

## **Substance Over Form: The Court of Appeal’s Protection of Intervener Rights at the Alberta Energy and Utilities Board**

**By Alice Woolley**

### **Cases Considered:**

[Lavesta Area Group v. Alberta \(Energy and Utilities Board\), 2007 ABCA 365](#)

In *Lavesta Area Group v. Alberta (Energy and Utilities Board)* 2007 ABCA 365, Madam Justice Carole Conrad granted two appeals of Alberta Energy and Utilities Board (“Board”) decisions. She did so on the basis of “reasonable apprehension of bias” and, in particular, on the basis of the Board’s own concession that such an apprehension had arisen.

While it is hard to dispute the granting of a result against a regulator who has conceded its own bias, Conrad J.’s decision is decidedly unusual. It grants appeals from decisions that had already been voided by the regulator who made them. It does so on the basis of a legal argument that was not raised by any party. And the legal argument on which it relies arises from facts that for the most part had not yet occurred when the applications for leave to appeal were filed. As this comment will suggest, however, the strangeness of the decision is not a cause for concern (although it is unlikely that it should be broadly applied). Rather, it represents an admirable triumph of substance over form.

The events leading up to the Court’s Lavesta decision began three years earlier, when the Alberta Energy and Utilities Board (“Board”) was first asked to consider the need for additional transmission to be constructed between Calgary and Edmonton. The Board was legislatively required to consider transmission construction in two phases: first, pursuant to s. 34 of the Electric Utilities Act (“EUA”), S.A. 2003 c. E-5.1 and from the perspective of the needs of the Alberta transmission grid; and, second, as a facilities project requiring approval pursuant to the Hydro and Electric Energy Act, R.S.A. 2000 c. H-16. This two stage process was new to the Board – it was introduced with legislative amendments to the EUA in 2003 – and perhaps as a consequence the Board struggled from the outset with the appropriate approach to considering the transmission projects. Further, and more significantly, it made a series of procedural misjudgments in handling the applications brought before it.

First, when it convened the initial EUA hearing into the need for the transmission line, the Board did not give specific notice to the landowners in the “West Corridor.” This despite the fact that twelve of the thirteen “concepts” proposed by the Alberta Electric System Operator (“AESO”) required transmission to be built in the West Corridor, including the concept “preferred” by the AESO and ultimately approved by the Board. Due to the absence of notice, none of the West Corridor landowners participated in that first and significant hearing.

After the hearing, when they were notified of the Board's approval, the West Corridor landowners sought Board reconsideration of the decision. The Board granted a partial reconsideration on the location of the transmission facility in the West Corridor, but would not reconsider whether it was needed. The Board did not acknowledge the issues with the notice, although it did note the lack of participation by West Corridor landowners in the hearing.

In then appointing the panel to hear the review and variance, the Board included two of the Board panelists who had participated in the initial EUA need hearing, and who had approved the AESO's recommendation for the transmission line. After complaints by participants the Board removed one of these panelists, but kept as Chair the panelist who had been Chair in the original proceeding. The Board decided in the review and variance that the decision approving the West Corridor location was correct.

Intervenors then sought leave to appeal the review and variance decision. Leave to appeal was ultimately granted by Conrad J. on the basis that there were arguable grounds for appeal raised with respect to, inter alia: 1) the scope of the original EUA need hearing (whether location should have been considered at that stage); 2) the lack of specific notice given to West Corridor landowners; 3) a reasonable apprehension of bias arising from the original appointment of two of the panelists from the first hearing to the review and variance, and the maintenance of the same Chair in both proceedings; and 4) improperly refusing to consider need in the review and variance proceeding.

After the review and variance decision (but before the Court granted leave to appeal) the Board commenced its second stage hearing into the specific application for approval of construction of the transmission facility pursuant to the Hydro and Electric Energy Act. When it did so some of the landowners pointed out that the specific statutory provision in question required the Board to determine the question of "public convenience and need" with respect to the construction of the facility. The Board allowed the "Needs Identification Document" it had considered in the prior hearing to be filed, but it would not re-open the question of need.

Leave to appeal this interlocutory decision was sought, and was granted by Justice O'Brien, on the basis that it, like the earlier appeal, raised an arguable question about the Board's interpretation of the statutory requirements with respect to its approval of the construction of transmission facilities.

By this point – when, still, the leave to appeal applications had not yet been decided – the Board was faced with some extremely angry landowners. However, instead of taking steps to ensure that the hearing was carefully managed, it held the hearing in a room that was inappropriately set up (so that lawyers sat to the side and the landowners sat in close proximity to the Board members), it did not register participants so as to distinguish affected intervenors from others, and it had no apparent structure to determine who would be heard, how and when. As a consequence, the hearing quickly descended into chaos with the "Raging Grannies" singing and hecklers shouting "piss off on you guys" and like comments. The Board was unable to re-gain control, simply conceding the floor to the intervenors for an afternoon of unstructured interventions, many of which were made by parties who would not have had standing under the statutory rules.

After this maelstrom of confusion the Board decided to turn its oral hearing into a "written proceeding" and to segregate the intervenors into a separate building. It did so on the basis of

three “isolated” incidents that it asserted amounted to a security threat – although no particulars as to those incidents were provided.

In addition, and unbeknownst to the interveners or their counsel, the Board also placed the interveners under covert surveillance by private investigators. While the investigators apparently had no mandate from the Board “to collect information from private conversations... eavesdropping or use of electronic measures” (Perras Report, September 7, 2007) the uncontested sworn affidavit evidence of interveners is that the investigators did so. The private investigators posed as interested parties, placed themselves amongst the clients talking to counsel and were observed looking over counsel’s “shoulder to view what was on the screen of his lap top computer” (Affidavit of James Vetsch). In addition, one of the investigators was invited to participate in a conference call involving interveners and their counsel, did participate in the conference call and was additionally copied on e-mail correspondence including some related to litigation planning.

Eventually some of the interveners became suspicious of the behaviour of the investigators and, on June 8, one of the investigators was confronted. As is apparently required by the investigators’ “code of conduct”, the investigator immediately acknowledged that he was an investigator. The Board ultimately acknowledged that the investigators had been retained by the Board to observe the interveners and report on their conduct.

It was these events respecting the retention of the private investigators which, ultimately, led to the Board’s decision to void all of its decisions related to the construction of the transmission line. In Decision 2007-75, in which Chairman Tilleman reached this conclusion, he noted the various problems that had troubled the transmission line process, but emphasized in particular the hiring of the private investigators and the public outrage with the Board that had arisen from its decision to do so. He stated that “The Board is profoundly troubled by the impact actions taken by Board officials, on its behalf, to protect its security, have had on the parties and the public’s perception of the Board” (Decision 2007-75).

The disclosure of the activities of the private investigators coincided almost exactly with the granting of leave to appeal by the Court – on June 8 with respect to the first application and on June 22 with respect to the second. Thus, as already noted, these actions – and the bias which arose therefrom – are unrelated to the applications for leave to appeal themselves. Neither the review and variance decision, nor the decision not to fully re-open “need” in the HEEA hearing, have any temporal relation to the Board’s later decision to hire private investigators.

Nonetheless, the Court’s decision to grant the appeals arising from those applications for leave is substantively correct, and provides appropriate judicial denunciation of the Board’s conduct. Throughout the two-stage process of considering the need, and appropriate location, for transmission between Edmonton and Calgary, the Board did not properly account for the procedural and participatory rights of directly and adversely affected interveners. They did not provide them with notice, they did not ensure that they were heard on the fundamental question of need, they did not structure the hearing so as to allow those interveners to be heard effectively, they segregated them without giving proper reasons for doing so and, in the end, they hired investigators to spy on them. That entire course of conduct warrants the Court’s decision, even if providing a technical explanation for why it does so is difficult.