

DENIED: All Requests for Permission to Appeal the Rejection of the Grassy Mountain Coal Project

January 28, 2022

Earlier today Justice Bernette Ho of the Alberta Court of Appeal denied the requests from Benga Mining, the Piikani Nation, and the Stoney Nakoda Nations for permission to appeal last June's Joint Review Panel decision to reject the Grassy Mountain Coal Project. Here's an initial reaction to the decision.

- Ian Urquhart, Executive Director



On Friday, January 28, 2022 Justice Bernette Ho of the Alberta Court of Appeal denied the requests from Benga Mining, the Piikani Nation, and the Stoney Nakoda Nations for permission to appeal last June's Joint Review Panel decision to reject the Grassy Mountain Coal Project. The Panel, acting in its capacity as the Alberta Energy Regulator, concluded that the project was not in the public interest.

The three applicants had to convince Justice Ho that their applications raised questions of law or jurisdiction. Permission to appeal cannot be granted based

on questions of fact or questions of mixed fact and law. Generally, they failed to convince Justice Ho that their applications raised those questions of law/jurisdiction. In the one instance where Justice Ho said Benga raised a question of law or jurisdiction she found that Benga's "ground of appeal does not have arguable merit."

Justice Ho's decision clearly and strongly endorses the fairness, thoroughness, and inclusiveness of the Grassy Mountain Joint Review Panel process.

Benga's Application

Of the six grounds for appeal raised in Benga's application, Justice Ho found only one of them raised a question of law or jurisdiction. That ground was that the Panel couldn't conclude Benga had submitted insufficient information after the Panel had decided Benga's project application could proceed to a hearing. Justice Ho ruled Benga's position didn't have arguable merit.

Here, Benga's interpretation of procedural fairness would have undermined one of the essential foundations of the Joint Review Panel process – the requirement that interveners in the hearing are able to participate meaningfully in the public hearing. To these layperson's eyes, Benga argued that deciding the application could proceed to a hearing was synonymous with approving the project. "In my view," Justice Ho wrote, "the Panel made clear...that while it deemed Benga's EIA to be complete, that did not equate to Project approval."

In the world Benga conjured for Justice Ho's consideration, interveners wouldn't be able to question the sufficiency of Benga's information or evidence after the Panel decided to proceed to a hearing. Why, one might wonder, would there then be any need at all for a public hearing in that world?

This isn't the only part of the decision where Justice Ho endorses the healthy position that the Joint Review Panel mechanism must ensure all participants an opportunity to participate meaningfully. Benga unsuccessfully tried to persuade the Court that, with respect to evidence and experts, the Panel committed errors of law by ignoring Benga's evidence and by not giving sufficient credence to Benga's experts.

Essentially, Benga argued that its evidence and its experts, by definition, should have prevailed in the hearing process. If Benga's evidence wasn't accepted and if its experts weren't privileged then this was an error of law. "At its core," Justice Ho wrote, "Benga's argument is that the Panel should have preferred Benga's expert evidence." She rejected this contention and made an important point that the evidence of experts and laypersons alike may play an important role in Panel deliberations.

The First Nations

Justice Ho also dismissed the applications from the Piikani Nation and Stoney Nakoda Nations for permission to appeal the AER's decision. A key contention of the First Nations' objections was that the Panel's public interest

determination didn't pay sufficient attention to the support these Nations gave to Benga. That support was based largely on the unspecified economic benefits the mine would bring to these First Nations. Justice Ho concluded that the Panel had not ignored those assumed positive benefits in its decision.

The participatory or inclusive character of the Joint Review Panel process, and the need to take advantage of it, figures importantly in the section of the Court's decision devoted to considering the First Nations arguments. If the Piikani and/or the Stoney Nakoda wanted to make an extensive, detailed argument to the Panel about Grassy Mountain's socioeconomic benefits for them they could have done so. They had full participant status in the process. "The record is clear that neither Stoney Nakoda nor Piikani were asked an explicit question about what they would lose if the Project did not proceed," Justice Ho wrote. "However, the record is also clear that Stoney Nakoda and Piikani were not limited by the Panel as to what information they could file in support of the Project, including in relation to the benefit agreements."

Conclusion

Justice Ho's decision may be remembered most for putting the final nail in the coffin of the Grassy Mountain Coal Project (assuming that Benga Mining doesn't pursue other appeal avenues). At first glance, it also should be regarded as a decision that endorses an inclusive, participatory understanding of impact assessment. Make no mistake about it. If Benga Mining's view had prevailed it would have opened the door to a very dangerous possibility – that Joint Review Panel assessments, by definition, would be ones where the proponent's evidence, the proponent's experts, and the proponent's interests would trump all else. In the universe of impact assessments, it's hard to imagine a more "significant adverse effect" than that.



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