a public duty and require flexibility. The Minister discharges a public duty of auditing to ensure the Crown receives the benefit of its royalty on the mineral resource that the Crown granted in return for royalty. The Minister requires flexibility to respond to the complexities of audits, availability of resources to conduct audits, and delays by operators or others in providing necessary information to conduct and complete audits.

[168] Given the public nature of the duty, the Minister's extensive discretionary power to extend, the absence of typical limitations language, and the lack of a statutory consequence other than to limit the time in which the Crown can commence an action under s. 39.1, I do not construe the s. 38 time periods as being in the nature of a limitation period on completing an audit or review or that the consequence of exceeding them is fatal.

[169] As to the importance of the decision to the operator, the EOPS review and recalculation process is primarily administrative both at the audit level and the review level. Audits involve investigations and adjustments. They require flexibility, practicality, and efficiency. The outcomes are economic, and the decisions are not the types of decisions affecting liberty, security, or livelihood where the Courts have required a relatively high degree of procedural fairness.

[170] As to the operator's expectations, timely administrative justice is a legitimate expectation. However, participants would also consider the Minister's wide ranging power to extend time in pursuit of its public duty.

[171] Should the extensions become unfair, unduly prejudicial or abusive, an operator may well have the opportunity to challenge them (***Blencoe v British Columbia (Human Rights Commission)***, 2000 SCC 44 at para 102, 115, 121 - 122) but MEG does not rely on this line of caselaw.

[172] As to procedural choices of the agency, neither side addressed the ordinary practice of the delegate in making Ministerial extension orders. In the audit of the 2014 EOPS, the Crown notified MEG on December 10, 2018 that the audit would "extend" into the fifth year under s. 38 of the *MMA*. It is telling that the Crown saw fit to notify MEG that the fifth year would be required. This is some indication that AEA would ordinarily notify the payor of an extension of a royalty audit.

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[173] The Crown emphasizes that the *MMA* does not explicitly require notice to MEG. While this is correct, it is also true that the statute does not dispense with the usual notice expected in an administrative decision-making process. The ***Baker*** factors are not limited to the wording of the statute.

[174] Given the foregoing, I conclude that the mere failure to provide MEG input into the highly discretionary extension decision does not amount to unfairness or breach of natural justice.

[175] Although MEG does not have the right to be informed of Alberta Energy's intention to make or request the extension orders, I agree with MEG that procedural fairness required Alberta Energy to inform MEG of the extension orders promptly after they were made.

[176] The Crown submits such notice would be redundant. MEG participated in the process and there was no need to tell it of something it knew, that the process would not be completed within the statutory time period (citing ***Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*** (SCC) at para 69).

[177] The Crown has taken the comments from the ***Alberta Teacher's Association*** decision out of context. In that case, the Court agreed there was a basis on the reasonableness standard for the privacy commissioner to decide that they could extend the applicable time period after it expired. That decision does not bear on a duty to tell an interested party that an order exists.

[178] MEG is entitled to a reasonable degree of transparency so that it can order and manage its affairs. The Minister owes MEG a duty of procedural fairness to inform an operator of an audit extension promptly after the extension is made.

(iii) Effect of breach of duty to inform MEG

[179] Having determined that MEG was entitled to know that the Ministerial Orders were made, what consequences follow from the breach?

[180] I agree with the Crown that not every category of error engages the rules of natural justice. I have found that the Minister or Alberta Energy merely failed to inform MEG of the orders. Such a defect would not justify setting aside the audit unless it amounts to "a defect in substance that goes to the very core of the tribunal's jurisdiction" (***Edmonton Police Association*** at para 10). In my opinion, the failure was a non-prejudicial omission.

[181] As to prejudice, MEG submitted that the failure to notify it of the orders deprived it of the ability to seek review of the orders and that it believed that once the time periods expired it was no longer liable to variation of its EOPS (ie, its royalty liability was fixed in the amounts that MEG reported). MEG's counsel stated in verbal submissions that MEG was fully aware the time limits had passed but continued with the audit because it was obliged to cooperate and sought to settle the amounts.

[182] I do not agree with MEG's submissions on prejudice.

[183] First, MEG was entitled to review the fairness of the extension orders and the reasonableness of the orders in the present judicial review. It did not lose that right only because the government failed to inform it of the Ministerial Orders.

[184] Rule 3.15 of the Alberta Rules of Court imposes a strict, non-extendable time limitation on commencing proceedings for judicial review. However, Rule 3.15 and the doctrine against

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collateral challenges do not preclude MEG from challenging the extension decisions in the judicial review of the audit determinations and decisions.

[185] The Ministerial Orders in the present case were intertwined with the audit process and should be characterized as interim orders, capable of challenge in the judicial review of the audit decisions under the general principle that “It is generally inappropriate to short circuit the administrative process by bringing a judicial review application mid-process ... except in rare and exceptional circumstances” (***Akinnawonu v College of Physicians and Surgeons of Alberta***, 2024 ABCA 167 at para 10; ***Fawcett v College of Physicians and Surgeons of Alberta (Complaint Review Committee)***, 2022 ABCA 416 at para 19).

[186] Second, I reject MEG’s contention (set out, for example, in para 87 of its written brief and repeated in verbal submissions) that it believed its financial responsibility for the quantum of the royalty was determined upon expiry of the statutory audit period.

[187] A Court can entertain affidavit evidence of facts that were not before the tribunal to prove procedural unfairness or prejudice. MEG has not filed evidence of any of its personnel deposing to such a belief or of any steps they took to MEG’s prejudice based on such belief. If MEG actually believed the EOPS were beyond recalculation, it would have asked the Department of Energy for any evidence of an extension, objected when the time periods expired, or objected in its Notices of Objection to the Minister. It did not respond in any of these ways.

[188] I accept that MEG may have thought it had an argument arising from expiry of the statutory time period, but the assertion MEG subjectively believed its liabilities were fixed strains credulity and I refuse to accept such a representation without affidavit evidence, of which there is none.

[189] Third, even if MEG’s personnel thought the EOPS were not open to adjustment, MEG did not provide evidence that it acted to its prejudice in reliance on such belief or demonstrate why such reliance would have been reasonable given an operator knows or ought to know that the Minister has discretion to act retroactively.

[190] Consequently, I agree with the Crown that the failure to inform MEG of the Ministerial Orders was not sufficiently serious to justify setting aside the audit determinations in the sense contemplated by ***Edmonton Police Association*** at para 10. Nor would I consider setting aside the orders for the same reasons.

[191] I also agree with the Crown that MEG’s conduct constituted acquiescence or waiver to any objection that the audit was not completed in time.

[192] Where a party freely and with full knowledge of the facts continues to participate in an administrative proceeding without raising its procedural objection, the Court may find that it has impliedly waived its objection (***Zündel v Canada (Human Rights Commission)***, 2000 CanLII 16575 (FCA) at para 4, 7 - 8; ***In Re Human Rights Tribunal and Atomic Energy of Canada Ltd***, 1985 CanLII 5528 (FCA), [1986] 1 F.C. 103 per MacGuigan JA; ***Bernard v Canada (Revenue Agency)***, 2015 FCA 263 at para 26 per Stratas JA).

[193] The substance of the matter was that the audits continued without MEG’s notice of the extensions but, upon MEG’s admissions, it continued to participate believing there were no extensions. MEG should have objected to Alberta Energy in a timely way. It should not be permitted to wait and see whether the decisions go its way. MEG impliedly waived objections to the expiry of the time periods.

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V Non-disclosure of determinations in other audit files

(a) Introduction

[194] MEG submits that AEA relied on audit determinations in previous audits without disclosing the details to MEG. MEG characterizes these as “secret decisions” and claims Alberta Energy deprived MEG of procedural fairness in refusing to disclose particulars of the past audits and determinations to MEG.

[195] The Crown submits that MEG is not entitled to disclosure of the other audit determinations. AEA merely considered them to ensure it was not acting inconsistently with any past practices. The Director did not rely on them.

(b) Regulatory background

[196] During the audit, several issues arose over the interpretation or application of the various regulatory provisions for determining whether to deduct costs in the royalty calculation and how to quantify them.

(i) Handling charges

[197] As noted in Part II, in considering how to apply the concept of a handling charge AEA considered whether the tanks at Stonefell Terminal were used for transportation or storage of blended product, and whether the cost of short-term storage could be allowed as a component of the handling charge.

[198] AEA obtained internal information about how this issue had been resolved in other files. AEA did not share this information with MEG.

(ii) Quantification of handling charges

[199] As noted in Part II, MEG claimed the Stonefell Terminal should be treated as a pipeline because it was licensed as a pipeline installation by AEUB under the *Pipeline Act*.

[200] AEA obtained internal information about whether terminals or tankage had been allowed the preferential pipeline rate in cost of service calculations in other files. AEA did not share this information with MEG.

(iii) Cost of Diluent Tanks

[201] As described in Part II, the *ACR* defines various “allowed costs” of an oil sands project. Among such casts are “fundamental costs” and “specifically included costs”.

[202] AEA was of the view that off Project-site diluent storage was not an allowable cost under the *ACR*. AEA obtained internal information of how diluent tanks had been treated in other files. AEA did not share this information with MEG. The Director considered one decision brought to its attention by MEG and provided MEG a copy (Decision at para 5). It is apparent from the Certified Record at Tab 279 that the copy was heavily redacted.

(iv) Other

[203] In one instance, an auditor sought information from another file about how to measure throughput of tanks. AEA did not share this information with MEG. Nothing appears to turn on this incident.

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(c) Facts

[204] The Certified Record reflects many communications among AEA personnel and personnel in other Alberta Energy departments on the issues of how and to what extent to allow costs of the Stonefell Terminal.

[205] A large number of these communications pertain to the issue whether the terminal (or tankage) should be considered separate from the Access Pipeline for the purposes of determining the rate of return in the cost of service calculation. The auditors discussed among themselves and with other departments in Alberta Energy the general treatment of tankage in other royalty files and concluded that AEA had separated tankage at terminals from pipeline allocations.

[206] In a note summarizing the issues and identifying audit options (October 31, 2019), the department noted that

> MEG has claimed that the treatment of Stonefell is inconsistent with the treatment of other operator's similar assets. They have produced no examples of this, and Alberta Energy has no evidence of inconsistent treatment.

[207] Similarly, Minutes dated November 27, 2019 record a review of past examples where tankage or terminals were segregated from a pipeline for royalty calculation purposes and the department had applied the lower long term bond rate in assessing the cost of service.

[208] On March 5, 2021 an executive director in Alberta Energy determined that for royalty purposes, a pipeline does not include tanks used for terminalling regardless how that infrastructure was licensed for pipeline regulatory purposes. The determination emphasized that doing so was consistent with previous decisions that the higher rate of return does not apply to tanks used for terminalling, which are considered separate from a pipeline for royalty purposes. The substance of this decision was provided to MEG by letters dated March 19, 2021 and March 26, 2021.

[209] MEG demanded access to the previous decisions. AEA declined to release the requested information, observing that the specific facts of MEG's case were applied to the legislative provisions; s. 50 of the *MMA* restricts information disclosure from other files; and, MEG was provided ample opportunity to respond to AEA's position.

[210] Ultimately, AEA concluded that a cost of service calculation based on the long term bond rate of return should apply. The Director dismissed MEG's objections in respect thereto.

[211] Another frequent topic of discussion in relation to other files, pertained to the dividing line between a tank used for storage and a tank used for transportation of blended product, and the extent to which the costs of tanks and terminalling services could be included in a "handling charge" under s. 32 of the *OSRR2009*.

[212] Ultimately, AEA decided that the Stonefell Terminal provided handling services for the blended product that could be deducted.

[213] Some of the information gathered by AEA concerning other files appeared to support its view that storage charges for diluent off the Project site were not "allowed costs". The Certified Record is vague as to the reasons why such costs are not allowable and these decisions to the extent they are described in the Certified Record do not shed much if any light on the reasoning process underlying AEA's conclusion.

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(d) Parties' positions

[214] MEG submits that AEA denied it procedural fairness in relying on past decisions which were not provided to MEG.

[215] MEG relies on ***Nortel Networks Inc v Calgary (City)***, 2008 ABCA 370 at para 18 - 19. That case concerned an appeal of a property tax assessment to an assessment review board. One of the issues was the appropriate market rental rates for the components of the subject property. The City relied on a list of 25 lease rate comparable properties, that contained general information about the properties but not property addresses or detailed information about the leases on those properties. Nortel asserted that it required further details about the comparables to effectively challenge the City's evidence. The board refused to order disclosure from the City.

[216] The majority in the Court of Appeal held that in the circumstances, it was impossible for Nortel to test the City's assertion that the properties were comparable without adequate disclosure and agreed with the chambers judge that the board breached its duty of procedural fairness to Nortel.

[217] MEG submits it required access to previous decisions to know the case it had to meet. It believes the other terminals addressed in the prior decisions are substantively different than the Stonefell Terminal in purpose, usage, and integration into the functionality of the pipeline.

[218] The Crown responds that MEG's position is based on the flawed proposition that AEA or the Director relied on information not disclosed to MEG. It asserts the Director's decisions were not based on decisions in other projects or the particulars of audits of such projects. Further, it says, the information was immaterial and irrelevant to the determinations, and MEG could not reasonably expect to have access to such information given the confidentiality provisions of s. 50 of the *MMA*.

[219] The Crown points out that in ***Cenovus*** the Court concluded that applications to approve an oil sands royalty project were more administrative than judicial, engaged economic and policy considerations, and "the process as outlined in the statute, regulations and Guidelines emphasiz[e] the need for judicial deference and limited judicial interference". The Court declined to find a duty that the Minister disclose every element it considered or that had an impact on its decision, and concluded the applicant was not treated unfairly by the Department's failure to disclose internal pricing data that it had relied on.

(e) Decision

[220] The Certified Record contains significant redactions of information about other files. Some are based on the statutory confidentiality requirement of s. 50 of the *MMA* and others on solicitor/client privilege as set out in the lists attached to the certification of the Record.

[221] Neither side requested that I make any ruling to lift any of the redactions, or addressed whether the statutory confidentiality provision creates a statutory privilege over the records, whether the statutory protection may have expired for some records under ss. 50(4) of the *MMA*, or whether it was appropriate for the Crown to file a Certified Record containing redactions without a Court Order authorizing it to do so.

[222] Without suggesting it was appropriate to redact the Certified Record without Court authorization and recognizing that neither party challenged the redactions in the hearing before me, I have proceeded on the basis that the conclusions expressed by AEA and recorded in the

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Certified Record as to the outcome of the other file audits or reviews are expressed reasonably accurately.

[223] I agree with the Crown's submission that AEA referenced other files in a general sense in seeking to consistently apply legislation and policy in the audit and did not consider themselves bound by the other file decisions.

[224] I agree with the Crown that the Director did not rely on the past decisions as precedent in deciding the issues. The Director did not reference previous determinations apart from the single determination that MEG identified in its Notice of Objection. Instead, the Director focussed on the scheme of the royalty regime, the differing legislative purposes of the *MMA* and the *Pipeline Act*, and the definitions of handling charges and allowed costs in making his decisions.

[225] Considering the ***Baker*** factors, I conclude that AEA and the Director are not under a procedural duty of fairness to disclose the general details of past royalty audits unless in exceptional circumstances:

(a) As discussed earlier in these reasons, the issues are primarily administrative and engage economic interests, and not issues of liberty, security and livelihood that would attract a relatively higher standard of disclosure.

(b) A royalty payor has an interest in seeking the same treatment as other similarly situated participants, but unlike the situation in ***Nortel***, s. 50 of the *MMA* explicitly imposes confidentiality obligations in respect of other royalty determinations. The royalty payor cannot reasonably expect disclosure of other audit files or even particulars thereof because those would likely disclose information subject to statutory confidentiality to any reasonably informed industry participant.

(c) Auditors may work on many files and rely on their past experiences. A royalty payor cannot reasonably expect the auditors to ignore consistency with other audit work in which they have been involved or to compartmentalize their memories or blind themselves to their past work experiences.

(d) This is not a case where AEA allegedly departed from longstanding practices or established internal authority. In a case of departure the Courts and operators have a greater interest in knowing of the decisions because such things are a relevant legal constraint on the decision maker that requires the decision maker to justify the departure (***Vavilov*** at para 131).

(e) MEG did not require the decisions reviewed by AEA to meaningfully participate in the process. MEG was able to make effective submissions on legal interpretation of the regulations, and on of the meaning and effect of the non-binding *Guidelines* in which the preferential rate for non-basic pipelines was disseminated, without resort to these decisions.

[226] Exceptional circumstances where a duty to disclose arises exist where a prior decision represents well established precedent or internal authority and the decision maker proposes to depart from it. In contrast to the decisions relied on by AEA, the Director departed from a decision concerning the cost of Diluent Tanks which I have found at the time represented established internal authority (see Part X below). The Director had a duty to disclose reasonable particulars of that decision before departing from it. The Director disclosed a heavily redacted

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copy, but as mentioned earlier neither party sought to lift the redactions causing me to assume the redacted copies reasonably described the decision and any rationale therein. On that basis, the copy was sufficient for MEG to make additional submissions in support of its objection if it saw fit, such as demanding an explanation of the basis of the decision if other records were available.

[227] I find that MEG was not treated unfairly by AEA or the Director in respect of non-disclosure of previous decisions in other files.

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VI Director's consultations with AEA

(a) Introduction

[228] MEG claims that the Director consulted extensively with AEA to obtain information and explanations of its decisions and allowed AEA or one of its staff to review and change the Director's draft decision. MEG was not allowed similar opportunities or an opportunity to respond to AEA's input. Consequently, MEG submits, the Director breached procedural fairness obligations owed to MEG, acted in a manner that raises a reasonable apprehension of bias, and failed to act impartially.

(b) Regulatory background

[229] The *MMA* provides for the Minister (or delegate) to review an operator's objections to an audit determination. The *DRR* requires an applicant to submit certain information in support of an objection, provides the Minister power to request information, and prohibits new information that was not considered by the department. Sections 3 and 4 provide:

> 3(1) An objection must contain the following information:
>
> (a) a copy of the notice issued under section 38(7) of the Act;
>
> (b) a summary of the basis for the objection;
>
> (c) evidence showing that section 2(3) has been complied with.
>
> (2) If the information required under subsection (1) has been provided to the satisfaction of the Minister and section 2 has been complied with, the Minister must give a notice in writing to the applicant that the Minister will review the objection.
>
> 4 (1) Subject to subsection (2), for the purpose of conducting a review of an objection, the Minister may request any relevant information in addition to the information provided under section 3.
>
> (2) The Minister shall not request or consider any information that was not considered by the Department when conducting an examination or audit of the subject-matter of the objection, unless the examination or audit was concluded before March 21, 2011.

(c) Facts

[230] The Director met alone with Alberta Energy personnel on March 29, 2022 and discussed the audit with them. Following that meeting, there were several communications between Alberta Energy personnel and the Director concerning the rationale for various determinations by AEA, including those in issue in the present review.

[231] MEG was not involved in these communications.

[232] MEG cites one email thread as evidence of an ex parte communication between the Director and AEA that MEG claims induced an error in the Director's decision. This communication pertains to AEA's decision not to apply a prescribed rate to the terminalling services.

[233] In its audit decision, AEA had stated:

> A prescribed rate (*under section 21 of the OSRR'09*) was considered, however, the Stonefell Terminal service is not a unique situation. Alberta Energy has past decisions for other off Project handling charges relating to tankage and terminalling. The cost of service treatment proposed by Alberta Energy is consistent with the treatment of other similar assets, and therefore a prescribed rate was not needed in this case.

[234] The Director requested "context" from a senior auditor of AEA on its decision not to pursue a prescribed rate from the Minister. The auditor responded that the *Guidelines*, Appendix J define the rule pertaining to the "prescribed rate eligible". If the terminal is not a pipeline, then the rate of return is the long term bond rate. If the terminal is a pipeline, the rate is different. The auditor then quoted a passage from the *Guidelines* describing the two rates:

> The Annual Return on Capital amount will be calculated by multiplying the average capital amount employed for the year (the sum of the initial capital book value [Initial Capital] plus the ending book value [End Capital], divided by two) by the rate of return. The Rate of Return on Capital (ROC) is established as the Long Term Bond Rate (LTBR). This rate will apply to the provision of both basic and non- basic services. The choice of this rate provides no incentive for disputes over whether the COS asset is providing a basic or non-basic service, and no financial incentive for operators to take the asset out of the Project. The exception to this ROC default rule is non-basic (sales) pipelines. In calculating the ROC for such lines, a deemed 45% / 55% debt / equity split is assumed. The return on debt is set at the LTBR+1%, and the return on equity at the NEB multi-pipeline rate of return.
>
> (*Guidelines*, June 2018, Appendix J at p 75).

[235] MEG states that the auditor misconstrued the question and provided an incorrect response which tainted the Director's decision.

[236] The second aspect of MEG's argument is that the Director demonstrated a lack of independence or bias in permitting an auditor to review the Director's draft decision before finalizing it.

[237] On June 14, 2022 a senior auditor of AEA, who was involved in the audits of MEG's 2014 and 2015 EOPS, emailed comments to the Director on a draft of the Director's 2014 EOPS decision. The timing of the email and the date of the decision lead me to conclude this was the final draft.

[238] MEG assumes there must have been an initial email from the Director requesting review and observed in its submissions:

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> ... The Record does not contain the original email from the Director to the [auditor] which is itself in issue – as the nature of the Director's request for review is unknown....

[239] The Certified Record (as supplemented) contains the usual formal certification that it was complete. I saw no indication that any alleged omission from the Certified Record was pursued before the judicial review hearing. I was not asked by either party to make any directions that the record be further supplemented or to adjourn the hearing pending pursuit of any alleged missing records.

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[240] The auditor's email states:

> Good Morning.
>
> I have reviewed the draft letter and have made the following changes:
>
> - Replaced all "project" to "Project" within the document
> - Corrected addressee to MEG Energy Corp.
> - Corrected some spacing issues (highlighted in yellow)
> - Added Ivanna [another government employee] and myself as cc's
>
> Have a great day,
>
> Sharon

[241] MEG was not given an opportunity to comment on the draft decision.

(d) Parties' positions

[242] MEG submits the Director breached obligations of procedural fairness by holding ex parte meetings or having ex parte communications with AEA or other departments of Alberta Energy.

[243] As to the specific example of harm that MEG cited (para 232 - 235 above), MEG claims that it could have cleared up the misunderstanding on the prescribed rate issue if it had been informed of these one-sided communications, by explaining why its circumstances were ideal for the use of a prescribed rate. Instead, the error caused the Director to reach an uninformed conclusion.

[244] MEG submits that the Director's one-sided consultations with Alberta Energy and allowing Alberta Energy to review and comment on the draft decision give rise to a reasonable apprehension of bias. Further, the Court should infer that "the procedure was not conducted in an impartial manner" and "the Director did not behave as an independent referee conducting an unbiased review...".

[245] The Crown submits that the Director has discretion to communicate with each of the department and MEG informally and in the absence of the other. It was reasonable to ask the department for clarifications and explanations, none of which raised new issues which are not permitted under s. 4 of the *DRR*.

[246] The Crown observes the auditor's comments on the draft decision were purely editing and format. There was nothing in the communications that would require a response from MEG.

[247] The Crown further submitted in verbal submissions that the Director's review is internal, acting as a "second set of eyes" but not as an independent adjudicative body.

[248] The Crown conceded that if in the review by the Director a new issue, reason or rationale was communicated to the Director that was "sufficiently central" to the matter, fairness could require that MEG have an opportunity to respond. However, no such matters arose in the Director's review in the present case.

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(e) Decision

(i) Director's communications with AEA

[249] MEG cites ***James Richardson International Ltd v Canada***, 2006 FCA 180 (CanLII) at para 22, 26 - 27, and ***Canadian Pacific Ltd v BC Forest Products Ltd***, 1980 CanLII 4247 (FCA), [1981] 2 FC 745 at p 756 as authority that the Director breached procedural fairness by obtaining information ex parte from Alberta Energy without providing MEG an opportunity to hear and respond to it.

[250] MEG further submits that procedural fairness rules require the Director to give it a fair opportunity to correct or contradict any relevant statement that contradicts their own views, and observes a tribunal must not hold interviews with witnesses or hear evidence in the absence of a party whose conduct is under scrutiny (citing ***Kane v Bd of Governors of UBC***, 1980 CanLII 10 (SCC), [1980] 1 SCR 1105 at pp 1112 - 1114). Further, the Director must not rely on information obtained ex parte from one side where the other side has not had an opportunity to respond (citing ***National Bank of Canada v Lajoie***, 2007 FC 1130 (CanLII) at para 18 - 19).

[251] The ***Baker*** factors guide the Court in determining the required level of procedural fairness.

[252] As mentioned earlier, royalty audits are primarily administrative and economic in nature. They do not necessarily attract the higher standards procedural fairness in case law that MEG cites.

[253] The Minister is responsible both for the initial audit and the review of objections (*MMA*, s. 38). I agree with the Crown that the Director functions "as a second set of eyes" on the audit and is not acting as an adjudicator between MEG and AEA. AEA is a subordinate decision maker, not an opposing party. The auditors are not witnesses. The auditors do not dictate to the Director. The Director's procedures did not purport to seek evidence outside the audit, which appears almost entirely to be based on MEG's EOPS, responses to written audit queries, written communications with MEG personnel, and a minuted meeting with MEG personnel. These features reinforce the administrative nature of the proceeding, and distinguish the numerous cases cited by MEG where adjudicators obtained additional evidence, information or submissions ex parte.

[254] Section 4 gives the Director wide latitude to investigate and inquire into the audit, subject to the limits of ss. 4(2). The *DRR* does not require the Minister to conduct an oral hearing, nor obtain and summarize each side's views for review and comment by the other. As discussed earlier, audits require efficiency, flexibility and practicality. The same is true of the review thereon.

[255] An operator would expect the reviewer to speak with auditors and other personnel within Alberta Energy such as compliance and policy personnel to fully appreciate the issues and test the audit conclusions.

[256] As mentioned, MEG submitted an example in support of its submission that harm can arise where the Director questions the auditors without allowing MEG to participate, as detailed in para 232 – 235 of these Reasons. Regardless whether the Director was actually misled, this raises the issue whether the process that the Director implemented is procedurally unfair by creating a material risk that the Director would be misled.

[257] The Director should be entitled to probe the basis of AEA's conclusions to conduct an effective review. The manner the Director chose does not create a risk of misleading the Director. The Director had AEA's written decision, MEG's extensive representations in its Notices of Objection, and the necessary materials to form his own opinion including applicable legislation, regulations, the *Guidelines* and access to file materials. The auditor's responses to the Director's questions could assist the Director in understanding the auditors' reasoning and reveal errors or gaps.

[258] Having regard to the ***Baker*** factors, I conclude that a relatively low standard of procedures is required. The Director may communicate with the auditors and others within the Department of Energy to understand and test the audit reasoning and for assistance in accessing and navigating the voluminous audit files. An important caveat is that should the inquiries generate new information outside the boundaries set by ss. 4(2) of the *DRR* or uncover an additional reason or rationale for an audit conclusion that is not apparent from the auditors' reasons, then the Director is duty bound to inform the operator and give it a fair opportunity to respond.

[259] The Certified Record does not suggest that the Director's inquiries generated new matters that would attract a duty to allow MEG further input and response.

[260] Further, the circumstances do not suggest that the process operated in a procedurally unfair manner.

[261] In the matter cited by MEG as prejudicial to its interests, the Director had merely asked the auditor for context of the decision by AEA not to prescribe a rate for the Stonefell Terminal services. The auditor repeated the general approach of the *ACR* as described in the *Guidelines* to the effect that where fair market value cannot reasonably be assessed, a cost of service calculation was required. Taken with the AEA's reasons, this did not disclose new information or perspectives that required additional input from MEG.

[262] Nor was the auditor's response liable to mislead. It did not omit a fact or consideration necessary for the response to not be misleading.

[263] In this regard, MEG submitted that if it had been informed of the Director's request and the auditor's response, it could have informed the Director why its case was ideal for a prescribed rate.

[264] I do not agree with MEG that there was any prejudice or unfairness in that incident.

(a) MEG had an opportunity to set out its argument in its Notice of Objection, yet MEG did not assert that the Director should reverse AEA on that issue and prescribe a rate.

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(b) The auditor's response aligned with AEA's reasons.

(c) The Certified Record does not disclose a rational reason that would have justified the Minister or delegate in departing from the normal manner of assessment of non-arm's length costs to give MEG more favourable treatment.

(d) In these circumstances, there were no other considerations of context that the auditor needed to include to avoid a misleading response.

[265] I note that the Certified Record contains an agenda of the Director's meeting with AEA, but no minutes. This leaves the Director open to allegations of unfairness or bias, in situations where the record justifies an inference that new factual information, evidence, or additional reasons from AEA may have been received ex parte and not disclosed to MEG.

[266] In ***James Richardson International***, the decision maker (Canadian Grain Commission or CGC) conducted a disciplinary proceeding against a licensed operator of a grain terminal, JRI. The tribunal indicated during the proceeding that it would take counsel from its "senior officials". Some of them had been personally involved in the events underlying the charge against JRI. The tribunal later issued an order mentioning facts not disclosed to JRI.

[267] McTavish J, whose reasons are reported at 2004 FC 1577 (CanLII), [2005] 2 FCR 534, observed:

> [82] There is obviously a distinction to be drawn between receiving advice, and being provided with factual information or evidence. That said, it is troubling that the CGC would potentially be consulting with a senior CGC official, who had been directly involved in the events in dispute, without disclosing to JRI whatever additional information it may have received.
>
> ...
>
> [90] I am of the view that in this case, the CGC breached the duty of procedural fairness that it owed to JRI by apparently receiving additional information from senior officials with respect to the facts of a specific case, which information was not disclosed to JRI. Given the state of the record, it is not possible to discern what information was received, or the extent to which that information may have influenced the Commission's decision. As a result, I am satisfied that the November 8 order cannot safely stand, and must be set aside.
>
> (underlining added).

[268] Further, the same circumstances gave rise to a reasonable apprehension of bias (*ibid* at para 129).

[269] The Federal Court of Appeal dismissed CGC's appeal. It agreed with the justice's findings that new information was obtained by the decision maker, it was not possible to determine the full extent of the ex parte information communicated, and therefore the order could not stand and there was a reasonable apprehension of bias (2006 FCA 180 at para 27 - 28)

[270] In the present case, there is no reason to infer or even suspect that the Director obtained new information, submissions or reasons from AEA that were not disclosed to MEG. Rather, the Director merely communicated with the subordinate decision maker to understand the audit and access information from the voluminous record.

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[271] The Director risked findings of unfairness, bias and reasonable apprehension of bias in failing to document his meeting with the auditors. However, having read the Certified Record, AEA's reasons and the Director's reasons and having regard to the fact the evidence itself was in written form, I have concluded the Director's conduct of the process in this particular case on this specific record did not give rise to unfairness (or indication of bias or reasonable apprehension of bias as explained below).

(ii) Lack of independence and bias issues

[272] The *MMA* designates the Minister as both decision maker in the audit and decision maker on the review of the objections. The Minster has delegated both functions. MEG did not assert that the *MMA* requires a degree of institutional independence in the reviewer or that the Minister's delegation to staff of departments within their portfolio breached any such requirements. Nor does MEG cite case law addressing whether the Director violated any institutional independence requirements through his interactions with AEA.

[273] Rather, MEG's assertions of lack of independence are effectively allegations of bias (or lack of impartiality) and reasonable apprehension of bias on the part of AEA and the Director.

[274] Bias is a state of mind in some way predisposed to a particular result or that is closed with respect to particular issues (***Todd v Perlau***, 2008 ABCA 17 at para 10; ***Scheidt v Scheidt***, 2014 ABCA 24 at para 27).

[275] The test and standard of proof for reasonable apprehension of bias is set out by de Grandpré J in ***Committee for Justice and Liberty et al v National Energy Board et al***, 1976 CanLII 2 (SCC), [1978] 1 SCR 369at pp 394-395

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."
>
> I can see no real difference between the expressions found in the decided cases, be they 'reasonable apprehension of bias', 'reasonable suspicion of bias', or 'real likelihood of bias'. The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[276] To decide "fairly" includes that the decision maker must act free of apprehension of bias. More recently, the Alberta Court of Appeal in ***Fitzpatrick v College of Physical Therapists of Alberta***, 2019 ABCA 254, leave to appeal to SCC refused 38736 (Nov 28, 2019) summarized the test as follows:

> [38] The test for determining whether there was a reasonable apprehension of bias is whether an informed person, reviewing the matter realistically and practically, would have a reasonable apprehension of bias. The ground must be

> serious and substantial. There must be a real likelihood or probability of reasonable apprehension of bias not just a mere suspicion: *Committee for Justice and Liberty v Canada (National Energy Board)*, 1976 CanLII 2 (SCC), [1978] 1 SCR 369 at 394-395, 68 DLR (3d) 716 and *College of Physicians and Surgeons of Albert v Ali*, 2017 ABCA 442 at para 22, 67 Alta LR (6th) 16. The burden of proof is on the party alleging the bias.…

[277] I accept that in making statutory decisions, the Director should act impartially and free from reasonable apprehension of bias (***Oleynik v Canada (Attorney General)***, 2020 FCA 5 at para 54). However, the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker (***Baker*** at para 47).

[278] The reasonable person takes into account the circumstances of the case, the nature of the inquiry, the rules under which the decision makers are acting, and the subject-matter that is being dealt with (***Committee for Justice and Liberty*** at p 395) and assumes the decision makers are people of good conscience acting in good faith (*ibid* at p 398). A procedure or level of interaction that might raise questions of apprehension of bias in a more formal procedural context may be innocuous in less formal proceedings, such as an audit.

[279] The circumstances do not demonstrate lack of impartiality or reasonable apprehension of bias on the part of AEA or the Director.

[280] The Certified Record indicates genuine concern by the auditors, other departments of Alberta Energy, and the Director to clarify the matters of applying the regulations to Stonefell Terminal.

[281] MEG asserts that all the decisions were results oriented or the Director had “pre-ordained” conclusions. Generally, the fact that a decision maker does not agree with a party is not evidence of bias or reasonable apprehension of bias. The circumstances of this case do not indicate otherwise.

[282] I do not agree with MEG that the auditors conducted a results-oriented review, wherein they changed the definition of “pipeline” to exclude the terminal after MEG told them the Stonefell Terminal (ie, tanks and associated equipment) was licensed as part of the Access Pipeline. To the contrary, the Certified Record describes extensive discussions on what was obviously an arguable issue – why assets functioning as a terminal, however licensed, should be considered a pipeline for royalty purposes.

[283] The fact Alberta Energy took a closer look at MEG’s position and ultimately did not agree with MEG’s claim for the preferential rate in the cost of service calculation is not evidence of bias, reasonable apprehension of bias or lack of impartiality, such as results oriented decision making.

[284] Similarly, the fact Alberta Energy requested evidence in the form of the Wolf Agreements to assess fair market value then concluded after further review that the evidence was lacking, is not evidence of bias, reasonable apprehension of bias or lack of impartiality, such as results oriented decision making. Later in these Reasons, I find AEA erred in failing to come to a conclusion in the 2014 audit whether service charges in the Wolf Agreements were at arm’s length and thus representative of fair market values in 2018, though the error was harmless

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because AEA nevertheless did not err in finding that fees in a 2018 market reflected fair market value in 2014 or 2015. Such an error does not amount to bias or reasonable apprehension of bias.

[285] As mentioned earlier, the Director may communicate with AEA in the absence of MEG to better understand the audit and ensure it meets necessary standards of transparency, rationality and fairness. I further conclude that the Director's manner of proceeding did not create a risk in the mind of a reasonable person having considered all the circumstances, that the Director would not decide fairly.

[286] The review of the Director's draft decision by an auditor is concerning but does not rise to the level of reasonable apprehension of bias.

[287] Grounds for apprehension of bias must be substantial and considered with the presumption of good faith.

[288] There is no evidence in the Certified Record of why or how the auditor came to comment on some limited formatting issues in the Director's draft decision.

[289] MEG expressed concern over the lack of information in the Certified Record explaining how or why the auditor came to review the Director's draft decision, but in the circumstances I am not prepared to speculate about those matters.

[290] If there was a document missing from the Certified Record then parties should have addressed it well before the scheduled hearing. The Court can allow the record to be supplemented in appropriate cases where issues such as bias or procedural fairness are in issue (***Northern Air Charters (PR) Inc v Alberta Health Services***, 2023 ABCA 114 at para 8) perhaps even directing examination of a witness in sufficiently concerning circumstances (Rule 3.21; ***Robertson v Edmonton (City) Police Service (#6)***, 2003 ABQB 188).

[291] The issue of missing records does not appear to have been raised before the Court prior to the hearing and neither party asked me as the presiding justice that the hearing be adjourned to inquire if there were records missing from the formal record that was certified complete.

[292] Undocumented requests for review of a draft decision by a subordinate decision maker are poor practice that should be avoided. However, in this case I am not prepared to speculate on the scope of the remit to the auditor. It may well have been to clean up the format of the draft decision, which in fact is all that occurred. The auditor's response does not justify an inference that the Director requested substantive input or review or adding or changing reasons. It does not justify a finding of reasonable apprehension of bias.

[293] I pause to note that had I procedural unfairness arising from the Director's communications with AEA, I also would have found reasonable apprehension of bias. However, the present record does not support a finding of unfairness or bias. As mentioned in para 271, my conclusions are based on the specific record in this case and should not be read as a suggestion that the Director's failure to minute or record his meeting with the auditors was a prudent practice.

VII Reasonableness Review

[294] MEG asserts that AEA and the Director:

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(a) Unreasonably decided that fair market value of the Stonefell Terminal services could not be determined.

(b) Alternatively, unreasonably decided that the non-basic pipeline rate of return on capital did not apply in a cost of service calculation for Stonefell Terminal.

(c) Unreasonably refused to permit the deduction of the cost of the Diluent Tanks.

[295] In reasonableness review, the Court considers whether the decision bears the hallmarks of reasonableness (justification, transparency, intelligibility) and whether it is justified in relation to the relevant factual and legal constraints bearing on the decision (***Vavilov*** at para 99). Where reasons are given the Court adopts a "reasons first" approach (***Mason v Canada (Citizenship and Immigration)***, 2023 SCC 21 at para 61).

[296] Shortcomings or flaws relied on by the party challenging the decision must be sufficiently central or significant to render the decision unreasonable. Two types of fundamental flaws may assist the Court in assessing reasonableness: failure of rationality in the reasoning process and an untenable decision in light of the legal and factual constraints bearing on the decision (***Vavilov*** at para 100 - 101).

[297] The requirement for internal coherence contemplates a rational, logical and understandable chain of analysis. The decision has to "add up". ***Vavilov*** observed:

> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.
>
> [103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission)*, 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Minister of Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if

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> the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).
>
> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[298] As to factual and legal constraints, the Court provided the following non-exhaustive list: the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies (***Vavilov*** at para 106). "These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context" (*ibid*).

[299] See also, for a recent summary of the reasonableness approach of ***Vavilov***, the Court's decision in ***Mason*** at para 56 - 76.

[300] ***Mason*** summarizes the "reasons first" approach and the requirement to remain mindful of the record on which the decision was made:

> [61] Under *Vavilov*'s "reasons first" approach, the reviewing court should remember that "the written reasons given by an administrative body must not be assessed against a standard of perfection", and need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (para. 91). The reviewing judge must read the administrator's reasons "holistically and contextually" (para. 97), "in light of the history and context of the proceedings in which they were rendered", including "the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body" (para. 94). Reasons must be read "in light of the record and with due sensitivity to the administrative regime in which they were given" (para. 103). Such factors may "explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency" (para. 94).
>
> (***Mason*** at para 61).

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[301] Where the reasons, read with the foregoing principles in mind, "contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision" (***Vavilov*** at para 96). Similarly, "[w]here a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (***Vavilov*** at para 98).

[302] Further elaborating on the need of the decision maker to address essential elements, the Court in ***Vavilov*** observed:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para. 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
>
> (Underling added).

[303] I address MEG's substantive grounds of review in the following sections of these Reasons.

VIII Whether AEA and the Director unreasonably decided that fair market value of the Stonefell Terminal services could not be determined.

(a) Introduction

[304] MEG's royalty calculations included, as handling charges, certain costs relating to the Stonefell Terminal. MEG asserts that AEA and the Director unreasonably refused to consider and assess the fair market value of such services in quantifying the cost thereof.

[305] As described in Part II, AEA concluded that the cost of service methodology should be applied to determine the charges and that in calculating the cost of service the rate of return should be that applied generally to off-project site assets and not the preferential rate applied to non-basic pipelines. Thus, the outcome was a quantification that is most favourable to the Crown and least favourable to the royalty payor. The Director agreed with AEA's decision.

[306] MEG asserts that the decisions were unreasonable and driven by results oriented reasoning to avoid any outcome other than the lowest quantification of the cost.

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(b) Regulatory background

[307] The requirements of the *ACR* in assessing fair market value are set out in Part II above. Generally speaking, the Minister must apply the fair market value of the costs if they can be reasonably determined. If not, the Minister must apply a cost of service calculation.

[308] The Minister has discretion to decide if a transaction is at arm's length notwithstanding the deeming provision in ss 2(3) of the *ACR* (*ACR*, ss. 2(4)).

[309] MEG also points out in its written brief that the Minister has discretion under s.21 of the *OSRR2009* to prescribe a cost for a service.

(c) Facts

[310] Stonefell Terminal was not at arm's length to MEG (*OSRR2009*, ss. 2(3)(d)). MEG was the only user of Stonefell Terminal's services.

[311] In its EOPS filings, MEG quantified handling charges for the Stonefell Terminal based on the cost of service methodology and applied the preferential rate of return for pipelines to the charges.

[312] AEA proceeded to assess MEG's position. On October 21, 2019 AEA issued Request 5C wherein it informed MEG that it required changes to the cost of service calculation including changing the rate of return on capital from the non-basic pipeline rate to the long term bond rate.

[313] MEG disputed AEA's characterization of Stonefell Terminal. It submitted the pipeline permit/license for the Stonefell Terminal Installation issued December 13, 2006 by AEUB.

[314] After receiving MEG's response, AEA replied in January 2020 that "the information contained in our Query 5C, issued to MEG Energy on October 21, 2019 was inaccurate". AEA requested that MEG provide all available contemporaneous information that would assist the department in identifying the fair market value of the Stonefell Terminal services including information about payments for comparable services and any transfer pricing studies related to handling charges.

[315] MEG continued to assert that a comparable asset did not exist, the terminal was licensed as part of the Access Pipeline system, and the non-basic pipeline rate of return applied to the cost of service calculation.

[316] In attempting to assess fair market value for the terminalling charges, AEA decided in August 2020 to obtain a copy of the Wolf Agreements (described in para 57 - 59 above) and information about fees charged under them in 2018-2019.

[317] In addition to the Wolf Agreements, AEA received a copy of a fairness opinion addressing the overall fairness of the consideration to be received by MEG under the purchase and sale agreement (opinion at p 6) having regard to the consideration to be received by MEG and the financial outlays of MEG pursuant to the transportation agreement (opinion at p 5), and excluding the Stonefell Assets as defined in the purchase agreement (opinion at p 6). The opinion does not suggest that it included consideration of MEG's financial outlays under the lease agreement.

[318] AEA further received a confidential information package dated September 2015 that presumably was used in seeking a disposition of the assets.

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[319] MEG further informed AEA that the quantification of the costs of blend handling and diluent transportation under the Wolf Agreements were comparable to the outcome under MEG's proposed cost of service calculation for Access Pipeline and Stonefell Terminal together. MEG indicated it would forego the difference and accept a charge based on the Wolf Agreements.

[320] As described in Part II, AEA concluded in its determination that a fair market value could not be determined and therefore, a cost of service was appropriate.

[321] In its objections, MEG asserted that the Director should determine the handling charges based on fair market value or apply a cost of service calculation using the non-basic pipeline rate of return. With respect to fair market value, MEG asserted that since March 2018, it has paid charges for the same services that are in issue and that the charges under the Wolf Agreements "are a clear demonstration of a third party, fair market value of the exact handling charges" in issue.

[322] As discussed in Part II, the Director found that the Wolf Agreements are not at arm's length under ss. 2(3) of the *OSRR2009* because the consideration was tied to other contractual obligations in the overall purchase and sale package. Because the agreement was deemed not at arm's length and the terminal was a unique asset, a comparable asset did not exist for purposes of determining fair market value. The Director further observed: "In any case, it is difficult to assess how reflective the Wolf tariffs were of [fair market value] especially given that the contract was signed in 2018 and the Objection relates to the 2014 production year".

[323] Although not included in the Certified Record, MEG indicates in its written brief that on November 22, 2022 Alberta Energy provided an advance ruling pursuant to an application by MEG that the transaction between Wolf and MEG should be treated as an arm's length transaction under ss. 2(4) of the *OSRR2009*. A copy of this ruling is appended to MEG's brief.

[324] The ruling provided that it applied only to periods following the sale. It outlined that MEG provided a significant information to Alberta Energy including the agreements, advice provided to MEG by various parties, and an overview of the sales process, and concluded:

> The diligence of the commercial sales process and diverse nature of the prospective counterparties help illustrate the ultimate intention for the asset sale and subsequent operations to be conducted in line with commercial norms which are normally accepted as arm's length within the oil sands royalty system.

(d) Parties' positions

[325] MEG submits that AEA's conduct throughout the audit demonstrates it acted unreasonably in concluding it could not determine the fair market value of the handling charges.

(a) AEA failed to follow the analysis required under s. 12 of the *ACR* to first determine whether fair market value could be determined.

(b) Instead, it ignored the requirement to address fair market value and proceeded directly to the cost of service method. It did nothing to determine the fair market value of the handling charges for over a year.

(c) On completing its analysis of cost of service, it denied the pipeline rate of return on capital for the calculation of the handling charges.

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(d) Only after MEG demonstrated that Stonefell Terminal was licensed as an installation to the Access Pipeline did AEA begin to consider the fair market value of the handling charges.

(e) AEA therefore prepared its analysis backwards for the first full year of the audit.

[326] Further, MEG submits that AEA failed to provide rational and logical reasons to justify why the Wolf Agreements could not assist in determining fair market value. MEG says that despite AEA requesting the agreements and acknowledging they should be considered, it then inexplicably ignored them. AEA's reasons are simply conclusory.

[327] MEG further pointed out that where fair market value cannot reasonably be determined, the Minister has the option of prescribing a rate under s. 21 of the *OSRR2009*. It asserted that AEA declined to prescribe a rate despite having evidence that the pipeline rate of return generated handling charges that were closer to the amounts under the Wolf Agreements than the long term bond rate.

[328] MEG further submitted that the Director perpetuated the repetition of the statutory test and conclusory language, without providing a rational chain of analysis. MEG submits the Minister bears the onus to demonstrate the recalculations are warranted, citing ***Taylor Processing*** at para 85, 87, 91. The Director further failed to acknowledge or consider his power to deem a transaction at arm's length under ss 2(4) of the *ACR*.

[329] MEG noted the Director decided that AEA acted reasonably in refusing to exercise discretion under s. 21 of the *OSRR2009* because AEA is not required to use its discretion.

[330] Although MEG did not explicitly argue that the Director ought to have prescribed a rate under s. 21, MEG said that the Director was silent on AEA's rationale in refusing to prescribe a rate (that Stonefell Terminal was not unique) "presumably" because the Director had already concluded the terminal was unique when deciding that a fair market value could not be determined. MEG generally asserts that that the Director engaged in results oriented reasoning and at one point states the Minister had a "focus on achieving a pre-ordained result".

[331] The Crown submits the decisions were reasonable and adequately explained.

(e) Decision

[332] I do not agree with MEG that the auditors failed to follow the required analysis under the *ACR*.

[333] The operator's opening position was that a cost of service approach was appropriate. The events do not suggest the auditors did not understand the structure of a quantum assessment of a handling charge under the *ACR*. At most, the auditors may have assumed early in the audit that the operator's opening position relieved them of the normal requirement to first assess the fair market value issue. However, they corrected their approach in further communication to MEG in January 2020. If there was an error, it was harmless.

[334] I do not agree with MEG that AEA engaged in results oriented reasoning or decided to disregard the Wolf Agreements only when MEG pointed out the tolls and charges therein supported MEG's quantification of the handling charges.

[335] To the contrary, the Certified Record amply demonstrates that the auditors and their other contacts in Alberta Energy were discharging their obligations diligently, fairly, and in

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accordance with the ordinary presumption that statutory delegates perform their duties in good faith until proven otherwise.

[336] The Certified Record does not suggest the auditors did not address their minds to the obvious issue of the various types comparables identified in s. 10 of the *ACR* for the handling charges on the Access Pipeline.

[337] MEG did not suggest any comparables other than tolls for the Stonefell Terminal established in later years under the Wolf Agreements. To the contrary, on January 31, 2020 MEG asserted to AEA that there were seven characteristics that a comparable terminal would require, which did not exist, and continued to assert the absence of comparable assets thereafter.

[338] The auditors' records show that AEA did not identify any comparables. Further, the auditors recorded that they decided to request information about the Wolf Agreements and the fees and charges in 2018-2019 "[t]o ensure due diligence in trying to obtain a FVM [sic] for the Stonefell Terminal ...".

[339] Consequently, the only potential comparable that either party identified were the fees and charges under the Wolf Agreements. MEG submitted in the audit that the agreements negotiated at arm's length represented fair market value of the charges for Stonefell Terminal in 2014 and 2015.

[340] The fees and charges pertaining to the terminal services under the Wolf Agreements are deemed by law not at arm's length because the consideration therefor is tied to other pieces of the entire transaction, unless the Minister otherwise determines on application by the operator of a Project or on the Minister's own initiative (*OSRR2009*, ss. 2(3), (4)). AEA understood their hands were not tied in using the charges in the Wolf Agreements as fair market value if they thought it appropriate.

[341] AEA concluded that relying on 2018 agreements for the market value of charges incurred in 2014 and 2015 was not appropriate: "The <u>future</u> years' service agreement with Wolf Midstream (after MEG divested the asset) is not satisfactory to use as a proxy in this case." (underlining added). I agree with the Crown that AEA's reasons although sparsely worded, conveyed that values in agreements approximately three or four years in the future are not a satisfactory proxy for values in 2014 or 2015.

[342] Nevertheless, AEA did not come to a conclusion whether the Wolf Agreements were at arm's length for the 2014 audit. In addition to AEA's failure to express a finding on the Wolf Agreements in its 2014 determination, there is some indication in the Certified Record (Tab 6) that the matter of the Wolf Agreements was an outstanding issue at the commencement of the 2015 audit as noted in Part II of my Reasons.

[343] AEA's 2014 determination on fair market value might fail the ***Vavilov*** test because AEA did not finish consideration of MEG's arguments on the Wolf Agreements. It just deferred the issue until the 2015 audit. I pause to note that I would not consider the error in the 2014 determination to merit any judicial remedy because (as I conclude later in these Reasons) the question of fair market value for both years was reasonably determined by the Director. Even if the objection proceeding of the Director was not an adequate alternative remedy, there would be no purpose in remitting AEA's 2014 determination for reconsideration by AEA because the outcome would be inevitable (***Vavilov*** at para 142). The Wolf charges would not have influenced AEA's finding on fair market value: First, even assuming the charges were at arm's length AEA

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impliedly and reasonably found that 2018 prices are not satisfactory for use in determining fair market value in 2014 and 2015; and second, in light of AEA's reasoned conclusion for 2015 that the Wolf Agreements were not at arm's length, there is no prospect of AEA finding they were at arm's length in 2014. It was a harmless error, likely a failure to explain that arm's length or not, 2018 agreements are not a reasonable means of assessing fair market value in 2014.

[344] MEG's submissions also do not persuade me that AEA's 2015 determination was unreasonable in any way under the ***Vavilov*** standards. Although AEA's decisions for both years under review were sparsely worded, the weakness of MEG's position on the use of the Wolf Agreements, both as to the claim the 2018 charges were at arm's length and that they have a bearing on determining fair market value in 2014 or 2015, is amply demonstrated in the Certified Record.

[345] First, the fairness opinion does not clearly opine on the fairness of the lease charges.

[346] Second, MEG did not provide information to AEA or the Director of how the parties to the Wolf Agreements determined the charges to MEG for the Stonefell Terminal services in those negotiations, what data they relied on in fixing the charges, what considerations were on the table in negotiating those charges, or how or why charges agreed as part of a 2018 transaction reflected fair market value in a 2014 or 2015 market.

[347] Third, even MEG acknowledged during the audit that a 2018 market value transaction would not necessarily provide material information about non-arm's length tolls and charges taken in 2014 and 2015. It told AEA that a reconsideration of AEA's view that the Wolf arrangements were not at arm's length "may not affect the Wolf Agreements being considered inappropriate for a fair market value in 2014, however this will provide clarity on the treatment of these agreement [sic] in 2018 forward".

[348] Fourth, MEG's submissions to AEA, the Director, and in this judicial review, simply assumed that the markets of 2014 and 2015 for Stonefell's terminalling services were similar to some combination of rent and transportation charges under the lease or the transportation agreements in 2018 and that each piece of the consideration in the overarching Wolf Agreements was not tied to the other pieces.

[349] The assumptions are speculation in the absence of market comparables for 2014/15 or in the absence of meaningful information about the discrete fees and charges in the later Wolf Agreements. There is nothing in the Certified Record to indicate that AEA erred in finding in the 2014 audit and 2015 audits that 2018 charges were not evidence of fair market value in the year under review in each audit, or in further finding in the 2015 audit that the 2018 charges were not at arm's length.

[350] The Director clearly articulated that there were no market comparables for the handling charges in 2014 and 2015, that it was difficult to assess how reflective the rates in a 2018 transaction would be of markets in 2014, and that the Wolf Agreements were not at arm's length.

[351] There is no gap or irrationality in the Director's conclusion. I do not agree with MEG that the Director bears the onus because in the present case, unlike ***Taylor Processing***, the law presumes that the processing fees and charges in the Wolf Agreements are not at arm's length due to the tied consideration. Moreover, MEG had not even prepared the EOPS on the basis of fair market value or the Wolf Agreements. It was MEG's burden to overcome the legal presumption imposed by ss. 2(3) of the *OSRR2009*.

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[352] MEG further submits that the Minister did not consider using their discretion under sub-ss. 2(4) to determine that the transaction is arm's length.

[353] I do not agree.

[354] The transaction under consideration was the contractual fees and charges for the terminalling services under the Wolf Agreements, not the entire acquisition of MEG's interests in the pipeline and terminal by Wolf. It was not enough for MEG to assert the entire set of Wolf Agreements containing tied consideration were arm's length. To justify a departure from the presumption, MEG had to show why the terminalling fees therein should be considered arm's length. MEG's Notices of Objections and the Certified Record are bereft of information focussing on the market value of services of Stonefell Terminal in contrast to the overall consideration for the entire transaction.

[355] The Director considered and refused MEG's request to accept the terminalling charges as arm's length and gave sufficient reasons for his refusal. On the record in the present case, exercising discretion to deem fees at arm's length on the same evidence that led the decision maker to conclude the presumption under *OSRR2009*, ss. 2(3) was not rebutted, is an exercise in arbitrariness.

[356] In these circumstances, the Director was not required under the standards in ***Vavilov*** to "respond to every argument or line of possible analysis", particularly one that MEG did not assert in its Notices of Objection. There is no basis to conclude that the Director overlooked his authority under ss. 2(4), nor was he required to specifically cite that subsection when the record did not disclose any significant information of how the terminalling charges under the Wolf Agreements were set or how they related back to fair market value in 2014 and 2015.

[357] Nor does the Certified Record disclose any failure by the Director to appropriately consider the issues or any defect in the Director's conclusion that it was difficult to assess how reflective the tariffs were of fair market value particularly when the agreements were made some years after the periods under review.

[358] In this regard, there were no comparables from the open market for charges of other terminals, no history of an open market for charges or tariffs of Stonefell, and no meaningful information or explanation of how Wolf and MEG ascertained fees akin to handling charges in their overall negotiation of the $1.52 billion acquisition transaction.

[359] I also reject MEG's suggestion that the Director created his reasoning "after the fact to justify the Determinations". There is no indication in the Certified Record that the Director abused his authority, was biased, or exhibited reasonable apprehension of bias. As mentioned, AEA and MEG both understood that a transaction in 2018 did not necessarily reflect markets in 2014 and 2015. The Director came to the conclusion that it did not reflect value in 2014 and 2015. There is nothing suspicious in doing so.

[360] In substance, Director was not satisfied on the information provided that the fees and charges in the Wolf Agreements so far as they related to Stonefell Terminal services reflected fair market value for 2014 and 2015. MEG has not demonstrated any unreasonableness, irrationality, gap or other error in the reasoning or the conclusions of the Director in this regard.

[361] MEG brought to the Court's attention that Alberta Energy determined the Wolf Agreements to be at arm's length for post-2017 royalty years in its subsequent ruling of November 2022. This ruling was made after all the audit determinations were completed.

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[362] Neither party addressed how such a decision, potentially made on a different record, could be admitted in this judicial review to impugn the subject decisions.

[363] Parties to a judicial review cannot simply supplement the Certified Record by filing affidavits or appending additional materials to written submissions, without justifying the exception that would permit admission of the evidence in accordance with the many cases circumscribing material outside the Certified Record. See, for example***, Northern Air Charters*** at para 8 - 9; ***Alberta Liquor Store Association v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904 at para 40 - 46; ***Alberta College of Pharmacists v Sobeys West Inc***, 2017 ABCA 306 at para 67 - 70.

[364] The mere fact the information was not reasonably available until after the decision under review is not sufficient (***Sobeys*** at para 68). Rather, engaging the Court in consideration of a later decision in a similar matter would require it to compare the record of the later decision to see if there was inconsistency. That would create, adopting the words from ***Sobeys***, “the potential to extend the review process indefinitely” which is “simply unworkable” (***Sobeys*** at para 69).

[365] If the information were potentially material to procedural, bias or substantive issues, I would have called for additional submissions about how this information could be admissible in the judicial review.

[366] However, I do not need these submissions because the information is immaterial. The subsequent decision pertains to periods well after 2014 and 2015 on a record which was not provided to the Court. Attempting to use the ruling therein as evidence of fair market value or error in the audit of the earlier periods is an exercise in speculation. It is another way of inviting the Court to assume that markets of 2014 and 2015 were comparable to markets of 2018 and afterward.

[367] Finally, to the extent MEG is suggesting the Director’s reasons in respect of AEA’s decision not to prescribe a rate under s. 21 of the *OSRR2009* demonstrate some infirmity in his reasoning process such as results oriented reasoning or an attempt to downplay or ignore the alleged inconsistency in AEA’s observations about the unique qualities of Stonefell Terminal, I make the following comments.

[368] First, the Director’s comment is not inaccurate, unreasonable, or irrational.

[369] The Director merely observed that AEA “was not required to create a prescribed rate for the Stonefell terminal costs”. That observation came after the Director had concluded that AEA could not reasonably have determined fair market value of the terminal services, acted in accordance with s. 12 of the *ACR* in computing a cost of service, and applied the correct rate of return on capital to Stonefell Terminal.

[370] When one reads the Certified Record, it is clear that MEG had simply asked AEA to prescribe a rate that would give MEG something to which it was not logically entitled in the event AEA found that fair market value could not be reasonably determined and the long term bond rate of return applied in the cost of service calculation. MEG was asking for more generous treatment because it was not satisfied with the economics of the situation, not because there were engineering, financial, economic or other principles supporting a departure from the normal analysis under the non-arm’s length rules in the *ACR*.

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[371] I think it is obvious when one reads the context of the Certified Record that the Director understood there was no reason appearing in the record in the present case to seriously consider prescribing a rate. In that context, his observation that AEA was not required to prescribe a rate is understandable and reasonable.

[372] Where reasons might suggest a gap in the decision maker's analysis the Court may infer the decision maker's rationale from the record in limited cases (***Vavilov*** at para 96, 98).

[373] When is it appropriate to infer the decision-maker's rationale from the record? Justice Rennie stated in ***Komalafe*** that the jurisprudence "allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (***Komolafe v Canada (Minister of Citizenship and Immigration)***, 2013 FC 431 at para 11, quoted with approval in ***Vavilov*** at para 97). This a helpful illustration of the principle the Crown suggests the Court ought to invoke in the present case.

[374] The lines can be readily drawn in this case. MEG's request for a prescribed rate did not invoke any reason to depart from the prescribed structure of fair market value or cost of service determinations for handling charges. Therefore, I would not infer from this aspect of the Director's reasons that the Director was acting arbitrarily (or perhaps ignorantly) while in pursuit of a pre-determined outcome as MEG suggests.

[375] Second, I do not read AEA's conclusions with respect to fair market value and prescribing a rate to be inconsistent. Each conclusion has to be read in the context in which it was made.

[376] AEA found the terminal was unique in terms of seeking comparables in the market to assess fair market value. However, it was not unique in the fact it was a group of tanks alongside and operated in association with a pipeline. In the latter sense, AEA found that the situation was not unique and in other cases the department had treated a terminal separately from a pipeline in selecting the applicable rate of return on capital. The latter has no bearing on the former. Thus I do not accept the Director was engaging in a disingenuous attempt to justify AEA's conclusions.

[377] I find that the Director did not err in finding that fair market value for Stonefell Terminal services could not reasonably be established for 2014 and 2015 or in not exercising discretion under s 2(4) of the *OSRR2009*. As noted, AEA's 2014 determination might have failed the ***Vavilov*** standard as AEA simply declined to decide in that audit on MEG's argument that the Wolf Agreement represented fair market value and did not provide reasons. MEG should have been provided a decision and reasons, even if the reasons merely were to the effect "We do not need to determine the question of arm's length status because the evidence of 2018 charges is not sufficient to establish fair market value in prior periods". The Director's review was an adequate alternative remedy, and in any event the outcome was inevitable so the Court has no reason to grant a remedy relating to AEA's 2014 decision.

IX Whether AEA and the Director unreasonably decided that the non-basic pipeline rate of return on capital did not apply in cost of service calculation for Stonefell Terminal

(a) Introduction

[378] As described in Part II, the Minister specified a preferential rate of return for non-basic pipelines in the cost of service calculations.

[379] MEG asserts that AEA and the Director unreasonably refused this rate for the Stonefell Terminal because it is a licensed installation on the Access Pipeline.

[380] The Crown asserts that the Director reasonably concluded that terminals and pipelines are distinct and that the Director reasonably concluded that they are treated differently for royalty purposes.

(b) Regulatory background

[381] The regulatory background of the royalty regime is described in Part II of these reasons. The Minister may specify an additional rate of return for assets in a cost of service calculation under the *ACR, s.* 12.1(1)(j). The *Guidelines* describe this enhanced rate for non-basic pipelines. There is no other enhanced rate; the rest of the assets get the long term bond rate,

[382] The word "pipeline" does not appear in the *MMA* and is not defined in the regulations dealing with royalty calculations or the *Guidelines*.

[383] Under ss. 1(1)(t) of the *Pipeline Ac*t, a pipeline is a "pipe used to convey a substance or combination of substances, <u>including installations associated with the pipe</u>" (underlining added) except for pipes used to convey certain substances which are not applicable in the present case.

[384] The installations mentioned therein are defined in ss. 1(1)((l) of the *Pipeline Act*:

> (l) "installation" means
>
> > (i) any equipment, apparatus, mechanism, machinery or instrument incidental to the operation of a pipeline, and
> >
> > (ii) any building or structure that houses or protects anything referred to in subclause (i),
>
> but does not include a refinery, processing plant, marketing plant or manufacturing plant;

(c) Parties' positions

[385] MEG submitted that AEA and the Director "invented" a new definition for "pipeline" which excludes Stonefell Terminal, after MEG provided the license for the terminal under the *Pipeline Act*.

[386] MEG further submitted that excluding the terminal violates the presumption of common expression, citing ***Vavilov*** at para 44, ***Austin v Goerz***, 2007 BCCA 586 at para 31 and ***Toronto (City) v Craft Kingsmen Rail Corp***, 2023 ONSC 292 (Div Ct) at para 38). As stated in ***Vavilov***: "... [T]he legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes" (***Vavilov*** at para 44).

[387] MEG says there is no convincing reason to presume the Alberta Legislature intended for the term "pipeline" to have multiple different meanings in the oil and gas industry.

[388] MEG says that AEA's conclusion was results-oriented reasoning and a predetermined result.

[389] The Crown responds that "terminal" and "pipeline" are not defined in the *MMA* or the *OSRR2009*. The Director's conclusion was supported by the ordinary meaning of the word "pipeline", the context in which it was used, and the differing objectives of pipeline regulation and royalty regimes. It asserts the Director's conclusion was reasonable.

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(d) Decision

[390] The *Guidelines* were the means by which the Minister published its decision to specify an additional amount to be added to the rate of return for non-basic pipelines. As the Director stated in his reasons (Decision at para 21), the question is what the Minister intended by using the word “pipeline” in respect of the preferential rate of return.

[391] The Director (at para 12) sought out the objective meaning of the Minister’s specification by adopting the modern approach to statutory interpretation described in ***Rizzo Shoes*** at para 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[392] The Director observed the words “terminal”, “terminalling” and “pipeline” are not defined in the *MMA*, the *OSRR2009*, or the *Guidelines* (Decision at para 13).

[393] The Director concluded the objects of the *Pipeline Act* and the royalty regime are significantly different. The former is a regulatory regime for construction and operation of pipelines, which the Legislature has extended to include installations. The royalty regime provides authority to administer, allocate and enter into agreements with respect to minerals owned by the Crown. Consequently, it was not correct to assume the definition under the *Pipeline Act* was applicable or binding in the royalty context.

[394] Further, according to the Director, “The scheme of the MMA strongly suggests that the Minister intends to make a distinction between pipelines and terminals for royalty purposes” (Decision at para 16) and “Considering the scheme of the MMA, the costs associated with terminals and pipelines are considered separately” (Decision at para 17).

[395] As authority for the latter proposition, the Director referenced the *Guidelines*, s. 4.2.5.1 (erroneously cited by the Director as s. 4.5.2.1) which, in discussing handling charges, distinguish between “pipeline tariffs” and “terminal and processing costs”:

> **HC** means all charges incurred in moving the third party disposition quantities of the oil sands product from the royalty calculation point to the point of disposition. Handling charges typically include pipeline tariffs, terminal and processing charges, and other related fees.
>
> **...**
>
> (Underlining added).

[396] As described in Part II, the Director then turned to the ordinary meaning of a “pipeline”, resorting to a common dictionary definition – “a long, usually underground pipe for conveying oil, gas, etc” – and contrasted it to a definition of a “terminal” – “an installation where grain, oil, etc is stored at the end of a rail line or pipeline, or at a port”.

[397] It was reasonable for the Director to conclude that the scheme for pipeline regulation has different objectives than royalty regulation. The former pertains to standards for construction, use and operation of pipelines. It is obvious why the Legislature would extend the meaning to “installations” to ensure they were safely and prudently operated. The latter pertains to determining the appropriate royalty share of the Crown’s mineral resources that the Crown

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grants to producers. It is reasonable to think that the Legislature adopted an extended meaning under the *Pipeline Act* for regulatory and safety purposes, not that the Director adopted a truncated meaning for royalty purposes.

[398] Was it reasonable to conclude that the Minister objectively intended a narrower meaning?

[399] In answering this question, the Director applied the well established principle of interpretation set out in ***Rizzo Shoes***.

[400] In the ordinary use of the language, the means of conveyance of a gaseous or liquid product through a pipe and the necessary equipment for its physical operation, would not necessarily include the means of storage or handling to allow an operator to "buffer" or manage its shipping commitments or market its product.

[401] Having concluded that the conveyance need not necessarily include every installation as defined in the *Pipeline Act* for regulatory purposes, the Director returned to the royalty scheme and concluded that the Minister drew a distinction between pipeline tariffs and terminal and processing charges. That distinction clearly appears from para 4.2.5.1 of the *Guidelines.*

[402] Again, the question is what the Minister objectively intended, not whether the Court or the Director thinks the Minister's allowance of the enhanced rate was insufficiently generous in its scope.

[403] Although the Director did not mention the presumption of common expression, he considered MEG's argument that he should apply the meaning of "pipeline" from the *Pipeline Act* and the usual factors that Courts would consider in deciding whether the presumption was displaced.

[404] Considering the wording of para 4.2.5.1 of the *Guidelines*, the differing purposes of the pipeline regulatory regime and the royalty regime, and the range of possible interpretations of the word "pipeline", it was not unreasonable for the Director to conclude that the Minister's objective intention in allowing a preferential rate of return for pipelines meant the pipe that conveyed the product as opposed to the tanks providing terminalling service whether characterized as short term storage, strategic buffering, or some other form of handling in the course of transportation.

[405] I do not discern any failures of rationality in the reasoning process, failures of justification in light of the legal and factual constraints, irrationality, fundamental reasoning gaps, fatal flaws, or lack of transparency in the AEA's reasons or the Director's reasons. It was open to the Minister to allow a preferential rate for some assets used in the transportation process but not others, and it was reasonable to conclude the Minister did not intend to allow a preferential rate for terminalling services.

X Whether AEA and the Director unreasonably refused to permit the deduction of the cost of the Diluent Tanks

(a) Introduction

[406] AEA refused the costs of the Diluent Tanks because offsite diluent tankage/storage is not an "allowed cost", and storage of diluent is not specifically included in the weighted average determination of the cost of diluent and is not generally considered necessary for transportation of diluent.

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[407] MEG objected to AEA's determination, asserting:

(a) Many costs related to diluent are allowed costs, such as rail, barge, transloading and trucking.

(b) AEA did not acknowledge that the tanks' primary function was not storage, and were used for the sole benefit of the project.

(c) The diluent costs were fundamental costs. Citing the definition of fundamental costs (s. 4(1) of the *ACR*), MEG stated that all costs "related to the Terminal are fundamental to the Project, and the transportation of MEG's oil sands products to third party buyers".

(d) Further, "the handling charges for the diluent at the Terminal are necessarily part of the costs of transporting oil sands products".

(e) Another operator was permitted to deduct diluent terminalling as an "allowed cost" and part of the "average cost of diluent".

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[408] As described in Part II, the Director found that the diluent tankage cost was not an "allowed cost" because it was not a "specifically included cost" or a "fundamental cost" because the tanks were not located on the Project lands. Further it was not a "handling charge" because it was not paid to transport an oil sands product.

(b) Regulatory provisions

[409] There are three possible ways that costs relating to diluent can enter the royalty equation:

(a) The "cost of diluent" can be deducted from project revenue (*OSRR2009*, ss. 1(1)(g) and 22). This cost must be calculated as "the weighted average cost per unit volume of that diluent calculated in accordance with the Minister's directions" (*ACR*, ss. 22(3)). According to an email from the Senior Audit Manager to MEG in the Certified Record, handling charges of diluent necessary for transporting it are allowed by the Minister in this cost.

(b) Some diluent costs are included in "allowed costs". For example, Schedule 1 (Column 1) of the *ACR* (applicable to periods prior to January 1, 2017) includes the following in the allowed cost category of "specifically included costs":

(i) The activities of blending diluent and operating diluent blending facilities on project lands (Schedule 1, item 4).

(ii) Construction, acquisition and operation of diluent storage and handling systems and diluent pipelines on project lands (Schedule 1, item 8).

(iii) Diluent "used by a project provided the diluent does not form part of handling charges in determining unit price" (Schedule 1, item 17).

(c) Diluent costs might be included in handling charges as part of the costs paid to transport third party disposition volumes of blended product under s. 32 of the *OSRR2009*. Section 32(1)(a)(i) and (iv) specifically exclude diluent costs under s. 32 that are "allowed costs" or "any cost of diluent referred to in section 22(2) or 33(3)(a)(ii) or that is an allowed cost of the Project".

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(c) Parties' Positions

[410] MEG submits in the judicial review that the costs of the Diluent Tanks are "fundamental costs" or "handling charges".

[411] MEG submits that given "the critical role of diluent in the Applicant's ability to process and transport its oil sands product to market, it defies belief that [AEA] determined it was not a fundamental cost", that AEA "ignored the evidence of Stonefell Terminal's function in providing necessary diluent to the Project, and mischaracterized it as diluent storage", and that AEA's decision amounts to "arbitrary punishment" because all the costs of transporting and terminalling incurred by third party sellers would have been passed on to MEG had it purchased diluent from third parties at the Project site.

[412] MEG submits the Director failed to address its arguments that the Diluent Tanks were not for storage, and simply repeats statutory language without analysis. MEG further asserts the Director misunderstood the royalty regime and appears to confuse MEG's argument that the costs were fundamental costs with the question whether they were handling charges, thus failing to demonstrate a "clear and rational understanding of the provisions".

[413] MEG further submits that another operator (herein called "***A Corp***") was allowed to deduct the cost of Diluent Tanks, MEG should receive the same treatment, and the Director's reasons for refusing to apply that decision do not meet the requisite standards of reasonableness in ***Vavilov***.

[414] The Crown submits that the costs of the Diluent Tanks are clearly excluded under ss. 4(2)(b) of the *ACR* because the tanks are not on Project lands, and in oral submissions said that the Director is entitled to error correct and decline to apply the previous decision concerning *A Corp*.

(d) Decision

[415] At the outset, I do not agree with MEG's submission that the Director's reasons demonstrate confusion over the difference between a "handling charge" and an "allowed cost". Paragraphs 37 and 38 of his Reasons recognize that "allowed costs" and "handling charges" are distinct costs categories, and that MEG's "submissions focus on diluent storage as an allowed cost".

[416] It was rational for the Director to address handling charges. MEG's Notices of Objection sometimes label the charges relating to diluent as "handling charges" (Notices of Objection at para 4(d), 6(d), 7, 43, 54, 69) and assert that *A Corp* was more favourably treated because it was allowed terminalling costs as allowed costs and average cost of diluent (Notices of Objection, para 70).

[417] It is not surprising that in such circumstances, the Director would also address whether the costs qualified as "handling charges".

[418] Turning to the Director's conclusion that the costs of the tanks are not "fundamental costs", I have concluded that MEG has not demonstrated unreasonableness in this aspect of the Director's decision.

[419] The Director quoted the exclusion of "costs incurred in respect of ... (b) lands other than Project lands" from "fundamental costs". He found the cost of the Diluent Tanks was not a fundamental cost because the "offsite diluent tankage/storage" is not on Project lands (Decision, para 37) or the "Terminal was not on Project lands" (Decision, para 38). AEA had similarly denied off Project site storage costs.

[420] In its submissions both to the Director and to this Court, MEG did not acknowledge the exclusionary language of ss. 4(2)(b), make submissions why it was unreasonable to conclude that the cost of huge tanks interconnected by piping and located on the Stonefell Terminal lands were not costs incurred in respect of off-Project lands, or demonstrate that it was unreasonable to exclude the cost of the tanks themselves under ss. 4(2)(b) of the *ACR*.

[421] I pause to note that the Director's conclusion concerning ss. 4(2)(b) is to exclude capital costs of constructing and acquiring tanks off the project site as fundamental costs. Depending how the Diluent Tank costs were calculated, it is possible that the claim for the cost of the tanks ran afoul of the exclusion. It also might be that some costs of operation of the tanks are not excluded. MEG did not address these points in its submissions to the Director or the Court.

[422] Next is the Director's decision that the costs were not a "specifically included cost" or a "handling charge".

[423] In addressing "specifically included costs", the Director considered *ACR*, Schedule 1, item 4 and concluded a "specifically included cost" for diluent must be conducted on Project lands. In addressing "handling charges", the Director found these must be paid to transport an oil sands product in contrast to diluent alone.

[424] The Director's conclusion that the tanks must be on project lands to qualify as "specifically included costs" was explicitly based on *ACR* Schedule 1, item 4. That item says the activity described therein must be on project lands. However, the Director failed to mention that Schedule 1, item 17 specifically includes as an allowed cost,

> Diluent used by a Project provided the diluent does not form part of handling charges in determining unit price.

[425] This omission is concerning because Schedule 1 is one of the legal constraints on the decision maker within the contemplation of ***Vavilov***. Item 17 is not explicitly tied to activities on the Project site. Further, it contemplates that some diluent costs can be "handling charges", otherwise the drafter would not have added the condition that the diluent does not form part of handling charges.

[426] Section 32 of the *OSRR2009* may also contemplate that "handling charges" can include some diluent costs. The drafter saw necessary to specifically exclude from "handling charges", "any cost of diluent referred to in section 22(2) or 33(3)(a)(ii) or that is an allowed cost of the Project" (*OSRR2009*, ss. 32(1)(a)(iv)).

[427] A decision maker's "failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (***Vavilov*** at para 128).

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[428] If the Director had considered Schedule 1, item 17 of the *ACR* and the exclusions in s. 32 of the *OSSR2009*, he would have had to “grapple” with four questions: (1) whether item 17 limits costs of diluent to activities on the Project site and excludes activities off the Project site, (2) whether the condition within item 17 suggests a wider scope for s. 32 that includes some handling of diluent, (3) whether the exclusion in s. 32 suggests that “handling charges” include charges for diluent that are not an oil sands product in appropriate cases, and (4) whether MEG’s contention that short term holding of the diluent in tanks at Stonefell was a transportation function not a storage function should be accepted.

[429] In my opinion, the Director’s reasons are not transparent or intelligible as written on the questions whether “handling charges” or “specifically included costs” could cover the cost of service of the Diluent Tanks.

[430] In respect of the rate of return debate, the Director followed the approach in ***Rizzo Shoes***. But the Director may not have adopted the same approach in relation to interpreting “handling charges”. He did not explicitly consider the harmonious interpretation of the *OSRR2009* and the *ACR* together or discuss the inter-relationship among handling charges, specifically allowed costs, and costs of diluent that are apparent in Schedule 1, item 17 and s. 32(1)(a)(iv).

[431] In my opinion, these issues ought to have been explained and are serious gaps in his reasoning process that the Court can not supplement. The Director’s conclusion does not “add up” (from ***Vavilov***) in the sense that one is left to wonder about the inter-relationship of s. 32 and Schedule 1, item 17 and why the Director did not mention item 17. These are indicia of unreasonableness.

[432] There is a further indicia of unreasonableness in the Director’s reasoning process on the tank costs.

[433] MEG submitted to the Director that the diluent tanks’ primary function was not storage, rather it was transportation. It reinforced its position by informing the Director of AEA’s decision in *A Corp* that “diluent terminalling is an <u>allowed cost and part of the average cost of diluent</u>, in contrast to the AB Energy decision here” (Underlining added).

[434] The Director declined to apply the decision and instead found it was incorrect. I agree with the Crown that the Director is entitled to error correct, and I agree with MEG that the Director did not sufficiently explain why the decision is erroneous.

[435] Where “a decision maker does depart from longstanding practices <u>or established internal authority</u>, it bears the justificatory burden of explaining that departure in its reasons” (***Vavilov*** at para 131, underlining added). The Court continued in ***Vavilov***:

> [131] ... We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[436] The Director’s reasons quote the *A Corp* decision, which states that a **“...** tank [cost of service] was included as part of the diluent costs claimed ...”.

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[437] The Director then observed that in the *A Corp* decision "similar costs to the disputed costs had been included in [name redacted] cost of service for eligible handling charges". He then found the prior decision was inconsistent with the requirements of handling charges under s. 32 of the *OSSR2009*.

[438] The decision in the Certified Record is heavily redacted. It is not clear whether the diluent costs were accounted for under s. 32 of the *OSRR2009* ("handling charge"), s. 22 of the *OSRR2009* ("weighted average cost of diluent") or s. 3 of the *ACR* ("specifically included cost"). But the Director says it was accounted for in "handling charges" and he likely had the unredacted determination.

[439] The decision in *A Corp* might or might not be a long standing practice (it is undated), but that decision or a substantially similar decision in another audit of a 2013 statement was arrived at by AEA after "significant consultation" (Certified Record, Tab 283).

[440] If it was backed up by significant consultation within the Department of Energy, there likely were good reasons underlying it. Under these circumstances, the Director ought to have explained the rationale for such decision and why it was wrong or appropriate to depart from it.

[441] In regard to the correctness of the decision, I noted the *A Corp* decision (or a substantially similar decision) came to AEA's attention shortly after the Director received a copy in late May 2022. According to Minutes in the Certified Record (Tab 283), AEA felt the decision was incorrect and decided not to apply it in future open audits. The only rationale expressed therein - that it is a "specifically excluded cost" - might not be justifiable given the activity under consideration is not listed in the column of specifically excluded costs in Schedule 1 to the ACR, but in any event the question of the basis of the *A Corp* decision and why the outcome of previous "significant consultation" should have been addressed.

[442] When all these considerations are taken as a whole, I conclude that the decision is not sufficiently explained and for that reason, it is unreasonable. It is severable from the other issues and should be remitted for redetermination.

XI Conclusion

[443] The denial of the cost of the Diluent Tanks is remitted to the Director for redetermination.

[444] The rest of the application is dismissed.

[445] The parties may speak to costs.

Heard on the 11th day of April, 2024.

Dated at the City of Calgary, Alberta this 4th day of October, 2024.

JT Eamon
J.C.K.B.A.

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