In the Court of Appeal of Alberta

Citation: Benga Mining Limited v Alberta Energy Regulator, 2022 ABCA 30

Date: 20220128
Docket: 2101-0196AC
2101-0199AC
2101-0201AC
Registry: Calgary

Between:

Docket: 2101-0196AC

Benga Mining Limited

Applicant

- and -

Alberta Energy Regulator, the Joint Review Panel for the Grassy Mountain Coal Project acting in its capacity as the Alberta Energy Regulator and the Municipal District of Ranchland No. 66

Respondents

And Between:

Docket: 2101-0199AC

Piikani Nation

Applicant

- and -

Alberta Energy Regulator

Respondent

And Between:

Docket: 2101-0201AC

Stoney Nakoda Nations

Applicant

- and -

Alberta Energy Regulator and the Joint Review Panel for the Grassy Mountain Coal Project acting in its capacity as the Alberta Energy Regulator

Respondents

Reasons for Decision of
The Honourable Justice Bernette Ho

Applications for Permission to Appeal

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I. Introduction

[1] This relates to applications for permission to appeal a decision of the Joint Review Panel (JRP or Panel), in its capacity as the Alberta Energy Regulator (AER). The JRP denied approval of the Grassy Mountain Steelmaking Coal Project, a proposed open-pit coal mine in Southwest Alberta (the Project). The JRP's decision, dated June 17, 2021, was reported as *Benga Mining Limited Grassy Mountain Coal Project, Crowsnest Pass*, 2021 ABAER 010 (JRP Report or Decision).

[2] Three applicants seek permission to appeal the decision: Benga Mining Limited (Benga), the Piikani Nation (Piikani), and the Stoney Nakoda Nations (Stoney Nakoda).

[3] The Municipal District of Ranchland No. 66 (MD) was added as a respondent to Benga's application by a single Justice of this Court: *Benga Mining Limited v Alberta Energy Regulator*, 2021 ABCA 363. The MD opposes Benga's application for permission to appeal and supports the JRP's decision. The MD has no status in either First Nation application.

II. Background

The Proposed Project

[4] In 2017, Benga applied to the AER for approval to construct and operate an open-pit metallurgical coal mine. The proposed Project site is located in the Crowsnest Pass area, approximately seven kilometres from Blairmore, Alberta. It is situated entirely within the MD as well as Treaty 7 First Nations territory. The Project footprint covers 1521 hectares with a maximum production capacity of 4.5 million tonnes of metallurgical coal per year over a mine life of approximately 23 years.

[5] The Project would generate an estimated $1.7 billion in royalties and taxes for provincial and federal governments over its operational life. Benga expects that the Project would employ 195 workers during construction and 385 workers annually.

[6] In order to proceed, the Project required:

- approvals from the AER under the *Coal Conservation Act*, RSA 2000, c C-17, the *Environmental Protection and Enhancement Act,* RSA 2000, c E-12 (*EPEA*), the *Water Act*, RSA 2000, c W-3 and the *Public Lands Act*, RSA 2000, c P-40;
- a provincial Environmental Impact Assessment (EIA) under the *EPEA*; and

- a federal environmental assessment under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19 (*CEAA 2012*).

[7] In 2018, the Chief Executive Officer of the AER and Canada's Minister of Environment and Climate Change jointly announced a federal-provincial review of the Project. They established the JRP pursuant to section 18 of the *Responsible Energy Development Act*, SA 2012 c R-17.3 (*REDA*) and sections 38-40, 42 of the *CEAA 2012*. The JRP was formally established under the terms of the "Agreement to Establish a Joint Review Panel for the Grassy Mountain Coal Project between the Minister of Environment, Canada and the Alberta Energy Regulator, Alberta" (JRP Agreement) and the appended Terms of Reference (TOR).

The Parties

[8] Benga is the Project proponent and has been pursuing regulatory approval since 2015.

[9] Piikani is the closest First Nation to the proposed site of the Project. Piikani entered into an agreement with Benga that provided socioeconomic benefits and opportunities for Piikani if the Project proceeded. Piikani states that the agreement will provide education, training, employment opportunities, ongoing environmental monitoring and increased measures to reduce environmental impacts of the Project. Piikani provided notice of this agreement to the JRP.

[10] Stoney Nakoda is comprised of the Bearpaw, Chiniki and Wesley First Nations. All are signatories to Treaty 7. Stoney Nakoda began discussions with Benga in 2015 and entered into a formal relationship agreement about the Project in February 2019. While the details of this agreement were not shared with the JRP, Stoney Nakoda states that the agreement will provide economic, social, and cultural benefits including ongoing consultation, employment and commercial opportunities, community development, and environmental reclamation.

[11] The MD is located in southwestern Alberta, stretching from Kananaskis Country to Crowsnest Pass and the British Columbia border. The MD predominantly consists of ranching land. The MD opposed the Project throughout the regulatory process and has consistently argued that the Project will have adverse environmental effects that will impact municipal infrastructure and services.

The JRP Process

[12] The JRP was tasked with reviewing the Project and issuing a decision in a manner that discharged the AER's responsibilities under *REDA*, the requirements set out in *CEAA 2012*, and the JRP's TOR.

[13] In its capacity as the AER, the JRP is a quasi-judicial tribunal, required to adhere to the principles of natural justice and the duty of procedural fairness. The JRP had to provide a reasonable opportunity for affected parties to make arguments and present relevant evidence. In

making a final decision, the JRP was obligated to provide a written statement setting out its findings of fact and its reasons for the decision: *Administrative Procedures and Jurisdiction Act*, RSA 2000, c A-3, ss 4, 7.

[14] The JRP undertook its mandate in three stages: 1) review submitted "Pre-Panel" materials; 2) conduct a public hearing; and 3) release a written decision report.

1. "Pre-Panel" Materials

[15] In November 2015, before the JRP was established, Benga submitted an EIA to the AER (pursuant to section 44 of *EPEA*) and to the Canadian Environmental Assessment Agency. Benga submitted an updated EIA in August 2016 and an integrated application in October 2017 that provided information required under the provincial legislation. Between January 2017 and October 2018, Benga responded to nine packages of pre-panel requests for information.

[16] After the JRP was established, Benga responded to additional information requests about the Project's impact on Indigenous traditional land use. The JRP conducted a site visit of the Grassy Mountain area on September 25, 2019.

[17] On June 25, 2020, the JRP issued a letter informing Benga that the content of its EIA report was deemed complete pursuant to section 53 of *EPEA* (the Completeness Determination letter).

2. Public Hearing

[18] The JRP issued a notice of public hearing on June 29, 2020. In the notice, the JRP noted that both applicant First Nations could participate fully in the hearing as they may be directly affected by the Project or have relevant information and expertise about the Project. As the Project proponent, Benga was required to participate.

[19] The hearing began on October 27, 2020 and spanned 29 sitting days, concluding on December 2, 2020. The Aboriginal Consultation Office (ACO), being a branch of Alberta's Ministry of Indigenous Relations, provided hearing reports on December 3, 2020, and final written arguments were provided thereafter. The hearing record was closed on January 15, 2021. After the oral hearing concluded but before the record closed the panel received more than 4,000 comments from the public. The majority of these comments expressed concerns about the Project.

[20] Piikani did not participate in the hearing but submitted comments and in 2019 indicated their support of the Project.

[21] Stoney Nakoda participated in the hearing by providing written submissions and an oral presentation. Stoney Nakoda indicated that they did not object to the Project and would accept the decision of the JRP.

[22] The MD participated in the hearing through written submissions, the presentation of expert evidence, cross-examination of Benga's representatives, and a written final argument. The MD argued that the Project was not in the public interest and should be rejected.

3. The JRP Decision

[23] The JRP issued its written decision on June 17, 2021.

[24] The JRP concluded that the Project was likely to result in significant adverse environmental effects. These effects include adverse effects to surface water quality, westslope cutthroat trout and their habitat, whitebark pine, rough fescue grasslands, as well as on vegetation species and community biodiversity. The JRP additionally found that the Project would cause loss of lands used for traditional activities and that this would adversely affect Indigenous groups who use the Project area. While all Treaty 7 First Nations stated that they had no objection to the Project, the JRP concluded that the Project would cause significant adverse effects to sites of physical and cultural heritage for three Treaty 7 First Nations.

[25] The JRP found that Benga took a limited approach to assessing the Project's cumulative environmental effects that made it difficult to assess the magnitude of the Project's impact. In assessing the positive economic impact to the region, Benga did not consider certain risks that could reduce the Project's positive economic impacts. The mitigation measures proposed by Benga and the First Nation applicants were not sufficient to fully address the negative effects.

[26] The JRP, in its capacity as the AER, concluded that the project was not in the public interest, at paragraph 3048:

> Overall, we conclude that the project is likely to result in significant adverse environmental effects on westslope cutthroat trout and surface water quality, and these negative impacts outweigh the low to moderate positive economic impacts of the project. Accordingly, we find that the project is not in the public interest. In making this determination, we understand that this means that the expected employment, related spending, and economic benefits for the region will not be realized. However, even if the positive economic impacts are as great as predicted by Benga, the character and severity of the environmental impacts are such that we must reach the conclusion that approval of the *Coal Conservation Act* applications are not in the public interest.

[27] Given the AER's decision not to grant approval of the Project under the *Coal Conservation Act*, the AER also denied Benga's applications under the *EPEA*, *Water Act*, and *Public Lands Act*. Without approval of the provincial applications, the Project cannot proceed. Given the AER's decision, the JRP in its federal capacity did not complete its assessment but made a number of recommendations to the federal government.

III. Test for Permission to Appeal

[28] Permission to appeal may be granted on questions of law or jurisdiction only: *REDA*, s 45(1). When deciding whether to grant permission, the Court considers: (i) whether the issues are of general importance; (ii) whether the issues are of significance to the decision itself; (iii) whether the appeal has arguable merit; and (iv) whether the appeal will delay the underlying proceeding: *Fort McKay First Nation v Prosper Petroleum Ltd*, 2019 ABCA 14 at para 18. The fourth factor is not at issue in this application.

[29] Permission to appeal may not be granted on questions of fact or mixed fact and law. This Court should ensure that legal language does not mask factual issues. It is open to this Court to look behind the wording of the issues as framed by the applicants to determine the true nature of the issues raised: *ATCO Electric Ltd v Alberta (Utilities Commission)*, 2019 ABCA 417 at para 20.

IV. Analysis

Benga's Application

[30] Benga's seeks permission to appeal on six grounds. Benga argues that the JRP, in its capacity as the AER, erred in law by:

(a) denying Benga procedural fairness by finding that Benga submitted insufficient information on potential adverse environmental effects, mitigation measures and Project benefits after the JRP issued the Completeness Determination letter to Benga;

(b) failing to properly consider Alberta government policy as reflected in the South Saskatchewan Regional Plan, which it was required to do pursuant to the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (*ALSA*) and *REDA*;

(c) ignoring relevant evidence from Benga, or misconstruing that evidence, regarding surface water quality, the westslope cutthroat trout and habitat, and Project economics. As a result, the JRP, in its capacity as the AER, improperly found Benga's evidence and plans to be inadequately developed and potential benefits overstated;

(d) failing to consider the rules of evidence and principles on which the are grounded, including reliability concerns, and thereby improperly relied on layperson, non-expert and unfounded opinion evidence lacking any science-based support to unjustifiably dismiss or disregard Benga's expert evidence;

(e) finding that Alberta's Mine Financial Security Program was inadequate for Benga to rely on to address long-term water treatment costs; and

(f) failing to engage with, seek further information from, consult with or suggest consultation with affected Indigenous groups when contemplating the rejection of the Project. As a result, the JRP, in its capacity as the AER, did not properly assess

> the impact of the rejection of the Project on Aboriginal rights and economic interests that accommodate potential impacts on those rights, notwithstanding that those Indigenous groups supported the Project and filed letters of support or no concern with the JRP.

[31] I note that Benga did not address the last proposed ground of appeal in its Memorandum of Argument and Benga's Notice of Application was not formally amended. In any event, Benga's last proposed ground of appeal is addressed in my discussion of the permission to appeal applications filed by Stoney Nakoda and Piikani.

Ground One: The Completeness Determination letter and procedural fairness

[32] This ground of appeal concerns the legal significance of a Completeness Determination letter issued under section 53 of *EPEA*.

[33] Benga argues that the JRP erred in law, or denied Benga procedural fairness, by issuing the Completeness Determination letter on June 25, 2020 but then later concluding that some of Benga's information respecting westslope cutthroat trout, surface water quality, and Project economics was incomplete or insufficient, and did so without requesting additional information from Benga.

[34] Benga argues, at paragraph 18 of its Memorandum of Argument, that this ground of appeal raises at least three issues of law or jurisdiction: (i) whether a completeness determination under s 53 of *EPEA* precludes the Panel from later finding information filed by a project proponent to be incomplete? (ii) whether a completeness determination under the Panel's TOR precludes the Panel from later finding information to be incomplete? And (iii) whether procedural fairness requires the Panel to live up to its explicit or implicit assurance that, following a completeness determination, it would provide the proponent an opportunity to provide any additional information and fill any gaps the Panel later identifies.

[35] I agree that this proposed ground of appeal raises a question of law or jurisdiction. However, having considered Benga's arguments, the statutory scheme, and the record, permission to appeal is denied because this ground of appeal does not have arguable merit.

[36] I do not accept Benga's argument that the plain language of section 53 of *EPEA*, its context, and its purpose supports the interpretation that after issuing the Completeness Determination letter the Panel was precluded from concluding in its Decision that additional information was required, or that the Panel was required to provide the proponent with an opportunity to "fill any gaps" identified by the Panel during the public hearing process.

[37] It is helpful to place section 53 of *EPEA* in context. Section 49 of *EPEA*, entitled "Contents of environmental impact assessment report", lists the information that must be included in a proponent's EIA, unless otherwise directed by the Director (here, the JRP). Sections 49(o) and 51

provide the Director with statutory authority to request further information from a proponent, anytime after receipt of an EIA under section 50 of *EPEA*.

[38] Section 53 provides, in part:

> Powers of Director
>
> 53 Where in the opinion of the Director an environmental impact assessment report is complete, the Director shall
>
> (a) advise the Alberta Energy Regulator or the Alberta Utilities Commission, as the case may be, that the report is complete, in a case where the proposed activity is one in respect of which the approval of the Alberta Energy Regulator or the Alberta Utilities Commission, as the case may be, is required,
> ...

Although in this case the Director and AER were the same body — being the JRP — the statutory scheme makes clear that a completeness determination by the Director merely relates to the requirements outlined in section 49 of *EPEA*. That is, a completeness determination letter under section 53 is the Director's opinion that the matter is ready to proceed to the next stage of the AER's process, nothing more. The completeness determination did not replace any AER process, nor did it mean that approval was not required from the AER. Rather, the AER's mandate to determine whether the Project was in the public interest through a public hearing was just beginning.

[39] The correspondence from the Panel to Benga demonstrates that the Panel did not, as Benga alleges, change its position on the completeness of Benga's information. It is necessary to include lengthy excerpts from the relevant correspondence.

[40] By letter dated May 22, 2020, the Panel indicated in its opening paragraph that it must determine whether the information submitted on the public registry is sufficient to proceed to the public hearing stage of the process, and whether the information provided by Benga is complete for the purposes of the provincial Environmental Impact Assessment (EIA). In this respect, the Panel wrote:

> The question of whether the information provided complies with the Panel's Terms of Reference and is sufficient to proceed to hearing is not based on whether there is agreement with Benga's information, analysis, or conclusions. In the next stage of the review process, individuals or groups that are granted participation in the hearing will have the opportunity to submit evidence to the Panel, and to test Benga's evidence. The Panel has determined that the concerns raised in the public comments can be addressed effectively through the hearing process.

> ... Following timely receipt of complete and sufficient responses from Benga to the Panel's requests for additional information, the Panel is prepared to move to the next stage of the environmental assessment process, which would include: deeming the EIA complete, confirming the sufficiency of the additional information provided by Benga, and issuing the notice of hearing.

[41] In this letter the panel also requested that Benga provide additional information on certain topics.

[42] The next letter from the Panel was the Completion Determination letter dated June 25, 2020 where the Panel stated (emphasis added):

> ...the Panel has determined that the content of the EIA report and addenda meet the Alberta Energy Regulator final terms of reference dated, March 19, 2015.
>
> The Panel has deemed the EIA report complete, pursuant to Section 53 of EPEA.
>
> This determination does not represent the Panel's agreement with the details of Benga's analysis included in the EIA report, nor does it represent acceptance or approval of the proposed Project. The EIA report will be further evaluated by the Panel in its consideration of the above-noted applications. The Panel may require Benga to provide additional information at the public hearing, regarding the proposed project in order for the Panel to make the necessary regulatory decisions, including whether to recommend approval of the applications and potential approvals conditions. [sic in original]

[43] On the same date, the Panel issued a letter with a subject line that read, "Determination of sufficiency of additional information submitted by Benga Mining Ltd. For the Grassy Mountain Coal Project". It stated, in part:

> On May 22, 2020, the Joint Review Panel (the Panel) for the proposed Grassy Mountain Coal Project (the Project) determined that additional information was required from Benga Mining Ltd. (Benga) (CIAR #352). The Panel indicated that following the receipt of complete and sufficient responses from Benga to the Panel's requests for additional information, the Panel would move to the next stage of the environmental assessment process.
>
> On June 19, 2020, Benga provided its response to these requests in the form of Addendum 12 (CIAR #360). The Panel has completed its review of Addendum 12, and has determined that the information on the public registry is now sufficient to proceed to the public hearing stage of the process in accordance with the Terms of Reference (CIAR #80). The Panel has also determined that the environmental impact assessment and addenda provided by Benga meet the information

> requirements outlined in the final Guidelines for the Preparation of an Environmental Impact Statement (CIAR #11). The Panel will issue the notice of hearing in the coming days.

[44] In my view, the Panel made clear in this correspondence that while it deemed Benga's EIA to be complete, that did not equate to Project approval. The correspondence made it clear that Benga's evidence had yet to be tested at a hearing and that the Panel may still require Benga to provide further information. Thus, I cannot accept Benga's assertion that the issuance of a completion letter pursuant to section 53 of *EPEA* essentially precluded the Panel from finding there were informational deficiencies in its final report in which it communicated its decision not to recommend approval of the Project. That the Completeness Determination letter did not represent approval of the Project was made clear to the proponent when the JRP wrote: "This determination does not represent the Panel's agreement with the details of Benga's analysis included in the EIA report, nor does it represent acceptance or approval of the proposed Project."

[45] Further, given that the Panel could have requested additional information throughout the public hearing process, it is evident that the Completeness Determination letter did not preclude the Panel from not approving the Project due to the insufficiency of information regarding a particular issue.

[46] The Completeness Determination letter merely signalled the start of the next phase of Benga's application process, which was consistent with the process outlined in the TOR. As mentioned above, section 8 of Part V of the TOR provided that the JRP undertake its mandate in three stages:

> Stage 1 - Review of the EIA report and any Supplemental Information;
>
> Stage 2 - Conduct of a public hearing; and
>
> Stage 3 - Preparation of a report and submission to the Federal Minister of Environment

[47] In the discussion of Stage 1, section 10 described the initiation of a public comment period on whether the information on the public registry was "sufficient to allow a joint review that complies with the Joint Review Panel's [TOR] and to proceed to the public hearing stage of the process." The Panel was to review the proponent's information, consider any comments received, and request additional information if it determined that the EIA Report and supplemental information on the public registry was not sufficient. Section 14 provided that this process would continue until such time as the JRP determined it had "sufficient information to proceed to the public hearing stage of the process." Then, in the discussion of Stage 2, section 21 provided that if the Panel determined it had sufficient information to proceed to public hearing, it would announce the hearing.

[48] Benga argues that the wording of the TOR supports its position. It points to section 7 of the TOR, in the discussion of the Pre-Panel review stage, where the TOR explicitly states that the Pre-Panel review of the EIA report does not "affect or predetermine" the result of the assessment of the proponent's EIA report. Benga says because this same wording is omitted in the TOR's discussion of Stage 1 it must mean that the issuance of a completeness determination precludes a later finding of insufficient information. There is no arguable merit to Benga's argument. While section 7 does explicitly state that the Pre-Panel review of the EIA report does not "affect or predetermine" the result of the assessment of the proponent's EIA report by the Panel, it also states, "and in particular the Joint Review Panel may decide that the proponent must provide additional information." This mirrors the message that was provided to the proponent in the Completeness Determination letter. More importantly, the Pre-Panel review is not the review conducted pursuant to section 49 of *EPEA*.

[49] I note that section 23 of the TOR explicitly provided that the public hearing shall provide opportunities for "timely and meaningful participation by the public, including Indigenous groups and peoples, in accordance with *CEAA 2012*, subsection 34(3) of REDA, and section 9 of the AER *Rules of Practice*." In my view, Benga's suggestion that the Panel was precluded from concluding that Benga submitted insufficient information after the Completeness Determination letter is at odds with the requirement that hearing participants have an opportunity to meaningfully participate in the public hearing process. Issues and questions about the sufficiency of information or methodologies employed by project proponents are often raised by intervenors in the public review and hearing process, even after a completeness determination.

[50] An examination of the JRP's Decision illustrates this very point. Take for example the issue of ground-water surface modelling. Benga argues that the panel erred by criticizing it for failing to provide groundwater-surface modelling when the Panel never asked Benga to provide this information. Benga points to paragraph 663 of the Decision:

> Groundwater base flow is of great importance in providing and maintaining surface water flows and habitat for westslope cutthroat trout. Consequently, changes in groundwater baseflow predictions may have significant implications for predicted effects on surface water flows and westslope cutthroat trout. To gain confidence in the predictions of effects, a comprehensive understanding of groundwater-surface water interactions is required. Given the sensitivity of the project's location in a headwaters area and the potential for adverse effects on westslope cutthroat trout, the use of an integrated groundwater-surface water model may have been more appropriate and provided greater confidence in assessment predictions.

[51] But paragraph 663 of the Decision cannot be read in isolation. Paragraph 654 of the Decision suggests that it was Fisheries and Oceans Canada (DFO) who initially raised a concern during the EIA review process about interactions between groundwater and surface water being critical for fish and aquatic wildlife habitat. It was DFO who observed that Benga "relied on stand-

alone surface water and groundwater analyses with outputs from the separate models used to assess interactions between the two systems. DFO suggested that the assessments contained within the EIA would benefit from application of an integrated (coupled) groundwater-surface water model, given the number of groundwater-supported headwater streams adjacent to the site." DFO went on to acknowledge that Benga's approach was in keeping with standard approaches used in projects like that proposed by Benga and that EIS guidelines and the TOR do not require such enhanced level of analysis. Later in the Decision, in a different chapter addressing Surface Water Quantity and Flow, the Panel further discussed Benga's groundwater model and the concerns outlined by the Coalition of Alberta Wilderness Association and Grassy Mountain Group (Coalition). After reviewing the Coalition's concerns and Benga's responses, the Panel wrote at paragraphs 812 and 813:

> While we agree with Benga that averaging the modelled base flows over the year would produce a superior calibration, this may not mean that the calibration accurately represents base flows. These calibration concerns, together with Benga's decision to apply high recharge values along some areas near Gold Creek, create uncertainty in estimating the impact on base flows produced by the groundwater model. Benga did not provide a detailed explanation as to how the base flows from the groundwater model are integrated into the load and water balance model. Given the complexity of the site, a better-integrated model of surface water-groundwater interactions would have been more suitable for assessing the impacts on base flow.
>
> We share the concerns expressed by participants about the groundwater model. When we consider these concerns together with Benga's use of a simplistic hydrologic model that uses average annual precipitation as the only changing parameter, we find that there is uncertainty about the model's ability to assess the impact of the project on base flow, fish, and fish habitat.

[52] The foregoing makes clear that the Panel did exactly what was mandated by the TOR. The Panel allowed hearing participants a meaningful opportunity to participate and considered the evidentiary record before arriving at its conclusions respecting Benga's application. The Panel did not, as Benga suggests, change its position on the completeness of Benga's information.

[53] Finally, there is no merit to Benga's submission, as outlined at paragraph 20 of its Memorandum of Argument, that "it was denied procedural fairness because the Panel assured Benga that it would seek further information if necessary, failed to do so, and then based its decision, in part, on a lack of information from Benga." In advancing this assertion, Benga does not point to a specific document on the record and relies on the Completeness Determination letter in support of its submission. But the Completeness Determination letter did not assure Benga that further information would be sought; the Panel merely reserved the right to request further information. Similarly, *EPEA* merely provided the Panel with the statutory authority to request further information. Benga had the burden of satisfying the Panel's informational requirements

and the process implemented by the Panel before and during the oral hearing process was not unfair to the proponent.

[54] For these reasons, permission to appeal on the first ground is denied as it does not have arguable merit.

Ground Two: Consideration of the South Saskatchewan Regional Plan

[55] Benga asserts that the Panel erred by failing to consider Alberta government policy as outlined in the *South Saskatchewan Regional Plan* (*SSRP*). Under section 20 of *REDA,* the Panel, acting in its capacity as the AER, is required to act in accordance with any applicable *ALSA* regional plans. Paragraph 26 of Benga's Memorandum of Argument states:

> While the relevant parts of the *SSRP* are not binding, the Panel is nevertheless statutorily obligated to consider the entire plan as reflecting the Government of Alberta policy. It failed to do so, ignoring the *SSRP* where clearly inconsistent with its reasons and conclusion. This is an error of law that impacted the Panel's economic assessment of the Project and raises issues regarding the interpretation and application of regional plans that transcend this proceeding. Indeed, there are currently two regional plans and five proposed regional plans covering all of the land in Alberta.

[56] I am not convinced that this proposed ground of appeal raises a question of law as Benga concedes that the Panel did consider the *SSRP* and the issue is the weight that was assigned to different portions of it. Further, Benga acknowledges that the portions of the *SSRP* it says were ignored are not legally binding, but rather "statements of policy to inform … decision-makers": see *SSRP* page 8 and *ALSA,* s 15(1).

[57] Even if this ground raised a question of law, permission to appeal is denied because this ground has no arguable merit. There is nothing in the record to suggest the Panel failed to consider the entirety of the *SSRP*. Paragraph 11 of the Decision, under the heading "Legislative and regulatory framework", confirms that the Panel expressly recognized the role that the *SSRP* had in its deliberations. Elsewhere in the Decision, the Panel described the *SSRP* as establishing "a long-term vision for the South Saskatchewan Region and aligns provincial policies at the regional level to balance economic, environmental, and social goals": paragraph 121.

[58] Benga argues that the Panel selectively relied on environmental protection policy described in the *SSRP* and points to five paragraphs in the decision: paragraph 843 (a general description of the *SSRP*), paragraphs 2095-2096 (a summary of participant comments respecting the *SSRP*), and paragraphs 1512 and 1596 (a discussion of the importance of native grasslands). These five paragraphs do not provide a complete picture. Notably, the Panel also wrote the following at paragraphs 2099 and 2102 of the Decision under the heading "Land and Resource Use":

> [2099] Overall, Benga stated that the project would not conflict with the intent of the various land use policies and regional planning initiatives in effect for the area, as the intent of these policies and planning initiatives is to help inform land use decisions. Benga contended the allowance of multiple uses in the existing regional plans supported a balance between the economy and the environment.
>
> ...
>
> [2102] We agree with Benga's conclusion that existing land use policies and regional plans do not restrict development of this project, subject to proper assurances respecting the protection of the environment and reclamation of disturbed lands.

[59] It is evident the Panel had regard for the entirety of the *SSRP* within the context of its mandate. Permission to appeal on this proposed ground is therefore denied.

Grounds Three and Four: The Panel ignored relevant and material evidence; The Panel failed to consider rules of expert evidence and reliability concerns

[60] Benga's next two proposed grounds of appeal can be dealt with together, as I am not satisfied that Benga has demonstrated that the proposed grounds raise questions of law or jurisdiction. This Court will not review questions of fact or mixed fact and law: *Sawyer v Alberta (Energy and Utilities Board)*, 2007 ABCA 297 at para 14. A question of mixed fact and law involves the application of a legal standard to a set of facts: *Housen v Nikolaisen*, 2002 SCC 33 at para 26. Further, whether evidence was credible or reliable is a question of fact: *ATCO Electric* at para 29.

[61] Benga asserts that the issue is not whether the Panel should have weighed or interpreted Benga's evidence differently, but rather, that the Panel disregarded, overlooked, mischaracterized or ignored material evidence from Benga and therefore erred in law. Benga relies on *PSS Professional Salon Services Inc v Saskatchewan (Human Rights Commission)*, 2007 SKCA 149 and *Beta Management Inc v Edmonton (City)*, 2017 ABQB 571, for the proposition that it has raised a question of law. I do not accept Benga's framing of the issues - the true nature of the issues raised do not amount to questions of law or jurisdiction suitable for appellate review.

[62] Addressing first Benga's assertion that the Panel ignored Benga's relevant and material evidence. The record shows that there was a voluminous amount of technical evidence filed with the Panel addressing a number of issues. As one example, Benga argues that the Panel erred by questioning Benga's ability to detect and mitigate groundwater plumes in a timely manner based on concerns raised by other participants while Benga had filed plans to address plumes: Exhibit R to Houston Affidavit filed October 28, 2021. Paragraph 903 of the Decision states:

> Given the concerns raised by participants, we question Benga's ability to detect and mitigate potential groundwater plumes in a timely manner. We further find that Benga provided insufficient evidence to support the assumption that it will have ample time to implement additional capture mitigation measures, should groundwater monitoring indicate elevated levels of selenium or other constituents of concerns.

[63] The evidence contained at Exhibit R of the Houston Affidavit does include Benga's plans to address plumes, but there is nothing on the face of the Decision to suggest the Panel ignored Benga's evidence when it (i) questioned the timing of Benga's ability to detect and mitigate groundwater plume issues, and (ii) arrived at its finding that Benga provided insufficient evidence to support its assumptions around timing.

[64] Benga points to numerous other examples of times it says the Panel ignored evidence, however these are not borne out by the record. On water treatment, the Panel expressly referenced Benga's evidence on the costs and feasibility of an active water treatment plant: paragraph 930. On the demand for coal, the Panel again expressly referenced Benga's evidence about the current demand for metallurgical coal required for steelmaking purposes and expected growth given the demand for global steel: paragraphs 2859-2860. The Panel also referred to Benga's evidence indicating that opportunities for the steel-making industry to improve and recycle would not replace the need or demand for metallurgical coal. In the end, after reviewing evidence of other participants, the Panel concluded Benga overstated the positive economic impacts that would flow from the Project and presented an overly optimistic economic analysis that did not adequately consider the downside economic risks, which likely would have affected the Project's economic viability, employment numbers, and payments to governments later in the mine life: paragraphs 2867 and 2868.

[65] Benga's arguments amount to assertions that the Panel should have accepted Benga's evidence. It is not an error of law for a decision-maker to accept or reject evidence before it.

[66] I arrive at the same conclusion respecting Benga's assertion that the Panel failed to consider rules of expert evidence and reliability. At its core, Benga's argument is that the Panel should have preferred Benga's expert evidence.

[67] First, I note that section 47 of *REDA* specifically provides that the AER, in conducting its hearings, is not bound by the rules of law concerning evidence applicable to judicial proceedings. That said, Paperny JA has observed that "the relaxation of the rules of evidence does not relieve an administrative decision-maker of the responsibility to assess the quality of the evidence received in a reasonable manner in order to determine whether it can support the decision being made": *Pridgen v University of Calgary*, 2012 ABCA 139 at para 59. In *Pridgen*, the decision-maker relied on double and triple hearsay of an extremely vague nature from unnamed sources.

[68] Benga provides many examples, but it is not necessary for me to address each one. As one example, Benga takes issue with the Livingstone Landowner Groups' expert, Dr. McKenna, and the Panel's failure to discuss the limits of Dr. McKenna's expertise.

[69] The Livingstone Landowners Group had full participatory rights in the hearing. They filed an expert report authored by Dr. McKenna. Dr. McKenna also testified at the hearing. Dr. McKenna was retained through his firm, McKenna Geotechnical, but admitted that he would normally work as part of a team that would include a hydrogeologist or hydrologist. Dr. McKenna's curriculum vitae was filed on the record and it described Dr. McKenna as a geotechnical engineer specializing in tailings and waste management, landform design, and mine reclamation with over 33 years of experience at a large oil sands mine, as well as other mines in Canada and the United States. Dr. McKenna earned his PhD in Geotechnical Engineering from the University of Alberta in 2002 and has served as an Adjunct Professor at both the University of Saskatchewan and University of Alberta.

[70] Benga argues that the Panel improperly relied on Dr. McKenna to provide expert evidence on capture systems notwithstanding his admission that the assistance of a hydrogeologist or a hydrologist is required, and was not provided here. Having reviewed the Panel's references to Dr. McKenna's evidence, there is no merit to the suggestion that the Panel failed to assess the quality of his evidence in a reasonable manner. In numerous instances in the Decision, the Panel merely reviews Dr. McKenna's evidence. In other places, such as at paragraphs 944 and 2886, the Panel notes how Dr. McKenna's evidence is similar to that of another expert or aligns with the fundamental principles of the Mine Financial Security Program.

[71] Even at paragraph 898, which is specifically cited by Benga as demonstrating the Panel's error, the Panel merely notes that Dr. McKenna "also raised the possibility of formation of groundwater plumes containing elevated selenium and other parameters under the saturated backfill and mine infrastructure." But the Panel did not rely exclusively on Dr. McKenna's evidence in assessing the collection efficiency of waste rock runoff water. In the previous paragraph, the Panel noted Benga's assumption that it would have ample time to implement additional capture measures should monitoring indicate elevated levels of selenium or other constituents of concern in groundwater. The Panel then referred to the evidence of the Coalition's expert, Dr. Fennell, who challenged Benga's assumption and stated that Benga's groundwater model was a "'gross simplification' of the complex system that exists in the area.": paragraph 897.

[72] Benga also argues that the Panel erred by relying on anecdotal information from a local fly fisherman, Mr. J. Rennie. At paragraph 1187 of the Decision, the Panel refers to Mr. Rennie's personal catch rates from Gold Creek for the period from 1993 to 2020, which showed a decline following an event in 2015. This reference is in the context of the Panel's discussion about whether Gold Creek is critical habitat for westslope cutthroat trout.

[73] This, however, is a selective reading of the Decision. That same paragraph also describes the position advanced by the Canadian Parks and Wilderness Society (CPAWS). The next

paragraphs then address the positions of the Coalition and DFO before the Panel ultimately questioned whether the baseline population data of westslope cutthroat trout collected by Benga was sufficient. The Panel went on to discuss the importance of having an accurate population estimate to determine effects, if any, of the proposed Project on the westslope cutthroat trout. Ultimately, there is nothing in the Decision that indicates the Panel unreasonably relied upon Mr. Rennie's evidence, particularly since his concern echoed that of other hearing participants.

[74] In conclusion, while Benga asserts that the Panel committed errors of law by ignoring material evidence and by failing to consider rules of expert evidence and reliability, the true nature of the issues are such that these are not questions of law that warrant appellate review. These are, at best, questions of mixed fact and law and therefore, permission to appeal on these grounds is denied.

Ground Five: The Panel erred in finding Benga's satisfaction of Alberta's Mine Financial Security Program was inadequate

[75] Benga's next proposed ground of appeal is that the Panel erred when it stated at paragraph 3047 that it was "concerned that the liability for long-term water quality management could fall on the future taxpayers of Alberta", notwithstanding that Benga is legally required to comply with Alberta's legislated Mine Financial Security Program (MFSP). Because the MFSP represents the government's policy choice on how to balance resource development against reclamation costs, Benga argues that it cannot be contrary to the public interest for Benga to rely on the legislated MFSP to address concerns about costs of long-term water quality management. Permission to appeal on this proposed ground is denied because it does not raise a question of law.

[76] Reclamation and Closure Liability is addressed in chapter 24 of the Decision. Starting at paragraph 2873, the Panel provided an overview of the MFSP and how security deposits are calculated. The Panel then reviewed participants' concerns regarding the potential for reclamation and closure liability becoming a public responsibility before turning to a detailed review of participants' concerns about the MFSP. For example, CPAWS submitted that the program is insufficient to enforce the polluter-pays principle and that Benga should not be permitted to rely on the asset-to-liability system of calculating liability if the Project were approved. The Panel then turned to Benga's estimate of liability and security under the MFSP. Paragraphs 2905 to 2908 outline the Panel's concern that Benga's mine reclamation costs estimates do not appear to represent costs for the entire life of the Project. Paragraphs 2909 to 2912 outline the Panel's concern that treatment costs for selenium and other contaminants are poorly understood, as outlined in the chapter on surface water quality. In particular, the Panel wrote at paragraph 2912:

> Benga appears to not have explicitly accounted for any of the additional water treatment approaches that may be necessary for selenium as well as other contaminants. As a result, Benga may have significantly underestimated the costs required for long-term management and maintenance of water treatment infrastructure. If long-term treatment costs for selenium and other contaminants are

> not understood, sufficient financial security may not be collected under the Mine Financial Security Program. ...

[77] The foregoing makes clear that this proposed ground of appeal is not an error of law. Benga's proposed ground of appeal seeks to challenge findings of fact, therefore, appellate review is not permitted.

Concluding remarks respecting Benga's permission to appeal application

[78] Permission to appeal on the first five grounds outlined in Benga's application is denied. Having considered Benga's materials and the Decision, I conclude that Benga's proposed grounds of appeal either have no arguable merit or do not raise questions of law or jurisdiction.

Applications of Stoney Nakoda and Piikani

[79] I turn next to the applications of Stoney Nakoda and Piikani, as well as the last proposed ground outlined by Benga in its permission to appeal application.

[80] The Stoney Nakoda seeks permission to appeal on five grounds. The Stoney Nakoda argue that the respondents, the AER and the JRP acting in its capacity as the AER, erred in:

(a) failing to properly interpret, apply and assess the public interest by failing to consider all relevant factors such as the honour of the Crown and reconciliation by not addressing the positive benefits associated with the Project to the Stoney Nakoda;

(b) failing to consider and apply the honour of the Crown and reconciliation in its decision to decline to approve the Project without seeking additional information on economic benefits from the Stoney Nakoda, notwithstanding that the Stoney Nakoda did not oppose the Project;

(c) failing to consult with or request that Her Majesty the Queen in Right of Alberta consult with the Stoney Nakoda regarding the potential finding that the Project is not in the public interest;

(d) fettering its discretion under the JRP's Terms of Reference by not considering any positive or beneficial effects on the Project on the Stoney Nakoda and only considering potential negative or adverse impacts on the Project on the Stoney Nakoda; and

(e) making determinations with respect to the validity of the Stoney Nakoda's asserted Aboriginal rights and interests when the JRP was specifically not permitted to do so under its Terms of Reference.

[81] Piikani seeks permission to appeal on four grounds. Piikani argues that the respondent AER erred in:

(a) failing to properly interpret, apply and assess the public interest as a result of its failure to seek information from and engage with Piikani regarding how a rejection of the Project would impact Piikani rights and interests;

(b) failing to engage, enquire, meaningfully consult with or request that Her Majesty the Queen in Right of Alberta consult with Piikani, once it had received and reviewed other information that could lead to a potential finding that the Project is not in the public interest;

(c) failing to consider and apply the honour of the Crown in its deliberations leading to its decision to decline to approve the Project by failing to seek additional information from Piikani on economic and other benefits secured by Piikani in the Agreement through its exercise of its constitutionally protected rights of self-determination and self-governance, notwithstanding that Piikani had filed evidence with the Panel regarding the outcome of the exercise of such Piikani rights and its corresponding position on the Project; and

(d) failing to engage, enquire and consult with and accommodate Piikani on potential adverse effects that a decision to decline to approve the Project would have on the Project-related economic benefits and opportunities derived from or through Piikani rights, as set out in the confidential agreement signed with Benga.

[82] Piikani's reference to "Piikani rights" is a reference to: Aboriginal title, rights and interests (including rights of self-determination and rights of self-governance) that have existed since time immemorial, as well as Treaty rights and interests that derive from the Blackfoot Treaty of 1877.

[83] Although the questions proposed by Stoney Nakoda, Piikani and Benga are worded differently, in my view, there are three main themes that underpin the proposed grounds of appeal. The first theme relates to the Panel's consideration, or lack of consideration, of positive benefits that would have accrued to Stoney Nakoda and Piikani in relation to the Project in the context of the public interest test and in the context of the honour of the Crown and reconciliation. The second theme relates to the Panel's responsibilities or obligations once it considered not approving the Project. In particular, it was argued that the Panel should have asked Stoney Nakoda and Piikani for further information or should have requested that Her Majesty the Queen in Right of Alberta engage further with Stoney Nakoda and Piikani regarding implications of not approving the Project. The third theme relates to the language of the TOR, which Stoney Nakoda and Piikani in particular submit gave rise to the Panel's error or errors.

[84] Before addressing each of these underlying themes, it is important to review Stoney Nakoda and Piikani's participation in the Panel's process. I note that counsel to Stoney Nakoda and Piikani expressed support for and adopted each other's position in oral argument.

Stoney Nakoda Participation

[85] On April 20, 2015 – more than five years before the hearing – Stoney Nakoda filed a Letter of Comment with the Canadian Environmental Assessment Agency (the Agency) expressing the view that an environmental assessment was necessary for the Project. Stoney Nakoda indicated the need for compliance with the *SSRP*, adherence to legislated standards and land use designations, and that government standards for air emissions be included in Benga's EIA. The letter stated that the governments of Canada and Alberta had duties to consult and accommodate Stoney Nakoda on the Project.

[86] On March 11, 2019, Stoney Nakoda filed a letter indicating they did not object to the application because Benga adequately addressed their Project-specific concerns and that Benga's consultation should be deemed adequate.

[87] On the same date the Panel issued the Notice of Hearing, June 29, 2020, the Chair of the Panel wrote to Stoney Nakoda's Director of Consultation inviting Stoney Nakoda to fully participate in the hearing subject to receiving confirmation of Stoney Nakoda's plans around the nature and scope of participation.

[88] On July 16, 2020, Stoney Nakoda confirmed its intention to participate in the hearing, but they were not interested in the full extent of hearing participation and they wanted only to present a statement to the Panel.

[89] On August 10, 2020, the Panel subsequently confirmed that Stoney Nakoda had full participation rights in the hearing process, including the opportunity to provide written and oral submissions, to cross-examine parties adverse in interest, and to submit final argument. Stoney Nakoda were invited to provide specific information regarding how the Project may impact asserted or established Aboriginal or Treaty rights, as well as any other relevant matters they chose.

[90] Having missed the September 21 deadline for filing of written participant submissions, Stoney Nakoda submitted a request on October 5, 2020 to participate in the JRP hearings. They wished to acknowledge the long-term relationship Stoney Nakoda had with Benga. Stoney Nakoda also expressed confidence that the Panel would undertake a rigorous, thorough and non-partisan review process and assessment. Stoney Nakoda expressed the view that resource development should be undertaken in a responsible manner and that it would work with Benga to ensure the highest environmental standards while providing economic and social opportunities for its citizens.

[91] The JRP confirmed on October 9, 2020 that it would accept a written submission from Stoney Nakoda even though they had missed the deadline for filing.

[92] On October 15, 2020, Stoney Nakoda filed its hearing submission, a five page statement and maps of the Stoney Nakoda Traditional Lands. The statement set out seven conditions that the Stoney Nakoda felt were necessary for the Project to be operated in a manner that would provide sustainable benefits to their community while protecting the environment.

[93] On October 23, 2020, the ACO provided the AER with its preliminary assessment of the adequacy of consultation relative to a number of Indigenous groups including Bearspaw, Chiniki and Wesley Bands, being Stoney Nakoda member bands. The ACO advised that Stoney Nakoda provided comments regarding potential site-specific impacts on their Treaty rights and traditional land uses. The ACO further noted a March 11, 2019 letter of no concern indicating Benga had adequately addressed their Project-specific concerns. A list of broad concerns that had been raised, as well as mitigation and/or responses to those concerns, were also noted. The ACO indicated which of those concerns would be addressed through implementation of a signed agreement with Benga. The ACO determined that consultation was adequate pending the outcome of the hearing process.

[94] On October 27, 2020, the Panel opened the oral hearing. Mr. Bill Snow made a statement on behalf of Stoney Nakoda on the first day of the hearing, relying on the written submission filed October 15. Following Mr. Snow's statement, the Panel asked whether Stoney Nakoda intended on participating any further, and Mr. Snow answered that they were not sure if they would be. Mr. Snow then took questions from Benga's counsel, AER staff, Panel counsel, and the Chair.

[95] On October 28, 2020 Stoney Nakoda filed a letter with the Panel clarifying that the seven conditions referred to in Mr. Snow's statement were conditions they were working on cooperatively with Benga and they were not asking the Panel to impose their listed conditions.

[96] On November 9 and 10, 2020, hearing participants provided evidence on Indigenous use of land and resources, rights, culture and other related topics. Stoney Nakoda did not participate.

[97] On December 3, 2020, the ACO provided its final advice on the adequacy of consultation. Relative to Stoney Nakoda, the ACO stated that Stoney Nakoda provided no evidence at the hearing of adverse impacts attributable to land and resource management decisions by Alberta in connection with the Project. The ACO advised the consultation was adequate as previously communicated to the AER on October 23, 2020.

Piikani Participation

[98] Like Stoney Nakoda, Piikani became involved with the Project at an early point in time. On April 15, 2015, Piikani submitted a document entitled, "Information to Inform the Determination of EA Requirements" to the Agency. In that document, Piikani identified potential adverse environmental effects of the Project including cumulative impacts to the watershed (biodiversity and ecosystems), monitoring, and air quality.

[99] On May 9, 2016, Piikani submitted an extensive technical review of Benga's environmental impact statement that included a description of Piikani's Aboriginal and Treaty rights and interests in and around the Project area. Piikani's technical review described key areas of interest to them.

[100] In July 2016, Piikani provided an updated technical review and asked the Panel to consider that as the final version.

[101] On January 18, 2019, Piikani submitted a letter to the Panel expressing support for the Project to proceed. Piikani advised that it signed a formal benefits agreement with Benga in 2016 to enter into a partnership with Benga's parent company, Riverdale. The partnership would allow it to provide employment, training, and education to its members; promote business development, help build economies on its reserve, increase its administrative capacity to provide community programming, and robust support for its members; and continue to be stewards of the land by working on environmental protection and mitigation measures using both traditional and modern methods. The Piikani indicated it was their hope that the Project would reduce their unemployment rate, put skilled members to work, increase quality of life on the reserve, and create a brighter future.

[102] On March 7, 2019, Piikani filed a letter stating that traditional land use site visits were completed between 2015 to 2018 and no significant traditional sites had been identified.

[103] On June 29, 2020, the Panel invited Piikani to fully participate in the hearing and requested that Piikani provide confirmation of its intent to participate and a description of the nature and scope of its participation. The Panel again wrote to Piikani on August 10, 2020 as the Panel received no response to its June 29 letter. Piikani ultimately did not give oral testimony or direct evidence at the oral hearing.

[104] On October 23, 2020, the ACO provided the AER with its preliminary assessment of the adequacy of consultation relative to a number of Indigenous groups including Piikani. The ACO advised that Piikani provided a letter of no concern respecting the Project and determined that consultation was adequate pending outcome of the hearing. The ACO advised that Piikani had raised a number of concerns, and the ACO identified which of those concerns would be addressed through the Agreement reached between Benga and Piikani.

[105] On December 3, 2020, the ACO provided the Panel with its final ACO Hearing Reports which contained the ACO's final advice on consultation adequacy. The ACO relied on its October 23 report relative to Piikani as Piikani did not participate in the Panel's hearing process and no further information was available.

Theme One: The Panel's consideration of the public interest and the honour of the Crown and reconciliation

[106] The applicants assert that the Panel failed to properly consider the public interest test and the honour of the Crown when it decided not to approve the Project because it did so without considering how such a decision would impact Stoney Nakoda and Piikani. Stoney Nakoda and Piikani rely on *Fort McKay First Nation v Prosper Petroleum Ltd*, 2020 ABCA 163 and Feehan JA's concurring decision in *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 for the proposition that failing to consider the honour of the Crown is an error of law.

[107] The honour of the Crown is a "core precept" that refers to the principle that "servants of the Crown must conduct themselves with honour when acting on behalf of the sovereign": *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 65. It is not a cause of action itself, but speaks to how obligations that attract it must be fulfilled: *Manitoba Metis Federation* at para 73. "The honour of the Crown gives rise to different duties in different circumstances": *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18; and *Manitoba Metis Federation* at paras 73-74.

[108] The honour of the Crown is focused on reconciliation and arises prior to questions of rights infringement or proof of Aboriginal claims: *Fort McKay* at para 55. Reconciliation is not a final legal remedy. Instead, it is a process flowing from the rights guaranteed by section 35(1) of the *Constitution Act, 1982* and the Crown's responsibility of honourable dealing toward Aboriginal peoples: *Haida Nation* at para 32.

[109] Based on the record before me, I conclude there is no arguable merit to the proposed grounds of appeal that relate to this theme. The benefit agreements entered into by Benga and Stoney Nakoda and Piikani, respectively, were not filed as evidence. While the Panel indicated in its Decision that it did not have detailed information from Benga, Stoney Nakoda or Piikani in order to undertake a detailed assessment of the effects of the Project on the socioeconomic conditions of Stoney Nakoda and Piikani (paragraphs 2398 and 2534), that did not prevent the Panel from fulfilling its mandate to consider whether or not the Project was in the public interest, in a manner consistent with the honour of the Crown.

[110] In describing their approach to assessing Project effects and impacts on Aboriginal and treaty rights, the Panel wrote at paragraph 2156 of the Decision:

> Our approach begins with the pathways of effects from project-related activities to the biophysical environment. We then explore the connection between the biophysical environment and the conditions needed for the continued use of lands and resources for traditional purposes, maintenance of physical and cultural heritage, and the improvement and maintenance of Indigenous health and socioeconomic conditions. We then take into consideration Aboriginal and treaty

> rights asserted by individual groups and the factors that support the practise of those rights and a community's way of life. [emphasis added]

[111] The Panel went on to indicate that its confidence in their assessment was highest for those groups for which they had the most information, which included Piikani: paragraph 2157. The Panel's confidence level in their assessment was moderate for all other groups. Because there is no explicit Agency guidance available relative to health and socioeconomic conditions of Indigenous peoples, the Panel relied on the assessments of the effects of the Project in the chapters related to social and economic effects, as well as information received from Indigenous groups: paragraph 2160. In other words, in considering the Panel's socioeconomic assessment, one must look to the chapter addressing social and economic impacts of the Project as a whole, as well as the chapter specific to the assessment of Project effects on Indigenous groups specifically.

[112] In the chapter addressing social and economic effects of the Project as a whole, the Panel recounted Benga's statement that the Project would "have a substantial, long-term, and positive effect on the Crowsnest Pass economy and provide benefits to Alberta and Canada.": paragraph 2789. It was also noted that communities within the Regional Study Area and Indigenous groups in the region would benefit from the Project's direct employment opportunities and economic benefits: paragraphs 2789 and 2790. The Panel found that Benga demonstrated the Project would provide some positive economic impacts through tax revenues and well-paying jobs, and that it would have a positive effect on the regional economy. The Panel expressed reservations about the lack of methodological details and models that would allow the Panel to verify some of Benga's estimates, and stated that did not have a clear understanding of the net economic benefits which would have been useful to assess the Project. The Panel ultimately concluded at paragraph 2820:

> We find that the positive economic impacts of the project would be relatively modest. We rate the magnitude of Benga's projected amount of government revenues, income, and new jobs as low at the provincial level and moderate at the local level, which aligns with the assessment Benga made in its 2016 socioeconomic impact assessment. Furthermore, the project has the potential to impose negative impacts on other economic sectors, and Benga did not assess certain risks that could reduce the project's positive economic impacts.

[113] It was within this bigger picture that the Panel assessed the social and economic effects of the Project on Indigenous groups. The Panel was clearly aware of the benefit agreements entered into between Benga and both Stoney Nakoda and Piikani. Although the Panel was not provided with these benefit agreements, Benga outlined for the JRP its Basic Indigenous Commitments which Benga stated were central to such agreements. Benga's Basic Indigenous Commitments included (paragraph 2179):

- Benga will consult with Indigenous communities to develop final monitoring and mitigation plans;

- Benga will work with Indigenous communities to develop reclamation plans that reflect traditional knowledge;
- Benga will implement a community-based monitoring program directed by Indigenous communities and implemented through Indigenous monitors;
- Benga will regularly provide project updates, environmental information, mitigation plans, and related reports to Indigenous communities;
- Benga will develop communication protocols that allow for exchange of information, including complaints and concerns about the project; and
- Benga will continue to administer an access management plan to allow Indigenous groups to access Benga lands in the area when it is safe to do so.

[114] The Panel expressly noted that while they did not have the specifics of agreements entered into with, for example, Stoney Nakoda and Piikani, it was "helpful to understand the Basic Indigenous Commitments they may be based on": paragraph 2180.

[115] The Panel also reviewed Benga's information regarding socioeconomic conditions for Indigenous groups in detail from paragraph 2217 to 2227 of the Decision. Though lengthy, it is useful to review several of these paragraphs:

> [2220] Benga expressed interest in creating Indigenous employment opportunities and stated that its project would bring good, well-paying, full-time jobs to the Indigenous people of the area. Benga stated that the project was expected to employ nearly 400 people for more than 20 years. This would allow Benga to work with Indigenous communities to systematically build capacity, train new employees, and provide Indigenous communities with work experience. Benga stated that it would not commit to specific Indigenous hiring targets, but it did expect to hire Indigenous workers. Benga committed to offering increased contracting opportunities for qualified local Indigenous businesses and employment opportunities for qualified local Indigenous workers.
>
> [2221] Benga stated that discussions about employment, contracting, and training were confidential commercial negotiations. Benga confirmed that it had signed agreements with all of the Treaty 7 First Nations and a protocol was in place with the Métis Nation of Alberta. Through these arrangements, they developed communications protocols that include communicating contracting, employment, and training opportunities. Benga stated that it would work with communities to determine whether any Indigenous hiring and training information would be made public.
>
> [2222] Benga concluded that there would be a low-magnitude residual effect on traditional land use and Indigenous culture from a socioeconomic perspective. Benga characterized the residual effect as having negative effects on traditional

> land use, while new economic opportunities would have both positive and negative social and cultural implications. ... Benga stated that the socioeconomic effects of the project would differ among Indigenous groups, with different factors determining how each one would be affected by the project.
>
> ...
>
> [2225] We accept Benga's overall conclusions related to residual effects on traditional land use and Indigenous culture from a socioeconomic perspective, to the extent that it applies to Treaty 7 groups and the Métis Nation of Alberta in a regional context. We agree with Benga's characterization that the new economic opportunities arising from the project are likely to have both positive and negative social and cultural implications. We also agree that the socioeconomic effects would be experienced differently by each Indigenous group, and by individuals within each group.
>
> [2226] A few Indigenous groups reported that they were looking forward to the economic benefits the project could provide. We view the signing of agreement with Benga as an indicating that these groups were interested in benefitting from the project. We received little information from Indigenous groups about how the positive gains from the project could lead to negative social effects. However, we acknowledge that industrial projects often produce both positive and negative effects on Indigenous groups' socioeconomic conditions.
>
> [2227] Our overall views relating to the socioeconomic impacts of the project can be found in the chapter on social and economic effects. We agree that the project would provide well-paying local jobs and have a positive impact on the regional economy during its operation. Overall, we find the project would have positive but modest economic impacts. However, we also find that neither Benga nor individual Indigenous groups provided information about the project's potential socioeconomic effects, either positive or negative, on specific communities. As such, we were unable to complete an assessment of the effects of the project on the socioeconomic conditions for individual Indigenous groups.

[116] The Panel then reviewed the position of each Indigenous group that participated in the hearing process and detailed its assessment of the effects of the Project on each of them. The discussion relative to Piikani is found at paragraphs 2343 to 2413 of the Decision, while the discussion relative to Stoney Nakoda is found at paragraphs 2485 to 2546. Some of the Panel's key conclusions relative to socioeconomic matters include:

(i) the Project is located approximately 57 km west of the main Piikani community of Brocket on the Piikani 147 Reserve and Piikani currently has about 3500 members: paragraph 2343;

(ii) Stoney Nakoda comprise the Bearspaw First Nation, Chiniki First Nation and Wesley First Nation, with combined total registered population of approximately 5,440: paragraph 2486;

(iii) Benga's Project site was within Stoney Nakoda traditional territory: paragraph 2488;

(iv) Piikani provided letters of non-objection on January 18, 2019 and March 7, 2019. Piikani did not object to the Project, as they did not identify any significant traditional sites in the immediate project area and right-of-way during their traditional land use site visits: paragraph 2344;

(v) Stoney Nakoda advised the JRP on March 11, 2019 that they had entered into an agreement with Benga and provided a letter stating they did not object to the Project as Benga had adequately addressed their Project-specific concerns: paragraph 2487;

(vi) Piikani did not provide any further information to the JRP after submission of the letters and did not participate in the public hearing: paragraph 2344;

(vii) Mr. B. Snow on behalf of Stoney Nakoda provided a presentation at the public hearing and that Stoney Nakoda were of the view that Benga's consultation with the Nation should be deemed adequate: paragraph 2487;

(viii) the Panel reviewed the information submitted by Piikani prior to their letters of non-objection, including that their community was interested in employment opportunities and income associated with the Project. It was extremely important to them that they share in the economic benefits of the Project and were particularly interested in construction, environmental services and provision of equipment on site. They wanted their members to move beyond manual labour jobs but there would be challenges making it difficult for members to take advantage of employment opportunities: paragraph 2391;

(ix) Stoney Nakoda raised unemployment as a major concern and sought advanced or on-the-job training, as well as an education plan: paragraph 2525;

(x) Stoney Nakoda wished to ensure the Project protected the environment while providing maximum economic and social benefits to them: paragraph 2526;

(xi) the Panel's findings and discussion in the socioeconomic conditions portion of the section on Benga's approach and assessment in that chapter applied to Piikani and Stoney Nakoda: paragraphs 2395 and 2531;

(xii) the Panel acknowledged Benga's commitment to provide Indigenous employment and procurement opportunities, including to both Piikani and Stoney Nakoda: paragraphs 2396 and 2532;

(xiii) Piikani anticipated positive implications from the Project, including employment for members and other economic benefits: paragraph 2396;

(xiv) the agreement entered into with Benga, described by Benga as a mitigation measure to address potential impacts to Piikani and Stoney Nakoda rights, evidenced a cooperative relationship that would provide a mechanism to address issues of importance to Piikani and Stoney Nakoda: paragraphs 2397, 2307, 2533 and 2540;

(xv) involvement of Piikani and Stoney Nakoda in proposed monitoring and in the implementation of their agreement would at least partially mitigate potential adverse socioeconomic impacts: paragraphs 2397 and 2533;

(xvi) the Panel expected that overall positive economic impacts of the Project would extend to Piikani and Stoney Nakoda: paragraphs 2398 and 2534;

(xvii) the Panel acknowledged that Piikani and Stoney Nakoda signed agreements with Benga and submitted letters of non-objection to the Project, stating their Project-specific concerns had been addressed. The Panel explicitly recognized Piikani and Stoney Nakoda's respective ability to determine for themselves the degree to which the Project would impact their ability to practise their rights: paragraphs 2411 and 2544; and

(xviii) the Panel respected Piikani and Stoney Nakoda's ability to work directly with Benga on how they would address potential effects of the Project on their traditional activities. Even with implementation of Benga's proposed mitigation and the existence of the agreements, the Panel found the Project would have a residual effect on Piikani and Stoney Nakoda's current use of lands and resources for traditional purposes, which was consistent with Benga's findings: paragraphs 2365 and 2507.

[117] Given all of the foregoing, it is apparent from the Decision that the Panel had sufficient information from Benga, as well as from Stoney Nakoda and Piikani, in order to complete its assessment of socioeconomic effects associated with the Project in determining whether the Project was in the public interest. In particular, the Panel had information from Benga regarding its Basic Indigenous Commitments that underpinned the benefit agreements entered into with Stoney Nakoda and Piikani. It also had information from Benga regarding its commitments to work with Indigenous communities in order to further Indigenous employment and procurement opportunities. Finally, the Panel arrived at its findings while expressly recognizing the ability of Stoney Nakoda and Piikani to enter into agreements with Benga to address their Project-specific concerns.

[118] It is clear on the face of the Decision that the Panel considered potential positive effects that may result from the Project given their conclusion that the Project would lead to low to moderate positive economic benefits. The Panel expected that the overall positive impacts of the Project would extend to both Stoney Nakoda and Piikani, notwithstanding the Panel was unable to complete an assessment of the effects of the Project on the socioeconomic conditions specific to both applicants.

[119] The record is clear that neither Stoney Nakoda nor Piikani were asked an explicit question about what they would lose if the Project did not proceed. However, the record is also clear that Stoney Nakoda and Piikani were not limited by the Panel as to what information they could file in support of the Project, including in relation to the benefit agreements. During oral submissions on this application, counsel to Piikani confirmed that the Panel placed no restrictions on the information that could be filed by them. Stoney Nakoda and Piikani both had full participation rights in the hearing process and they chose the extent to which they participated. Stoney Nakoda filed a written submission, albeit after the deadline, presented a statement, and answered questions. They otherwise declined to participate at the session dedicated to addressing Indigenous issues. Piikani did not participate in the hearing process at all after filing its letters of non-objection. While Stoney Nakoda and Piikani were clearly within their right to participate in the hearing process in the manner and to the extent that they did, Stoney Nakoda and Piikani did so on the understanding that the Project would either be approved with conditions, or not. I disagree with any suggestion that the Panel did not understand that many, if not all, of the benefits that might accrue to Stoney Nakoda or Piikani from Benga would be lost in the event that the Panel did not recommend the Project proceed.

[120] Unlike *Prosper*, this was not a situation where a decision-maker refused to consider information submitted by the parties; here, the Panel considered the information provided by Benga, Stoney Nakoda and Piikani. There were no restrictions placed on any of the parties in relation to what evidence could be filed related to socioeconomic benefits. And, unlike *AltaLink*, this was not a rate case, where different considerations come in to play under a different legislative scheme. Here, unlike the Alberta Utilities Commission in *Altalink*, the Panel had the benefit of receiving reports from the ACO, as well as participation from the Indigenous groups in arriving at its Decision.

[121] For those reasons, permission to appeal is denied on all proposed grounds related to the Panel's consideration, or lack of consideration, of positive benefits that would have accrued to Stoney Nakoda and Piikani in relation to the Project in the context of the public interest test and in the context of the honour of the Crown and reconciliation.

Theme Two: The Panel's responsibilities or obligations arising from the potential decision not to approve the Project

[122] Both Stoney Nakoda and Piikani submitted that the Panel had an obligation to seek information from Stoney Nakoda and Piikani about what effect would result from the Panel's decision not to approve the Project. In addition, the applicants submitted the Panel erred in failing to consult with or request that Alberta, through the ACO, consult with them regarding a potential decision that the Project was not in the public interest. The applicants maintain that the Panel's actions, or lack thereof, again meant that the Panel erred in its consideration of the public interest test and breached the honour of the Crown.

[123] Again, I conclude that the proposed grounds of appeal raised by the applicants in their respective permission to appeal applications related to this theme do not have arguable merit.

[124] I have already concluded that the Panel had the information from Benga, Stoney Nakoda and Piikani in order to fulfil its mandate, particularly in relation to the social and economic benefits that may accrue from the Project, including to Stoney Nakoda and Piikani. I have also rejected the suggestion that the Panel did not understand that many, if not all, of the benefits that might accrue to Stoney Nakoda or Piikani from Benga would be lost in the event that the Panel did not recommend the Project proceed.

[125] Since both Stoney Nakoda and Piikani were granted full participation rights in the hearing process, I do not see any arguable merit to the suggestion that the Panel had to seek further information, or ask the ACO to seek further information, from Stoney Nakoda or Piikani about implications of non-approval after final arguments were provided in writing and after the hearing record closed. As already noted, Benga and hearing participants were aware that the Panel process would lead to approval with conditions, or not. Neither Stoney Nakoda nor Piikani can suggest that the outcome of the process was outside of the realm of possibility and that the Panel was therefore required to offer them an opportunity to provide further submissions.

[126] This is not a case where a hearing participant or project proponent was not aware of "the case that had to be met", or were otherwise presented with an outcome that could not have been contemplated at the time of the oral hearing. As participants to the Panel's process, Stoney Nakoda and Piikani had the right to decide how much or how little to participate and what they each wished to communicate to the Panel. Having had that opportunity, I see no arguable merit to the suggestion that the Panel had an obligation, once it reached the point in its deliberations that non-approval of the Project was a possibility, to return to either Stoney Nakoda or Piikani to seek further information.

[127] This is also not a case where new evidence is available or where a circumstance beyond a participant's control has arisen. There may be rare and exceptional circumstances when a regulator needs to re-open its proceedings, but I do not consider a rare and exceptional circumstance to exist here. Indeed, doing so would presumably give rise to a host of procedural questions about what other parties to the proceeding should be allowed to participate at that stage, and may give rise to further questions and uncertainties. I note that Section 42 of *REDA* allows the regulator, in its sole discretion, to reconsider a decision made by it. Sections 34-35 of the AER *Rules of Practice* set out the procedure for a reconsideration hearing. However, both the AER *Rules of Practice* and *REDA* are silent on re-opening a proceeding before the final decision is made. The following discussion from Sara Blake in *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis, 2017) at 146 is apt:

> If the statute is silent, then the question is whether the reason to re-open the matter is sufficient to outweigh the need for finality. The parties and the public need finality so they can govern their affairs in reliance on the decision.

[128] For these reasons, permission to appeal is denied on all proposed grounds related to whether the Panel had an obligation to seek further information about the effect of the Panel's decision to not approve the Project.

Theme Three: The TOR language

[129] The final theme relied upon by the applicants, and Stoney Nakoda in particular, relates to the language of the TOR. Specifically, Stoney Nakoda argues that because the TOR referenced only adverse effects, the Panel erred in failing to consider potential positive benefits associated with the Project. Having reviewed the language of the TOR, I do not agree that it directs the Panel to only consider adverse effects of a Project, and therefore, the proposed grounds of appeal related to this theme have no arguable merit.

[130] Section A under Part III of the TOR addresses Aboriginal Rights and states, in part:

> In considering the factors outlined in Part II, the Joint Review Panel shall have regard for the following:
>
> **A. Aboriginal Rights**
>
> The Joint Review Panel shall consider and include in its report the effects of the Project on asserted or established Aboriginal or Treaty rights, to the extent the Joint Review Panel receives such information as provided in Part III. The Joint Review Panel must invite Indigenous groups and peoples to provide information related to:
> ...
>
> - the potential adverse environmental effects and the potential impacts that may be caused by the Project on asserted or established Aboriginal or Treaty rights,
>
> - any potential adverse effects that may be caused by the Project on the health, social or economic conditions of Indigenous people,
>
> - any measures proposed to avoid, mitigate or accommodate the potential adverse environmental effects of the Project and the potential adverse impacts on asserted or established Aboriginal or Treaty rights, ... [emphasis added]

[131] While the TOR provides that the Panel "shall consider" the potential adverse effects of the proposed Project, the requirement to consider any measures to avoid, mitigate or accommodate potential adverse environmental effects also required the Panel to consider the information submitted in relation to the benefit agreements, as well as any other positive benefits that might accrue to Indigenous communities from the Project. I do not accept the suggestion that the repeated

use of the phrase "adverse effects" meant that the Panel did not or could not consider positive aspects associated with the benefit agreements entered into between Benga and Stoney Nakoda, as well as between Benga and Piikani. The language of the TOR does not go so far as to preclude the Panel from considering possible positive socioeconomic impacts to Stoney Nakoda and Piikani. As already discussed above, the Panel did in fact consider positive socioeconomic impacts that might accrue to Stoney Nakoda and Piikani if the Project went ahead.

[132] Moreover, focussing on the language of the TOR loses sight of section 5 of *CEAA 2012* which also informed the Panel's mandate. At paragraph 2145 of the Decision, the Panel expressly acknowledged its statutory obligation to assess whether the Project would cause changes to the environment that would affect current use of lands and resources for traditional purposes, as well as health and socioeconomic conditions, amongst other factors. I note this does not restrict the panel to limit negative changes, but any changes. The Panel further described at paragraph 2155 that the "effects assessment under section 5 of *CEAA 2012* is intertwined with our mandate to assess the potential adverse impacts of the project on asserted or established Aboriginal and treaty rights."

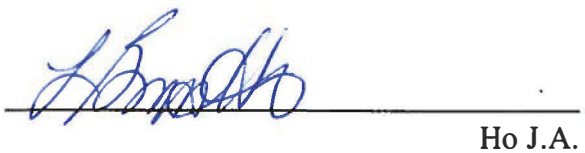
[133] Therefore, I conclude there is no arguable merit to questions that suggest the Panel fettered its discretion by acting in accordance with the TOR, or that the Panel made determinations respecting the validity of Aboriginal rights and interests contrary to the TOR.

Concluding remarks respecting Stoney Nakoda and Piikani's permission to appeal applications

[134] The permission to appeal applications of Stoney Nakoda and Piikani are dismissed as the proposed grounds of appeal have no arguable merit. Benga is similarly denied permission to appeal on the final proposed ground of appeal as set out in its application.

Application heard on December 08, 2021

Reasons filed at Calgary, Alberta
this 28th day of January, 2022



Ho J.A.

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