Court of King's Bench of Alberta

Citation: Imperial Oil Resources Limited v Alberta (Minister of Energy), 2025 ABKB 303

2025 ABKB 303 (CanLII)

Date: 20250516
Docket: 2001 09226
Registry: Calgary

Between:

Imperial Oil Resources Limited

Applicant

\- and -

His Majesty the King in Right of the Province of Alberta as Represented by the Minister of Energy and Alberta Energy

Respondent

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Table of Contents

I. Introduction 3

II. Background 3

A. Oil Sands Royalty Regime 3
B. Audit Process 5
C. Decisions in Issue 5

III. Standard of Review 5

IV. Issues of General Application 6

A. Procedural Fairness 6
1. Closure of Audits 7
2. Extrapolation 8
3. Altered Reasons 9
B. Allocation of Centralized Costs 10
1. 2009 – Issue 17 & 2012 – Issue 8 – R&T Transaction Sample/Salary Adjustment (Equipment) 12
2. 2009 – Issue 22 – Corporate Allocations – HR 13
3. 2009 – Issue 23 – Corporate Allocations – Controllers 13
4. 2012 – Issue 2 – Procurement Personnel Costs 15
5. 2012 – Issue 4 – HR Personnel Costs 16
6. 2012 – Issue 9 – R&T Eligibility Costs 17
7. 2012 – Issue 14(a) – Capex Salary Sample – Drilling Allocations 18
C. Corporate Plan 19

V. Specific Issues 20

A. Worley Parsons Contract Employee Costs 20
B. Are Development Unit Costs as Assessed by Alberta or as Certified by PWC? 22
C. US Benefit Rate or Canadian Benefit Rate? 23
D. Noetic Engineering Study 23
E. Transmission Line Costs 24
F. Requirement for Imperial to Provide Documentation to Verify Reconciliation of Salary Costs 24

2025 ABKB 303 (CanLII)

VI. Conclusion 25

I. Introduction

[1] Imperial Oil Resources Ltd ("Imperial") seeks judicial review of decisions made by a delegate of the Minister of Energy, the Director of Dispute Resolution for Alberta Energy (the "Director"), regarding whether various costs are allowed or disallowed for the purpose of royalty calculations for Imperial's Cold Lake Oil Sands Project ("Cold Lake") for the years 2009, 2010, 2011, and 2012.

[2] Each year, Alberta Energy auditors review the costs claimed by oil sands project operators to determine whether the claimed costs are "allowed costs" for the purposes of calculating royalties payable to Alberta. Oil sands operators may lodge an objection to the auditors' findings. The Minister of Energy – or, in practice, his delegate, the Director – determines whether to allow or reject the objection.

[3] Imperial submits that the process followed by the Director was procedurally unfair because, amongst other reasons, the Director rejected Imperial's objection on some audit issues for different reasons than the auditors. Imperial further submits that the Director took an unreasonable approach to matters of principle that affect many audit issues. Imperial asserts that the auditors rushed the conclusion of the audits and that the auditors and Director interpreted the regulations narrowly to preclude Imperial from allocating shared or centralized costs to Cold Lake for the purposes of calculating royalties. Imperial further contends that the Director made many unreasonable decisions regarding specific audit issues.

[4] Alberta submits that the audit process and the dispute resolution process were fair and that the auditors and Director acted reasonably in all respects. Alberta submits that, for many of the disputed audit issues, Imperial failed to provide sufficient evidence to satisfy the auditors and the Director.

II. Background

A. Oil Sands Royalty Regime

[5] Alberta owns most of the oil sands rights in the province. Alberta grants energy companies the right to develop oil sands resources and receives royalties on the production of oil. Alberta shares the risk of oil sands development by receiving a low royalty rate until an oil sands project has achieved payout (*i.e.,* broken even). Under the current royalty regime, for pre-payout projects, the royalty ranges from 1% to 9% of the project's gross revenue depending on oil prices. For post-payout projects, the applicable royalty is the greater of what would have been paid using the pre-payout formula and a percentage of the project's net revenues ranging from 25% to 40%, depending on the price of oil.

[6] Whether an oil sands project has reached payout is determined pursuant to the oil sands royalty regime, which is prescribed in several regulations adopted under the rubric of the *Mines and Minerals Act*, RSA 2000, c M-17, including *Oil Sands Allowed Cost (Ministerial) Regulation*, Alta Reg 231/2008 ("*OSACR*"), *Oil Sands Royalty Regulation, 1997* ("*OSRR*

2025 ABKB 303 (CanLII)

1997”), Alta Reg 185/1997, and *Oil Sands Royalty Regulation*, *2009*, Alta Reg 223/2008 (“*OSRR 2009*”).

[7] Under the oil sands royalty regime, the allowance and disallowance of costs by auditors plays a critical role in determining when a project reaches payout. *OSACR* s 3(1) provides that a cost is allowable if:

(a) the cost

(i) is incurred by or on behalf of the lessee or operator of the Project,

(ii) is incurred on or after the later of January 1, 2009 and the effective date of the Project,

(iii) is incurred to carry out Project operations,

(iv) is reasonable under the circumstances in which it is incurred, and

(v) is adequately evidenced in accordance with section 6 and affirmatively established to the satisfaction of the Minister.

(b) the cost is one of the following:

(i) a specifically included cost;

(ii) a fundamental cost of the Project under section 4;

(iii) a cost approved by the Minister under section 5,

and

(c) the cost is not a specifically excluded cost or a cost excluded from allowed costs under subsection (2).

[8] Costs that are “specifically included costs” are listed in *OSACR*, Schedule 1, Column 1. “Specifically excluded costs” are listed in *OSACR*, Schedule 1, Column 2. *OSACR*, Schedule 1 is comprised of 59 “items.”

[9] *OSACR* s 4(1) provides that “fundamental costs” are “costs incurred directly

(a) to recover, obtain, process or transport oil sands or oil sands products, or to market oil sands products, pursuant to the Project,

(b) to reclaim or abandon Project lands, or

(c) to comply with environmental laws applicable to the Project or applicable to a lessee or operator of the Project in respect of the Project.”

[10] *OSACR* s 4(2) provides that corporate overhead, costs in respect of non-project lands, and costs regarding an expansion of the project before the effective date of the project expansion are not fundamental costs.

[11] The oil sands royalty regulations are “intended to create a fair royalty scheme which balances the interests of the resource owner (the people of Alberta), while encouraging the development of the resource. The scheme encourages developers to innovate and maximize the efficiency of their operations”: ***Shell Canada Limited v Alberta (Energy)***, 2022 ABKB 4 at para 37. The Suncor Dispute Review Committee Report, quoted in ***Fort Hills Energy Corporation v Alberta (Minister of Energy)***, 2018 ABQB 905 at para 63, observed that “[t]oo broad or too

2025 ABKB 303 (CanLII)

narrow an interpretation of the allowed cost provisions would not achieve the balance intended by the regulation": Alberta, Oil Sands Operation Division, *Oil Sands Information Bulletin 2010-06*, Subject: Dispute Review Committee – Minister's Decision (6 April 2010) at 11.

B. Audit Process

[12] Every year, Imperial reports to Alberta Energy on its revenues and costs for Cold Lake on End of Period Statements ("EOPS"). The EOPS are then audited by Alberta Energy to determine if the claimed revenues and costs are in accordance with the governing regulations.

[13] The audit process involves discussion and information sharing between Imperial and Alberta Energy. Imperial is obliged to substantiate its claimed revenues and costs and respond to inquiries from Alberta Energy. Alberta Energy has the power to attend at Cold Lake to inspect records. Once Alberta Energy has completed its audit fieldwork, its practice is to issue a Notice of Pending Audit Closure and Summary of Audit Adjustments in which it gives Imperial 30 days to respond to the audit adjustments proposed by Alberta Energy. After 30 days have passed, Alberta Energy issues a Notice of Determination in respect of the audits. This process was followed for each of the years 2009-2012.

C. Decisions in Issue

[14] Imperial lodged objections to Alberta Energy's Notices of Determination for each of 2009-2012 pursuant to the *Mines and Minerals Dispute Resolution Regulation*, Alta Reg 170/2015 ("*MMDRR*"). The Director issued the following decisions concerning the Imperial objections:

(1) <u>February 3, 2020</u>: Decision for Objection dated March 31, 2017; Cold Lake Project, Project Approval No. OSR037 (the "Project") 2009 End of Period Statements;

(2) <u>March 2, 2020</u>: Decision for Objection dated March 31, 2017; Cold Lake Project, Project Approval No. OSR037 (the "Project") 2010 End of Period Statements;

(3) <u>March 2, 2020</u>: Decision for Objection dated March 31, 2017; Cold Lake Project, Project Approval No. OSR037 (the "Project") 2011 End of Period Statements; and

(4) <u>March 9, 2020</u>: Decision for Objection dated March 31, 2017; Cold Lake Project, Project Approval No. OSR037 (the "Project") 2012 End of Period Statements.

[15] There is no right to appeal a decision made pursuant to the *MMDRR* to the Court. Imperial accordingly commenced this judicial review proceeding in respect of all four decisions made by the Director.

III. Standard of Review

[16] The parties agree that the standard of review is reasonableness: ***Canada (Minister of Citizenship & Immigration) v Vavilov***, 2019 SCC 65. The majority in ***Vavilov*** at para 84 described the approach to reasonableness review where the decision-maker has provided written reasons:

> … reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the

2025 ABKB 303 (CanLII)

> reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion [citations omitted].

See also, ***Shell Canada Limited v Alberta (Energy)***, 2023 ABCA 230 at paras 20-21.

[17] Most of the issues in this judicial review concern the interpretation or application of *OSACR*. Reasonableness, not correctness, is the applicable standard when an administrative decision-maker interprets its enabling statute: ***Vavilov*** at paras 7 and 25. Using the reasonableness standard to review the Director's interpretation of *OSACR* does not mean that the Court must accept that interpretation. Sometimes the language of a statute or regulation limits the number of reasonable interpretations to one: ***Vavilov*** at para 68. I emphasize this point because in the Reasons that follow, where I disagree with the Director's interpretation of *OSACR*, I am not deploying a correctness standard. For the most part, the language of *OSACR* is prescriptive and is not open to multiple interpretations.

[18] Imperial also asserts that Alberta Energy's audits were procedurally unfair. When considering "questions of procedural fairness, the task for the court is to determine whether the requisite standard of procedural fairness was met": ***Bauhuis v Association of Professional Engineers and Geoscientists of Alberta***, 2024 ABKB 603 at para 36 and ***Rebel News Network v Alberta (Election Commissioner)***, 2021 ABCA 376 at para 10.

IV. Issues of General Application

A. Procedural Fairness

[19] Administrative processes must be procedurally fair: ***Muradov v College of Naturopathic Doctors of Alberta***, 2024 ABCA 224 at para 16. Justice L'Heureux-Dubé writing for the majority in ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, observed at para 20, "[t]he fact that a decision is administrative and affects 'the rights, privileges or interests of an individual' is sufficient to trigger the application of the duty of fairness" [citations omitted].

[20] The content of the duty of procedural fairness is context-specific: ***Vavilov*** at para 77; ***Baker*** at para 21. The majority in ***Vavilov*** at para 77 affirmed and summarized the "non-exhaustive list of factors that inform the content of the duty of procedural fairness..." previously articulated in ***Baker***. Those factors include:

i. the nature of the decision being made and the process followed in making it;

ii. the nature of the statutory scheme;

iii. the importance of the decision to the individual or individuals affected;

iv. the legitimate expectations of the person challenging the decision; and

v. the choices of procedure made by the administrative decision maker itself.

[21] Justice Eamon considered the content of the duty of fairness in the context of the oil sands royalty regime and the dispute resolution process under the *MMDRR* in ***MEG Energy Corp v Alberta (Minister of Energy)***, 2024 ABKB 592. He concluded at para 169 that both the audit and review processes were "administrative", not judicial, in nature. He went on to explain that "[a]udits involve investigations and adjustments. They require flexibility, practicality, and

2025 ABKB 303 (CanLII)

efficiency. The outcomes are economic, and the decisions are not the types of decisions affecting liberty, security, or livelihood where the Courts have required a relatively high degree of procedural fairness."

[22] I agree with Eamon J that the audits call for only a low level of procedural fairness, though in my view this is because of the nature of the audit process, not because the subject-matter is "economic." Audits are iterative and cooperative processes that are ill-suited to being governed by standards of procedural fairness analogous to those that apply to court processes. The audit phase of the matters in dispute does not attract a high degree of procedural fairness. That does not mean that Alberta Energy may run roughshod over resource developers, but the Court will not impose onerous procedural requirements on Alberta Energy auditors in the name of fairness.

[23] I find it incongruous that in a royalty regime premised on fairness and balancing the interests of resource owner and resource developer, the dispute resolution process also is characterized by a low degree of procedural fairness. There are, in my opinion, good arguments that the dispute resolution process under the *MMDRR* demands a higher degree of procedural fairness than the audit process. But I need not delve into those arguments because, despite my misgivings, I am bound by the principle of horizontal *stare decisis* to follow Eamon J's finding in ***MEG*** that the *MMDRR* dispute resolution process is characterized by a low degree of procedural fairness: ***R v Sullivan***, 2022 SCC 19 at para 75.

[24] Imperial identified three procedural fairness concerns: (1) the alleged early closure of the 2009-2011 audits; (2) the failure to perform full audits for 2010 and 2011 and the use of extrapolations from the 2009 and 2012 audits instead; and (3) the Director decided issues based on new and different reasons than had been offered by the auditors.

1. Closure of Audits

[25] Imperial submits that Alberta Energy issued to it a Notice of Pending Audit Closure and 2009 Audit Summary (the "2009 Closure Notice") on October 14, 2016 without warning. Imperial argues that many audit queries still were being worked on by the auditors and Imperial when the 2009 Closure Notice was issued. It asserts that it was unable to address all items identified in the 2009 Closure Notice due to time constraints.

[26] Imperial claims that the 2010 and 2011 audits "ended on a similarly abrupt note." Closure notices were issued for the 2010 and 2011 audits on November 21, 2016 (the "2010 Closure Notice" and "2011 Closure Notice"). Imperial complains that it also was unable to adequately respond to the 2010 Closure Notice and 2011 Closure Notice because of lack of time. The lack of time was exacerbated because Imperial was obliged to respond to multiple closure notices concurrently.

[27] Alberta Energy gave Imperial 30 days from the issuance of closure notices to respond to the auditors' conclusions stated therein. The 2009 audit commenced in early 2012, though most of the work was done in 2015 and 2016, and concluded near the end of 2016, a period of almost 5 years. The other audits took place over shorter timeframes.

[28] As noted above, the content of a duty of procedural fairness is contextual. The items remaining in dispute over the four audit years in issue are valued at $77 million; at earlier stages of the dispute, the discrepancy was greater than that. This is a large dispute, and Imperial is a large company with significant financial and human resources. Tight timelines demand

2025 ABKB 303 (CanLII)

resources and may be unfair in some contexts to some parties, but in the context of oil sands audits and a company the size of Imperial, it is not unfair to expect that the necessary resources be dedicated to meet deadlines imposed by Alberta Energy. The case law cited above indicates that courts have concluded that the royalty regime is intended to be fair and to balance the interests of the resource owner and resource developers. Implicit in the concept of balance is that oil sands developers have a duty to commit the resources required to provide the information demanded by Alberta Energy auditors within a reasonable period. In these circumstances, I am not persuaded that Alberta Energy's deadlines were unreasonable.

2025 ABKB 303 (CanLII)

[29] At some point, an audit must come to an end. Under the circumstances, Alberta Energy made a reasonable decision to conclude the 2009 audit in late 2016 considering the length of time it had been underway and Imperial's capacity to respond to audit inquiries. It is noteworthy that even then Alberta Energy did not strictly hold Imperial to the 30-day deadline. Alberta Energy accepted comments on the 2009 Closure Notice on November 18, 2016, and concluded the 2009 audit on December 20, 2016. I conclude that Alberta Energy's conduct concerning the closure of the 2009 audit was procedurally fair.

[30] The audits for the years after 2009 occurred within shorter timeframes. But this makes sense because many of the issues in the 2010-2012 audits were like those in the 2009 audit. Moreover, Imperial's complaint that it was faced with responding to multiple audit closures during the same time frame rings hollow. The issues in the audits significantly overlapped and it was reasonable for Alberta Energy to expect that Imperial could respond to similar requests for multiple years. Neither the duration of the 2010-12 audits, the overlapping audit closure windows, nor the way Alberta Energy brought them to a close was procedurally unfair.

2. Extrapolation

[31] Imperial complains that the 2010 and 2011 audits were not rigorous. It asserts that Alberta Energy's superficial review of those years and use of extrapolation was procedurally unfair. Imperial submitted in its first brief of argument:

> Contrary to Imperial's reasonable expectations and what is typical of a royalty audit, the Auditors closed the 2010 and 2011 audits without any significant or meaningful discussion, information sharing, or assessment of those years such that findings were not drawn from the information specific to each year. Instead, the Auditors extrapolated and applied their sampling and findings from the 2009 audit to a significant portion of Imperial's 2010, 2011 and 2012 EOPS.

[32] Extrapolation is a recognized audit method that is sometimes required for the sake of efficiency. The use of such a method may be unfair or unreasonable depending on the circumstances; in my view, however, the use of extrapolation is not *per se* procedurally unfair or unreasonable.

[33] Alberta Energy's use of extrapolation in the present case was not procedurally unfair, especially given the relatively low degree of procedural fairness applicable in the audit phase. *OSACR* s 6 provides that the resource developer "must be capable" of providing evidence to substantiate its costs. A prudent operator should run its business and maintain its records in such a way that all costs that it claims are "allowed costs" can be substantiated with evidence. Imperial could have offered Alberta Energy proof of its allowed costs; instead, it took a reactive stance responding to audit queries. Imperial knew the issues that Alberta Energy was interested

in for 2009 and knew that it was interested in the same issues for other years. Imperial could have provided the information to substantiate its claims for allowed costs for all years under audit.

[34] Extrapolation was used by the auditors because similar issues arose in multiple years. The same challenge affected how this case was argued and how I must decide issues. Imperial made arguments in respect of disputed items for the 2009 and 2012 audit years but in some instances did not provide argument where the same issues arose in the context of the 2010 and 2011 audit years. Similarly, Alberta made arguments that addressed issues for multiple audit years without always specifying the different issues in each year. Accordingly, my reasons should be understood to apply to like issues in different years. In particular, my findings on the disputed 2009 and 2012 audit items apply to the analogous items for 2010 and 2011. To the extent that the application of my findings regarding issues from one audit year to another audit year is unclear, the parties may seek clarification prior to the issuance of a formal order.

2025 ABKB 303 (CanLII)

3. Altered Reasons

[35] Imperial complains that "[c]ompounding the procedural unfairness were decisions by the Director which presented new reasons for the costs disallowed by the auditors...." Though variations of this complaint are made in each of Imperial's three written submissions, only one instance of new reasons is identified. The auditors disallowed Imperial's information technology allocations described as "Office IT" and "SAP Applications" pursuant to *OSACR* Items 30 and 58. Imperial argued in its submission in the dispute resolution process that the auditors' disallowance of the information technology allocations using Items 30 and 58 was wrong. The Director disallowed the information technology allocations pursuant to Item 40 on the grounds that they were "corporate overhead." The potential disallowance of the information technology allocations based on Item 40 was not communicated to Imperial prior to the Director's decision.

[36] Eamon J concluded in ***MEG*** that even though a low degree of procedural fairness applies to the Director in the oil sands royalty dispute resolution process, the Director is obliged to notify an operator when a new reason for an audit conclusion is identified and provide the opportunity to respond. He held at para 258:

> An important caveat is that should the [Director's] inquiries ... uncover an additional reason or rationale for an audit conclusion that is not apparent from the auditors' reasons, then the Director is duty bound to inform the operator and give it a fair opportunity to respond. [emphasis added]

[37] The duty of fairness owed to Imperial required the Director to identify that he was considering deciding the information technology allocations based on Item 40 instead of the bases identified by the auditors. The Director then was required by the duty of fairness to provide Imperial a reasonable opportunity to respond. Requiring the Director to provide Imperial a reasonable opportunity to respond to potential new grounds for deciding disputed issues is consistent with the principle that parties have a right to a "meaningful opportunity to present their case fully and fairly": ***Baker*** at paras 30 and 32-33. The Director failed to provide Imperial a meaningful (or any) opportunity to respond to the new ground for deciding the information technology allocation issue and, in doing so, breached his duty of fairness.

[38] The information technology allocation issue is remitted to the Director for re-determination. The Director may set the parameters for the process for the re-determination of

the information technology allocation issue, but that process must allow Imperial to provide its position regarding Item 40 and he must consider Imperial's position before making a new decision. For the avoidance of doubt, this applies to 2009 – Issue 7, 2010 – Issue 3, 2011 – Issue 8, and 2012 – Issue 17.

B. Allocation of Centralized Costs

[39] The issue of "allocation of centralized costs" identified by Imperial is really two issues. The first arguably is not an allocation issue because the relevant question is whether the costs are "allowed costs" pursuant to *OSACR*. Imperial casts this as an allocation issue because whether the claimed costs are "allowed costs" turns on interpretations of *OSACR* Schedule 1, the definition of "fundamental costs", and the requirement that certain employees be "solely dedicated" to the relevant project. Alberta Energy's position is that costs associated with certain categories of employees may not be allocated to Cold Lake because *OSACR*, Schedule 1 and the definition of "fundamental costs" requires that the relevant categories of employees must be "solely dedicated" to Cold Lake. The second issue concerns the method of allocation used by Imperial or the evidence offered by Imperial to substantiate its allocation of certain centralized costs to Cold Lake. Though there are common themes that run through the specific audit issues classified by Imperial as allocation issues, each must be analyzed on its own.

[40] Imperial operates three oil sands projects – Cold Lake, Kearl, and Aspen – and is a joint venture participant in Syncrude. Imperial has centralized many of its business operations to minimize costs. Employees in Imperial's centralized business units provide services to Imperial's oil sands projects and for Imperial's other business activities. Some of Imperial's centralized costs are allocated to Cold Lake and form part of the costs that Imperial claims are "allowed costs."

[41] Imperial's costs are allocated in several ways. Many costs are allocated according to Imperial's corporate plan, which estimates the proportion of resources that each of Imperial's centralized business units devote to its oil sands projects. The costs allocated by the corporate plan to Cold Lake are claimed by Imperial as "allowed costs" for the purpose of calculating royalties. Imperial allocates some other costs shared between projects – controllers, for example – based on share of production. A third approach is used for information technology costs. Imperial and ExxonMobil affiliates pool their information technology costs globally. The pooled costs include computer and office hardware, software including SAP, IT support, and SAP infrastructure and hardware necessary to operate SAP applications. The pooled costs are then allocated to each ExxonMobil affiliate, including Imperial, based on computer counts. Imperial, in turn, allocates a proportionate share of its allocated cost to Cold Lake based on Cold Lake's computer count. Lastly, Imperial has technical departments that provide services to Cold Lake and its other oil sands projects. Imperial uses internal charge-out rates to calculate the cost of services provided to Cold Lake and other projects. The internal charge-out rates are based on all the actual costs incurred by those departments, including employee, equipment, and office space costs.

[42] *OSACR* s 8 provides that portions of shared costs that are "allowed costs" may be allocated to an oil sands project. *OSACR* s 8 states that "where a cost incurred by or on behalf of a lessee of a Project may be an allowed cost only in part, the cost must be allocated by the operator such that a portion of the cost is treated as an allowed cost and the remaining portion of the cost is not treated as an allowed cost." For example, where an employee dedicates part of her

2025 ABKB 303 (CanLII)

time to Cold Lake and part of her time to other Imperial business activities, only the cost of the employee proportional to the time dedicated to Cold Lake may be claimed as an allowed cost.

[43] A simplified statement of the *OSACR* analysis regarding allocated costs that suffices for the discussion of issues raised by Imperial is as follows:

i. is the cost an “allowed cost” pursuant to *OSACR* s 3-5? This is determined by considering the following questions:

1. is the cost a specifically included cost?
2. is the cost a fundamental cost?
3. has the cost been approved by the Minister?
4. is the cost a specifically excluded cost?

ii. if the claimed cost is an “allowed cost”, is there evidence of the claimed cost (*OSACR* s 6)?

iii. if the claimed cost is an “allowed cost” and there is evidence of the claimed cost, is the cost allocation consistent with *OSACR* s 8-8.4?

[44] Alberta Energy and Imperial agree that a cost must first be an “allowed cost” before the question of allocation arises. The question of whether certain categories of costs are “allowed costs” is common to the following issues which are identified below using the descriptions in the Director’s decisions:

2009 – Issue 17 & 2012 – Issue 8 – R&T Transaction Sample/Salary Adjustment (Equipment)

2009 – Issue 22 – Corporate Allocations – HR

2009 – Issue 23 – Corporate Allocations – Controllers

2012 – Issue 2 – Procurement Personnel Costs

2012 – Issue 4 – HR Personnel Costs

2012 – Issue 9 – R&T Eligibility Costs

2012 – Issue 14(a) – Capex Salary Sample – Drilling Allocations

[45] The question of whether a claimed cost is an “allowed cost” must be determined with reference to *OSACR* Schedule 1. The relevant parts of *OSACR* Schedule 1 provide as follows [emphasis added]:

Item	Column 1 Specifically Included Costs	Column 2 Specifically Excluded Costs
57	Salaries, wages, benefits, training, travel and accommodations for employees <u>solely dedicated</u> to carrying out Project operations Salaries, wages, benefits, training, travel and accommodations for employees or	Salaries, wages, benefits, bonuses, stock options, training, travel and accommodations, relocation and severance (including associated relocation and training expenses in respect of that severance) for <u>executive</u>

2025 ABKB 303 (CanLII)

	personnel performing information technology, administration, accounts payable or office support work and solely dedicated to Project operations Salaries, wages, benefits, training, travel and accommodations, for employees to the extent those employees carry out Project operations in the following circumstances: - legal counsel for matters integral to furthering Project operations - providing production accounting and royalty accounting for oil sands products - purchasing assets, materials or supplies delivered for use in, or disposing from, Project operations - conducting recruitment, classification, employee relations activities for employees carrying out Project operations - carrying out engineering activities for Project operations - carrying out marketing activities for oil sands products Relocation and severance (including associated relocation and training expenses in respect of that severance) for employees solely dedicated to Project operations	or management employees not solely dedicated to Project operations Salaries, wages, benefits, training, travel and accommodations for employees or personnel performing information technology, administration, accounts payable or office support work and not solely dedicated to Project operations Relocation and severance (including associated relocation and training expenses in respect of that severance) for employees not solely dedicated to Project operations

1. 2009 – Issue 17 & 2012 – Issue 8 – R&T Transaction Sample/Salary Adjustment (Equipment)

[46] These issues concern research and technology employees assigned to Cold Lake work. Imperial, as noted earlier, has an internal rate that it charges business units for specialized employees. The auditors concluded that the research and technology employee costs were allowed costs but reduced Imperial's charge out rate by 64%. The charge out rate was reduced to the actual salary cost for the relevant employees. Alberta Energy stated in its first written submission that "the costs were not allowed because Imperial did not provide sufficient evidence to allow Audit to find they were eligible as solely dedicated employees under Schedule 1, Item 57."

[47] The problem with Alberta Energy's position is that the auditors and the Director accepted the portion of the charge out rate that represented the employees' salaries as an "allowed cost." Though the Director states in the 2009 decision that "allowing certain costs within a cost pool [does not] guarantee that all costs were either specifically included or fundamental costs", by

2025 ABKB 303 (CanLII)

allowing the salary costs he implicitly accepted that the cost of those employees meet the test for allowed costs, either as a specifically included cost or fundamental cost. The Director's complaint that there was insufficient evidence to determine if the employees are solely dedicated to Cold Lake makes no sense when the salary costs of the employees was allowed. The Director's reasons do not address why the non-salary components of the charge out rate were denied.

2025 ABKB 303 (CanLII)

[48] According to Imperial's first written submission, the charge out rate includes salaries, wages, benefits, office space, and IT support. I recognize there may be a principled basis for denying some of the non-salary components of the charge out rate, but an explanation of such a principled basis is absent from the Director's 2009 decision. And it is possible that the Director's concern about a lack of evidence may be relevant to other possible reasons for denying components of the charge out rate. Again, however, the Director does not explain any connection between the lack of evidence and the denial of the non-salary components of the charge out rate.

[49] Accordingly, I find that the Director's reasons for reducing the charge out rate are unintelligible and, therefore, unreasonable. I direct the Director to reconsider 2009 – Issue 17 and 2012 – Issue 8 with the benefit of these Reasons. If the Director contemplates reducing the charge out rate on other grounds, he must disclose those grounds to Imperial and provide Imperial with an opportunity to respond.

[50] Given my conclusion in para 34 above, I also direct the Director to reconsider 2010 – Issue 16 and 2011 – Issue 19.

2. 2009 – Issue 22 – Corporate Allocations – HR

[51] The issue styled as 2009 – Issue 22 – Corporate Allocations – HR has nothing to do with allocation *per se*. Following the completion of the audit, Imperial realized that it had erred by providing the auditors with information concerning only 22 human resources professionals who provided services for Cold Lake when it should have provided information for 72 human resources employees. The inclusion of the 50 extra human resources employees would have changed the allocation calculation in Imperial's favour.

[52] The Director refused to consider information provided by Imperial in the dispute resolution process on the grounds of the "no new information" rule: *MMDRR* s 4(2). The relevant part of *MMDRR* s 4(2) provides "The Director <u>shall not</u> request or <u>consider any information that was not considered by the Department when conducting an</u> assessment, <u>audit</u> or review of the subject-matter of the objection..." [emphasis added].

[53] *MMDRR* s 4(2) states in mandatory terms that the Director is not to receive and consider new information. The Director acted reasonably in following the clear instruction in *MMDRR* s 4(2). The result may be harsh for Imperial, but the regulation sets down a firm rule that leaves the Director no discretion.

[54] Given my conclusion in para 34 above, this finding also applies to 2010 – Issue 25 and 2011 – Issue 15.

3. 2009 – Issue 23 – Corporate Allocations – Controllers

[55] The costs for seven controllers were disallowed on the basis that they were specifically excluded costs under *OSACR,* Schedule 1, Column 2. The Director concluded that the controller

duties are best characterized as "accounts payable or office support ... not solely dedicated to Project operations." Imperial submits that four of the seven controllers should instead be categorized as "providing production accounting and royalty accounting for oil sands products" under *OSACR,* Schedule 1, Column 1. The remaining three are responsible for revenue accounting, capital expenditures, and inventory valuation, which are costs incurred directly to "recover, obtain, process or transport oil sands ... pursuant to the Project." As such, Imperial submits that their costs are "fundamental costs" as defined in *OSACR* s 4.

2025 ABKB 303 (CanLII)

[56] The job titles provided by Imperial for the seven controllers are: (1) Revenue Settlement/Company Operated Supervisor; (2) Revenue Support Analyst; (3) Project Accounting Supervisor; (4) Capex Analyst; (5) Operations Analysis Supervisor; (6) Drilling Accountant; and (7) Inventory Analyst. Based on these titles, it seems clear that some of these employees should not be categorized as "accounts payable." For example, it is unreasonable to conclude that accounting personnel responsible for "revenue" and "inventory" fall under the category of "accounts payable." It is possible that the duties of some of the remaining employees included accounts payable, but that is not clear on the record.

[57] The term "office support" is so broad that it could potentially encompass specifically included costs and fundamental costs. For purposes of determining allowed costs, "office support" cannot be interpreted so broadly as to result in the exclusion of a specifically included cost such as "providing production accounting and royalty accounting for oil sands products." Further, the term must be given a meaning consistent with its context. The words "office support" are found along with the words "administration", "information technology", and "accounts payable." These are generic corporate services that may not have anything to do with an oil sands project. The job titles for the various controllers indicate that they are providing project-related services, albeit to several projects, rather than generic corporate services. I am satisfied that the Director acted unreasonably in categorizing the seven controllers as "accounts payable or office support" and thereby concluding that their costs were not allowed costs.

[58] Alberta Energy offers an alternative justification in its first written submission to the Court. This is not a new argument as it concerns whether the controller costs are "fundamental costs", which was addressed in submissions to the Director. Alberta Energy contends that the controllers provide "accounting services" and accordingly that their costs should be classified as "corporate overhead" as defined in *OSACR* s 1(1)(b). Corporate overhead "means costs that are not directly and solely incurred for the purposes of Project operations...." and is excluded from the definition of "fundamental costs" in *OSACR* s 4(2).

[59] *OSACR* s 4 "fundamental costs" must be interpreted in a manner coherent with the *OSACR* s 3 regime of "specifically included" and "specifically excluded" costs set out in *OSACR,* Schedule 1. The example of the controllers is instructive. The controllers described as having "revenue" and "inventory" roles appear to be providing services that are categorized by *OSACR* Schedule 1, item 57 as specifically included costs namely, "providing production accounting and royalty accounting for oil sands products." To interpret the exclusion of "corporate overhead," including "accounting services," from "fundamental costs" as converting production and royalty accounting from a specifically included cost to an excluded cost is unreasonable because it renders part of Schedule 1, Item 57 meaningless. The Director's job, and the Court's job, is to strive for a meaning that is supported by the text and preserves the function of both parts of the regulation consistent with the purpose of the regulation.

[60] I remit the question of whether the cost of the controllers is an allowed cost to the Director to be reconsidered with the benefit of these Reasons. The question that the Director must ask in respect of each controller is whether, on the evidence before him, the controller is "providing production accounting and royalty accounting for oil sands products" such that the cost of the controller is an "allowed cost" that may be allocated to Cold Lake. Alternatively, the Director must consider whether the cost of the particular controller is a "fundamental cost". Depending on the evidence, the answer may differ for each controller. For the avoidance of doubt, this direction applies to each of the audit years 2009, 2010, and 2011.

2025 ABKB 303 (CanLII)

[61] The Director went on to comment that the allocation method proposed by Imperial for the cost of the controllers was inappropriate. Imperial initially proposed that the cost of the controllers be allocated according to the corporate plan. When that idea proved too complicated, Imperial proposed that the cost of the controllers be allocated based on Cold Lake's share of Imperial's oil sands production. Cold Lake accounted for 48.1% of Imperial's oil sands production in 2009. Imperial's allocation approach has intuitive appeal because Cold Lake's cost of production accounting and royalty accounting should roughly correspond to Cold Lake's share of Imperial's oil sands production. But the Director rejected this allocation methodology "because a production-based allocation was not strongly linked to the extent of this particular work performed for the Project." The Director, however, did not explain *why* there was no link between Cold Lake's proportion of Imperial's oil sands production and the proportion of the controllers' work performed for the Project. The rejection of an allocation method that appears on the surface to have a logical premise demands more than an assertion. The Director's position may be reasonable, but the reasons that he offered are insufficient. I direct the Director to reconsider the allocation of the cost of the controllers and, if he maintains the same conclusion, to provide reasons that explain his conclusion.

4. 2012 – Issue 2 – Procurement Personnel Costs

[62] Imperial claimed costs for procurement personnel. These procurement personnel were described by the auditors as "system and process advisors, business analysts/associate and procurement Managers." The Director disallowed Imperial's claim for procurement personnel costs on two grounds: (1) some procurement personnel were "management employees" whose costs were specifically excluded costs pursuant to *OSACR*, Schedule 1, Item 57; and (2) the costs of other procurement employees were warehouse costs specifically excluded under *OSACR*, Schedule 1, Item 31.

[63] Imperial submits that the Director's decision with respect to Item 57 was based on an interpretation that procurement personnel must be "solely dedicated" to Cold Lake. Imperial submits that procurement personnel are not required to be "solely dedicated" because *OSACR*, Schedule 1, Item 57 provides that the cost of "employees to the extent that those employees carry out project operations in the following circumstances ... purchasing assets, materials or supplies delivered for use in, or disposing from, Project operations" are specifically included costs. Though Imperial is correct, it appears to me that the Director's decision turned on his conclusion that "[t]he information provided was not sufficient to conclude that these procurement manager primary tasks were functional or technical rather than supervisory."

[64] The use of the word "manager" in an employee's job title does not mean that the employee is a manager. The employee's responsibilities must be analyzed to determine whether an employee's function is managerial or otherwise. This is recognized in the guidance provided

by the Government of Alberta to oil sands industry participants. *Oil Sands Information Bulletin 2013-14* (July 31, 2013) *Re Determination and Treatment of "Solely Dedicated Employee Costs"* provides that: "Employees who may have employees working under them but whose primary tasks are functional or technical rather than supervisory are not considered management employees." The Information Bulletin goes on to give the following examples of "acceptable documentary evidence" to demonstrate employee functions:

- Organizational charts
- Job offer letters
- Job description
- Timesheets
- Itineraries
- Work schedules
- Electronic transaction details
- Employment contracts.

[65] The Director's conclusion disallowing costs of procurement personnel with "manager" or similar words in their titles is reasonable. The Director did not consider job descriptions and organizational charts provided by Imperial because those records had not been provided to the auditors. This appears to be an application of the "no new information" rule. The Director's assessment that there was inadequate evidence to show that the "manager" roles were, in fact, functional is entitled to deference.

[66] The Director's disallowance of procurement personnel with non-managerial titles appears to be premised on *OSACR*, Schedule 1, Item 31. The problem with this is that the plain wording of Item 31 excludes the costs of "[a]ny warehouse not exclusively dedicated toward providing inventory services to one or more approved Projects." The Director has interpreted the cost of a warehouse to include the cost of warehouse staff. In the abstract, this might be reasonable. However, the Item 31 specific exclusion of warehouse costs must be interpreted in such a way as not to undermine the Item 57 specific inclusion of costs of employees involved in purchasing and disposing of assets and materials. The Director's interpretation renders the specific inclusion in Item 57 nugatory and, as such, is unreasonable. I direct the Director to reconsider with the benefit of these Reasons whether the evidence shows that the costs of the non-managerial procurement employees are allowed costs.

5. 2012 – Issue 4 – HR Personnel Costs

[67] Imperial asserts that the HR Personnel Costs were denied by the Director on the basis that the employees were not "solely dedicated" to Cold Lake. My reading of the Director's decision is that he denied the HR Personnel Costs on the grounds of lack of evidence that they were performing a functional, not managerial, role. The Director concluded:

> These positions were clearly management employees because they met the criteria of a manager under IB 2013-10 of supervising two or more employees and the information provided was insufficient to conclude that these employees' primary tasks were functional or technical rather than supervisory.

2025 ABKB 303 (CanLII)

[68] The Director's reference should have been to Information Bulletin 2013-14, but the substance of his point is sound. Imperial failed to provide the necessary job descriptions and other evidence to support its contention that the human resources managers were functional employees. Imperial's submission to the Director describes the employee responsibilities but does not point to any evidence that was provided to auditors to substantiate the employee responsibilities. As with the procurement personnel issue, the Director's decision turned on his evaluation of the quality of the evidence, which is entitled to deference. The Director's conclusion that the HR Personnel Costs are not allowed costs is reasonable.

2025 ABKB 303 (CanLII)

6. 2012 – Issue 9 – R&T Eligibility Costs

[69] The Director, Imperial, and Alberta have all done a poor job of explaining what the disputed research and technology work involved. The 2012 Decision refers to the auditors' Notice of Determination and Imperial's Objection. But on inspection, neither document helps me understand anything about the disputed research and technology work. Similarly, neither Imperial's nor Alberta's submissions on judicial review provide any description of the disputed research and technology work.

[70] The best that I can discern is that the Director disallowed some research and technology costs because the research was "theoretical," not of "immediate applicability" to Cold Lake, or not "exclusively dedicated" to Cold Lake as required by *OSACR*, Schedule 1, Item 56. The Director concluded, "[a]lthough this research could have application to the Project at a later date, it did not have immediate applicability for activities within Project operations and therefore these costs were not specifically included costs." The Director went on the explain that "research that could be used or applied to other locations or oil sands projects ... could not have been considered to meet the criteria of 'within Project operations.'" He further concluded that some research is best characterized as "corporate overhead" and thus could not qualify as "fundamental costs."

[71] *OSACR*, Schedule 1, Item 56 is shown in the table below.

Item	Column 1 Specifically Included Costs	Column 2 Specifically Excluded Costs
56	Research personnel and their consumed supplies toward the development of technology to solve a problem of immediate applicability for the recovery, production or processing activities within Project operations Any research facility, laboratory or area exclusively dedicated toward the development of technology to solve problems of immediate applicability for the recovery, production or	Research that provides the foundation for further research, or research conducted without any defined practical end pointing to practical applications Any research facility, laboratory or area not exclusively dedicated toward the development of technology to solve problems of immediate applicability for the recovery, production, or processing activities within Project operations Management fees or membership fees in research organizations

	processing activities within Project operations	Research grants, research chairs and research fellowships to educational and research institutions

2025 ABKB 303 (CanLII)

[72] Imperial objects to the Director's disallowance of research costs on the grounds that the research was not "immediately applicable" to Cold Lake because, as it argues in its second written submission, "the technology developed as a result of these research costs was actually used at the Cold Lake Project." I agree that the actual use of the fruits of the research at Cold Lake would be strong evidence that the research was of "immediate applicability" to Cold Lake. However, on the facts available, I cannot ascertain whether the research was in fact used at Cold Lake.

[73] Imperial's second objection to the disallowance of research and technology costs is that all research costs need not be "exclusively dedicated" to a project. Imperial reads *OSACR*, Schedule 1, Column 1, Item 56 as providing one standard for the costs of research personnel and another for research facilities. Research personnel must be working on technology to solve a problem of "immediate applicability" while research facilities must be "exclusively dedicated ... to solve problems of immediate applicability" to the project. Imperial submits, and I agree, that research personnel need only be working to solve problems of "immediate applicability" and do not have to be "exclusively dedicated" to Cold Lake.

[74] Based on the material available to me, I am not able to determine whether Imperial provided the auditors and the Director sufficient evidence concerning the use of the research at Cold Lake. I direct the Director to review the record to determine if there is evidence of the use of the research at Cold Lake and to reconsider the R&T Eligibility Costs issue with the benefit of these Reasons.

7. 2012 – Issue 14(a) – Capex Salary Sample – Drilling Allocations

[75] The costs of drilling wells on project lands are specifically included costs pursuant to *OSACR*, Schedule 1, Items 4 and 32. Imperial drilled 52 wells at Cold Lake in 2012. It allocated 17.8% of its overall drilling costs to Cold Lake on the basis that the Cold Lake drilling program for the Nabiye expansion required the services of 10.5 employees out of the 59 employees in the drilling group.

[76] Imperial submitted to the Director, "Imperial's allocation of its drilling costs represents the portion of the time spent by personnel in that business unit working specifically on the Cold Lake Project. This is a reasonable basis on which to allocate costs to the Project and determine those costs which are directly attributable to the Project." The Director rejected Imperial's position concluding, "[r]elated to the disputed Drilling allocations costs ... based on the information provided, I was not able to substantiate how or where these employees carried out Project activities. As a result, I concluded that disputed adjustment in the NOD related to this issue was correct."

[77] There is no doubt that Imperial drilled wells at Cold Lake in 2012 and that the costs of employees who worked on these wells are "allowed costs." The problem is that the spreadsheet that Imperial offered to support the allocation is opaque and offers conclusions, not evidence or explanations. The auditors' notes on the spreadsheet indicate that they were looking for AFEs

describing the work and explanations as to how employees in far flung locations were connected to the drilling program at Cold Lake. These are fair questions. Given the lack of evidence, the Director acted reasonably in denying the claimed salary costs for the drilling program.

C. Corporate Plan

[78] The next four issues were grouped by Imperial under the heading "Corporate Plan." Imperial allocated portions of these costs to Cold Lake based on its corporate plan. For each of the issues, the Director concluded that the corporate plan was not an acceptable method for allocating shared costs to Cold Lake and that Imperial had failed to provide sufficient information to justify the corporate plan allocation. The Director concluded as follows:

> *2009 – Issue 14 Field Personnel – Doc Type CO CTR Allocations*
>
> I agreed with the Department that the level of detail provided wasn't sufficient to justify Imperial's revised allocation (see Preliminary Matters). I was also not convinced that using a corporate allocation in the manner proposed by Imperial was appropriate. Specifically, Imperial only provided a general estimate of the amount of time that the Programmatics unit would likely spend on the Project in the coming year without details of how this allocation of time-to-be-spent was actually determined.
>
> *2009 – Issue 25 – Environmental Affairs/Compliance*
>
> I agreed with the Department that a corporate plan was an inappropriate measure to allocate the extent of employee work on the Project and that the information provided did not support Imperial's proposed allocation methodology. Specially, a general forecast by management of the amount of time this group of employees would spend on various activities was not sufficient to accurately establish the extent of work for the Project.

[79] Imperial submitted that the Director made the same decision with respect to the use of the corporate plan for allocation for two issues in 2012: Issue 2 – Procurement Personnel Costs and Issue 20 – Well Servicing Costs. I have already addressed Issue 2 and found that the Director's decision that Imperial failed to provide sufficient supporting information was reasonable. I have not previously addressed Issue 20 which specifically refers to the Director's decision on Imperial's use of the corporate plan regarding 2009 – Issue 14, quoted in part above.

[80] Imperial argues that the Director's insistence on timesheets and other evidence to justify the allocations in the corporate plan is unreasonable and inconsistent with past practice. Imperial submits that the *Oil Sands Information Bulletin 2012-19, Oil Sands Dispute Review Committee Report* (the "Imperial DRC") established that Imperial's use of its corporate plan as the basis for allocating shared costs was acceptable. Though Imperial did not put it this way, its argument is that the Director is taking another "kick at the can" on an issue that it lost before the Imperial DRC.

[81] The Imperial DRC reviewed Imperial's costs for the purposes of calculating royalties for the years 2000-2004. The Imperial DRC concluded that allocation of shared costs based on the corporate plan was acceptable and that timesheets did not necessarily provide a better basis for allocations. The Imperial DRC accepted that management analysis of the work required for a project in the budgeting process was a reliable method for allocation. The Minister accepted the

2025 ABKB 303 (CanLII)

Imperial DRC's recommendations, which included allocations of shared costs based on the corporate plan.

[82] Alberta signalled its rejection of the Imperial DRC's position on timesheets and similar evidence when it issued *Oil Sands Information Bulletin 2013-14* quoted earlier in these Reasons at paragraph 64. *Oil Sands Information Bulletin 2013-14* was issued on July 31, 2013, *after* the end of the four audit years that are disputed in this proceeding. Imperial did not have the benefit of it prior to the audit years in issue and, accordingly, could not govern its affairs in accordance therewith.

[83] Imperial submits that the Imperial DRC confirmed the parties' reasonable expectations with respect to the use of the corporate plan for allocation of shared costs. Alberta argues that Imperial DRC is not binding because it was based on the pre-*OSACR* regime. Though this is true, the pre-*OSACR* regime was not meaningfully different on the points in issue. Alberta is correct that the Imperial DRC is not binding in the sense that it is not a court decision. That said, the panel that decided the Imperial DRC was comprised of distinguished counsel with relevant expertise; their views are worthy of respect and careful consideration. In a royalty regime that seeks to balance the legitimate interests of the resource owner and oil sands operators, a departure from the parties' reasonable expectations demands a justification. As the Supreme Court of Canada noted in ***Vavilov*** at para 14, "...administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be 'justified to citizens in terms of rationality and fairness'...".

[84] Given this ethos, the Director's insistence on timesheets and similar evidence to support the allocation of shared costs without addressing the Imperial DRC's conclusion that Imperial's corporate plan methodology was equal to or better than a timesheet-based approach is unreasonable. Moreover, at this late date, even if the Director could justify his position, it would be unfair to require Imperial to adduce the type of granular evidence of employee activities that the Director says is required. In my view, the only reasonable outcome at this stage is for the Director accept Imperial's corporate plan approach to the allocation of shared costs and revise the costs for the disputed issues accordingly. Accordingly, I so direct.

[85] Given my conclusion in para 34 above, this direction also applies to 2010 – Issue 21 and to 2011 – Issue 12.

V. Specific Issues

A. Worley Parsons Contract Employee Costs

[86] The Director disallowed 45% of Imperial's internal charge out rate for contract personnel who worked for the engineering firm Worley Parsons. This relates to the following issues:

2009 – Issue 16 – Salary Cost Rate Adjustment Doc X6 – Capex; and

2009 – Issue 21 – Development Unit Cost – X6.

[87] Imperial's Notice of Objection stated that "in calculating the 45% applicable to Imperial's contractors, the Auditor improperly disallowed the contract fee Imperial must pay to Worley Parsons as part of its contract with Worley Parsons. The Auditor provided no basis upon which to disallow this contractually required fee...." The Director nevertheless agreed with the auditors' conclusions and observed that "[t]he information Imperial provided to me regarding the

2025 ABKB 303 (CanLII)

Worley Parsons contractor fee was provided after the Assessment and was not considered by audit and therefore is new information under section 4 of the Dispute Regulation and was not considered during my review." The Director further observed it was "difficult to differentiate Imperial's employees from Worley Parsons contractors."

[88] Imperial submits that it provided the auditors with the relevant excerpt from the Worley Parsons contract that explained that the fee was to compensate Worley Parsons for Imperial's proportionate share of employment taxes and employee benefits. Correspondence from the auditors to Imperial also suggests that the contract fee paid by Imperial compensates Worley Parsons for some overhead costs. Imperial's position is that the fees associated with the Worley Parsons employees were payable to Worley Parsons pursuant to the contract and, as such, should be recoverable. Imperial points to *Oil Sands Information Bulletin 2013-14*, which suggests that auditors will not go behind third party contracts to question the appropriateness of contract fees:

> The costs for employees who provide services to a Project on a contract basis will be determined by the terms in the contract agreed to between the employee, or the entity supplying the employee, and the Project operator.

[89] Imperial further submits that the auditors had sufficient information to allow them to differentiate between Imperial and Worley Parsons employees. Imperial provided the auditors with Worley Parsons invoices with employee names redacted and a spreadsheet listing employees by name with a column indicating if an employee was a contractor.

[90] *OSACR,* Schedule 1, Item 57 provides that employee benefits are a specifically included cost. The Worley Parsons contract fee appears to be, in part, to compensate Worley Parsons for Imperial's share of employee benefits. Accordingly, at least part of the contract fee is consistent with the spirit of *OSACR*, Schedule 1, Item 57. Further, the guidance to oil sands operators in *Oil Sands Information Bulletin 2013-14* suggests that contract fees like those in issue are acceptable and will not be second guessed by auditors and the Director.

[91] The spreadsheet provided by Imperial appears to distinguish between Imperial employees and contractors. It is not clear to me why this was not enough for the auditors. Regardless, it is evidence that Imperial was willing and able to provide the auditors with the information to allow the auditors to distinguish between Imperial employees and contractors employed by Worley Parsons.

[92] The Director's decision to affirm the auditors' decision to treat Worley Parsons contractors as Imperial employees and to assess their costs using *OSACR*, Schedule 1, Item 57 is unreasonable because the Director failed to address why the auditors failed to follow the guidance in *Oil Sands Information Bulletin 2013-14* concerning costs of contract employees. Further, the Director's decision to accept the auditors' conclusion that it was difficult to differentiate between Imperial and Worley Parsons employees is unreasonable because he failed to explain why he agreed with the auditors' assessment. I direct the Director to re-assess the evidence provided by Imperial to determine whether it shows which individuals are Imperial employees and which individuals are contractors and to address the guidance concerning the cost of contract employees in *Oil Sands Information Bulletin* 2013-14.

[93] Given my conclusion in para 34 above, I direct the Director to re-assess Imperial's evidence for 2010 – Issues 17 and 28 and 2011 – Issues 20 and 18.

2025 ABKB 303 (CanLII)

B. Are Development Unit Costs as Assessed by Alberta or as Certified by PWC?

[94] The disallowance of costs of employees of Imperial's ExxonMobil affiliates is common to several audit issues:

> 2009 – Issue 19 – Field Personnel – Research Recoveries
>
> 2009 – Issue 36 – CAF XE and Allocations
>
> 2012 – Issue 20 – Field Personnel

[95] The Director's explanation for disallowing the costs of employees of Imperial's ExxonMobil affiliates in connection with 2012 – Issue 20 – Field Personnel is representative:

> [I]nsufficient backup information was provided to the department and it was reasonable to disallow these costs. Imperial was responsible to provide the Department with all of the required information requested in a useable form to allow for reasonable audit procedures and tests to verify filings in the EOP.

[96] Imperial objects to the Director's disallowance of costs of employees of its ExxonMobil affiliates. Imperial disagrees with the auditors' use of *Oil Sands Information Bulletin 2015-2* because it post-dates the audit years but submits that the bulletin nevertheless supports Imperial's position:

> If the offshore service is provided by an affiliate, the amount of allowed costs to be charged to the Project must reflect the FMV of the service or comparable service from the location where the service took place, and not the FMV of the service in Canada. <u>If the FMV of the offshore service from the location where it was provided cannot be determined, then the operator may claim the lesser of the amount charged or the actual cost to provide the service in the location where the service took place</u>.
>
> If the offshore service is not subject to the "solely dedicated" rule (Information Bulletin 2013-14) and said service is shared between Project and non-Project units within the company, then the operator is responsible for allocating the offshore cost such that the portion of the cost allocated to the Project may be treated as an allowed cost while the remaining portion of the cost allocated for non-Project uses is not an allowed cost. The operator's suggested allocation methodology for this purpose must be appropriate, reasonable and auditable to the satisfaction of the Minister. [emphasis added]

[97] Imperial submitted that it was unable to determine the fair market value of the services. As such, Imperial retained PricewaterhouseCoopers LLP ("PwC") to certify that the inter-affiliate charges were at cost with no profit element. The Director did not accept the PwC certification. In connection with 2009 – Issue 19 – Field Personnel – Research Recoveries, the Director stated as follows:

> While the internal salary rates could have reflected all or some actual costs, as per PwC certification, those rates would have included various ineligible components that were related to office space, IT, corporate overhead and so on. These components of the internal salary hourly rates were not disclosed to the Auditor for a review, neither were the employees' salaries that were allocated to the pool for internal salary rate calculation.

2025 ABKB 303 (CanLII)

[98] The Director's position is, in my view, reasonable. There is nothing in *OSACR* or *Oil Sands Information Bulletin 2015-2* that requires the auditors to take PwC's certification as dispositive of actual cost. Should the auditors determine it necessary and appropriate, they must be able to review the evidence alleged to support the claimed costs. Moreover, the Director's position that providing services through an affiliate does not turn excluded costs into allowed costs is a reasonable interpretation of *OSACR* that prevents operators from gaming the system.

[99] Given my conclusion in para 34 above, this applies equally to 2010 – Issue 18 and 2011 – Issue 21.

C. US Benefit Rate or Canadian Benefit Rate?

[100] Imperial states that certain employees working in its Western Canada Major Projects unit were employees of a US affiliate and are paid US benefits. Imperial asserts that the US benefits are allowed costs. The Director does not appear to disagree with Imperial's position in principle. Rather, the Director concluded that the auditors were correct to reject Imperial's claim on the grounds that Imperial failed to provide sufficient evidence that US benefits were paid. The auditors allowed benefits at the Canadian rate (approximately 35% of salary), not the US rate (approximately 52% of salary).

[101] The auditors requested paystubs from Imperial to verify that the US benefits were paid. Imperial says that it provided the requested paystubs in a Zip file attached to an email. Alberta's brief states that the paystubs provided by Imperial, which it says are numbered in the Record ABJ 1255-1270, do not reflect US benefit rates. Regrettably, the copy of the Record provided to the Court included only ABJ 1255 as a single page pdf, not the balance of the paystubs. As such, it is impossible for the Court to determine whether Imperial provided the auditors with the information required to substantiate that US benefits were paid and at what rate.

[102] I direct the Director to review the complete Record (not the partial Record provided to the Court) to determine whether Imperial provided paystubs that substantiate that US benefits were paid and, if so, the rate at which they were paid. If Imperial provided the requested evidence, I direct the Director to decide the issue afresh.

D. Noetic Engineering Study

[103] Some of the costs disallowed for 2009 – Issue 19 – Field Personnel – Research Recoveries relate to a study done by Noetic Engineering. The Noetic Engineering study was a multi-client research project to address well casing integrity. The Director observed that the "research, while extremely useful and very important, generated information that is directly applicable not only to Cold Lake, but is also directly applicable to any thermal in-situ oil sands operation and it was a multi-client study, with participation by many partners and not solely the Cold Lake OSR Project." The Director went on to disallow the costs of the Noetic Engineering Study because "it is not exclusively dedicated to the Project (area) as per OSACR Schedule 1 item 56 column 1."

[104] Earlier in these Reasons, I explained that *OSACR*, Schedule 1, Item 56, Column 1 contains two separate standards, one for personnel and one for facilities. The work by personnel must have "immediate applicability" whereas facilities must be "exclusively dedicated." Based on the information provided to me, it is not clear if the Noetic Engineering Study costs are personnel costs, facility costs, or a combination of the two.

2025 ABKB 303 (CanLII)

[105] I remit the issue of the Noetic Engineering Study to the Director to consider afresh with the benefit of the interpretation of *OSACR*, Schedule 1, Item 56, Column 1 set out herein.

E. Transmission Line Costs

[106] The Director disallowed costs associated with a pre-disturbance survey required for the construction of a 144 kV transmission line on the Cold Lake project lands. The Director concluded:

> Although OSACR Schedule 1, items 18 and 19 require that certain electricity systems must be "on Project lands" to be specifically included costs and some of these costs appear to be incurred on Project lands, this was irrelevant because these electrical systems are not part of the Project description and not allowed costs.

[107] *OSACR*, Schedule 1, items 18 and 19, Column 1 provide that the cost of "utilities required for Projects" including "electricity transmission lines" are allowed costs. The difficulty in the present case is that Imperial constructed a cogeneration plant at Cold Lake that exports electricity to the provincial power grid. The cogeneration plant and the infrastructure for producing electricity is expressly excluded from the scope of the Cold Lake project. Imperial says that the Director's interpretation of this exclusion as extending to transmission lines that can import back-up power is unreasonable.

[108] This is another issue where the parties have provided insufficient information for me to decide the issue. If the transmission line is for the export of electricity from the cogeneration facility, then the Director's interpretation is reasonable. Similarly, if it is a bi-directional line that is capable of both exporting electricity from the cogeneration facility and importing power from the grid, the Director's interpretation is reasonable because the line can be fairly said to be part of the cogeneration project. However, if the only purpose of the transmission line is to import power from the grid for the Cold Lake oil sands operations, then the Director's decision is unreasonable. I direct the Director to review the evidence provided by Imperial and decide the issue afresh.

F. Requirement for Imperial to Provide Documentation to Verify Reconciliation of Salary Costs

[109] The Director disallowed certain costs claimed by Imperial on the grounds that the SAP costs submitted by Imperial were greater than the corresponding costs in Imperial's Human Resources Management System. This dispute is common to the following issues:

> 2009 – Issue 13 Field Personnel – Salary Completeness, HRMS vs SAP – Field XE
>
> 2010 – Issue 20 – Field Personnel Cost
>
> 2011 – Issue 11 – Field Personnel Cost

[110] Imperial provided a reconciliation that showed that the discrepancy between the two systems was less than thought by the auditors. The auditors, however, did not accept the reconciliation because the source documentation was not provided. Imperial's position in its second written submission was that "[t]o the extent the Auditors had questions or required further information or data with respect to these issues, they had numerous opportunities to make those requests of Imperial and in many cases did not raise queries with respect to them."

2025 ABKB 303 (CanLII)

[111] As I have noted previously in these Reasons, the audit process is iterative and cooperative. But it also must come to an end. The auditors must balance making additional inquiries against the need for finality. With respect to the discrepancy between the SAP costs and HRMS costs, I cannot fault the auditors. They acted reasonably in making their concern known to Imperial. Imperial provided a reconciliation without source documents to show their work. Imperial could have and should have shown its work and connected it to the underlying evidence. The Director's decision to affirm the auditors' conclusion is reasonable in the circumstances.

VI. Conclusion

[112] I have directed the Director to reassess various issues in these Reasons. Given the passage of time since the audit years, this reassessment must be done promptly.

Heard on the 12th and 13th days of February, 2025.
Dated at the City of Calgary, Alberta this 16th day of May, 2025.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Bryan Walker, Lindsay Bec, & Meghan Parker, Norton Rose Fulbright Canada LLP
for the Applicant

Doreen Mueller, KC & Julia Kingdon, Alberta Justice
for the Respondent

2025 ABKB 303 (CanLII)