



Mackenzie Valley Land and Water Board
7th Floor - 4922 48th Street
P.O. Box 2130
YELLOWKNIFE NT XIA 2P6
Phone (867) 669-0506
FAX (867) 873-6610

May 11, 2017

File: MV2011L4-0002

Ms. Eleanor Olszewski
MLT Aikins LLP
2200, 10235 – 101 Street
Edmonton AB T5J 3G1

Email: EOlszewski@mltaikins.com

Mr. Douglas Evanchuk
McLennan Ross LLP
600 McLennan Ross Building,
12220 Stony Plain Road
Edmonton AB T5N 3Y4

Email: devanchuk@mross.com

Re: Request for Amendment to Agenda and Request for Elder's Presentation at the Taltson Compensation Re-Hearing

The Board met on May 11, 2017 to consider the request made by the Carters on May 4, 2017 to amend the Taltson Compensation Re-Hearing agenda to permit the Carters to present their opening statement and presentation first, and to consider the request made by the Carters on May 10, 2017 to call on Elder Albert Boucher as part of their presentation at the compensation Re-Hearing. Each of these requests are addressed separately below.

Order of Proceeding

The Carters seek to vary the order of presentations at the Re-Hearing so that they be allowed to make their opening statement and presentation first. The Carters argue that the purpose of the Re-Hearing is to determine the compensation claim and therefore they should be seen as applicants on this issue. As applicants, they argue that the Carters should proceed first. They further argue that Justice Shaner's decision directs that the Board must provide the Carters with an opportunity to respond and that opening and presenting first allows them that opportunity. Finally, the Carters rely on Rule 54 to argue that the NTPC's participation is intended to be a reply to the Carter's written submissions.

The NTPC opposes the request and asks that the agenda remain unchanged. The NTPC argues that pursuant to the legislation, they were and remain the “applicant” in these proceedings. They note that Justice Shaner’s decision includes the observation that the Board’s Rules of Procedure would have provided “NTPC, as applicant, ... an opportunity to reply to all” submissions and “effectively [have] the last word.” Further, the NTPC argues that the remedial relief granted by the Supreme Court was fulfilled by permitting the Carter’s response and submissions as filed on February 17, 2017 and April 18, 2017. Finally, the NTPC submits that they have a legitimate expectation for the Board to follow its Rules for the order of events at a public hearing.

Board Decision

The Board denies the Carter’s request to amend the Taltson Compensation Re-Hearing agenda to permit the Carters to present their opening statement and presentation first. The order of proceedings originally established by the Board will remain in place. The Board is satisfied that there will be ample opportunity for both parties to be heard by the Board and that there has been no compelling reason brought forward to suggest that the requested change will have any material benefit to the decision at hand.

Reasons for Decision

With respect to the Carter’s request to amend the order of procedure as set out in the Taltson Re-Hearing agenda, the Board considered the submissions of both parties including a letter sent by the Carters on May 4, 2017 and a letter sent by the NTPC on May 8, 2017. The Board also considered the Rules of Procedure and principles of procedural fairness.

The Board has jurisdiction to control its own procedure and to that end established Rules of Procedure in order to “ensure that Board proceedings meet the requirements of fairness” and “to ensure that Board hearings are efficient, focused and meet the needs of all parties.”

Rule 93 addresses the “Order of Events at a Public Hearing.” The Rules also emphasize flexibility and discretion in order to achieve efficiency and fairness. For example:

Rule 3: These Rules will be interpreted liberally to achieve the most fair and efficient determination of every matter before the Board.

Rule 6: The Board may, by its own motion, or an application by a party in any proceeding, dispense with, vary or supplement these Rules.

Rule 77: To the extent consistent with its duty of procedural fairness, the Board will emphasize flexibility and informality in its proceedings.

The Board considered whether the order of procedure could impact their ultimate obligation to consider the evidence, submissions and presentations in determining the Carter’s claim for compensation. The Carters have offered no suggestion that the order of presentation could impact the substance or quality of their presentations or submissions.

The Carters have suggested that the order of presentations has some relevance to their fair opportunity to respond to the NTPC's submissions of April 12, 2012. The Board is cognizant that the Carters have provided two lengthy expert reports in response to the NTPC's expert reports. Those reports as part of the Carter's response were filed on February 17, 2017. The Carters, as well as the NTPC, have also already filed lengthy written submissions as of April 18, 2017. Further, on today's date, the Board considered a further request from the Carters to call an additional and previously unexpected witness as part of their presentation at the Re-Hearing. All of these are part of the Carter's opportunity to respond. In addition, the Carters will have a further opportunity to provide their in-person presentation and submissions at the Re-Hearing scheduled for May 16 and 17, 2017.

In all of the circumstances, the Board is satisfied that the Carters have had and will continue to have a fair opportunity to provide a complete response to the NTPC's submissions, regardless of order of presentations at the in-person Re-Hearing.

Request to Call Additional Witness at the Re-Hearing

The Carters seek to call Elder Albert Boucher as part of their presentation at the Re-Hearing. They argue that Elder Boucher's evidence will assist the Board by providing third party evidence about the adverse impacts of the NTPC's continued operations.

The Carters offer no explanation let alone justification for the late notice of this prospective witness. They have not relied on any Rule in support of their request.

The NTPC asks the Board to deny the admissibility of this witness. The NTPC argues that the Carters had ample opportunity to submit relevant evidence and that this late request creates irreparable prejudice to the NTPC. The NTPC maintains they will be unable to provide, if necessary, an evidentiary response to the witness' potential evidence and therefore allowing the admission of this additional witness is unfair.

Board Decision

The Board approved the Carter's request to call Elder Albert Boucher as part of their presentation at the compensation Re-Hearing. Mr. Albert Boucher will be permitted to speak for 10 minutes, as requested, as part of the Carter's presentation. The Board hereby requires that the Carters submit to the Board a written summary outlining the subject matter of Mr. Boucher's presentation by 5:00 PM MT, May 12, 2017. This summary will be forwarded to the NTPC once received.

At the Re-Hearing, following the Carter presentation, the NTPC will be given the opportunity to request up to a two-hour adjournment to consider the evidence provided by Mr. Boucher and consider their response, if any. Furthermore, the Carters are responsible for the costs and logistics required to ensure both Mr. Albert Boucher and the identified interpreter, Ms. Sarah Basil, both attend the Re-Hearing in person. The Carters are also responsible for costs incurred for Ms. Basil's interpretation services. The Board will cover the costs incurred to provide the translation equipment and transcription services.

Reasons for Decision

As described in the reasons immediately preceding, the Board has jurisdiction to control its own procedure and to that end established Rules of Procedure in order to “ensure that Board proceedings meet the requirements of fairness” and “to ensure that Board hearings are efficient, focused and meet the needs of all parties.”

Rules 17-20 address the admissibility of evidence at a hearing. Rule 17 confirms a power common to administrative tribunals to admit evidence that is beyond the scope of technical and strict rules of evidence. Rule 20 proposes that any witness who is to give opinion evidence “may be required by the Board to file a statement of their qualifications on the public record before their evidence is considered.”

Before deciding whether to exercise its discretion and allow the admissibility of a further witness on late notice, the Board considered whether this is more likely to enhance or detract from procedural fairness. Three aspects of procedural fairness are particularly important: the opportunity to make one’s case, the right to know and understand the opposing case one is required to meet, and the legitimate expectations of the parties.

The Carters identify the NTPC’s argument that the Carter’s own personal observations about the lake cannot be relied upon and suggest that the Board ought to hear from Elder Boucher in order to provide support for their position as he is a disinterested third party to their claim.

Significant materials have been exchanged between the parties including detailed personal observations by various members of the Carter family, as well as letters written by some of their patrons. It is difficult to imagine that the NTPC is entirely unable to predict what the evidence of Elder Boucher is likely to relate to or that they would be unable to prepare to address this witness at the Re-Hearing that is still five days away.

Ultimately the Board would like to hear all available evidence. The weight that such evidence receives cannot be determined in advance. There are procedural safeguards that the Board can employ in order to try to balance fairness to both parties

Closing

If you have any questions or concerns regarding these matters please contact Shannon Allerston via email at sallerston@mvlwb.com.

Sincerely,



Mavis Cli-Michaud
Chair, MVLWB