September 11, 2015

Provincial Environmental Appeal Boards: A Forum of Choice for Environmental (and First Nation) Plaintiffs?

By: Nigel Bankes

Decision Commented On: *Chief Gale and the Fort Nelson First Nation v Assistant Regional Water Manager & Nexen Inc et al*, Decision No. 2012-WAT-013(c), BC Environmental Appeal Board, September 3, 2015

In this important (and lengthy) decision (115pp), British Columbia's Environmental Appeal Board (EAB) revoked Nexen's commercial water licence for two reasons: first, the terms and conditions of Nexen's licence were not technically supportable, and second, the Crown was in breach of its constitutional obligation to consult the First Nation with respect to the decision to issue the water licence.

I think that the decision is important for at least four reasons (notwithstanding the fact that the days for the version of the *Water Act*, RSBC 1996, c 483 in force at the time of this licence decision are numbered since it is due to be replaced by the new BC *Water Sustainability Act* in early 2016 and for comment see here). First, and most generally, it is an excellent example of the important role that environmental appeal boards can play in shining a light on the administrative practices of line departments. In the same vein, it is also offers a dramatic illustration of the differences between the role of an EAB and the role of a court on a judicial review or statutory appeal application. An EAB can offer a searching, *de novo*, technical re-assessment of the merits of the department's decision; a court is inevitably more deferential and precluded from engaging in an assessment of the merits. I have written at length on this important role that EABs serve, see "Shining a light on the management of water resources: the role of an environmental appeal board" (2006), 16 Journal of Environmental Law and Practice 131 - 185.

Second, the EAB offers some important and useful observations on the *Water Act* and the role of the EAB and also on the role of both precaution and caution.

Third, the Board's discussion of the duty to consult in a treaty context is detailed and well-reasoned and an interesting example of Board (rather than a court) assessment of the (non)satisfaction of the duty to consult: see *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 and my post on that decision, here).

Fourth, the remedy is significant since the outcome of a successful breach of a duty to consult case is rarely a decision to quash: see, for example *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511. The remedy was especially significant here since the licence authorized diversion of significant volumes of water (2.5 million cubic meters per year) and Nexen depends on this water licence for at least some of its fracking operations in the Horn River Basin.

The following attempts to summarize some of the more important of the EAB's observations and conclusions (with the aid of some fairly liberal "cutting and pasting") under the following headings: (1) a preliminary jurisdictional issue, (2) the role of an EAB on an appeal, (3) the object and purposes of the *Water Act*, (4) decision-making with incomplete information, (5) the Board's review of the merits of the licence decision, (6) the duty to consult, (7) the decision to revoke the licence, and, (8) implications for Alberta.

(1) A Preliminary Jurisdictional Issue

The EAB dealt with one preliminary jurisdictional issue at the outset, namely whether or not it had the jurisdiction to review a remedial Order that the Department had issued subsequent to the licence. The First Nation evidently contended that the Order also triggered the duty to consult which the Crown had failed to discharge. The EAB was of the view that the Order was a separate decision and that the First Nation should have taken out an additional appeal if it wished to put that Order at issue. Accordingly, the EAB concluded (at para 127) that it had no jurisdiction to consider the Order. This seems entirely correct and simply serves as a reminder of the need to recognize that there may be multiple decisions that need to be considered and separate applications made for each. In most cases EABs and courts will be able to join such applications. See, for example, my post on the Northern Gateway litigation here.

(2) The Role of the EAB on an Appeal

I can do no better than cut and paste the EAB's observations (at paras 157 – 158) as to its role:

> The Board's powers and procedures for hearing and deciding an appeal under the *Water Act* are not limited to reviewing the appealed decision, or the decision making process that led to that decision, for errors. The Board is authorized under ... the *Water Act* to conduct an appeal as a new hearing. As such, the Panel may consider evidence that was not before the Manager, as well as any information that the Manager considered. Indeed, in the present appeal, the evidence before the Panel consisted of 19 days of oral evidence (over 2,000 pages of transcript) and 42 exhibits, some of which were short documents or maps, and some were multi-volume sets running to hundreds or thousands of pages. Both expert opinions and published hydrological literature were included in the evidence provided to the Panel. Moreover, under section 92(8) of the *Water Act*, the Board has broad remedial powers in deciding an appeal. In the present case, the Panel may make any decision that the Manager could have made and that the Panel considers appropriate in the circumstances.
>
> Consequently, the Panel is not limited to determining whether there were errors or inadequacies in the Manager's decision-making process or his decision to issue the Licence. Rather, the Panel is entitled to consider the technical merits of the Licence based on all of the relevant information presented at the appeal hearing, including information that became available after the Licence was issued, and the changes that were made in the 2013 Water Plan Addendum. As such, the Panel's findings on the technical merits of the Licence will focus on assessing the extensive body of evidence that is before the Panel, rather than simply deciding whether the Manager's decision or his decision-making process was flawed.

(3) The Object and Purpose of the *Water Act* and Other Interpretive Issues

The Board took the view that the *Water Act* is principally a water allocation statute (at pars 161 – 162). However, this did not mean that decision makers under the *Water Act* could ignore the environmental context of their decisions (at para 163):

> … in deciding whether to issue a licence, the potential effects of the licensed water use on aquatic and riparian species and their habitat may be a relevant consideration. Water is a finite resource which may be subject to competing demands from private users, and adequate water quantity and quality is critical for maintaining aquatic ecosystems, including fish and fish habitat. Licensed water use may affect not only the amount of water available in a stream, but also the physical characteristics of the stream channel and banks.

The Board also commented on the ability of the original decision-maker (and itself as effectively the substitute decision maker) under the *Water Act* to take into account the cumulative effects of activities licensed by others that might have an impact on the ability of First Nations to exercise their treaty rights. Examples would include roads, wells and other resource developments and resource-related construction activity. The EAB concluded that such issues fell outside the *Water Act* and could not be considered (at para 170):

> … the Panel finds that there is no basis under the *Water Act* for a manager, in assessing a water licence application, to consider the broad cumulative environmental effects of oil and gas developments, such as roads, gas pipelines and gas wells, in the watershed. Those activities, and their environmental impacts, are regulated under other legislation, including the *Oil and Gas Activities Act*. Consequently, the Panel finds that, in deciding the present appeal, the Board has no jurisdiction to order the Manager or Nexen to "examine the effect of proposed withdrawals together with other activities that may have ecological or hydrological effects on the lake or stream, such as the construction of roads, bridges or pipelines," as requested by the First Nation.

On the other hand, decision makers under the *Water Act* can and must take into account the cumulative effect of other water withdrawals (at para 168):

> The Panel finds that it is consistent with the purposes of the *Water Act* to consider the total demand from all authorized water uses on the water source, and the impact that the total demand may have on stream flow as well as habitat in and about the stream.

Again this distinction makes sense in an administrative law context, but it cannot release the Crown from its obligations with respect to treaty rights: see in particular *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 and my post on that decision here.

The EAB also considered whether the precautionary principle should be read-in to the normative order of the statute. The Board declined to do so reasoning (at para 179) as follows:

> … the Panel finds that the precautionary principle is not mentioned in the *Water Act* and there is no indication that the Legislature intended this principle to apply to water licensing decisions. At para 129 of *Burgoon*, [decision available here] the

> Board rejected the proposition that the precautionary principle is one of the factors that must be taken into account in deciding whether to issue a water licence under section 12 of the *Water Act*. The Panel agrees with that finding in *Burgoon*.

However, the Board's aversion to precaution did not prevent it from embracing (at para 183) caution:

> Given the uncertainty involved in estimating stream flows and attempting to predict the potential impacts of a licence on the aquatic and riparian environment, a manager should take a conservative or cautious approach to making licensing decisions and setting conditions in a licence.

The Board returned to the need for caution several times in its discussion: see at paras 218 and 253 referring to the need for cautious use of comparator basins and instream flow models which might not be applicable in a muskeg basin setting. There are differences between caution and the precautionary principle. The latter is definitively normative (the decision maker *ought* to...) whereas "caution" is just good pragmatic advice, but in practical terms the outcomes may be similar in many contexts.

(4) Decision-making with Incomplete Information

The discussion throughout the decision makes it clear that the department was put in the position of making decisions on Nexen's application with inadequate information. While this theme pervades the decision, the EAB also addressed it explicitly in relation to what seems to have been the First Nation's argument to the effect that, given the inadequacy of the information, no licence should have been issued. The Board addressed this argument in two ways. First, it examined the requirements of the Act and regulation with respect to the information that an applicant must provide and then commented as follows (at para 176):

> The Panel notes that section 2 of the *Water Regulation* does not require an applicant to provide information about the potential environmental impacts of the proposed licence. The information required under section 2 focuses on identifying the applicant, the water source, the intended amount of the water to be used, the purpose of the use, the location of the diversion point and the water use, and the locations of any works to be built and any land that may be physically affected by the water use. However, a manager has broad discretion to issue directions to the applicant and to require further information pursuant to sections 10(1)(b) and (c) of the *Water Act*. Given the purposes of the *Water Act* discussed above, additional information about the potential impacts of a licence on the water source, including aquatic and riparian species and their habitat, may be relevant to assessing a licence application, depending on the circumstances of a particular application.

Second, the Board emphasized that information requirements in any particular case must be context specific (at para 177): "The amount and type of information needed to properly assess an application to divert 500 gallons of water per day for domestic use may be quite different from the amount and type of information needed to properly assess an application to divert 2.5 million cubic metres of water per year for industrial use." In this case, the information needs were large (at para 178):

> In the present case, Nexen sought to use a large volume of water from a relatively small lake (i.e., not a major river or reservoir) for several years. There was no history of licences of a similar nature to provide guidance in assessing Nexen's application, and there was limited hydrological information about northeast B.C., and almost no hydrological information about the Tsea River before 2009. Consequently, there was a high level of uncertainty regarding the potential effects of the Licence, and an elevated level of risk associated with those potential effects. In these circumstances, the Panel finds that additional information concerning the potential impacts of the Licence was warranted.

However, while that reasoning seemed to support the contentions of the First Nation, the EAB was not prepared to go that far, and indeed continued as follows (also at para 178):

> While it is prudent in such circumstances to ask an applicant to provide further information about the water source and the potential impacts of the proposed licence, the Panel finds that it is impractical, and inconsistent with the objective of the licensing provisions in the *Water Act*, to expect applicants to delay developments indefinitely pending studies that attempt to conclusively predict impacts.

The EAB reinforced that message by referring to the reality that a hard line in licence applications would simply cause applicants to pursue temporary diversion approvals rather than licence, a practice which, while recently upheld as lawful (see *Western Canada Wilderness Committee v. British Columbia (Oil and Gas Commission)*, 2014 BCSC 1919 (CanLII)), was sub-optimal from a water management perspective (at para 180):

> … the Panel notes that placing excessively onerous requirements on an applicant to gather data and conduct studies before a licence may be issued could simply result in the applicant seeking a number of section 8 approvals over a period of years, instead of a licence that lasts for a period of years. In the present case, Nexen could have continued to apply annually for section 8 approvals, as it had done since 2009, rather than applying for the Licence. Nexen's section 8 approvals imposed far less onerous requirements than the Licence. Nexen's section 8 approvals simply required compliance with a 0.1 metre maximum drawdown of the lake level, measured from the commencement of operations, and monthly and annual reporting. From a water manager's perspective, a water licence provides a means to take a longer-term approach to regulating water use and monitoring impacts. In general, a longer-term approach to managing and regulating water use will better serve the objective of conserving water resources and protecting aquatic and riparian ecosystems.

But all that said, the Board was very demanding when it came to examining the merits of the licence and its terms and conditions. Thus, what the Board seems to be saying is that while a poor information base should not *automatically* preclude the issuance of a licence, the decision-makers in the department must still be able to show that the licence terms and conditions are responsive to the information uncertainties. So, as with precaution and caution, so with information uncertainties!

(5) The Merits of the Licence Decision and the Terms and Conditions Attached to the Licence

This is the most extensive section of the EAB's report. In it the EAB examines various methodological matters with respect to issues such as measuring stream flows, hydrological models, instream flow methodologies as well as the specific terms of the licence in light of these matters. I will leave the task of examining the details of this discussion to others. Suffice it for present purposes to offer the EAB's summative conclusions (at paras 337 and 338):

> In conclusion, after assessing the evidence regarding the technical aspects of the Licence and the flow-weighted withdrawal scheme set out in the 2011 Water Plan (including the 2013 Water Plan Addendum), the Panel finds that the Licence should be reversed because it is fundamentally flawed in concept and operation. It authorizes a flow-weighted withdrawal scheme that is not supported by scientific precedent, appropriate modelling, or adequate field data. Also, the flow-weighted withdrawal method relies on a set of withdrawal parameters that, except for the Zero Withdrawal Limit and the 15% withdrawal rate, are arbitrary and have no basis in scientific theory or hydrometric modelling. These parameters also rely on an Inferred Median Flow that could not be explained or justified by Nexen or the Manager. In addition, compliance with the withdrawal parameters relies on a hydrometric monitoring program that is not included in the Licence, either as an express condition or by reference to the monitoring plan in the 2011 Water Plan and the 2013 Water Plan Addendum.
>
> Further, the Manager's conclusion that the withdrawals would have no significant impacts on the environment, including fish, riparian wildlife, and their habitat, was based on incorrect, inadequate, and mistaken factual information and modelling results. The new, but still limited, data and information about the Tsea River watershed that became available after the Licence was issued does not support a conclusion that the Licence, together with the 2011 Water Plan and the 2013 Water Plan Addendum, adequately protect against detrimental impacts on the aquatic and riparian environment. Rather, the evidence before the Panel establishes that excessive water withdrawals may cause adverse effects on the habitat of aquatic and riparian species, including species that the First Nation depend on for the exercise of their treaty rights, as discussed further under Issue 2.

(6) The Duty to Consult

The EAB's duty was a duty to assess whether the Crown (as aided by Nexen at least to the extent that there was a clear delegation of responsibilities) had discharged its obligations to consult and accommodate the interest of the First Nation. It was not a duty to engage in consultation itself (at paras 159 and 428).

In issuing the licence the department took the view that it had engaged in a lengthy and informed consultation process and had fully discharged its obligations. A major premise for that assessment was the conclusion that the proposed diversion would have no impact on the First Nation's treaty rights. However, it was clear from the Board's analysis (above) that that premise and conclusion were not supportable because the departmental decision-makers simply could not come to such a definitive judgement on the information available and the methodologies applied to understand the impact of the diversion. This had implications for both the overall conclusion and the depth of the consultation required along the *Haida* spectrum.

The EAB's key conclusions on the duty to consult were as follows:

1. The duty to consult is triggered by the *potential* for a proposed decision to interfere with or impair a treaty right (at para 439).

2. The degree of consultation required fell in the mid-range of the *Haida* spectrum (at para 440):

> Given the relative importance of the North Tsea Lake area, and downstream portions of the Tsea River, to members of the First Nation for the exercise of their treaty rights, and the Licence's potential to adversely affect the habitat of fish, beaver, moose and waterfowl in that area that the First Nation depend on to exercise their treaty rights, the Panel finds that the level of consultation required in this case was at the mid-range of the spectrum.

3. The consultation should be structured so that each party (Crown, applicant for the licence and First Nation) should be clear about needs, expectations and responsibilities. A consultation agreement between the Crown and the First Nation would be helpful in achieving this result but was not required (at paras 441 – 446).

4. Delegation of responsibilities to the applicant for the licence should be clear; otherwise the First Nation might consider that the applicant was engaging in consultation to further its own interest rather than to meet the Crown's obligations (at para 447).

5. In order to engage in good faith consultations the Crown needs to have a clear understanding of the First Nations rights and how they might be impacted (at para 449):

> To ascertain the appropriate level of consultation, the Manager, on behalf of the provincial Crown, needed to consider the potential impacts of the Licence on the First Nation's treaty rights. To properly understand the potential impacts on the First Nation's treaty rights, the Manager needed to understand the nature and scope of the treaty rights that could be adversely affected by the Licence.

   The Crown did not in this case.

6. The First Nation also had obligations and duties and in particular needed to provide the Crown with information that would allow the Crown to assess the impacts of the proposed diversion on the First Nation's rights. The First Nation failed to provide all relevant information but this was only part of the reason why the Crown failed to obtain a clear understanding of the issues.

7. While much of the Crown's consultation activities were carried out in good faith, that was not the case for the way in which these consultations were concluded. At this stage, the Crown proceeded peremptorily and with a closed mind (at para 484):

> The Panel finds that the Crown failed to consult with the First Nation in good faith. Based on the internal Ministry correspondence and the Manager's rationale, the Panel finds that by April 2012, the Manager

> intended to issue the Licence regardless of the promised meetings, and had no intention to substantially address any further concerns or information that may have been provided by the First Nation. The Panel finds that this conduct was inconsistent with the honour of the Crown and the overall objective of reconciliation.

(7) Decision to Revoke the Licence

While alive to the prejudice that Nexen would suffer the Board still concluded that revocation of the licence (rather than, say, changing its terms and conditions) was the appropriate remedy. The Board reasoned as follows (at para 490):

> In contrast [to the *Chief Harry Case*, available here], in the present case, the Licence authorizes a much greater percentage of the stream flow from a relatively small water source, and the Panel has found that the Licence and the flow-weighted withdrawal scheme are fundamentally flawed and lacking in technical merit. There remains considerable risk that the licensed water withdrawals could cause harm to aquatic and riparian habitat and species that the First Nation depends on for the exercise of its treaty rights. In addition, the Panel has found that the consultation process was seriously flawed, as the Ministry never explained the process it intended to follow or Nexen's role in the process, the Manager did not consider critical information that was available to him regarding the First Nation's exercise of its treaty rights in the Tsea Lakes area, the Manager considered inaccurate and irrelevant information, and the Crown failed to consult in good faith. The Panel finds that suspending the Licence pending further consultation would not necessarily address the serious flaws in the licensing regime, or "protect Aboriginal rights and interests to promote the reconciliation of interests called for in *Haida Nation*" as stated in *Rio Tinto.*

(8) Implications for Alberta

The *direct* implications of this decision for Alberta are, I think, quite limited for two reasons. First, and most obviously, the creation of the Alberta Energy Regulator has effectively limited the jurisdiction of Alberta's EAB. While the EAB generally does have jurisdiction of water licensing decisions under Alberta's *Water Act,* RSA 2000, c. W- 3, it has no such jurisdiction where the water licence is issued by the AER as part of the single window approach to licensing energy projects which lies at the heart of the *Responsible Energy Development Act*, SA 2012, R-17.3 (*REDA*). I commented on this aspect of *REDA* here. Second, the vigour and reach of an EAB very much depends on the standing rules for commencing an appeal. These rules are very tightly and narrowly defined in Alberta and thus it is extremely difficult for parties, and especially ENGOs, to obtain standing. And since these standing rules are effectively jurisdictional rules for commencing an appeal there is little chance of persuading the courts to adopt a more general public interest standing approach. See here in particular *Alberta Wilderness Association v Alberta Environmental Appeal Board* 2013 ABQB 44 commented on by Professor Fluker here and Bankes, Sharon Mascher and Martin Olszynski, "Can Environmental Laws Fulfill their Promise? Stories from Canada" (2014), 6 (4) Sustainability online The AER's own standing rules are also particularly demanding, especially for First Nations asserting treaty rights. See my post on the AER's practice here.

There are however some indirect implications to consider. First, both of the arguments recited above beg the question of whether Alberta should learn from BC. Or, to put it another way: (1)

should Alberta allow a merits-based review of AER decisions, and (2) *should* the EAB's jurisdictional standing rules in Alberta continue to ignore the developments in public interest standing that we have seen over the last decade, or, should the relevant statutes be amended to allow a broader range of parties to question departmental decisions in appropriate cases. I understand that the government is busy right now addressing royalty issues and climate change law and policy, but perhaps when things die down these questions might be worth examining again! Second, I think that the detailed discussion of the trigger to the duty to consult in a treaty context and the content of that duty in the context of resource licensing decisions provides a useful learning opportunity for both the AER and Alberta's EAB.