Indexed as:

Flamborough (Town) v. Canada (National Energy Board) (F.C.A.)

**IN THE MATTER OF an appeal from the National Energy Board;
AND IN THE MATTER OF the National Energy Board Act and the regulations made therunder;
AND IN THE MATTER OF Order No. XO-1-83 dated May 4, 1983, issued to Interprovincial Pipe Line Limited pursuant to s. 49 of the National Energy Board Act;
AND IN THE MATTER OF a public hearing held pursuant to subsections 17(1) and 20(3) of the National Energy Board Act held in 1985 under Order No. MH-1-83, as amended, for the purpose of reviewing that portion of the National Energy Board Order XO-1-83 approving the location of the two proposed propane loading facilities, Board File No. 1755-J1-43;
AND IN THE MATTER OF Order No. AO-2-XO-1-83 dated December 18, 1985, and the National Energy Board reasons for decision in respect of the said Order issued January 10, 1986
Between
Corporation of the Town of Flamborough and Regional Municipality of Hamilton-Wentworth, Appellants, and National Energy Board and Interprovincial Pipe Line Limited, Respondents**

[1987] F.C.J. No. 460

[1987] A.C.F. No 460

81 N.R. 229

5 A.C.W.S. (3d) 109

Court No. A-288-86

Federal Court of Appeal
Toronto, Ontario

Heald, Mahoney and Marceau JJ.

Heard: May 4, 1987
Judgment: May 7, 1987

Energy -- Approval of loading facilities for propane -- Right to a fair hearing.

D. Estrin, for the Appellants.
L. Keough, for the National Energy Board.
J.W. Brown, Q.C. and N. Finkelstein, for Interprovincial Pipe Line.

MAHONEY J. (for the Court, allowing the appeal):-- This appeal, by leave granted pursuant to section 18 of the National Energy Board Act, R.S.C. 1972, c. N-6, is concerned with an order of the Respondent, National Energy Board (NEB), which approved the location of truck and rail delivery and loading facilities for propane within the Appellants' municipal boundaries. The facilities are proposed to be ancillary to a pipeline owned and operated by the Respondent, Interprovincial Pipe Line Limited (IPL). The facilities are located some distance apart: the truck facility on Ontario Highway No. 6 near Harper Corners, the rail facility on a Canadian Pacific line near Flamborough Centre. There are 20 existing residential units within one kilometer of the rail site and 165 within two. There are 45 and 170 respectively within the same distances of the truck site.

The NEB had initially approved the facilities without a hearing after invoking section 49 of the Act. It made an order. It then determined that a public hearing ought to be held. The order in issue amends the original order. Major items of concern at the hearing were public safety and the management of emergencies.

The NEB's hearing occupied 34 days: 30 days in which it received evidence followed by four days of argument. In presenting their evidence and cross-examining witnesses tendered by others, the Appellant municipalities had the objective of satisfying the NEB that the facilities ought not be located within their boundaries at all. While the evidence received by the NEB certainly gave a clear indication of most, if not all, of the safety and emergency management concerns, it was not directed to pertinent conditions that might be stipulated should the location approvals be confirmed.

In the course of argument cousel for IPL (Transcript, Vol. 31, p. 5523) observed:

> I do not propose at this point to address any question of what conditions -- or additional conditions to those that are there -- may be part of the Board's affirming order were the Board to accept our submissions. I would be prepared to do that at the Board's convenience or at a later stage.

The Appellants supported that proposal. The suggestion was disposed of by the Chairman (Vol. 33, p. 5731ff.) in the folloiwng terms:

> ... yesterday you left the impression, Mr. Brown, that you felt that should the Board's decision be in favour of IPL, you would then expect that there would be some process where there would be a discussion or some exchange of views with respect to conditions that might be attached to that decision, and I think I was trying to make it quite clear that this hearing will come to an end when argument finishes and the Board has to reach its decision.
>
> Should the decision be in favour of IPL, the Board, in its discretion, will attach whatever conditions it feels appropriate and will not seek any further views from any of the parties.

In the decision issued, at pages 24 and 29, the NEB dealt with the matter in the following manner:

> 6.3 Contingency Plans
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> It was the view of Intervenors that Interprovincial should have presented contingency plans for the proposed facilities during the hearing. As such plans were not provided, the Town/Region requested that, should the facilities be approved, it have the opportunity to comment on any emergency response plans which Interprovincial might submit.
>
> Views of the Board
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> The safety of the public residing near the proposed facilities is of primary importance to the Board. The Board is well aware of the hazards associated with propane, and feels that careful contingency planning could mitigate potential damage from a serious propane incident.
>
> The Board would require Interprovincial to provide an emergency procedures manual for review and approval by the Board before leave-to-open the facilities is granted. That manual would be expected to address emergency measures to be followed on-site, in the event of a propane release. After Board approval of the manual Interprovincial would be required to provide the Town and Region with copies of the manual. If local authorities decide to develop evacuation plans for

the population in the areas near the sites, Interprovincial would be expected to co-operate in formulating such plans, should it be requested to do so.

7.3.3 Operating Manuals

The Town/Region questioned Interprovincial's witnesses regarding both the availability and the intended contents of a site operating manual. Intervenors implied, through questioning, that it was difficult to fully assess the safety of the site without such manuals.

Interprovincial indicated that the final site design would have to be completed and hardware ordered before manuals could be written. Interprovincial stated that it had obtained a manual in use at a propane depot in Alberta, to provide reference material in producing its own. Questioning by Intervenors revealed that the manual was for a manned site and would not be directly applicable to an unmanned truck terminal.

Views of the Board

The Board would require Interprovincial to file the site operating manuals for Board approval. Interprovincial should take care to ensure that the operating manuals comply fully with the requirements of the Pipeline Regulations and detail the procedures for items such as on-site security, loading and routine maintenance. The Board also would require that Interprovincial file copies of the approved operating manuals with the Town and Region.

Under section 26 of the Act, IPL will require the leave of the NEB to open the facilities. In the order in issue the NEB stipulated a number of conditions. No. 12 required that an operations manual covering a lengthy list of items be submitted for approval before leave to open would be granted. No. 13 required submission of an emergency response manual including, but not limited to, a lengthy list of items. No. 14 required submission for approval of a staff training program and No. 15 a noise monitoring program. This Court's order, granting leave to appeal, is expressed in the following terms:

> This application is granted and the applicants are accordingly granted leave to appeal from the Order of the National Energy Board No. AO-2-XO-1-83 dated December 18, 1985, and the Reasons given by the Board in respect of that Order on the following questions:

> Did the Board breach the principles of natural justice, procedural fairness or fundamental justice in imposing the conditions contained in paragraphs 12, 13, 15 and 15 of its Order
>
> a) Without providing the applicants with an opportunity to lead evidence or make submissions as to the precise content of such conditions prior to the making of the order, and
> b) Without providing the applicants with an opportunity to lead evidence and make submissions as to whether such conditions have been complied with prior to leave to open being granted.

In my opinion, the hearing undertaken by the NEB was inherently a two-stage process entailing, firstly, the determination of whether the earlier approval of the locations should be confirmed and, secondly, a determination of the conditions under which the facilities ought to be permitted to be operated on those locations. The Appellants had the same right to be heard on the second stage as on the first.

Given the expertise available to the NEB, one may well question the value of the Appellants' input into the preparation of the operations manual and the staff training program. The Appellants' counsel conceded that the noise monitoring program, while important to them, was not something they felt strongly required their input. That is all beside the point. As was said by LeDain, J., in Cardinal et al. v. Kent Institution, [1985] 2 S.C.R. 643 at 661:

> ... I find it necessary to affirm that the denial of a right to a fair hearing must always render a decision invalid, whether or not it may appear to a reviewing court that the hearing would likely have resulted in a different decision. The right to a fair hearing must be regarded as an independent, unqualified right in the sense of procedural justice which any person affected by an administrative decision is entitled to have. It is not for a court to deny that right and sense of justice on the basis of speculation as to what the result might have been had there been a hearing.

In any event, it is foreseeable that some emergencies arising in connection with the facilities could have effects requiring management outside their boundaries. The value of the Appellants' input as well as their right to have input in this area is obvious. That the presence of the facilities may impose a financial burden on the municipalities for the provision of emergency services is, likewise, not to be ignored.

I would allow this appeal, set aside paragraph 12, 13, 14 and 15 of Order No. AO-2-XO-1-83 and refer the matter back to the NEB for reconsideration on a basis not inconsistent with these reasons.

In referring the matter back I would make clear that the Appellants and IPL are entitled to be heard as to what, within the contemplation of those paragraphs, IPL is to be required to deal with as a precondition of leave to open and also to be heard on those subjects before that material is approved. That said, the NEB is master of its own procedures. It may determine how it will afford the parties a fair hearing. This judgment is not to be construed as necessarily requiring a resumption of the public hearing.

MAHONEY J.A.