

COURT FILE NUMBER 1203 08299
COURT QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE EDMONTON
APPLICANT RESPONSIBLE ELECTRICITY
TRANSMISSION FOR
ALBERTANS ASSOCIATION
RESPONDENT MINISTER OF INFRASTRUCTURE
DOCUMENT BRIEF OF RESPONSIBLE
ELECTRICITY TRANSMISSION
FOR ALBERTANS ASSOCIATION

**BRIEF OF RESPONSIBLE ELECTRICITY TRANSMISSION FOR
ALBERTANS ASSOCIATION**

For the Special Chambers Application to be heard January 15th & January 16th, 2013

A.W. (Sandy) Carpenter
FASKEN MARTINEAU
DUMOULIN LLP
#3400, 350 – 7 Avenue SW
Calgary, Alberta T2P 3N9

Counsel for Alta Link
Management Ltd.

Kim Wakefield
Fraser Milner Casgrain LLP
2900 Manulife Place
10180 – 101 Street
Edmonton, AB T5J 3V5

Counsel for EPCOR Distribution
& Transmission Inc.

J. Cameron Prowse, QC
Noël Papadopoulos
PROWSE CHOWNE LLP
Phipps-McKinnon Building
#1300, 10030 – 101 A Ave
Edmonton, Alberta T5J 3G2

Counsel for Responsible
Electricity Transmission for
Albertans Association

Sean McDonough
DEPARTMENT OF JUSTICE
Civil Litigation, Legal
Services, 9th Flr., NW
Edmonton, AB T5J 3S8

Counsel for Alberta
Infrastructure

TABLE OF CONTENTS

I.	INTRODUCTION	3
II.	SUMMARY OF FACTS	3
III.	ISSUES	6
IV.	POINTS OF LAW	7
	Standard of Review.....	7
	Issue One - The Minister failed to provide reasons for the decision contained in the December 1, 2011 letter.....	9
	Issues Two and Five – If the contents of the December 1, 2011 letter amount to reasons, the Minister failed to provide adequate reasons & the decision to grant written consent was unreasonable.....	12
	Issue Three - The Director of Land Planning did not have jurisdiction to give written consent to the construction of the Line within the RDAs.....	18
	Issue Four - The Minister did not have jurisdiction to give written consent to the construction of the Line within the RDAs.....	20
V.	NATURE OF RELIEF SOUGHT	23
VI.	INDEX OF AUTHORITIES.....	24

INTRODUCTION

1. In the letter dated December 1, 2011, the Director of Land Planning, Mr. Lyle Markovich, purported to grant Ministerial Consent pursuant to Section 5 of the *Edmonton Restricted Development Area Regulations*¹ and the *Sherwood Park West Restricted Development Area Regulations*² for the development of the EPCOR Distribution & Transmission Inc. and AltaLink Management Ltd. 500 kV transmission line (“500 kV line”) within the Edmonton and Sherwood Park Restrictive Development Areas [“RDAs”].
2. The Applicant seeks an Order directing that the written consent contained in the December 1, 2011 letter be quashed and declared null and void and an Order enjoining all further development of the 500 kV line within the RDAs.

SUMMARY OF FACTS

3. On September 27, 2010 AltaLink Management Ltd. [“AltaLink”] and EPCOR Distribution & Transmission Inc. [“EPCOR”] filed an application with the Alberta Utilities Commission [the “AUC”] for approval to construct and operate, among other things a 500-kilovolt double-circuit transmission line, connecting the 500-kilovolt system on the south side of Edmonton with the proposed Heartland 12S substation [“Heartland Transmission Project”].
4. Commencing on April 11, 2011 the AUC conducted a hearing on the Heartland Transmission Project. During this hearing the AUC heard submissions including expert and non-expert witnesses and demonstrative evidence. The Responsible Electricity Transmission for Albertans Association [“RETA”] was an intervener in the AUC’s hearing, made submissions, presented expert and non-expert evidence and provided argument.

¹ Alta. Reg. 287/1974 [Tab J]

² Alta. Reg. 45/1974 [Tab K]

5. On November 1, 2011 the AUC issued Decision 2011-436³ in which they conditionally approved the application by AltaLink and EPCOR to construct and operate:
 - a. the Heartland 12S substation near Gibbons-Redwater;
 - b. a double-circuit 500-kilovolt transmission line between the existing 500-kilovolt transmission system located on the south side of Edmonton and the Heartland 12S substation; and
 - c. a double-circuit 240-kilovolt line that would connect the Heartland 12S substation to the Alberta interconnected electric system at line 942L.

6. The route approved by the AUC was presented during the hearing as AltaLink's and EPCOR's preferred route for the double-circuit 500-kilovolt transmission line and is laid out as follows:
 - a. It begins by exiting the Ellerslie 89S substation located at NW 27-51-24-W4 and proceeding east within the existing Edmonton restricted development area [the "Edmonton RDA"];
 - b. The Edmonton RDA adjoins the Sherwood Park Restricted Development Area [the "Sherwood Park RDA"] as the route crosses range road 234;
 - c. The route remains in the Sherwood Park RDA and continues North through townships 51 and 52. The route exits the Sherwood Park RDA and re-enters the Edmonton RDA when it crosses the Yellowhead Highway;
 - d. The route then continues North in the Edmonton RDA until a point north of 167 Avenue where it veers in a north-easterly direction to connect with the proposed Heartland 12S substation.

[the "East TUC Route"]

7. Decision 2011-436 expressly stated that approval of the East TUC Route was conditional upon, *inter alia*, receipt of the written consent of the Minister of Infrastructure in accordance with the *Edmonton Restricted Development Area Regulations*,

³ Certified Record of Proceedings Volume 5

Alta. Reg. 287/1974 [the “E-RDAR”] and the *Sherwood Park West Restricted Area Development Area Regulations*, Alta. Reg. 45/1974 [the “SP-RDAR”].⁴ The AUC did not decide whether the East TUC Route was compliant with those Regulations.

8. On November 17, 2011 AltaLink and EPCOR, submitted a request to the Minister of Infrastructure seeking written consent under the E-RDAR and SP-RDAR for the construction of the portion of the 500 kV line which lay in the RDAs. No other person or group was invited to make submissions to the Minister.
9. The Director of Land Planning purported to grant Ministerial Consent in a letter dated December 1, 2011 under the E-RDAR and SP-RDAR to carry out the surface disturbance within the RDAs which was associated with the project approved by the AUC.
10. No Reasons were provided for the consent. The December 1 letter states only that the AUC has approved the proponents’ preferred east route and that “this Ministerial Consent authorizes the development of the subject project in a manner consistent with the AUC Decision.”⁵
11. On December 30, 2011 RETA filed an application for review and variance of the AUC’s decision which was ultimately dismissed by the AUC on May 14, 2012.
12. AltaLink and EPCOR have commenced construction on the 500 kV line which has included brushing and trimming of trees and construction of access approaches within the Edmonton and Sherwood Parks Restricted Development Areas.⁶
13. RETA is a society incorporated in Alberta with a mandate to question the need for specific proposed high voltage power lines, advocate for new high voltage transmission lines to be buried near schools, homes, daycare centres, hospitals and

⁴ *Ibid.* at para 1231

⁵ Certified Record of Proceedings Volume 4 page 719

⁶ Affidavit of Darin Watson dated August 28, 2012 at para 18;
Affidavit of Bruce Brandell dated September 10, 2012 at para 15

environmentally sensitive areas and support the use of more efficient and environmentally friendly electricity generation and transmission technologies. RETA consist of approximately 9,000 members which includes individuals and families affected by the 500 kV line.

14. RETA is concerned with the 500 kV line and the approved route. The line and route are incompatible with the retention of the environment and propagation of plant and animal life in Restricted Development Areas and will have a detrimental or destructive effect on the land surface.

ISSUES

15. The Applicant submits that the issues before this Court are as follows:
 - a. The Minister failed to provide reasons for the decision contained in the December 1, 2011 letter (“Issue One”);
 - b. If the contents of the December 1, 2011 letter amount to reasons, the Minister failed to provide adequate reasons (“Issue Two”);
 - c. The Director of Land Planning did not have jurisdiction to give written consent to the construction of the Line within the RDAs (“Issue Three”);
 - d. The Minister did not have jurisdiction to give written consent to the construction of the Line within the RDAs (“Issue Four”); and
 - e. The decision to grant written consent was unreasonable (“Issue Five”).
16. It has been determined that the argument pertaining to Issues Two and Five overlap; therefore in the interest of convenience and brevity these Issues will be argued concurrently.

POINTS OF LAW

Standard of Review

17. In *New Brunswick (Board of Management) v Dunsmuir*⁷ the Supreme Court of Canada narrowed the standards of review applicable in Judicial Review applications to Reasonableness and Correctness and outlined the principles in determining the appropriate Standard of Review as follows:

In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

.....

The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.⁸

This approach has been confirmed by the Supreme Court of Canada in *Khosa v. Canada (Minister of Citizenship & Immigration)*.⁹

18. The Supreme Court of Canada stated in *Dunsmuir* that “when applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the

⁷ 2008 SCC 9 [*Dunsmuir*] [Tab A]

⁸ *Ibid.* at para 62-64.

⁹ 2009 SCC 12 [*Khosa*] [Tab B].

correct answer. From the outset, the Court must ask whether the tribunal's decision was correct".¹⁰

19. The Supreme Court of Canada further stated that "in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law".¹¹

Issue One

20. In *N.L.N.U. v Newfoundland & Labrador (Treasury Board)*¹² the Supreme Court of Canada confirmed that "'in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision"¹³ and that a "breach of a duty of procedural fairness is an error in law"¹⁴. It is therefore submitted that the appropriate standard of review to apply when assessing the Minister's failure to provide reasons is correctness.

Issues Two & Five

21. The SCC further stated in *N.L.N.U. v Newfoundland & Labrador (Treasury Board)* that "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes"¹⁵. The standard of review applicable in judicial review of a Minister's exercise of his statutory discretion was determined in *Halifax (Regional Municipality) v Canada (Public Works & Government Services)*¹⁶ to be reasonableness. In light of the Court's comments it is submitted that Issue Two, the failure of the Minister to provide adequate reasons,

¹⁰ *Dunsmuir*, *supra* note 7 at para. 50

¹¹ *Ibid.* at para. 47

¹² 2011 SCC 62 [*N.L.N.U.*] [Tab C]

¹³ *Ibid.* at para 20

¹⁴ *Ibid.* at para 22

¹⁵ *Ibid.* at para 14

¹⁶ 2012 SCC 29 at para 43[*Halifax*] [Tab D]

and Five, whether the grant of written consent was reasonable, warrant the same standard of review – reasonableness, and should be argued concurrently.

Issues Three & Four

22. Jurisdictional issues are a question of law to which the standard of correctness applies. The Federal Court of Appeal stated in *Georgia Strait Alliance v Canada (Minister of Fisheries & Oceans)*¹⁷ that the standard of review applicable to reviews of Ministerial interpretation of their governing statute is also correctness. As such it is submitted that the standard of review applicable to both Issues Three and Four is correctness.

Issue One - The Minister failed to provide reasons for the decision contained in the December 1, 2011 letter

23. The duty of procedural fairness and, in particular, the requirement to provide reasons for an administrative decision were considered by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship & Immigration)*¹⁸

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

Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it.

¹⁷ 2012 FCA 40 [*Georgia Strait*] [Tab E]

¹⁸ [1999] 2 S.C.R. 817 [*Baker*] [Tab F]

.....

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

A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

.....

In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact.

....

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

Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances.

.....

Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself,

....

I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights.¹⁹

¹⁹ *Ibid.* at para 22 - 28

24. In the present circumstance the absence of a statutory appeal process, the importance of the decision to the individuals affected and legitimate expectation all lead to the conclusion that the duty of procedural fairness requires the Minister to provide reasons for granting Ministerial Consent under the E-RDAR and SP-RDAR. Of the factors outlined in *Baker* the Minister should have been alive to the fact that his decision under the Regulations would affect hundreds of individuals since he directly received several letters from concerned citizens²⁰, his attention had been brought to several letters sent directly to the Premier²¹ and the AUC decision itself appended a comprehensive list of all the participants and witnesses²². The approval of the 500 kV line was and remains a controversial topic which the public legitimately expected reasons as to why the line was being approved or at the very least under what section of the E-RDAR and SH-RDAR written consent was being granted.
25. The Supreme Court of Canada noted in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*²³ that “giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials”²⁴.
26. Unfortunately the Director’s December 1, 2011 letter is far from fair and transparent. In it he simply states the following:

²⁰ Certified Record of Proceedings Volume 2 pages 41-42, 45, 47, 49, 51, 52, 55-56, 64, 68, 70, 72, 74, 77, 79, 81, 90-91, 161-162, 185 and 205b-206;

Certified Record of Proceedings Volume 4 pages 693

²¹ Certified Record of Proceedings Volume 2 pages 131-143;

Certified Record of Proceedings Volume 3 pages 363-368

²² *Supra* note 3 at page 277 - 282

²³ 2004 SCC 48 [*Congrégation*] [TabG]

²⁴ *Ibid.* at para 13

This Ministerial Consent authorizes the development of the subject project in a manner consistent with the AUC Decision. Without restricting the generality of the foregoing, this Ministerial Consent authorizes AltaLink Management Ltd. and EPCOR Distribution & Transmission Inc. to carry out the surface disturbance associated with the subject project within the TUC. Section 5 of the *Edmonton Restricted Development Area Regulations* and *The Sherwood Park West Restricted Development Area Regulations* provides the authority for Ministerial Consent.

27. The Director, failed to provide any reasons for granting Ministerial Consent under the E-RDAR and SH-RDAR. He merely provided a brief background to the request for consent, granted the Ministerial Consent and outlined the conditions upon which the Ministerial Consent was granted. The duty of procedural fairness was breached and it is submitted that the purported Ministerial Consent is null and void.

Issues Two and Five – If the contents of the December 1, 2011 letter amount to reasons, the Minister failed to provide adequate reasons & the decision to grant written consent was unreasonable

28. As stated above the standard of review applicable to Issues Two and Five are the same - reasonableness – and their analysis are intertwined. As such these Issues will be argued concurrently.

29. In *Dunsmuir* at para 47 the court stated the following:

Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

This has been interpreted by the SCC in *N.L.N.U.*²⁵ as stating that “reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes”²⁶ and “if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”²⁷.

30. Should this Court determine that the statements in the December 1 letter amount to reasons for granting Ministerial Consent under the E-RDAR and SP-RDAR, it is submitted that those reasons were inadequate and failed to satisfy the *Dunsmuir* criteria.
31. The December 1, 2011 letter states that Section 5 of the E-RDAR and SP-RDAR provide the authority for the Ministerial Consent. Section 5 of the Regulations which were in force at the time of the December 1 letter are replicated in full in Tabs J & K and state that written consent of the Minister is required prior to conducting operations that cause or are likely to cause surface disturbance within the RDAs.
32. But the written consent referred to in Section 5 of the Regulations is not unlimited. Section 6 of the E-RDAR and Sections 6 and 6.1 the SP-RDAR outline the limited circumstances in which the Minister may exercise his discretion and grant Ministerial Consent.

²⁵ *N.L.N.U. supra* note 12

²⁶ *Ibid.* at para 14

²⁷ *Ibid.* at para 16

6(l) The Minister may give his written consent pursuant to section 4 or 5 for only those uses of the land surface which

- (a) are compatible with the protection of parts of the Area as a watershed, the retention of the environment of parts of the Area in a natural state or a state suitable for recreation or the propagation of plant or animal life and, generally, the preservation of the environment of that Area, and
- (b) do not have a detrimental or destructive effect on the land surface within the Area.

(1.1) The Minister may, notwithstanding subsection (l), give his written consent pursuant to section 4 or 5 to the development and use of land for the purpose of

(a) confining to land within the Area

(i) any operation, activity, use, development or occupation of land

(A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resource, or

(B) that destroys, disturbs, pollutes, alters or makes use of a natural resource or is likely to do so,

or

(ii) any emission, discharge, noise or other environmental pollutant, or the source thereof, whether from any commercial, industrial or other operation, activity, use development or occupation of land,

or

(b) separating

(i) any operation, activity, use, development or occupation of land

(A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resources, or

(B) that destroys, disturbs, pollutes, alters or makes use of a natural resource, or is likely to do so,

or

(ii) any emission, discharge, noise or other environmental pollutant, or the source thereof, whether from any commercial, industrial or other operation, activity, use, development or occupation of lands from any operation, activity, use, development or occupation of adjacent land.

(2) The Minister's consent may be unconditional or may be subject to such conditions as in the Minister's opinion will minimize or alleviate any adverse effect on land in the Area and may require the person proposing to conduct or conducting any operation or activity on the land to file with the Minister for approval a development and reclamation plan containing such reports, plans, maps, sketches or other information as the Minister may prescribe.

Edmonton Restricted Development Area Regulations, Alta Reg 287/1974

6 The Minister may give his written consent pursuant to section 5 for only those uses of the land surface which

(a) are compatible with the retention of the environment of the Area for agricultural purposes or the propagation of plant or animal life and, generally, the preservation of the environment of that Area, and

(b) do not have a detrimental or destructive effect on the land surface within the Area.

AR 45/74 s6

6.1 The Minister may, notwithstanding section 6, give his written consent pursuant to section 4 or 5 to the development and use of land for the purpose of

(a) confining to land within the Area

(i) any operation, activity, use, development or occupation of land

(A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resource, or

(B) that destroys, disturbs, pollutes, alters or makes use of a natural resource or is likely to do so,

or

(ii) any emission, discharge, noise or other environmental pollutant, or the source thereof, whether from any commercial, industrial or other operation, activity, use development or occupation of land,

or

(b) separating

(i) any operation, activity, use, development or occupation of land

(A) that adversely affects or is likely to adversely affect the quality or quantity of any natural resources, or

(B) that destroys, disturbs, pollutes, alters or makes use of a natural resource, or is likely to do so,

or

(ii) any emission, discharge, noise or other environmental pollutant, or the source thereof, whether from any commercial, industrial or other operation, activity, use, development or occupation of lands

from any operation, activity, use, development or occupation of adjacent land.

Sherwood Park West Restricted Development Area Regulations, Alta Reg 45/1974

33. The Regulations limit the Minister's power to provide consent and require the Minister to consider the impact of the proposed development on the RDA surface area. Ministerial Consent can only be granted in very specific circumstances.

There is no indication in the December 1 letter that Section 6 and 6.1 of the Regulations were considered. The only references to surface disturbance in the December 1 letter are in relation to deemed acceptance by AltaLink and EPCOR of the conditions contained therein and the proposal sent by AltaLink and EPCOR which outlined the construction area. No where does the Director of Land Planning state whether he was granting Ministerial Consent to either confine or separate operations, activities, use, development, occupation of land, emission, discharge, noise or other environmental pollutant, or the source thereof to the lands.

34. Additionally, the Certified Record of Proceedings ["CRoP"] produced by the Minister of Infrastructure emphasizes the unreasonable nature of the granted written consent. The material contained in the CRoP dates back to January 2007 proving that dialog between the Land Planning Department and the proponents (AltaLink and EPCOR) commenced well before the Application filing date of September 27, 2010. The parties were discussing the various potential routes and need for a new high voltage transmission line. The issue of environmental impact was mentioned early on in the communications but the only reports on this issue were the SNC-LAVALIN Environmental report dated November 21, 2011²⁸ and the Stantec Report commissioned by AltaLink and EPCOR dated November 2011²⁹. Although these reports outline the steps that can be taken to mitigate the construction effects on wetlands they indicate that wetlands will be adversely effected.

35. The AUC decision itself speaks about the adverse effects construction will have on the natural habitat and reiterates evidence put forward during the hearing to that effect. Such evidence included the September 27, 2010 Stantec report which indicated that the 500 kV transmission line will not be compatible with the retention of the environment of the RDAs for agricultural purposes or the

²⁸ Certified Record of Proceeding Volume 4 page 617

²⁹ Certified Record of Proceeding Volume 4 page 633

propagation of plant or animal life and that it will have a detrimental or destructive effect on the land surface within the RDAs. The report specifically stated:

- a. Terrain integrity might be affected through surface disturbance during construction;
- b. Complete vegetation loss will occur around towers and in the Ellerslie 89S Substation expansion area. Vegetation communities will be lost on all-weather access roads and developed access roads, rare species are at risk of extinction.
- c. Within the right-of-way (36.5 perimeter on either side of the line), which is itself within the RDAs, there will be a complete loss of woody vegetation to minor surface damage altering community structure, species composition and site moisture;
- d. With respect to wildlife, the construction of the transmission line will cause ground disturbance, habitat fragmentation and sensory disturbance to wildlife.

36. There was also evidence that there are 182 bird species within the landscape area of the East TUC route. Of these species, 30 are sensitive, 5 are special concern, 2 are at risk, and 3 are threatened. Construction of the 500 kV line on the East TUC route would create a significant risk to birds with respect to bird collision mortality resulting in 124 to 214 bird deaths per kilometre per year.

37. Based on the contents of the CRoP, which by definition is all of the information before the deciding body, the only information the Director had regarding the effect of the construction on the RDA is that construction of the 500 kV line would negatively affect land surface and environment. It is very clear that the 500 kV line is incompatible with the retention of the environment of the Area for agricultural purposes or the propagation of plant or animal life and, generally, the preservation of the environment of that Area, and does have a detrimental or destructive effect on the land surface within the Area. The 500 kV line does not satisfy Section 6(1) of the E-RDAR or Section 6 and 6.1 of the SP-RDAR. This is clear from the CRoP.

38. Furthermore it is clear from the definition of the route approved in the AUC Decision that the 500 kV line is not confined to the Edmonton RDA or Sherwood Park RDA nor can the activities in the RDAs be separated from those outside of the RDAs. In other words 500 kV line and work surrounding it does not fall within the parameters outlined in Sections 6 (1.1) and 6.1 of the respective Regulations.
39. The December 1, 2011 letter does not allow a reviewing Court to understand why the Minister granted his consent to the construction of the 500 kV line within the Edmonton and Sherwood Park RDAs or to determine whether granting such consent falls within the range of acceptable outcomes. The reasons provided are wholly inadequate and fail to meet the *Dunsmuir* criteria.
40. It is submitted that based upon the information contained in the December 1 letter and contents of the CRoP, the outcome of the consideration of AltaLink's and EPCOR's application for Ministerial Consent cannot fall within the range of acceptable outcomes. It was unreasonable for written consent to be granted under the E-RDAR and SP-RDAR.

Issue Three - The Director of Land Planning did not have jurisdiction to give written consent to the construction of the Line within the RDAs

41. The powers and authority contained in the E-RDAR and SH-RDAR are conferred upon the Minister. The explicit definition of "the Minister" in Section 2 of each Regulation as the Minister of Infrastructure. Unlike other Regulations this definition does not include the Minister's delegates such as the Director of Land Planning.

42. Although Section 9 of the *Government Organization Act*³⁰ permits a Minister to delegate any power, duty or function conferred on that Minister under a regulation to any person, the breadth of the ability to delegate has been commented on by the Court. In *Cook v Alberta (Minister of Environmental Protection)*³¹ the Court of Appeal confirmed the trial judge's decision stating that:

Sometimes the power to delegate is implicit in a legislative scheme because "the tasks of a Minister ... are so many and varied that it is unreasonable to expect them to be performed personally." *R. v. Harrison*, 1976 CanLII 3 (SCC), [1977] 1 S.C.R. 238 at 245. But if the discharge of such obligations involves the exercise of discretion or judgment, it is unlikely to have been intended that the determination will be made by someone else. *Orellanav. Canada (Minister of Employment and Immigration)*, [1979] F.C.J. No. 607 (C.A.). See also *Forget v. Quebec (Attorney General)*, 1988 CanLII 51 (SCC), [1988] 2 S.C.R. 90. Since the Minister's power to withdraw land from an FMA is inherently discretionary, it is unlikely that the Legislature meant the Appeal Committee to exercise the Minister's powers in this regard.

As with the *Public Lands Act* which was in issue in *Cook*, the E-RDAR and SH-RDAR do not contain a provision by which the Minister can appoint officials and designated officers necessary for the administration of the Act. All powers and discretions conferred on the Minister are personal. It is submitted that the decision of the Court in *Cook* is applicable.

43. Under the E-RDAR and SH-RDAR the Minister is not required to give his consent but instead has the discretion to grant written consent to matters which fall within the Regulations' parameters. In the present case it appears that Minister delegated his discretion to the Land Planning Department. The contents of the CRoP show that the Land Planning Department was involved in the communication with AltaLink and EPCOR since January 2007 and it was the Director of Land Planning who issued the December 1, 2011 letter entitled 'Ministerial Consent'. Notably absent in the CRoP is any document from the Minister of Infrastructure discussing the

³⁰ RSA 2000, c G-10 s.9 [Tab I]

³¹ 2001 ABCA 276 at para 28 [*Cook*] [Tab H]

application for consent under the Regulations or agreeing to issue such consent. The Minister appears to have abdicated his role and to have left the exercise of discretion in the granting of consent to the Land Planning Department.

44. As a matter of public policy a Minister must be accountable for legislated discretions, such as that contained in the E-RDAR and SH-RDAR, which are conferred to them personally. The Director of Land Planning did not have authority to issue the Ministerial Consent contained in the December 1, 2011 letter and acted *ultra vires*.

Issue Four - The Minister did not have jurisdiction to give written consent to the construction of the Line within the RDAs

45. As stated above the E-RDAR and SP-RDAR set out the parameters in which the Minister of Infrastructure can issue Ministerial Consent. Although the Regulations confer a wide discretion to the Minister, it is not unlimited. Sections 6 and 6.1 outline the parameters in which the Minister may exercise his discretion and grant written consent for activities within the RDAs.
46. In *Georgia Strait*³² the Federal Court of Appeal reviewed the Minister of Fisheries' decision under the *Species at Risk Act* and stated the following;

In my view, no deference is owed to the Minister as to the interpretation of the relevant provisions of the SARA or of the *Fisheries Act*. The Minister's interpretation of the Supreme Court's most recent pronouncements is erroneous as it fails to consider the context in which they were developed and the reasons which may warrant deference to an administrative tribunal when it interprets its enabling statute. The reasonableness standard of review does not apply to the interpretation of a statute by a minister responsible for its implementation unless Parliament has provided otherwise. I thus conclude – as did the Federal Court judge in this case – that where an application for judicial review of a decision as to the implementation of the SARA is based on an allegation that the Minister has

³² *Georgia Strait supra* note 17

misinterpreted a provision of the SARA – of the Fisheries Act as it relates to the SARA – the Minister’s interpretation must be reviewed on a standard of correctness. The courts owe no deference to the Minister in that respect.³³ [Emphasis Added]

47. In the present case the purported Consent is granted under Section 5 of the E-RDAR and SP-RDAR which, in essence, states that parties must obtain written consent of the Minister prior to conducting specified activities within the RDAs. The Consent did not refer to the sections of the governing Regulations which outlines the circumstances in which the Minister is permitted to grant Ministerial Consent. It is clear from the CRoP that the 500kV line will not be separated from adjacent property nor confined to the RDAs. It is also clear that construction of the line will cause detrimental or destructive effect on the land surface within the RDA.
48. It is submitted that the following is the correct interpretation of Section 6 in the E-RDAR and Section 6 and 6.1 in the SP-RDAR:

The Minister may grant written consent for development and uses of land which are incompatible with the protection of watershed, retention of the environment, propagation of plants and animal life or have which have a detrimental or destructive effect on the land surface area within the RDA only if the purpose of such development or use falls under one of the following categories:

- A) The purpose is to confine to the RDA operations, activities, uses, development or occupation of land which adversely affect any natural resource;
- B) The purpose is to confine to the RDA operations, activities, uses, development or occupation of land which destroys, disturbs, pollutes, alters or makes use of any natural resource;

³³ *Ibid.* at para 6

- C) The purpose is to confine to the RDA any emission, discharge, noise or other environmental pollutant;
 - D) The purpose is to separate operations, activities, uses, development or occupation of land which adversely affect any natural resource from that of adjacent lands;
 - E) The purpose is to separate operations, activities, uses, development or occupation of land which destroys, disturbs, pollutes, alters or makes use of any natural resource from that of adjacent lands; or
 - F) The purpose is to separate any emission, discharge, noise or other environmental pollutant from that of adjacent lands.
49. The project approved by the AUC Decision 2011-436 runs from the south of Edmonton through the Edmonton RDA and Sherwood Park RDA and continues northward. In their decision the AUC outlines the evidence regarding EMF, Corona Effect and the environmental impacts which are not confined to the RDA but which are issues along the whole East TUC Route.
50. It is submitted that the Director, in purporting to exercise the Minister's discretion misinterpreted the governing regulations. It is further submitted that the decision is not supported by the Regulations, there was no jurisdiction for the Minister to grant written consent for the project and the decision should be overturned.

NATURE OF RELIEF SOUGHT

51. The Applicant respectfully requests the following:
- a. An order of *certiorari* quashing the Minister's written consent;
 - b. A declaration that the Minister's written consent is null and void for being *ultra vires* both the Edmonton Regulations and the Sherwood Park Regulations;
 - c. An order enjoining all further development of the Line in the RDAs;
 - d. Costs of this application; and
 - e. Such additional and other relief as this Honourable Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of November, 2012.

PROWSE CHOWNE LLP

PER:

NOËL PAPADOPOULOS
Counsel for the Applicant

INDEX OF AUTHORITIES

- Tab A: *New Brunswick (Board of Management) v Dunsmuir* 2008 SCC 9
- Tab B: *Khosa v Canada (Minister of Citizenship & Immigration)* 2009 SCC 12
- Tab C: *N.L.N.U. v Newfoundland & Labrador (Treasury Board)* 2011 SCC 62
- Tab D: *Halifax (Regional Municipality) v Canada (Public Works & Government Services)* 2012 SCC 29
- Tab E: *Georgia Strait Alliance v Canada (Minister of Fisheries & Oceans)* 2012 FCA 40
- Tab F: *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 S.C.R. 817
- Tab G: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)* 2004 SCC 48
- Tab H *Cook v Alberta (Minister of Environmental Protection)* 2001 ABCA 276
- Tab I *Government Organization Act* RSA 2000, c G-10
- Tab J *Edmonton Restricted Development Area Regulations* Alta. Reg. 287/1974
- Tab K *Sherwood Park West Restricted Development Area Regulations* Alta. Reg. 45/1974