

# In the Court of Appeal of Alberta

**Citation: McCain Foods Limited v Alberta Utilities Commission, 2025 ABCA 297**

**Date:** 20250902

**Docket:** 2501-0189AC

**Registry:** Calgary

**Between:**

**McCain Foods Limited and Coaldale Renewables GP Inc.**

Applicants

- and -

**Alberta Utilities Commission and FortisAlberta Inc.**

Respondents

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**Reasons for Decision of  
The Honourable Justice Jane Fagnan**

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Application for Permission to Appeal

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## **Introduction**

[1] The applicants, McCain Foods Limited and Coaldale Renewables GP Inc, apply for permission to appeal *AUC Decision 29294-D01-2025* under s 29(1) of the *Alberta Utilities Commission Act*, SA 2007, c A-37.2.

[2] The application is granted in part for the following reasons.

## **Background**

[3] McCain owns the McCain Coaldale Processing Plant which produces a variety of McCain potato products. CRGP is a wholly owned subsidiary of Elemental Energy Renewables Inc, a developer, owner and operator of wind, solar, and hydro energy projects.

[4] In 2019, the Alberta Utilities Commission interpreted the Self-Supply Exemption in the *Electric Utilities Act*, SA 2003, c E-5.1 as it existed at the time, finding that it prohibited the export of excess electricity: *AUC Decision 23418-D01-2019 re EPCOR Water Services Inc EL Smith Solar Power Plant* (February 20, 2019) at para 102.

[5] This led to consultation with stakeholders and study of the issue of self-supply. The Commission eventually reported to the Alberta government that a system of unlimited self-supply and export, were it to be permitted through statutory amendments, would lead to system and societal benefits: AUC, *Self-supply and Export – Alberta Utilities Commission Discussion Paper* (June 5, 2020) (online) at 28-30, PDF at 29-31.

[6] The consultation and report culminated in proposed legislative amendments initially through Bill 86 (*Electricity Statutes Amendment Act*), introduced in November 2021, and then through Bill 22 (*Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act*).

[7] The Associate Minister of Natural Gas and Electricity stated in 2021 (Alberta Legislature Hansard, November 24, 2021, Second Reading of Bill 86, at 6450):

The act also enables unlimited self-supply with export, the ability to generate electricity on-site, to sell any surplus to the grid, and to draw from the grid when required. This piece will be particularly appealing for larger industrial-scale operations. It removes restrictions that limited adoption of this technology while ensuring that all system participants continue to cover the fair share of transmission system costs.

There was widespread support for the adoption of unlimited self-supply with export among stakeholders as they believe it will support investment growth and innovation across the economy. By providing industry with clear regulations and policy, increased self-supply with export projects will result in generation competition that should help reduce electricity costs and improve system reliability over time.

[8] The Self-Supply Exemption provisions were ultimately amended through the *Electricity Statutes (Modernizing Alberta's Electricity Grid) Amendment Act*, SA 2022, c 8, which came into force on March 6, 2024 following the multi-year inquiry into self-supply. The Commission's decision in this matter was one of the first to consider the amended legislation.

[9] The applicants have been involved in the development of the Coaldale Renewable Energy Project on property owned by McCain. The Project involves a \$600 million investment on the part of McCain in its Coaldale facility. The Project would generate up to 40 MW to be primarily consumed at the McCain Plant. The Project was in development for several years, with an initial stakeholder consultation occurring in May 2021. McCain worked closely with Fortis for over two years. Fortis had been aware and supportive of advancing the Project design and self-supply and export configuration through the connection process. The Alberta Electric System Operator and AltaLink were also involved in those discussions.

[10] On September 6, 2024, CRGP applied to the Commission for approval to construct the Project. On November 29, 2024, McCain separately applied for approval to connect the Project to the Fortis electric distribution system to export any unused electricity from the Project to a maximum of 12.3 MW to the local distribution system during periods when the generation from the Project exceeds McCain's self-supply consumption. The Commission consolidated the applications.

[11] In a letter dated December 13, 2024, the Commission communicated its ruling that it would initiate a preliminary module to consider and determine specific legal issues related to self-supply and export prior to considering the facility-specific aspects of the applications, including whether the Project qualified for the statutory Self-Supply Exemption under s 2(1)(b) of the *Electric Utilities Act*, SA 2003, c E-5.1 (*EUA*), and whether it was necessary for the Project to satisfy the statutory exemption from Part 3 of the *Hydro and Electric Energy Act*, RSA 2000, c H-16 (*HEEA*), which applies to electric distribution systems. The Commission directed that because the issues identified were legal in nature, submissions should be in the form of written legal argument prepared by an active member of the Law Society of Alberta.

[12] In its June 3, 2025 decision, the Commission held that because the Project would produce energy across several "non-contiguous" lands due to a railway line, Highway 3 and Township Road 93B traversing the nine sections on which the Project would be located, the electric energy would not be consumed solely on the same property on which it is produced. Consequently, the

Commission held that all electricity generated by the Project must be sold to the provincial power pool, not McCain, to comply with the *EUA*.

[13] The Commission also determined that the electric gathering lines are not permitted under the *HEEA*, as they would constitute an electric distribution system as defined in the *HEEA* and would cross a public highway at greater than 750 volts. The Commission held the proposed collector lines are “an attempt to self-distribute and are not permitted by the *HEEA*”. Therefore, the Project did not qualify as an exception to Fortis’ exclusive right to distribute electricity in the region. The Commission concluded that the Project constituted an impermissible attempt by McCain to self-distribute electricity, effectively operating a distribution system in Fortis’s service territory. The Commission dismissed the applications and closed the proceedings.

### Test

[14] In considering whether permission to appeal should be granted, the Court will consider:

- a) whether the appeal raises a *prima facie* meritorious issue of law or jurisdiction;
- b) whether the point on appeal is of significance to the practice;
- c) whether the point raised is of significance to the action itself;
- d) whether the appeal will unduly hinder the progress of the action; and
- e) the standard of appellate review that would be applied if permission to appeal is granted.

***Battle River Power Coop v Alberta Utilities Commission***, 2024 ABCA 260 at para 15.

[15] In a nutshell, the Court should consider whether there is an issue of law of sufficient importance to justify an appeal: ***AltaLink Management Ltd v Alberta (Utilities Commission)***, 2022 ABCA 18 at para 13.

### Analysis

[16] The applicants request permission to appeal on the following grounds:

1. The Commission erred by interpreting s 2(1)(b) of the *EUA* without regard to the legislative intent or context of the Self-Supply Exemption and without regard to the public interest.
2. The Commission erred in interpreting the Self-Supply Exemption as applying only to arrangements where electric energy is generated and

consumed on a single contiguous property that is not bisected by roads or railways.

3. The Commission erred in categorizing electric energy gathering facilities associated with a renewable generation facility under the *HEEA* as:
  - a) an "electric distribution system" where they form part of an electricity consumer's self-supply and export arrangement, such as in the case of the Project; and
  - b) a "power plant" when they are part of a grid-supply project.
4. The Commission unreasonably concluded that the purpose of the Project's gathering lines was to deliver electric energy to the end user as opposed to gathering electric energy from a source.
5. The Commission breached principles of natural justice and procedural fairness by applying Part 3 of the *HEEA* and the definition of "distribution system" inconsistently with directly analogous precedent without adequate reasons for doing so.

[17] The first two proposed grounds of appeal relate to the interpretation of s 2(1)(b) of the *EUA*. The 2024 amendments resulted, *inter alia*, in the addition of the definition of "self-supply" in s 1(1)(vv.1) and changed the wording of s 2(1)(b), which creates an exemption from the *EUA* for self-supply produced on a person's property.

[18] The Commission held in part:

14 ...While the *Electric Utilities Act* does not define "property" or "that property," the Commission considers that the term "property" cannot be stretched as far as proposed by CRGP and McCain. It is not enough that the generating units are all located on lands owned by McCain. The Commission finds that to be produced and consumed on "that property," the lands must, at a minimum, be contiguous, and the proposed project lands are not. The proposed project is spread over nine quarter sections with various sections of the project separated by a railway line, Highway 3 and Township Road 93B... The Commission ... finds that CRGP and McCain have not established that the electrical energy will be produced and consumed on the same property.

[19] "Property" and "that property" are used in both ss 1(1)(vv.1) and 2(1)(b). They are not defined in the *EUA*. The terms "contiguous", "non-contiguous", "railway", "highway" and "road" do not appear in the *EUA*. The *HEEA* employs the terms "land" and "property". Again, neither one is defined.

[20] The applicants intend to argue on appeal that the Commission erred in law in interpreting s 2(1)(b) in an arbitrary and overly restrictive manner and without regard to the scheme of the *EUA*, the object of the *EUA*, and the intention of the legislature in passing Bill 22.

[21] The respondent submits the appeal on these issues does not raise a *prima facie* meritorious issue of law or jurisdiction. The respondent opines as to possible analyses which would support the Commission's conclusions. However, those analyses are not reflected in the Commission's reasons.

[22] The Commission's reasons on this point are brief. It mentions the argument on the part of certain interveners that "property" refers to a single titled parcel of land. The Commission's reasons place importance on the existence of a railway, highway and road on land, although those types of interests may traverse a single title. There is no fulsome discussion of the words of the statute or the intent of the legislature. Fortis had argued before the Commission that the interpretation must be consistent with the *HEEA*. The Commission makes no reference to the *HEEA* in its reasons on this issue.

[23] It is not this Court's role on a permission to appeal application to decide the merits; the issue need only be more than merely theoretically arguable: *AltaLink Management Ltd* at para 13. The first and second grounds meet the threshold for permission to appeal.

[24] The third and fifth grounds relate to the interpretation of "electric distribution system" and "power plant" in the *HEEA* in the context of a proposed self-supply and export arrangement under the *EUA*.

[25] The applicants intend to argue that the Commission erred in finding that the term "electric distribution systems" applies to self-supply arrangements. On this issue, the Commission concluded:

23 The Commission therefore finds that the proposed collector lines are an attempt to self-distribute and are not permitted by the *Hydro and Electric Energy Act*. The proposed collector lines would be subject to Part 3 of the *Hydro and Electric Energy Act*. While the proposed project is part of Fortis's service area, under Section 26 of the *Hydro and Electric Energy Act* the Commission could approve the construction or operation of a distribution system in Fortis's service area if it is for the purpose of providing service to a customer who is not receiving service from Fortis. Since Fortis is already providing service to McCain, CRGP is not permitted to construct and operate a distribution system in Fortis's service territory.

[26] Section 1(1)(b)(i) of the *HEEA* defines "electric distribution system" as any system, works, plant, equipment or service for the delivery, distribution or furnishing of electric energy directly to "consumers" (plural). The Commission did not cite that definition in its reasons. Again, the reasons are brief and do not explain the interconnection between the self-supply provisions of the

*EUA* and the words of, and intent behind, the *HEEA*. The third and fifth grounds meet the threshold for permission to appeal.

[27] The Commission's interpretation of the relevant provisions of the *EUA* and the *HEEA* are questions of law.

[28] Questions of law appealed pursuant to s 29 of the *Alberta Utilities Commission Act* are reviewed for correctness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37 citing *Housen v Nikolaisen*, 2002 SCC 33 at para 8; *Equus Rea Ltd v Alberta (Utilities Commission)*, 2022 ABCA 61 at para 26, *AltaLink Management Ltd v Alberta Utilities Commission*, 2023 ABCA 325 at paras 39-40, *Battle River Power Coop v Alberta Utilities Commission*, 2024 ABCA 260 at para 15.

[29] The issues are of significance to the practice as they concern the scope and parameters of the self-supply arrangements contemplated by the *EUA*. They are of sufficient importance to justify an appeal. This Court's decision would have practical utility: *FortisAlberta Inc v Alberta (Utilities Commission)*, 2020 ABCA 271 at para 33. The issues are sufficiently important that the Court of Appeal should say whether the Commission was right or wrong: *AltaLink Management* at para 13.

[30] The issues are also clearly of significance to the action as the Commission's interpretations led it to dismiss the applications and close the proceedings.

[31] The Court must consider whether an appeal will unduly hinder the progress of the action. Again, the Commission closed the proceedings. The applicants have filed an application for review and variance of the Decision. However, the Commission placed that application in abeyance pending a determination of the application for permission to appeal and subsequent appeal, if granted.

[32] That leads to the fourth proposed ground of appeal which relates to the Commission's understanding of the proposed Project and its purpose.

[33] The parties disagree as to whether the Decision on this point is reviewable for unreasonableness arising from an error of fact or mixed fact and law. The applicant cites recent cases for the proposition that such errors must be reviewable: *Vavilov* at paras 24, 67, 82; *Yatar v TD Insurance Meloche Monnex*, 2024 SCC 8 at paras 57, 65, *Northback Holdings Corporation v Alberta Energy Regulator*, 2025 ABCA 186 at para 28 (application for leave to appeal to SCC pending), *Yatar* at paras 57-58, 65; *Democracy Watch v Canada (Attorney General)*, 2024 FCA 158 at para 56.

[34] The respondent notes that s 1(2)(b) of *HEEA* provides that the Commission's decision is final as to whether any line, system or installation is, or is part of, a power plant, an energy storage facility, a transmission line, an industrial system or an electric distribution system. It takes no

position on the availability of judicial review in respect of alleged errors of fact or mixed fact and law in Commission decisions but submits that an application for judicial review must be commenced by way of Originating Application in the Court of King's Bench in accordance with Rule 3.15 of the *Rules of Court*.

[35] The applicants propose to argue in relation to their fourth ground of appeal that the Commission unreasonably concluded that the purpose of the Project's gathering lines was to deliver electric energy to the end user as opposed to gathering electric energy from a source.

[36] The applicants' application for review and variance concerns the purpose of the gathering lines, whether they constitute a distribution system and the impact on the decision of any mischaracterization in that regard by the Commission. These issues largely overlap with the fourth ground of appeal.

[37] Generally, parties should exhaust the available administrative process and remedies before bringing an appeal or judicial review to the court. As was the case in *AlphaBow Energy Ltd v Alberta Energy Regulator*, 2023 ABCA 239 at para 21, the application for permission to appeal on the fourth issue is, at best, premature. The Commission's approach to the Project was informed by its interpretation of various provisions of the *EUA* and the *HEEA*. The application for review and variation is in abeyance and can proceed following the appeal on the statutory interpretation issues.

## Conclusion

[38] Permission to appeal is granted with respect to two broad issues. The first encompasses the first and second issues outlined by the appellant. The second encompasses the appellant's third issue and the fifth issue, to the extent that it may relate to the third issue.

1. Did the Commission err in its interpretation of "property" in relation to the self-supply provisions in the *EUA*?
2. Did the Commission err in its interpretation of "electric distribution system" under the *HEEA* as it relates to self-supply and export arrangements?

Application heard on August 6, 2025

Reasons filed at Calgary, Alberta  
this 2nd day of September, 2025

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Fagnan J.A.

**Appearances:**

M.K. Ignasiak, KC

J. Kennedy

for the Applicants

T. Campbell

for the Respondent Alberta Utilities Commission

A. Sears

for the Respondent FortisAlberta Inc.