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Sense and Sensibility at the AER?

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Decision Commented On: Pembina Pipeline Prehearing Meeting 2015 ABAER 002

The Alberta Energy Regulator (AER) held a prehearing meeting on May 14, 2014 with all of the objecting parties and the project's proponent Pembina Pipeline Corporation (Pembina). The AER felt it was appropriate to issue a decision report for the guidance of industry, landowners and objecting parties.

The Decision noted that the *Responsible Energy Development Act*, SA 2012, c R-17.3 (*REDA*) requires the AER to provide for the "efficient, safe, orderly and environmentally responsible development of energy resources in Alberta," under subsection 2(1)(a). Further the AER must consider the interests of landowners when reviewing applications under section 15 of *REDA* and section 3 of the *Responsible Energy Development Act General Regulation*, Alta Reg 90/2013. Thus when a matter is referred to a hearing, a Panel is appointed to establish a hearing process for the application, and:

> [i]n determining procedural matters, the panel takes guidance from REDA, its regulations, and its rules. One of the panel's most important responsibilities is to ensure that the hearing process is fair. This includes ensuring that parties are provided with adequate notice of the hearing and application and that they have an opportunity to reply or to be heard (at para 5).

Further, the process is "intended to be fair, efficient, and effective for all concerned: for participants as well as the applicant" (at para 6, emphasis added).

The Decision is a short, well written 10 page ruling that warrants careful consideration by industry, lawyers and the public, but in this post I will focus on 3 novel aspects.

Publication

The Decision is available on AER's website. The decision to publish the decision represents a break with past practice (criticized by Nigel Bankes here and here) and is to be welcomed.

Adjournment

On April 17, 2015, the AER issued a Notice of Hearing setting July 13, 2015, as the hearing start date. Only the applicant Pembina supported the original hearing date.

The participants, among them the Grassroots Alberta Landowner Association (Grassroots) wrote a letter on May 5, 2015 asking for an adjournment to October 26, 2015 arguing that a summer hearing would interfere with their farming business and harvesting. The aboriginal participants, Gunn Métis Local 55, the Driftpile First Nation, the Alexander First Nation, and the Alexis Nakota Sioux Nation, also spoke to the proposed adjournment. They advised that the July 13 hearing schedule would directly conflict with the extensive preparations for the annual historical Lac Ste. Anne pilgrimage, taking place from July 18 to 23. All participants noted that the timeline, April 17 to July 13 – some 60 working days, was inadequate and they would have to rush to obtain expert testimony, particularly for the aboriginal participants who were negotiating with the applicant Pembina for their interim advance costs.

In an uncommon display of sensitivity, the AER Panel noted that the decision to grant an adjournment was discretionary and what was fair depended on the circumstances. In granting the adjournment, the AER Panel identified the relevant factors by way of seven questions to be answered:

Question 1: What is the nature of the application?

The proposed project was considered significant as it extended 270 kilometres through 70 landholders' private lands most of which were held as farmland and public lands which fell within the traditional territories of the aboriginal participants.

Question 2: When was the adjournment requested?

The AER had established the original hearing schedule without consulting the parties in order to conduct the hearings in a timely manner. The adjournment request was made shortly thereafter and well in advance of the hearing date.

Question 3: Have there been any previous requests?

This was the first request for an adjournment and even the applicant did not argue that the requested adjournment was an attempt to delay the proceedings.

Question 4: Was the hearing schedule established through consultation with the parties?

The AER set the original hearing schedule without consulting the parties and the participants had established that keeping to the original schedule "would be unfair and would make it difficult for them to effectively engage in the process" for the reasons described above (at para 21).

Question 5: Are there any concerns about an unnecessary or unjustified delay?

The applicant argued that the participants had known about the application for over a year, but the AER Panel noted that no one could know that the application would be set for a hearing until April 9, 2015 at the earliest when a letter was sent by the AER to the proponent and participants who had filed statements of concern advising them that a hearing would be held. This was

followed by the AER issuing the formal Notice of Hearing on April 17, 2015.

At the meeting of May 14, 2015 giving rise to the Decision, the AER Panel heard from all parties that they had, prior to and after the Notice of Hearing, been endeavouring in good faith to engage with each other to resolve concerns and that this would continue. In short, the AER noted that time did not appear to be wasted in the process and the participants "could not reasonably be expected to have started preparing for the hearing or retain experts before the notice of hearing was issued" (at para 22).

Question 6: What would be the prejudice to the participants if no adjournment is granted?

The AER Panel was satisfied that "prejudice to the participants resulting from the original hearing date outweighs any potential prejudice to the applicant of an adjournment. Participants provided specific examples of how they would be prejudiced, including:

- being forced to choose between participating in traditional practices and gatherings, or participating in the hearing;
- being compromised in their ability to provide helpful submissions in the most efficient manner; and
- detrimental consequences to farm operations and livelihood" (at para 23).

Question 7: What would be the prejudice to the applicant if an adjournment is granted?

The AER Panel noted that the applicant Pembina did not provide any specific examples of prejudice but only argued fairness. While a speedy process is desirable for any applicant, the AER panel found "the balance of fairness and potential prejudice weighs in favour of the adjournment" (at para 25).

The AER Panel accepted Grassroots' proposed adjournment date of October 26, 2015, noting that a lesser adjournment to August or September would "present more conflict with agricultural operations and traditional harvesting activities by the Métis and First Nations" (at para 26) In granting the adjournment, the AER Panel noted the participants' submissions that an adjournment would enable them to collaborate; and avoiding duplication was desirable and more likely to be achieved with the adjournment which the AER Panel said they expected to continue.

Aboriginal Traditional Knowledge at the AER

Another notable aspect of the Decision is the possibility that the AER Panel would travel to the participant First Nation and Métis Communities to hear oral evidence on traditional knowledge.

Counsel for the aboriginal participants had, in the course of the pre-hearing meeting, advised that "oral evidence of traditional knowledge given by community elders would form an important part of their presentation. They also noted that the demands of travelling to and attending a hearing can be difficult for community elders" (at para 53). The AER Panel raised the possibility of travelling to the respective communities to receive such evidence. This surprising proposal was greeted with enthusiastic support by the counsel and representatives of the Alexander First Nation and lawyers for other aboriginal parties expressed interest in that procedure. Even the applicant Pembina was not adverse to this provided that the evidence was part of the public record.

The AER Panel said:

> [55] In light of the comments received at the prehearing meeting, the panel would like to further explore the idea of receiving oral evidence of traditional knowledge in the community. There are a number of procedural processes and logistics that would have to be worked out. The panel would have to ensure that oral evidence of traditional knowledge is gathered and included on the record in a manner that is respectful and fair for all parties.

To do so the AER Panel asked the lawyers for the aboriginal participants to confirm whether their clients were in agreement and to prepare proposals for the AER Panel as to timing and dates as soon as possible. If aboriginal participants were in agreement the AER Panel would provide an outline of the hearing plan to all parties for comment.

Consideration of oral evidence of aboriginal traditional knowledge would fulfill the directions of the Supreme Court of Canada in *Delgamuukw v British Columbia,* [1997] 3 SCR 1010 to "adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight" (at para 84). Traditionally *Delgamuukw* has been interpreted to allow the admission of aboriginal oral history as that was the specific result in the Supreme Court. However, I would argue that the specific language used regarding the consideration of aboriginal perspectives is much broader than the traditional interpretation.

Other Matters

Various other procedural matters were addressed sensibly in the Decision, including among others: Grassroots members who had filed confirmation of non-objection will be allowed to participate as members of the Grassroots group (at para 45-48); reciprocal Formal Information Request Process (at para 36-40); potential supervision of the presently amicable negotiation of advance interim cost requests (at para 33-35); deferral of firm witness schedules (at para 30-31) and potential collaboration (at para 41-44).

Significance

Traditionally, administrative tribunals such as the AER have not considered themselves bound by their own prior decisions as courts are (*stare decisis*). This has, at least in Alberta, been partially addressed by the Court of Appeal in *Altus Group v Calgary (City),* 2015 ABCA 86, the potential implications of which are canvassed by Professor Fluker in a blog post here. Essentially, the Court argues that there should be some consistency in interpreting the tribunal's home statute.

The AER's home statute is *REDA*, although one wrinkle is that *REDA* contemplates differing hearing panels. In this Decision this AER Panel has interpreted *REDA* and the AER Rules in accordance with the legislative intent with some surprising sensitivity. The precedential value of the Decision should be important.