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ERT FORCES SETTLED APPELLANT AND DIRECTOR TO SEEK SUBMISSIONS OF PUBLIC AT PRE-HEARING CONFERENCE

By Jack D. Coop

In *SEJJ Environmental Solutions Inc. v. Ontario (Environment and Climate Change)*[1], a decision of the Ontario Environmental Review Tribunal released on November 24, 2017, the Tribunal forced an appellant and the Ministry Director who settled the appellant's appeal before any Pre-hearing Conference had been held, and before any other "parties, participants or presenters" had been identified by the Tribunal, to essentially seek the input of these third parties before it would consider approving the settlement.

Background

The appellant operated a solid waste transfer facility in Toronto. The Director imposed certain conditions of approval in the appellant's Environmental Compliance Approval (ECA), including a suspension of the facility's ability to receive waste. The appellant appealed these conditions to the Tribunal.

In a settlement reached by the appellant and Director before any Pre-hearing Conference could be held, the Director revoked the suspension condition. The appellant then gave the Tribunal notice that it was withdrawing its appeal.

When the Tribunal demanded the appellant provide to it a list of adjoining landowners, in accordance with the Tribunal's usual practice, so that notice could be given to them and a Pre-hearing Conference held to identify "parties, participants or presenters" who may wish to comment on the settlement, the appellant and Director balked.

The Director took the position the Tribunal had no jurisdiction to force a Pre-hearing Conference upon the parties simply to obtain input from the public into the settlement. Both parties took the position that this input was unnecessary and should be waived by the Tribunal because the conditions that had been appealed did not relate to "adverse effects" upon adjacent landowners and did not arise because of public complaints.


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[1] *SEJJ Environmental Solutions Inc. v. Ontario (Environment and Climate Change),* 2017 CanLII 80040 (ON

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The appellant moved to have the requirement of notice to the public and Pre-hearing Conference waived by the Tribunal, and for a settlement hearing to be held without the public present.

Decision

In dismissing the motion, and forcing the hearing to solicit the input of "parties, participants or presenters", the Tribunal considered its Rules, which provide:

> TERMINATION OF PROCEEDINGS
>
> 201. Where there has been a proposed withdrawal of an appeal as part of a settlement agreement not objected to by any Party that alters the decision under appeal, the Tribunal shall review the settlement agreement and consider whether the agreement is consistent with the purpose and provisions of the relevant legislation and whether the agreement is in the public interest. The Tribunal shall also consider the interests of Participants and Presenters. After consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.
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> 202. Where a Director, Risk Management Inspector or Official, Authority or municipality proposes to revoke a decision that is the subject of an appeal, the Tribunal shall consider whether the proposed revocation is consistent with the purpose and provisions of the relevant legislation and whether the proposed revocation is in the public interest. The Tribunal shall also consider the interests of Parties, Participants and Presenters. After the consideration of the above factors, the Tribunal may decide to continue with the Hearing or issue a decision dismissing the proceeding.

The Tribunal identified the following issue on the motion:

> [13] The issue is whether to waive the requirements in Rules 27-28 and 126-132 and schedule a settlement hearing without any requirement to identify added parties, participants or presenters.

The Tribunal variously concluded:

> "As set out in Gold, the usual practice of the Tribunal is to hold a PHC to consider status requests where a proposed settlement alters the decision under appeal, but the Tribunal has the discretion to depart from that practice where appropriate."
>
> "…the settlement agreement [in this case] either alters the decision under appeal for the purposes of Rule 201 or revokes a decision under Rule 202."

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In rejecting the Director's jurisdictional argument, the Tribunal conclude:

> "[24] The Tribunal disagrees with the Director that in every case only the interests of those with status on the date a settlement is reached need to be considered. To accept the Director's argument would mean that whenever an appeal is brought to the Tribunal but settled prior to a PHC being convened, the Tribunal would be precluded from identifying and hearing from potentially interested persons and would thereby be hampered in being able to fulfil its mandate of considering the public interest and the interests of persons beyond the statutory parties. Notice of the PHC may be the first time that other persons are made aware of the appeal. It is at the PHC when the Tribunal first identifies and gives status to added parties, participants and presenters, on the basis of a personal or genuine public interest. If the Tribunal were to by-pass these steps whenever an appeal is settled, it would have no reliable way of knowing if there were any persons other than the statutory parties who might have an interest in the terms of the settlement and who could contribute to its understanding of the impact of the settlement on individuals and the broader public interest. Therefore, the Tribunal finds that, when considering a proposed settlement under Rules 201 and 202, it is not limited to considering the interests of the parties, participants and presenters who have been given status as of the date of the proposed settlement agreement, but has authority to convene a PHC to, among other things, determine whether status should be granted to interested persons."

On the waiver argument, the Tribunal considered that the purposes of its Rules included "to provide a fair, open, accessible and understandable process for Parties and other interested persons" and "to facilitate and enhance access and public participation." In concluding that waiver of public notice would be inappropriate in this case, the Tribunal concluded:

> "[30] In determining whether it is appropriate to waive the requirement of notice and the convening of a PHC in a particular case, the Tribunal should not attempt to predict whether any of the persons entitled to receive notice under its Rules will seek to participate.
>
> …
>
> The Tribunal has no reliable way to make an accurate prediction, so even when it seems unlikely that any person will seek status in a given case, as appears to be the case here based on the Appellant's submissions, the use of that low of a standard for waiving notice would inevitably exclude some would-be intervenors in some cases, given the volume of cases the Tribunal hears. If the Tribunal were to guess wrong, the effect would be to deny the right to participate to an interested person who may be able to contribute to its understanding of the issues and inform its appreciation of the public interest."

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While the Tribunal agreed with the appellant and Director that its Rules also include purposes which intend “to encourage co-operation among Parties” and “to assure the efficiency and timeliness of proceedings”, it concluded that the various purposes would have to be balanced by the Tribunal. The need for efficiency does not necessarily trump the need for public participation. Balancing these factors, the Tribunal ordered the Pre-hearing Conference to proceed, so that public input could be solicited.

Conclusion

The decision reinforces what risks can attend upon a disgruntled recipient of an approval or order decision launching an appeal to the Tribunal. Appellants will often appeal such decisions simply to maintain leverage over the Director, and force the Director and her staff into settlement discussions. Here, that strategy evidently worked, as the appellant did reach a favourable settlement with the Director. However, the settlement was not "final". Having "altered" the decision with their settlement, neither the appellant nor Director were allowed by the Tribunal to terminate the hearing quickly, or avoid subjecting their settlement to public scrutiny.

Members of the public and competitors may always have something to say about a bi-lateral settlement reached between an appellant and the Director in the "backroom". They may support it, or they may oppose the settlement entirely. They may even demand more stringent conditions be imposed. Therefore, great caution must be exercised before deciding to appeal to the Tribunal. When you do so, you risk entering into a public forum. And you may lose control over the hearing process to an assiduous Tribunal, bent upon protecting the public interest.

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