The AER's broad duty of disclosure in licence appeals: Judd v Alberta Energy Regulator

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Alberta Energy Regulator (AER) *Directives 067* and *088* require operators to provide the AER with detailed financial and compliance information. Can the AER give a landowner appealing a pipeline licence granted under *Directive 056* access to this information? The Alberta Court of Appeal (ABCA) has ruled that it can and where relevant should.[1]

Background

The AER granted a licence to Pieridae Alberta Production Ltd. (the Operator) to construct and operate a sour gas pipeline adjacent to landowner Michael Judd's land (the Pipeline Licence). The AER granted the landowner's request for regulatory appeal (the Regulatory Appeal).

In accordance with its practice, the AER produced a "Record of Decision Maker" into the Regulatory Appeal, including the information relevant to the AER's licencing decision under *Directive 056*. The landowner then brought a motion (the Motion) for additional production from the AER. The landowner sought the Operator's financial, capability, and compliance information collected under *Directives 067* and *088* relating to the Operator's eligibility to acquire and hold a licence for energy development in Alberta (the Requested Information).

The AER Panel denied the Motion.[2] It ruled that the Requested Information was not relevant and material to the Regulatory Appeal because the licence eligibility and the licensee assessment under *Directives 067* and *088* were distinct regulatory processes, and separate from the process of deciding a new licence under the *Pipeline Act*.[3] According to the AER Panel, the Requested Information did not relate to either the assessment of direct and adverse effects of the Pipeline Licence on the landowner or the merits of the Pipeline Licence itself.

The Court of Appeal's decision

The Court of Appeal allowed the landowner's appeal and overturned the AER Panel's decision.

The Court was specifically critical of the AER's reliance on the separation of the *Directive 056* application process from the *Directive 067* licence eligibility and *Directive 088* holistic licensee assessments as the basis for its decision. The Court ruled that the landowner was entitled to whatever of the AER's records were relevant to the Regulatory Appeal, regardless of the process through which the AER received them.[4] The test was simply whether the records were relevant and material to the matters at issue in the Regulatory Appeal.[5]

While the Court cautioned that the AER should not be subjected to "fishing expeditions,"[6] it concluded that the AER Panel hearing the Regulatory Appeal must determine which of the records in the AER's possession, including those the operator had provided through *Directives 067* and *088,* were relevant and material to the Regulatory Appeal.[7]

As a final issue, the Operator argued that the AER had no duty to disclose the information at all. While the AER believed that it had a statutory obligation to produce relevant and material information,[8] the landowner did not bring the Motion in reliance on a particular section of the *AER Rules,* but as a matter of procedural fairness.[9] The Court adopted the AER's opinion but did not identify the source of the AER's obligation.

After the Court's decision, the Motion returned to the AER Panel. Emphasizing the Court's warning against a fishing expedition, the Panel declined to order the AER to produce evidence of the operator's financial capability. It did order the AER to produce evidence of the operator's field non-compliance and pipeline incident and abandonment rates. The AER Panel also allowed the operator to make submissions on whether that information should be subject to confidentiality protections.[10]

Takeaways

There are at least three takeaways from the Court's decision.

First, the Court endorsed the AER's position that it had an open-ended duty to disclose relevant information into the regulatory appeal process. The Court did not identify a statutory basis for this claim. Most likely, this duty is premised on the doctrine of procedural fairness.

Second, the Court found that the scope of the AER's duty to produce records is not confined to those records that the operator had specifically placed before it in support of its licence application. The AER should also produce other records in its possession, so long as they are relevant and material to the issues at hand.

And third, the AER in its adjudicative role will decide production requests based on what is at issue in the appeal. In this case, the records the Panel ordered to be produced appear to be limited compared to the vista of potential content opened by the Court. That will not always be the case.

Ultimately, operators faced with or commencing a regulatory appeal should plan their position in the knowledge that any of their information in the AER's possession could be produced into the appeal where relevant and material.

BLG has significant experience handling regulatory appeals and other proceedings before the AER, as well as production disputes in regulatory and litigation contexts. For more information, please reach out to one of the key contacts below.

Footnotes

[1] *Judd v Alberta Energy Regulator*, 2024 ABCA 154 [*Judd*].

[2] *Re Pieridae Alberta Production Ltd*., (May 19, 2023), Regulatory Appeal No., online: <https://static.aer.ca/prd/2023-05/1935549_20230519.pdf> [*Judd AER #1*].

[3] *Judd* at paras 9-11.

[4] *Judd* at paras 14 and 27.

[5] *Judd* at para 22.

[6] *Judd* at para 24.

[7] *Judd* at para 25.

[8] *Judd* at para 25.

[9] *Judd AER #1* at page 2.

[10] *Re Pieridae Alberta Production Ltd*., (June 27, 2024), Regulatory Appeal No., online: <https://static.aer.ca/prd/documents/decisions/Participatory_Procedural/1935549-20240627.pdf>.

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