



COVID-19, Procedural Fairness, and Energy Regulation in Alberta

Chaos v. Opportunity



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Introduction

- In 2020, the COVID-19 pandemic arrived in Canada, changing our daily experience dramatically.
- Governments declared states of public emergency.
- Energy regulators responded by suspending/deferring in-person hearings.
- The effect of the pandemic did not come and go quickly. It appears, at this time, that some of the changes are here to stay.
- As Sun-Tzu famously said – **where there is chaos, there is opportunity.**
- We have experienced the chaos for the last 6 months.
- Is there an opportunity?



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Outline

- Establish the foundation for the “new normal” world that we are in
 - Public health actions
 - Key energy regulators’ responses regarding daily operations, primarily hearings
 - Overview of compliance and monitoring legislation that has been impacted
- Background administrative law principles
 - High level review of principles of natural justice, procedural fairness
- Chaos v. Opportunity
 - What is happening to oral hearings?
 - Points of potential failure
 - *Hearing itself*
 - *Consultation/engagement – public and Indigenous*
 - Opportunity for change



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What happened?

- COVID-19 outbreak conditions erupted onto the world scene in early 2020, after first being discovered in China in late 2019.
- The WHO (World Health Organization) made the pronouncement that there was a global pandemic as of March 11, 2020.
- Governments across the world responded to the declaration of a global pandemic by taking actions to limit the potential spread of the virus.

COVID-19 Statistics – October 2, 2020

	Worldwide	Canada	United States
Total cases	34,817,612	162,659	7,549,299
Total deaths	1,032,709	9,409	213,523
Tests per one million population	Not reported	198,015	330,328
Deaths per one million population	132.5	249	644
Reference: www.worldometers/coronavirus.com			

A decorative graphic of a feather, rendered in a light beige or tan color, positioned on the left side of the slide. The feather has a central rachis with numerous barbs extending outwards, creating a fan-like shape. It is oriented vertically, pointing downwards.

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Public Health Response



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National and Provincial Response

Canada

- Work from home if possible
- Isolation for all people with symptoms (minimum 10 days)
- Mandatory self-isolation for returning travellers (14 days)
- Business closures
- 2 metre distance (social distancing)
- PPE and ventilator shortages addressed by converting manufacturing to PPE and ventilators
- CERB to provide financial relief for people whose jobs were lost as a result of COVID-19 closures

Alberta

- Work from home if possible
- Isolation for all people with symptoms
- Business closures, except essential services
- Masks – mandatory in Edmonton and Calgary in all public places
- Hand sanitizer – shortages initially
- 2 metre distance (social distancing)
- Large gatherings prohibited (numbers varied based on public health situation)
- Contact tracing – app for phones



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Public Health Actions

- Order in Council 80/2020 (March 17, 2020)
 - Made under section 52.1 of the *Public Health Act*
 - Declared a state of public health emergency in Alberta due to COVID-19 and significant likelihood of a pandemic
 - Section 52.8(1)(a) of the *Public Health Act* provides that an order made in respect of pandemic has effect for 90 days
- *Public Health Act* – ss. 52.1(2) and (3) provides that where an Order declaring a state of public health emergency is made, a Minister responsible for an Enactment, or the Minister of Health, may suspend, modify, and add to provisions of any Enactment



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Public Health Actions (2)

Public Health Act – ss. 52.1(2) (pre-Bill 10)

(2) On the making of an order under subsection (1) and for up to 60 days following the lapsing of that order, a person referred to in subsection (3) may by order, without consultation, suspend or modify the application or operation of all or part of an enactment subject to the terms and conditions that person may prescribe if the person is satisfied that its application or operation is not in the public interest.

Public Health Act – ss. 52.1(2) (post-Bill 10)

(2) On the making of an order under subsection (1) and for up to 60 days following the lapsing of that order, a person referred to in subsection (3) may by order, without consultation,

(a) suspend or modify the application or operation of all or part of an enactment, subject to the terms and conditions that person may prescribe, or

(b) specify or set out provisions that apply in addition to, or instead of, any provision of an enactment,

if the person is satisfied that doing so is in the public interest.



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Essential Services

March 27, 2020, Chief Medical Officer of Health (CMOH) issued CMOH Order 07-2020 under section 29(2.1) of the *Public Health Act*

- restricted gatherings in excess of 15 people in a group
- restricted non-essential services
- "essential services" – which are "services considered critical to preserving life, health, public safety and basic societal functioning"
- Essential Services – include energy, industrial, petroleum, natural gas, coal and utility industries and services related to Environmental and Regulatory compliance and enforcement

What did the Key Energy Regulators do?

AER

- As of March 17, oral portions of AER hearings were deferred.

AUC

- As of April 17, all public hearings, consultations, or information sessions were deferred.

CER

- As of April 29, oral portions of hearings deferred.

Delicate balance between ensuring that access to the system was facilitated, public confidence in administrative tribunals and processes was preserved, and public safety was maintained.

- Bulletin 2020-10, dated April 9, 2020* states:

Physical distancing and other safety protocols that have been put in place to support the COVID-19 response may impact the availability of industry staff and limit capacity to comply with reporting requirements.

Alberta Environment and Parks and Alberta Energy have temporarily suspended a number of reporting requirements that affect Alberta's energy industry. This direction does not affect monitoring requirements, which must continue to be met.

Industry must continue to report as directed in compliance and enforcement orders. They must also continue to report emergencies, including incidents, notifications, contraventions, and releases that have or may have the potential to impact the environment or public safety ...

...

- The Bulletin lists a number of provisions of various acts where reporting was temporarily suspended.

* <https://www.aer.ca/regulating-development/rules-and-directives/bulletins/bulletin-2020-10>

- AUC Bulletin 2020-06, dated March 12, 2020*, states:

As part of its response to COVID-19, the Commission is immediately deferring all public hearings, consultations or information sessions until further notice. Should there be an essential economic requirement to proceed with a hearing or other normally public proceeding, written or remote-participation options will be explored with parties.

Further, AUC employees will not attend live gatherings hosted by industry or professional associations.

* <https://www.auc.ab.ca/News/2020/Bulletin%202020-06.pdf>

– AUC Bulletin 2020-07, dated March 17, 2020*, states:

AUC Calgary and Edmonton offices are closed in response to COVID-19 risk. AUC teams remain engaged on all files.

* <https://www.auc.ab.ca/News/2020/Bulletin%202020-07.pdf>

- **Alberta Consultation Office**

- All Consultation Timelines and Consultation Adequacy Decisions are paused for First Nations and Metis Settlements identified
- 29 Metis Settlements and First Nations have requested a consultation "pause", as of April 20, 2020

CER – Announcement

- CER issued an announcement, dated March 16, 2020*, which states:

The CER has protocols in place for a variety of situations that could impact day-to-day operations... Effective immediately, the CER is implementing the following operations changes. These changes are in place until further notice.

- **Oral portions of hearings will not be held as planned.** All current adjudication processes are being looked at for ways to optimize hearing participant involvement to ensure these processes continue in a manner that is fair and transparent, while protecting the health of those involved.
- Compliance verification activities will continue to take place but will be modified to reduce in-person interactions.
- Information sessions, technical conferences, working groups, committee and sub-committee meetings will be conducted by webinar or conference call where possible, **or postponed.**

*The CER expects regulated companies to **commit the necessary resources to plan for and respond to the impacts and potential impacts caused by this event.** The CER also expects regulated companies to consider the potential challenges that this pandemic may present in the event of an incident or emergency situation and that the appropriate resources are being dedicated to planning and preparing for this potential scenario. The CER may be in contact with specific companies regarding their contingency plans.*

* <https://www.cer-rec.gc.ca/bts/nws/whtnw/2020/2020-03-16-eng.pdf>

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Compliance and Reporting Impacts



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Compliance and Reporting – Some of the Acts Affected

- *Environmental Protection and Enhancement Act*
- *Water Act*
- *Public Lands Act* Authorizations
- *Emissions Management*
- *Climate Reliance Act*
- Air Monitoring Directives
- *Coal Conservation Act*
- *Oil and Gas Conservation Act*
- Oil Sands Conservation Act Routine Inspection, Reporting and Suspension Requirements



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Suspension of EPEA, Water Act, Public Lands Act Authorization Reporting Requirements

- Minister of Environment and Parks M.O. 17/2020 - Suspends reporting requirements pursuant to:
 - EPEA approvals or registrations
 - *Water Act* licenses or approvals
 - *Public Lands Act* disposition requirements to submit returns/reports
- The holder such approvals, registrations, licenses, or dispositions must continue collection of the data and information required
- Approval holders must be prepared to make this information available to the AER (in respect of energy resource activities) or AEP upon request
- **Note:** AER has published some exceptions (discussed below)

Suspension of EPEA, Water Act, Public Lands Act Authorization Reporting Requirements (2)

Minister of Environment Letter (March 30, 2020) – Re: Suspension of Reporting Requirements

- Confirms all unauthorized substance releases that have the potential to cause an adverse effect by impairing or damaging the environment, human health, safety or property must be reported
- *“In an effort to reduce the administrative burden on reporting unauthorized substance releases, the follow-up seven-day written report requirement is waived accordance with the lapsing provisions in the Ministerial Order, unless otherwise communicated to you in writing.”*

Emissions Management and Climate Resilience Act – Reporting Relief

- Ministerial Order 15/2020
 - Extends deadline to submit compliance reports and emissions reduction plan reports for 2019, as required by the *Technology Innovation and Emissions Reduction Regulation*, from March 31, 2020 to June 30, 2020.
- Ministerial Order 16/2020
 - Extends the deadline for fuel suppliers, approved contributors, and renewable fuel providers to submit reports for the 2019 compliance period, as required by the *Renewable Fuels Standard Regulation*, from March 31, 2020 to June 30, 2020.

Temporary Amendment of Select Air Monitoring Directive Requirements

- AEP also separately released the “Temporary Amendment of Select Air Monitoring Directive (AMD) Requirements” in response to COVID-19
 - Recognizes that COVID-19 Pandemic has the potential to impact the availability of station operators both directly and indirectly and this may lead to staff shortages and limit the capacity for on-site work
 - Allows deviations from select AMD monitoring, siting and reporting requirements
 - Continuous Air Monitoring Station Requirements
 - Reporting Requirements

Suspension of Coal Conservation Act, Oil and Gas Conservation Act, Oil Sands Conservation Act Routine Inspection, Reporting and Suspension Requirements

- Minister of Energy M.O. 19/2020 - Suspends:
 - Specified requirements to report information pursuant to provisions in the Coal Conservation Rules and approvals
 - Specified requirements to report information pursuant to provisions in the Oil and Gas Conservation Rules, Directives, Approvals, and licenses
 - Specific initial suspension requirements for certain inactive wells (as outlined in the Ministerial Order) per Directive 013: Suspension Requirements for Wells and section 3.020 of the Oil and Gas Conservation Rules
 - Specified requirements to report information pursuant to the Oil Sands Conservation Act and approvals
- The suspension provides relief for reporting but not from the underlying obligation to collect and record information as otherwise required

AER Bulletin 2020-10 – Relief for Industry During COVID-19 Pandemic Response (April 9, 2020)

- Suspension of Reporting Requirements in Ministerial Orders does not affect monitoring requirements, which must continue to be met
- Industry must continue to report as directed in compliance and enforcement orders emergencies, including incidents, notifications, contraventions, and releases that have or may have the potential to impact the environment or public safety
- During the period of temporary suspensions, must continue to record and retain complete documentation and make it available upon request

AER Bulletin 2020-10: Relief for Industry During COVID-19 Pandemic Response (April 9, 2020) (2)

- Notwithstanding AEP M.O. 17/2020, the following exceptions apply (meaning the following reports must still be submitted):
 - *Environmental Protection and Enhancement Act*
 - Bird protection plans for oil sands sector
 - Annual Mine Financial Security Program submissions for oil sands and coal sectors
 - Research program for Base Mine Lake and Miwasin Lake
 - *Water Act*
 - Final reclamation summary reports for all sectors
 - Dam safety submissions for all high-, very-high-, and extreme-consequence dams
 - Baseline studies at the McClelland Lake Wetland Complex
 - *Public Lands Act*
 - Annual aggregate management plan update for oil sands and coal sectors
 - Annual disclosure of area cleared for oil sands and coal sectors

AER Clarification of Ministerial Orders – April 14, 2020

- AER issued further clarification of requirements it considered suspended
- Includes a variety of additional suspensions to requirements, including various operational, reporting and notification requirements under AER Directives and other provisions of the *Oil and Gas Conservation Rules*
 - Suspends requirement to report certain spills and releases under s. 8.050(2)(b) of the *Oil and Gas Conservation Rules*

AER Clarification of Ministerial Orders (2)

- AER states that these exceptional times and it will remain flexible and responsive to the changing circumstances
- For questions, contact Industry.Relief@aer.ca
- **Operational Measures**
 - Deferral of oral portions of hearings
 - Work from home policy
 - Virtual meeting with stakeholders
 - Continued response to energy-related incidents
 - Customer care center remains open

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What's Next?





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Focus on Regulatory Process

- Now that we have discussed the lay of the land, how do we address the relationship between regulatory hearings, procedural fairness, and COVID-19?
- Focus on the Regulatory Process
 - Hearing and Inputs to Hearing that affect procedural fairness

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Back to Law School – Briefly 😊



How do Administrative Tribunals Acquire Jurisdiction?

- Administrative/regulatory tribunals are different from courts
- Created by statute
- Exercise delegated authority
- Adjudicate or administer ONLY the matters delegated to them by their specific statute
- NO jurisdiction outside the four corners of their empowering statute – decision would be *ultra vires*
- Required to exercise their specific jurisdiction fairly and in accordance with the principles of natural justice a.k.a. procedural fairness

Principle of Due Process

Administrative tribunals are required to arrive at their decisions in a manner that can be described as procedurally fair or meeting the rules of natural justice.

* David Jones and Anne de Villars, *Principles of Administrative Law*, 5th Edition, Toronto, Carswell, 2009, pages 208-210.



Rules of Natural Justice

- *Nemo iudex in sua causa*
 - *No one should be a judge in his own cause (a.k.a. the rule against bias)*
 - Know the case being made
 - *Access to information, opportunity to participate in pre-hearing processes*
 - Opportunity to respond
 - *Written hearings, cross-examination, direct opportunity to face the other side*
- *Audi alteram partem*
 - The right to know the case that you must meet and be given the full opportunity to respond
 - Rule against bias
 - *Not just actual bias, also unconscious bias, unintentional bias, capacity bias*

* David Jones and Anne de Villars, *Principles of Administrative Law*, 5th Edition, Toronto, Carswell, 2009, pages 208-210.



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Cardinal v. Director of Kent Institution (SCC) (1985)

- The duty to act fairly applies to all quasi-judicial and administrative decision makers*

**Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R., para.14 and *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, para. 24.

Baker v. Canada (Minister of Citizenship and Immigration) (SCC) (1999)

- There is a distinction to be made between the existence of the duty of procedural fairness and the determination of the content of that duty.
- The SCC in *Baker*, relying on its decision in *Cardinal*, SCC determined that any administrative determination that affects the rights, privileges or interests of a person is sufficient to trigger the duty of procedural fairness.
- Once there is a duty, the composition of that duty of fairness must reflect the situation and may reflect (some or all) or the following factors:
 - Nature of the decision and the process followed in making it – the more judicial, the closer the protections would resemble a court process
 - Nature of the statutory scheme and the terms of the statute
 - Importance of the decision on the affected person
 - Legitimate expectations of the affected person
 - Choices of procedure made by the administrative body, particularly when the statute gives the tribunal the ability to choose its procedure or if it has expertise (this would be the case with energy regulators)

**Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817

Procedural Fairness in Energy Regulatory Hearings

- Take on a new twist in a remote hearing or a written hearing
- Regulators have processes for determining which applications can be heard by written hearing in the ordinary course
- Talking about applications that would:
 - Otherwise have had an oral hearing and are converted to written hearing
 - Need an oral hearing but it must be conducted remotely
- Natural justice = procedural fairness = due process*

** There are some technical differences, and legal evolution, with respect to these concepts but, for the purposes of this presentation, these terms will be used interchangeably.*



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Know the Case you have to Meet

- In a traditional hearing, the submissions are made in advance. Is this the same for a remote hearing?
- Pre-hearing submissions can be made electronically so that all parties have access.
 - What if a party's home computer is not sufficient to permit reading or downloading very large graphic documents (like maps)?
 - Solution might be to request hard copy. What about delays or updates?
- During the hearing, documents are often entered into the record. Is it sufficient that an opposing party is only able to see the document on a computer screen or to receive an email with the document? Is this practical? What if the document is "heavy"?

Opportunity to be Heard

- In a traditional hearing, an intervener can provide written submissions in advance of the hearing and attends to present their position in person.
- In a remote/electronic hearing, the pre-hearing submissions could be the same, but is the impact really the same when a person presents their position via remote platform? For example:
 - person who is not familiar with the “screen” environment
 - Person who needs assistance to present – hand documents, look at notes
 - Translation requirements
 - Hearing or visually impaired people
- Impact of speaking in person – anecdotally, the “sweet little old lady effect”
 - sincerity, body language, credibility – all negatively impacted in a “on screen” environment

The Rule against Bias

- The right to an unbiased adjudicator is fundamental to the concept of natural justice.
- A remote hearing does not necessarily result in a biased adjudicator.
- But, if a hearing is remote, are there opportunities for bias (unconscious or unintentional) or unfair judgement to creep in?
 - What about the backdrop of the person speaking? Their home?
 - What if an internet connection is glitchy or freezes? Whose fault is it? The party who is assumed to be creating the problem could be judged more critically than if there was an uninterrupted connection.
 - Interruptions – in a traditional hearing, interruptions are controlled by being out of the home but in a remote hearing, “household” interruptions could occur. Does this result in negative judgement out of frustration?

How can the Process Fail?

- Failure of the hearing process itself to meet the requirements of procedural fairness
 - Failure to have an unbiased adjudicator
 - *Generally speaking, the conversion to written or virtual hearings does not create a biased adjudicator by its form.*
 - *Can an adjudicator be biased by the fact that a participant is unsophisticated with respect to the use of the technology required to participate in the hearing? Maybe.*
 - Failure to know the case you have to meet
 - *If the hearing is virtual, and there are logistics problems, could a participant be excluded from knowing the case that they have to meet? Potentially.*
 - Failure to have the opportunity to be heard fully
 - *If the hearing is virtual, participants could be disadvantaged by access to technology or capacity to use technology to participate, or failure of the technology at the time of the hearing*

Consequences of Failure?

- A breach of procedural fairness (or natural justice) is a jurisdictional error.*
- If the virtual hearing fails to meet the requirements of procedural fairness, the decision can be overturned on appeal and set aside.
- The Court, in *Cardinal*, said:
*[...] The right to a fair hearing must be regarded as an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.***
- Having a virtual process for the sake of having a process is useless, if the process is flawed.

**Baker v. Canada (Minister of Citizenship and Immigration)* at paras 21-22; *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, para 43.

** *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R., para 23.

Université du Québec à Trois-Rivières v. Larocque (SCC) (1993)

- SCC wrote on the issue of whether a refusal to admit evidence constitutes a breach of procedural fairness:

*The proposition that any refusal to admit relevant evidence is ... a breach of natural justice ... one which could have serious consequences. ... For my part, I am not prepared to say that the rejection of relevant evidence is automatically a breach of natural justice. ... It may happen, however, that the rejection of relevant evidence has such an impact on the fairness of the proceeding, leading unavoidably to the conclusion that there has been a breach of natural justice.**

- Could obstacles to full participation result in a conclusion that there has been a breach of natural justice?

**Université du Québec à Trois-Rivières v. Larocque*, 1993 CanLII 162 (SCC), [1993] 1 SCR 471, at paras 43-46.



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C.U.P.E. v. Ontario (Minister of Labour) *(SCC) (2003)*

- SCC case which summarizes the relationship between the idea of procedural fairness and the process set out by the tribunal:

*... content of procedural fairness goes to the manner in which [the decision maker goes about] making his decision, whereas the standard of review is applied to the end product of his deliberations.**

**C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 SCR 539, para. 102

Dunsmuir v. New Brunswick (SCC) (2008)

- In *Dunsmuir*, Bastarache and Lebel, JJ. (for the majority) wrote that procedural fairness is “a cornerstone of modern Canadian administrative law [and that public] decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual”*
- In *Dunsmuir*, Binnie, J. (concurring in the decision, with separate reasons) wrote:
... a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of “procedural fairness” ... The need for procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process ...

* *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, para. 79.

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CHAOS v. OPPORTUNITY





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How has COVID-19 Impacted Project Development in Alberta?

- Projects need to continue to progress through the regulatory process
- Proponent companies may have slowed down new project submissions
- What about projects in the regulatory pipeline?
 - Projects in development
 - Projects that have been filed but not adjudicated



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What do Regulators want us to know about Hearings

Generally, energy regulators focused on determining whether there are hearings that could proceed by alternative means which would **optimize hearing participant involvement** to ensure processes continue in a **fair and transparent manner**, while **protecting the health** of those involved.

What Happened to Oral Hearings?

- Current status of oral hearings – deferred or converted to written hearings
 - This started occurring in April 2020 but has not really ended
 - Impacts to processing times for ordinary regulatory matters
- How long are the delays?
 - Beyond months, verging on the calendar quarter to half-year delays
- How are regulators going to cope with delays from the point of view of project continuity?
 - My observation is that regulators are not innovating or attempting to figure out a solution other than slowly making their way through their backlog with alternative processes, like written hearings

Common Modifications

Some proposed modifications by proponents:

- Replacing site visits with video or photographic visits
- Conducting stakeholder engagement virtually rather than in-person

Some proposed modifications by regulators:

- Replacing oral cross-examination with written information requests or videoconferences
- Replacing oral arguments with written submissions or oral submissions via videoconferences

A Real Example – Windrise Wind Farm Inc. Facility Application (AUC)

- Application deemed complete – February 6, 2020, triggering 180 day time frame (August 25, 2020)
- Oral hearing initially scheduled to commence May 12, 2020
- Deferred in accordance with Bulletin 2020-06: *AUC defers live proceedings to reduce COVID-19 risk*. Despite stating that “the situation with respect to COVID-19 is very fluid ... continue to monitor the status of COVID-19 and evaluate further approaches”, nothing significant has changed since March 12, 2020
- Converted to a written hearing
- AUC’s 180 day time frame ended on August 25, 2020, so it gave notice on September 1, 2020 that AUC was extending the time frame by 90 days, with the result that the decision that ought to have been issued at the latest August 25, 2020, could now be issued as late as November 16, 2020
- No real acknowledgement that the process needed to be modified in the COVID-19 response world, just slowed down as a result of the delays associated with conversion of hearing from oral to written

* *AUC Bulletin 2020-06: AUC defers live proceedings to reduce COVID-19 risk*; <https://www.auc.ab.ca/News/2020/Bulletin%202020-06.pdf>



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What happens next?

- Focus on whether hearings that are allowed to progress can do so in this environment and still comply with the rules of procedural fairness
- Two specific points of examination:
 1. *The hearing itself*
 2. *The inputs to the hearing that affect its fairness*

Hearings need to happen/restart

- What learnings can we leverage from the early stages of the COVID-19 response?
 - Electronic submission of materials is essential
 - Communications are already established on an electronic format basis
 - More thought around whether a written hearing will be sufficient
 - What does sufficient mean?
 - *Where are the “bright lines” around how a project qualifies for an oral hearing v. a written hearing?*
 - *Due process – for written hearings without opposition, not a hard conversation but what about when there is intervention?*



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Are these concerns
surmountable?

Two critical points of potential failure in the administrative review of energy facility applications

The actual hearing

- Rules of natural justice and due process
 - Ensuring a full, unbiased, transparent hearing
 - Ability to be heard fully
- **Could be compromised in a remote hearing or a written hearing

Ensuring that the inputs to the hearing are also reliable and meet the requirements of due process

- Getting information to support a hearing
 - Consultation
 - *Can you do effective consultation without having a direct conversation with affected parties*
 - Indigenous engagement
 - *Elders*
 - *Site visits*

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The Hearing



How does the Hearing Fail?

- Failure to ensure that the forum doesn't create bias in the adjudicator
- Failure to ensure that the parties are able to have access to all of the information that has been filed with the adjudicator or is being presented in the hearing process
- Failure to ensure that the parties are able to know the case that they have to meet in full
- Failure to allow the parties the full opportunity to present their case and to be aware of the case that they have to meet
- **If any of these criteria fail to meet the required standards, then the hearing is compromised and subject to appeal on due process grounds.**



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How does the Hearing Fail? (2)

- Compromises at the actual hearing can occur if parties to the matter are:
 - Unable to access the hearing
 - Unable to see the material upon which the adjudicator will rely,
 - Unable to present their material clearly
 - Unable to cross-examine the opposing parties
 - Unable to remain present during the entire hearing

Some Things to Consider

Technology

- Remote meeting platforms are being used for daily business
- Electronic filings
- Confidentiality of platform
 - Zoom hack
 - Skype problems
- Recording capability
 - How do you make a record?
 - How do you read back from the record?
 - What about daily transcripts?

Logistics

- No face-to-face meetings to conduct fulsome consultation
- No oral hearings
 - Credibility
 - Sense of being able to speak directly to the panel

Difficulties with Virtual Hearings

- Dehumanization of presenters, particularly intervenors
- Reduces the symbolic function of the hearing room and the authority of the panel
- Compromises opportunity to have effective assistance from counsel
- Undervalue the importance of non-verbal communications
 - Facial expressions
 - Attire
 - Approach to the panel
 - Perceived loudness of the speaker/tone of voice
- Courts have acknowledged the importance of non-verbal communication in assessing credibility
 - *R. v. N.S.*, 2012 SCC 72, SCC held that non-verbal communication can provide the cross-examiner with “valuable insights that may uncover uncertainty or deception, and assist in getting at the truth”
 - *This advantage is one of the reasons that appellate courts show deference to trial judges when it comes to evaluating the credibility of witnesses*

Difficulties with Virtual Hearings

- Dangers of systemic biases and stereotypes regularly associated with lying
- “nonverbal communication contributes to our understanding of what witnesses are trying to say” said Vincent Denault (Centre for Studies in Nonverbal Communication Sciences) who recently wrote a paper titled “Justice and nonverbal communication in a post-pandemic world: an evidence-based commentary and cautionary statement for lawyers and judges”*
- “One cannot evaluate the credibility of a person if one does not adequately understand what that person is saying. Nonverbal communication helps us to understand what witnesses, lawyers, and all the participants in a trial are trying to communicate. It allows us to be in a better position to compare the different versions presented by different witnesses. Nonverbal communication contributes to that process.”
- Facial characteristics of witnesses could be better viewed on computer screens – can “adversely influence the evaluation of evidence”
- R. v. Marquard [1993] 4 S.C.R. 233: “Credibility must always be the product of the judge or jury’s view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter”

* Virtual justice in COVID era comes at a heavy cost, legal scholars say; as published in The Lawyer’s Daily , on September 14, 2020 by Luis Millan



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Virtual hearings – Procedural Fairness

– Emmanuelle Bernheim, University of Ottawa:

“When you have never seen your lawyer and are facing a television with a judge and two lawyers, and you have absolutely no knowledge about the justice system, it raises a host of fundamental issues, including procedural fairness ... We have to bear in mind the experience these people face and the interpretations they make on developments of a judicial process they have little understanding of”. (emphasis added)

Context – mental health patients held in hospitals but applies to a degree to the administrative tribunal hearing context

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Technology

- Choice of platform
 - Webex, Zoom, Skype, GoToMeeting, Microsoft Teams, BlueJeans
- Connectivity and band width
 - Many rural interveners, disproportionate impact on rural, Indigenous, less prosperous communities
 - Access to internet connection or sufficiently stability connection is an issue
 - CBC news article, September 22, 2020, “How COVID-19 worsens Canada’s digital divide” - <https://www.cbc.ca/news/canada/british-columbia/covid-19-highlights-urban-rural-digital-divide-1.5734167>
- Access to hardware
 - Not everyone has a computer that will be effective to participate
- Capacity to use platforms
 - Older interveners
 - Lack of experience compared to business – exacerbates the inequality of power in a hearing between the proponent and the intervener
 - Translation and communication accommodations – possible or unwieldy?
- Privacy of connection
 - Can a hacker access your whole computer if you are connected to a remote hearing?

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What if the Technology Fails?

- Person drops off
 - Some arbitrators have “emergency call number” so party can telephone in that they have dropped their connection
 - Is this effective?
 - What if phone line is compromised?
 - What happens after someone drops? Do you stop the hearing if they can’t get on? What if they are just an observer? What if they are a party but not presenting that day?
- No access
 - Location, capacity, willingness
- Glitchy connection
- Microphones, webcams

- Access to materials
 - Maps require significant computer speeds – is this practical for most home users?
- Exhibit sharing
 - Ensuring everyone can see the same document at the same time can be a challenge
 - Marking an exhibit to reflect a feature
- Cross-examination of experts
 - Presentation of materials to experts for cross-examination purposes
- Background controls
 - Distractions, interruptions, judgement

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The Human Factor



So ... this happened ... recently!

- *West Edmonton Mall Property Inc and David Ghermizian v. Dana Proctor aka Debbie Dana Marie Proctor aka [a bunch of other names], 2020 ABQB 477 per Mah, J.*

[1] ... The hearing, including the delivery of the oral reasons, was conducted by way of WebEx (an online video conferencing program utilized by this Court) with several participants. While I was giving my reasons, there were occasions of interruption where one participant, the Defendant Ms. Proctor, was talking at the same time that I was talking.

[2] As judge, I explain at the outset of a WebEx hearing that when participants are not speaking, they should put their computer microphones on “mute” so as not to create audio feedback, which adversely affects the live audio and the quality of the audio recording. I also explain that only one party should talk at a time since two (or more) parties talking at the same time makes it difficult for other participants to hear or follow what is being said and may make the recording incomprehensible. ...



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More

[3] During the course of the hearing, and in particular during the delivery of the oral reasons, I had cause to ask the clerk to mute Ms. Proctor on several occasions. In four months of doing hearings by WebEx (brought about by the pandemic), this is the first time I have had someone involuntarily muted. This proved less than satisfactory as a means of controlling the proceedings because a participant has the ability to unmute himself or herself, which Ms. Proctor freely did.

[4] At various points in the hearing, it was also necessary for me to interrupt Ms. Proctor when she launched into extended rhetorical speechifying on largely irrelevant topics (more on that later).

[5] My overall impression of the resulting audio recording (and any transcript that may be derived therefrom) is that the quality and clarity may well be lacking in certain spots during the reasons portion.

...

I. Coda

[37] While I was delivering my reasons, Ms. Proctor persistently held up to her computer camera a full-page colour photo of a young woman in a bikini, apparently as a gesture of protest. During the hearing and the interruptions that occurred, Ms. Proctor engaged in what I can only describe as rants ...:

...

[38] After giving my reasons, I attempted to politely suggest to Ms. Proctor that it was doing her no good to constantly relive events (the loss of her store) that has concluded more than three years ago and that it may be time for her to let go of her grievances and move on with her life. She was having none of it. I was barely able to start imparting my message before I was interrupted again with another excited and overwrought tirade.



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Pros and Cons of Video Conference Hearings

Pros

- Platforms are inexpensive and effective (relatively)
- Screen share is possible to display exhibits
- It is a way forward – for now

Cons

- Platforms work IF AND ONLY IF you have good quality internet speed, connectivity, sound/video
- Users must be familiar with features of many different platforms
- Data security could be compromised
- Home setting participants' personal lives disclosed to the world
- Home interruptions (pets, children)
- Assessment of credibility is difficult
- Digital divide



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Opportunity – Remote/Virtual hearings

- Access to parties who are at a distance from the hearing may have better access to participate or observe
- Access to parties who are unable to take the amount of time necessary to observe or participate in a traditional hearing can tune in for the part that they need to see
- Lower cost based on less travel for regulatory adjudicators and staff
- Less production of paper copies of application materials if access can be given to electronic version or centralized location
- Build community capacity in general



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The Components of the Application

What if the Application is Compromised by COVID-19 Affected Inputs?

- If consultation is insufficient, then the rules say that the permit may not be issued.
- If Indigenous engagement is insufficient, then the rules say that the permit may not be issued.
- Or, in the alternative, is the entire process subject to a legitimate appeal on the basis that due process has failed?
- If any of the social, economic, and environmental impacts cannot be solidly presented by the proponent and examined by the regulator, there is no due process.



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What components of the application are not affected by COVID-19?

- Let's assume that we can get to the place where a virtual hearing meets the requirements of natural justice/due process.
- Some aspects of preparing an application that are not significantly affected by COVID-19 restrictions are:
 - Engineering and design
 - Environmental assessment
 - Power impact studies
 - Economic analysis
 - Route selection and evaluation
 - Noise impact assessment
 - Emissions modelling



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What components of the application are affected by COVID-19?

- What about the aspects of the proponent's preparation that are affected by the restrictions on meeting in person?
 - Consultation
 - Indigenous engagement



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How does Consultation (public and Indigenous) Cail?

- Without the opportunity to meet in person:
 - Is a participant really able to ask the questions that they need to ask?
 - Is the proponent able to create a relationship with stakeholders that will form the basis of good neighbour conversations going forward?

Public Engagement – check your Regulator’s Playbook

- Alberta Utilities Commission
 - Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*
(<https://www.auc.ab.ca/Shared%20Documents/rules/Rule007.pdf>)
- Canadian Energy Regulator
 - <https://www.cer-rec.gc.ca/prtcptn/stkhldrnggmnt/index-eng.html>
- Alberta Energy Regulator
 - Manual 012 (<https://www.aer.ca/documents/manuals/Manual012.pdf>)
 - Directive 056 (<https://www.aer.ca/documents/directives/directive-056.pdf>)



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Virtual Public Consultation

- Tons of issues
- Technical capability
- Confidentiality
- Willingness to engage on an electronic platform
- Availability of technical resources
- Virtual open houses
- Communications in general



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Indigenous Engagement and Consultation

- Critical aspect of pre-hearing work up of the application
 - How do you create working relationships?
 - Participate in community?
 - Meet elders and establish trust?
 - Do site visits with very vulnerable people (elders – age and potential underlying conditions)?
 - Monitors – how do you ensure that everyone remains safe?
 - Ceremonies for meetings and commencing processes?

Legal Foundation of Obligation to Consult Indigenous Intervenor

- S. 35(1), *Constitution Act*, 1982:
 - [t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- Foundation cases:
 - *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 SCR 511
 - *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74 (CanLII), [2004] 3 SCR 550
 - *Mikisew Cree First Nation v. Canada*, 2005 SCC 69 (CanLII), [2005] 3 SCR 388
- Also of interest:
 - United Nations Declaration on the Rights of Indigenous Peoples. United Nations. 2008. (http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)



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Opportunity – Virtual Public Consultation

- Consultation efforts may be more able to reach people if they can communicate from comfort of home at more convenient times
- Virtual open houses - opportunity to interact with proponent staff more confidentially than in an open house atmosphere
- Consultation can be faster if it is by email, chat, or other virtual modality
- Electronic materials can reach more people at a lower cost than distributing printed copies
- More scope to visual interface, like drone photos or fly overs



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Opportunity – Indigenous Engagement

- Elders
 - Engage with elders without risking their health
 - Provide elders with opportunity to do virtual site visit through interactive interface
 - More contact with elders because travel is not required
 - Recording of elders' traditional knowledge for the future
- Community
 - Electronic communication becoming more familiar, capacity is growing
 - Assisting with capacity to engage virtually would be long lasting benefit to community
 - Opportunity for greater involvement because members could participate from various locations, particularly important where study area is large

What is happening outside Canada in the public participation arena? – Tidbits from USA

United States of America – Department of Homeland Security (June 3, 2020) Guidance

- Public meetings related to National Environmental Police Act (“NEPA”) and National Historic Preservation Act (“NHPA”) be transitioned to virtual meetings, alternative means of engagement (online meetings, live-streaming, tele-conference, webinar, website discussion boards, social media, or email)
 - Maximize participation and accessibility
 - Ensure confidential information is handled properly during forums
 - Use public notices to inform public of alternative public participation procedures and how to obtain materials
 - Make materials readily available, including scoping documents, impact statements etc.
 - Inform regulatory agencies and cooperating regulatory agencies that alternative public participation methods are being used

* Homeland Security memorandum, dated June 3, 2020 for Component Environmental Planning Program Heads, from Dr. Teresa Pohlman (Executive Director, Sustainability and Environmental Programs), Titled – Department of Homeland Security National Environmental Police Act and National Historic Preservation Act Interim Guidance during COVID-19

What is happening outside Canada in the public participation arena? – Tidbits from UK

Planning Inspectorate – United Kingdom (May 28, 2020)

- All public participation events were suspended when the UK went into lockdown
- Planning Inspectorate (deals with consenting for Nationally Significant Infrastructure Projects) allowed the consultation to continue with an extended timeline
 - Added “telephone surgeries” – public could book a time to speak with project specialists and ask questions
 - Very wide postal drop
- Planning Inspectorate continues to complete examinations of project applications through written questions and some virtual hearings

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/888114/COVID-19_Guidance_for_NSIP_External_Events_Advice_28_May_2020.pdf, provided by informal inquiry of G. Bishop, Wood PLC

- We are in a world where COVID-19 has impacted regulatory processes in significant ways:
 - Hearings themselves are procedurally challenged from a procedural fairness/due process point of view
 - *Regulators are doing their best but are reacting in a very conservative fashion with respect to current public health conditions*
 - Public consultation and Indigenous engagement have been significantly impacted and, if not executed in a comprehensive and defensible fashion, could undermine the integrity of the hearing regardless of the form of the hearing

- Where do we go from here?
- Opportunity is:
 - *to revisit processes for conducting hearings while ensuring that the principles of natural justice and procedural fairness are preserved*
 - *to expand tools for public engagement and Indigenous consultation through the use of technology to ensure that a failure in the adequacy of consultation does not undermine the hearing*
- Need a mind shift to get there
- No path to follow ... yet

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Questions?

