August 28, 2024

Taking Stock of the Grassy Mountain Litigation, Part 2, August 2024

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Cases and decisions commented on: (1) AER Panel Decision on Stay Motion Filed by the Municipal District of Ranchland No. 66 (Stay Application) August 9, 2024, and (2) *Municipal District of Ranchland No. 66 v Alberta Energy Regulator*, 2024 ABCA 274 (CanLII) (PTA Application) August 22, 2024

This ABlawg post is an update to a post from earlier this year: "Taking Stock of The Grassy Mountain Litigation as of February 2024". In that post, I traced the litigation commenced by Benga and its corporate successor Northback following the June 2021 report and decision of the Joint Review Panel to reject the Grassy Mountain Project exercising authority as the Alberta Energy Regulator (AER). That litigation involved cases in the Federal Court and Alberta's Court of Appeal and Court of King's Bench. The Alberta Court of Appeal litigation came to an end in 2022 when the Supreme Court of Canada denied a further leave to appeal. The Federal Court cases are still ongoing, as is the King's Bench matter, as well as allied litigation brought by First Nations in both Federal Court and in King's Bench. I refer the reader to my February 2024 post for details on these case as well as the necessary links and references.

Since then, however, an additional front has opened in the battle for Grassy Mountain with the decision of the AER to allow Benga/Northback to file applications with the AER for new drilling permits on the Grassy Mountain site. My October 2023 post noted that development as well as my argument that "The AER Does Not Have the Jurisdiction to Consider New Coal Applications for the Grassy Mountain Coal Deposit". But on the same day as that last update post (February 22, 2024) the AER issued a decision under the signature of Sean Sexton, Executive Vice President Law, and General Counsel of the AER "[o]n behalf of the Executive Leadership Team" of the AER. This unusual letter decision was addressed to Mr. Alex Bolton as the AER's Chief Hearing Commissioner. The decision confirmed that the AER had decided to accept Northback's applications for filing on the basis that the applications were covered by the "advanced project" exception in Ministerial Order 002/2022 (for discussion of that Order and the "advanced project" exception see the October 2023 and February 2024 posts referenced above.) In doing so, the AER accorded significant weight to a November 16, 2023 letter to the AER from Minister of Energy, Brian Jean purporting to clarify the terms of the Ministerial Order to the effect that "[t]he Minister's Letter provides that once a project summary has been submitted and a project is considered an advanced coal project, it remains as such regardless of previous application outcomes." (at 1). That same February decision directed Mr. Bolton to arrange for an oral public hearing on Northback's applications, reasoning as follows:

> Coal development in the Eastern Slopes of Alberta has engaged significant interest from surrounding municipalities, Indigenous and local communities, and many other Albertans.

> The Minister's Letter emphasizes the importance of Indigenous and community engagement in the AER's regulatory processes. A public hearing will allow for the most informed and transparent technical review of the applications. (at 2)

The AER subsequently issued a Notice of Hearing (ID 444) on April 10, 2024 inviting statements of intent to participate and a series of decisions on June 5, 2024 ruling on those applications. In some limited cases the hearing panel has granted full participation rights, including the right of cross examination, but in many other cases the hearing panel has granted only limited participation rights that allow for little more than the opportunity to make a written or oral statement to the hearing panel.

The Municipal District of Ranchland No 66 (the MD) is one of the parties that has been granted full participation rights and the MD also elected to seek the permission of the Court of Appeal to appeal the AER's decision of February 22, 2024 to accept for filing Northback's new applications. In that application the MD noted that the existence of the Minister's November 16 letter had not been disclosed to parties, including the MD, before the AER published its decision (PTA Application at para 8). On June 17, 2024 the MD subsequently brought a motion before the hearing panel to stay the hearing pending the Court of Appeal's decision on the permission application.

The AER hearing panel issued its decision on the stay application on August 9, 2024 and the Court of Appeal issued its decision on the permission to appeal application on August 22, 2024.

The Stay Application

The hearing panel denied the MD's application to stay the hearing. As is customary, the hearing panel applied the three part test for a stay adapted from the Supreme Court of Canada's decision in *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC) (*RJR-MacDonald*) with the onus on the applicant for the stay to demonstrate that it meets each element of the test: (1) serious issue to be tried, (2) irreparable harm if the stay is not granted, and (3) balance of convenience. The panel concluded that while the MD had satisfied the first element of the test it had not provided evidence of irreparable harm. Specifically, the panel concluded that:

> First, the harms Ranchlands (*sic*) submits it will suffer if the proceeding is not stayed and it is successful on appeal are time, resources, and money. These amount to administrative inconvenience and harms that can be quantified in monetary terms, neither of which constitutes irreparable harm.
>
> …
>
> Second, the alleged harms are, at least in part, speculative. Ranchland states that it is likely that numerous experts will be retained to provide evidence and reports in relation to the potential negative effects of Northback's coal exploration programs but does not provide any detail. We are not satisfied that this rises to the level of clear, non-speculative evidence of irreparable harm that is required.

> Finally …. The questions in Ranchland's application for permission to appeal go to whether the AER erred in accepting the Applications, not whether this hearing process is fair. If Ranchland is successful this proceeding may become moot, but in the meantime, nothing prevents Ranchland from arguing its position before this panel, adducing whatever evidence it deems necessary to support its position, and participating fully in the hearing. (References omitted) (at 9-10)

Given its conclusions on irreparable harm it was not necessary for the panel to consider the balance of convenience.

The Permission to Appeal Application

The Court of Appeal (per Justice Kevin Feth) granted, in large part, the MD's application for permission to appeal the AER's decision of February 22, 2024 – precisely six months to the day of that decision. The MD raised five possible grounds of appeal:

a) improperly delegating the decision to the Minister or fettered its discretion in making the decision;
b) failing to consider relevant issues, facts, and arguments;
c) finding that the Minister's letter constitutes "written notice" to terminate the suspension of applications pursuant to s 3 of the Ministerial Order or "guidelines" for the receipt of applications as contemplated by s 67 of the *Responsible Energy Development Act*, SA 2012, c R-17.3;
d) relying on improper or irrelevant evidence by giving "significant weight" to the Minister's opinion as expressed in his letter; and,
e) finding that the term "advanced coal project" includes projects which have been rejected by the AER. (at para 14)

A ground of appeal must raise a question of law or jurisdiction (see *REDA* at s 45) which must then be evaluated against four criteria widely applied by the Court in permission to appeal applications:

a) whether the applicant has demonstrated a question of law or jurisdiction of general importance, rather than of interest only to the immediate parties;
b) whether the issue is significant to the underlying administrative proceeding, or is merely interlocutory or collateral, or may not affect the ultimate outcome of the proceeding;
c) whether the appeal raises a serious, arguable point of law; this factor considers the standard of review to be applied and is balanced with the importance of the issue; and,
d) whether an appeal will unduly hinder the underlying proceedings.

(For a discussion and critique of the origins of these criteria see Fluker and Yewchuk, "Seeking Leave to Appeal a Statutory Tribunal Decision: What Principles Apply?")

In this case Justice Feth paid particular attention to Northback's argument that the MD's application was interlocutory or collateral and would simply serve to delay the proceedings. In rejecting that contention Justice Feth reasoned as follows:

> The AER's process of "accepting" an application usually involves a review for technical requirements of the application and nothing more. The Ministerial Order creates a unique gatekeeping function by which the AER must decide whether an exception to the general suspension of the Regulator's acceptance of Category 4 applications is engaged. That suspension effectively creates a moratorium on coal exploration and development on Category 3 and 4 lands, except for those subject to an "advanced coal project".
>
> I conclude that determining whether an application should enter the regulatory process is not truly interlocutory or collateral because a refusal brings finality to the coal exploration and development application. Nothing in the record suggests that the moratorium will be of short duration. To the contrary, the regulatory history suggests that curtailing coal exploration and development is the norm, with only limited exceptions.
>
> …. the history of the Grassy Mountain project and the number of interested parties submitting Statements of Concern (122) with the Regulator in response to Northback's applications suggest that a lengthy and complicated hearing process is likely. The Municipal District's appeal, if successful, may be dispositive of the applications in their entirety and probably avoid substantial expense and the consumption of limited regulatory resources.
>
> I find that the proposed appeal has potentially dispositive consequences and is not premature. (at paras 23 – 26)

Justice Feth then turned to the specific grounds of appeal. On the first ground, Justice Feth concluded that there was no evidence of improper delegation but did accept that "the AER's decision appears to offer no independent analysis of whether Grassy Mountain met this definition in arriving at its decision to accept Northback's applications." (at para 36) In particular, the AER's decision "did not explain why a project it previously rejected continues to be an *advanced* coal project or why a rejected project continues to be a 'project' under the Ministerial Order at all." (*ibid*) That raised an issue of fettering and one that "concerns more than the immediate parties and has a wider impact than the current AER decision because four advanced coal projects are identified in the Minister's letter …" (at para 37).

It seems from Justice Feth's judgment that the MD effectively reframed its second ground of appeal as one of procedural fairness. This was undoubtedly a sound approach since as originally framed ("failing to consider relevant issues, facts, and arguments") it was likely not raising a question of law or jurisdiction. But in the end, even as reframed, Justice Feth considered that the applicant had failed to particularize its procedural fairness concerns and accordingly leave was denied on this second ground of appeal. (at paras 40-43)

Justice Feth dealt with third and fourth grounds together and effectively reformulated them as a charge that the AER had used the Minister's letter to impermissibly expand, narrow or otherwise influence the interpretation of a Ministerial Order. (at para 54) That, said Justice Feth, raises a question of law of "general importance to the use and interpretation of Ministerial Orders more generally, both under *REDA* and otherwise." (at para 58) Justice Feth framed the question as "Did

the AER err by relying on the Minister's letter in interpreting the Ministerial Order?" (at para 67(b))

Justice Feth also granted leave on the fifth ground, namely the proper interpretation of the term "advanced coal project" – while apparently leaving to the appeal panel the applicable standard of review.

In sum Justice Feth has granted the MD permission to appeal on three questions:

a) Did the AER improperly fetter its authority in accepting Northback's applications?
b) Did the AER err by relying on the Minister's letter in interpreting the Ministerial Order?
c) Did the AER err in its interpretation of the term "advanced coal project" in the Ministerial Order?

Going Forward

Having decided not to grant the MD's application for a stay, the following day the AER hearing panel went ahead and issued a hearing order (August 13, 2024) and schedule for proceeding 444. The schedule looks like this:

Filing	**Due Date**
Submissions from Northback	September 4, 2024
Submissions from Full Participants	October 2, 2024
Reply submissions from Northback	October 23, 2024
Submissions from Limited Participants (Optional)	November 6, 2024
Northback Reply to Limited Participants (Optional)	November 18, 2024
Deadline for Motions	November 18, 2024
Hearing Commences – Oral presentations from Limited Participants	December 3 & 4, 2024
Hearing continues	January 14 – 31, 2025

Justice Feth's subsequent decision to give permission to appeal the AER's decision to accept Northback's application for filing does not itself suspend the AER's proceeding 444, but s 45(5) of *REDA* does provide as follows:

> (5) A decision of the Regulator takes effect at the time prescribed by the decision, and its operation is not suspended by any appeal to the Court of Appeal or by any further appeal, but the Regulator may suspend the operation of the decision or part of it, when appealed from, on any terms or conditions that the Regulator determines until the decision of the Court of Appeal is rendered, the time for appeal to the Supreme Court of Canada has expired or any appeal is abandoned.

The hearing panel did refer to this section in its decision on the MD's stay application earlier in the month, but now that leave has been granted the MD may see reason to ask the panel to reconsider its decision, especially in light of Justice Feth's comments at para 25 to the effect that

"The Municipal District's appeal, if successful, may be dispositive of the applications in their entirety and probably avoid substantial expense and the consumption of limited regulatory resources." In addition, or in the alternative, s 14.48 of the Rules of Court (*Alberta Rules of Court*, Alta Reg 124/2010), would allow the MD to make the same application to the Court of Appeal itself:

> An application to stay proceedings or enforcement of a decision pending appeal may be made
> (a) to the judge who made that decision, or
> (b) to a single appeal judge, whether or not the application was made to the judge who made the decision, and whether or not that application was granted or dismissed.

Another possibility would be to reframe the application to the AER as an application for an adjournment of Proceeding 444. This seems more appropriate. A stay is the appropriate application when a party such as Northback already has its permit; the stay order is designed to prevent that party from exercising its rights under the permit pending the outcome of the appeal or other proceeding. But in this this case Northback has no permit and it will not be in a position to carry out any activities on the ground unless and until the AER completes its proceedings and rules (if it does) in favour of Northback. All that Northback has right now is a live application and even that claim is tenuous given Justice Feth's decision to grant permission to appeal.

In such a case therefore the better application is an application for an adjournment pending the outcome of the appeal. Such an application engages the pragmatic exercise of discretion by the hearing panel rather than the *RJR McDonald* three-part rule. AER Proceeding 417 offers a pertinent example. The proceeding is an ongoing application involving Pieridae and Mr. Judd. In that case the AER's hearing panel (Decision of January 16, 2024) granted Judd's application (at least in part) for an adjournment on the grounds that:

> … it is in the interests of all parties to conduct this hearing only once. Given that the Alberta Court of Appeal granted permission to Mr. Judd to appeal our procedural decision from May 19, 2023, and no one is in a position to know the outcome of the Court's deliberations, prudence dictates that we adjourn this matter until such time as the Court's decision is known, and a new hearing date selected that permits all the issues in play to be fairly adjudicated.

For the subsequent Court of Appeal decisions on the permission to appeal application see 2023 ABCA 296 and on the merits 2024 ABCA 154.

That seems like a prudent course of action in this case too, either on the basis of an application by an interested party such as the MD or by the hearing panel of its own motion. Failure to adjourn creates the risk the Court of Appeal will issue a decision on the merits of the MD's appeal to the effect that the AER should never have accepted Northback's applications thus making the entire AER hearing panel proceedings a nullity.

This post may be cited as: Nigel Bankes, "Taking Stock of the Grassy Mountain Litigation, Part 2, August 2024" (28 Aug 2024), online: ABlawg, http://ablawg.ca/wp-content/uploads/2024/08/Blog_NB_Grassy_Mountain_Part2.pdf

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