

Via Email

December 10, 2020

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Regulatory Law Chambers

Alberta Energy Regulator – Compliance and
Liability Management Branch

Attention: Laura-Marie Berg

Attention: Maria Lavelle, Counsel

Dear Mesdames:

RE: Late Filed Request for Regulatory Appeal or Reconsideration by Christopher Hanne
Alberta Energy Regulator – Compliance and Liability Management Branch
Declaration Naming Christopher Hanne pursuant to Section 106(1) of the *Oil and Gas Conservation Act* (OGCA)
Regulatory Appeal No.: 1931598 (Regulatory Appeal)

I. INTRODUCTION

This decision deals with Christopher Hanne’s (Mr. Hanne) request for a regulatory appeal filed on March 10, 2020 (Request) of an AER decision dated April 19, 2019 (Decision) issued pursuant to section 106 of the *Oil and Gas Conservation Act* (OGCA). Mr. Hanne also requested the AER to extend the time limit for filing of the Request or, alternatively, he requested the AER to exercise its discretion and reconsider the Decision in accordance with section 42 of the *Responsible Energy Development Act* (REDA). For clarity and ease of reference, the reconsideration request is considered as part of the Request.

The AER has considered Mr. Hanne’s request under section 38 of the REDA for a regulatory appeal of the AER’s decision to approve the issue a Declaration Naming Christopher Hanne pursuant to Section 106(1) of the OGCA. The AER has reviewed Mr. Hanne’s submissions and the submissions made by the AER Compliance & Liability Management Branch (CLM).

For the reasons that follow, the AER has decided that there are compelling reasons and special circumstances that warrant allowing the late filing of the Request. Further, the AER has decided that Mr. Hanne is eligible to request a regulatory appeal in this matter and has therefore granted the Regulatory Appeal.

The applicable provision of REDA in regard to regulatory appeals, section 38, states:

38(1) An eligible person may request a regulatory appeal of an appealable decision by filing a request for regulatory appeal with the Regulator in accordance with the rules. [emphasis added]

The term “eligible person” is defined in section 36(b)(ii) of REDA to include:

a person who is directly and adversely affected by a decision [made under an energy resource enactment]...

II. BACKGROUND

The Decision, pursuant to section 106 of the OGCA, named Mr. Hanne as a person in direct or indirect control of Arrow Point Oil & Gas Ltd. (Arrow Point), Big Coulee Resources Ltd. (Big Coulee), and Drumlin Energy Corp. (Drumlin), which are companies that have contravened or failed to comply with orders of the AER or have debts to the AER. The Decision, in its terms and conditions, imposed certain restrictions on Mr. Hanne, which restrictions are summarized below.

The Decision imposed an obligation on Mr. Hanne, and any licensee or approval holder directly or indirectly controlled by him, to inform the AER of the section 106 declaration upon submitting any applications to the AER under the OGCA or the Pipeline Act. The Decision also directed Mr. Hanne to submit sworn declarations by May 13, 2019, declaring whether he is in direct or indirect control of any licensee or approval holder that is an applicant to the AER or a licensee or an approval holder of any licences or approvals issued under the OGCA or the Pipeline Act. If the answer to those questions is yes, Mr. Hanne must provide the name of the licensee or approval holder, the applications numbers or the numbers of the licences or approvals.

The Decision also stated that the AER may refuse to consider any application from Mr. Hanne, Arrow Point, Big Coulee, Drumlin (Regulated Entities) or any other licensee or approval holder over which Mr. Hanne has direct or indirect control. In case the AER decides to consider any applications from Mr. Hanne or any other companies under his control, the AER may require the submission of abandonment and reclamation deposits in an amount to be determined by the AER prior to granting any licence, approval, or transfer of a licence or approval under the OGCA.

Finally, the Decision stated that the declaration is in force until the contraventions are rectified or until the AER directs otherwise.

III. AER REGULATORY APPEALS

The AER's Regulatory Appeals established a process schedule that provided the parties with an opportunity to provide submissions on the lateness of the Request since it was filed way beyond the 30-day deadline applicable to this regulatory appeal. More specifically, in its March 18, 2020 letter, Regulatory Appeals solicited submissions from the parties on whether or not there are special circumstances that would warrant allowing Mr. Hanne to file the late regulatory appeal request or, in the alternative, whether or not there are extraordinary circumstances that would warrant the AER to reconsider its Decision pursuant to section 42 of REDA.

IV. SUBMISSIONS FROM THE PARTIES

1. Christopher Hanne's Request

As noted in the introduction of this decision, Mr. Hanne requested a regulatory appeal, including extension of the time limit for filing the appeal, and alternatively a reconsideration of the Decision under section 42 of REDA.

In relation to the applicable law for filing a regulatory appeal, Mr. Hanne submitted that he is an eligible person to request a regulatory appeal under section 36(b) of REDA because he is directly and adversely affected by the Decision. He also submitted that the Decision is an appealable decision under section 36(a)(iv) of REDA since the Decision was made under an energy recourse enactment, namely section 106 of the OGCA, and without a hearing.

Mr. Hanne submitted that the deadline for submitting the request was 30 days pursuant to section 30(3)(m) of REDA. Mr. Hanne conceded that request was filed late and requested the AER to grant an extension of the time limit in accordance with section 41(2) of the Rules and allow him to file the regulatory appeal. Mr. Hanne noted that, at the time the Decision was issued, he was unaware of the availability of a regulatory appeal and the applicable timelines for submitting one.

Alternatively, Mr. Hanne requested the AER to exercise its discretion and reconsider a decision pursuant to section 42 of REDA since there are extraordinary circumstances in this case. AER has made a decision that is wrong on its face having regard to the evidence in this case and the

law regarding the meaning of "control." The record was confusing and it is understandable that a person unfamiliar with AER processes would be aware of another avenue of appeal. Finally, the implications of the AER's section 106 order are negative and significant for Mr. Hanne. These are exceptional and compelling grounds, that warrant the use of the AER's discretion to reconsider its decision.

Mr. Hanne submitted that the declaration in the Decision may have significant negative impact on Mr. Hanne's future as an investor, manager and director of a very successful Calgary restaurant. The declaration, if left in force, may impede the possibility of him holding a senior position in a public company. Mr. Hanne understands that section 106 declarations serve important purpose in ensuring that individuals who control non-compliant companies are not in position to continue to control such companies in Alberta. In this particular case, the declaration was issued against a person who has never had an oversight and control over the Regulated Entities, has never worked in the oil and gas industry and who stands to suffer significant long-term harm only because of a poorly made investment decision.

2. Compliance & Liability Management Branch's Submissions

In its April 14, 2020 submission, the AER's Compliance & Liability Management Branch (CLM) conceded that Mr. Hanne is an eligible person to request the regulatory appeal and that the Decision is an appealable decision in accordance with the applicable REDA provisions. CLM also submitted that Mr. Hanne's request for a regulatory appeal is out of time and there are no special circumstances that would warrant extending time for filing a request for regulatory appeal.

CLM is of the view that Mr. Hanne has the onus of proving that an extension of the time for a regulatory appeal is warranted. Mr. Hanne was aware of the of the availability of a regulatory appeal since the Decision expressly provided information regarding the availability of a regulatory appeal. Mr. Hanne could have consulted the AER website and sought independent legal advice at the time of receipt of the Decision on the regulatory appeal process and timelines.

According to CLM, the record demonstrates that Mr. Hanne was treated in a procedurally fair manner since a section 106 declaration was initially issued against Mr. Hanne on March 11, 2019. The CLM did recognize after issuing the initial declaration that his January 28, 2019 submission was inadvertently omitted. Consequently, CLM reconsidered the initial declaration after Mr. Hanne submitted on the following day a reconsideration request claiming that his January 28, 2019 submission had not been considered when the first declaration was issued. The reconsideration letter issued on March 22, 2019 was issued by someone without the appropriate

statutory authority. The Decision was issued after a reconsideration, by a different decision-maker with the appropriate statutory authority, confirming that a section 106 declaration against Mr. Hanne was still warranted.

CLM also argues that, in previous decisions on requests for reconsideration, the AER held that it will reconsider its decisions only when compelling circumstances warrant it, remarking that mere disagreement with a decision is not sufficient. CLM notes that no further comments on the substance and rationale are necessary since they were clearly articulated in the Decision. In his submissions, Mr. Hanne relies on information that has already been considered by the decision maker when the Decision was issued and any additional information submitted in this process was available at the time the Decision was issued. This failure does not amount to exceptional or compelling circumstances that would warrant the exercise of the AER's discretion to reconsider the Decision.

The effect of a section 106 declaration is outlined in the declaration itself, which places restrictions on Mr. Hanne's ability to participate in the upstream oil and gas industry and there is nothing in the Decision that would expressly impact his participation in his current industry. Mr. Hanne's failed to substantiate his concerns with regard to the alleged significant long-term harm.

3. Christopher Hanne's Reply Submissions

In its response to CML's submissions, Mr. Hanne submitted that, given the facts of the case, the Decision is not justified. Mr. Hanne disagrees with CLM's assertion that there was no evidence before the CLM when the Decision was made that clearly demonstrated Mr. Hanne did not exercise any control over the Regulated Entities.

Mr. Hanne is of the view that for tribunals like the AER, a clear, justifiable and coherent decisions underpin administrative legitimacy, as highlighted by the Supreme Court of Canada in *Canada v. Vavilov*.¹ To allow a decision that is demonstrably wrong to stand undermines the legitimacy of a regulatory tribunal. One of the key reasons for the AER's discretion under the Rules to extend timelines for anything, including regulatory appeals, is to ensure that it has ability to correct such decisions. This is also a key reason why the AER also has the ability to reconsider its decisions without any time limitations.

¹ 2019 SCC 65.

Mr. Hanne argues that the irregularities in the process that led to issuing the Decision and his unfamiliarity with the AER's appeal process should warrant granting this request. This argument is supported by the steps taken by CLM prior to issuing the Decision. On March 11, 2019, CLM issued the initial 106 declaration and Mr. Hanne requested the AER to "reconsider the Decision" in an email sent the same day. On March 22, 2019, the AER issued a letter dismissing the reconsideration request. Mr. Hanne responded to the March 22, 2019 AER letter on April 1, 2019 and April 3, 2019, asking again the AER to reconsider the initial decision reaffirming the he did not have control over the Regulated Entities.

On April 11, 2019, the AER issued the Decision, noting that it had received a request for reconsideration dated March 12, 2019, further advising that the AER letter dated March 22, 2019 was issued without authorization. The Decision stated that it confirmed the March 11, 2019 decision to issue a section 106 declaration against Mr. Hanne, with certain variations, and another declaration with variations was issued as part of the Decision.

Even though the Decision made significant changes to the initial declaration dated March 11, 2019, including acknowledging that the previous decision failed to consider Mr. Hanne's January 28, 2019 letter, and the new declaration was issued on April 11, 2019, the Decision was not publicly available on the AER's external website on March 20, 2020, which is the date of the Request.

Mr. Hanne submits that the fact that the Decision was not publicly available highlights the very convoluted nature of the CLM Branch's decision process, which includes the following:

- (a) a January 28, 2019 submission by Mr. Hanne that was misplaced;
- (b) a March 11, 2019 decision that was made without consideration of Mr. Hanne's January 28, 2019 submission;
- (c) a March 22, 2019 AER decision which was made without authorization;

all of which was followed by

- (d) the April 11, 2019 Decision which purported to correct all of the previous errors, but that was not publicly available until after the Request for Regulatory Appeal or Reconsideration was filed.

Mr. Hanne does not view his requests to reconsider the initial declaration and the Decision as reconsideration requests under section 42 of REDA. In his email and letters dated March 11, April 1, and April 3, 2019, Mr. Hanne was simply asking the AER to reconsider its decision, as the term “reconsider” is commonly understood, which in this case means that Mr. Hanne believed that he had issued requests for an appeal, first on March 12, 2019 and again on April 1st and 3rd, 2019. In other words, by asking the AER to reconsider the decision on three occasions Mr. Hanne assumed that he exhausted the avenues of appeal regardless of the appeal warning contained in the Decision.

With regard to the potential harm and prejudice from the Decision, Mr. Hanne’s main concern is not with his participation in the food industry but rather with the ability to be part of the management team that takes a business public. The Toronto Stock Exchange (TSX) sets significant requirements for persons who wish to participate in the management or as a director in a public company, such as: requiring the business of the issuer to be conducted with integrity and in the best interests of its securityholders and the investing public; requiring absence of any regulatory or securities laws violations or infractions by the individual or by issuers; and preventing persons to serve as directors or officers of an issuer if any corporate or any other legislation prohibits or disqualifies that person from acting as a director or officer of a reporting issuer.

Considering these TSX requirements and the TSX significant discretion in assessing them, it is highly unlikely that Mr. Hanne would be approved to be a member of management or a director of a public company as long as he is subject to a section 106 declaration.

In addition, prejudice to the opposite party is a key factor in any application to enlarge time² and the principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature’s intention.³ There is significant prejudice to Mr. Hanne’s career prospects going forward. The AER should consider this factor when deciding whether to extend the time for a filing of a regulatory appeal or to reconsider of the Decision.

V. ANALYSIS

The usual process in case of late filed requests for a regulatory appeal is for Regulatory Appeals to seek submissions on the lateness issue alone after which a delegate decides on whether to

² *Zahmol Properties Ltd. v. City of Calgary (City)*, 2012 ABCA 89.

³ *Vavilov*, at para 133.

register the late regulatory appeal request and assess the regulatory appeal on its merits. Regulatory Appeals sought submissions in its March 18, 2020 letter issued to the parties. If the late filing is granted, Regulatory Appeals then seeks submissions from the parties on the substantive issues and the merits of the regulatory appeal and whether to grant the request.

In this case, the parties in general and Mr. Hanne in particular, made arguments on both the lateness and the merits of the regulatory appeal request, in response to the Regulatory Appeals' March 18 letter. As a result, the parties went beyond the scope of what was requested by Regulatory Appeals in its March 18 letter.

Having said that, and considering the somewhat unique circumstances of this case, Regulatory Appeals has decided to consider all of the arguments made in the parties' submissions. Consequently, there are two questions that need answering. The first question is whether the AER should grant the late filing of the Request and the second question is whether the regulatory appeal should be granted and the matter referred to a hearing.

Lateness of the Request

Statutory time limits for filing appeals of AER decisions serve important purposes. They provide a level of certainty to parties as to the validity and reliability of a decision. They also give assurance that proceedings relating to decision will not continue into perpetuity. Requests for Regulatory appeals must be filed on time, unless there is a valid reason to depart from this requirement. The reason must be compelling or there must be special circumstances for making an exception. Factors such as why the request was not filed on time, the amount of time that has elapsed since the deadline, the significance of the decision and its impact on the requester, and the prejudice suffered by a party if the request is or is not allowed to be filed are all relevant when considering requests to extend the timelines for filing regulatory appeal requests under the AER's *Rules of Practice*.

Hanne's counsel indicated that he was not aware the regulatory appeal process or its timelines until he consulted with counsel. However, the final paragraph in the letter accompanying the Decision clearly states that eligible persons may appeal AER decisions, provides the sections in REDA where one should look to find out more about regulatory appeal requests, and directs the reader to the AER's website for further information, including filing requirements and forms. The AER is of the view that Mr. Hanne had sufficient information about the regulatory appeal process at the time the decision was issued to him but that he failed, or chose not to, review this information or inform himself further about the regulatory appeal process.

It is also not helpful to Mr. Hanne's case that it took him approximately 10 months after the Decision was issued to make inquiries with a lawyer as to the proper processes involved with filing an appeal. He did not file his request until March 10, 2020, nearly 11 months after the Decision. The tardiness of Mr. Hanne's Request and his failure to follow instruction provided to him about the regulatory appeal process are significant factors and weigh strongly against extending the timeline for filing his Request.

The main factor in favour of granting Mr. Hanne's Request to be filed late is the significant and adverse impact of a s.106 declaration as against him personally. Mr. Hanne is also fortunate that, other than the AER's CLM group there is no other party prejudiced by the lateness of Mr. Hanne's very late request. If there were, this could easily have tilted the scales in favour of not allowing the request to be filed. As it is, the substantive impact of the Decision to Mr. Hanne is at least as significant as the procedural irregularity and prejudice to CLM that may be caused by allowing the extreme late filing of his Request.

The multiple correspondences that the AER CLM sent out regarding the declaration(s) would have been confusing for Mr. Hanne in understanding the AER's s. 106 appeal request process. There was the initial declaration issued on March 11, 2019, without considering Mr. Hannes' January 28, 2019 submission. Second, and as admitted by CLM, the reconsideration letter issued on March 22, 2019 was issued by someone without the appropriate statutory authority. It is also worth noting that when Mr. Hanne began trying to access the AER's internal appeal processes by asking the AER's CLM staff 'reconsider' the Decision, he was not told that there was a more suitable process available and not directed to the AER's RA coordinator for further information about the RA process. CLM accepted Mr. Hanne's 'reconsideration' requests filed on April 1 and 3, 2019. All the above could have served to further confuse Mr. Hanne as to the AER's processes, and may even have created the expectation that he was 'on the right track' as far as appealing the Decision.

Consequently, the AER finds that there are special circumstances and sufficient reasons that, on balance and by a very slim margin, warrant accepting the late filing of the Request.

The Merits of the Request

With regard to the eligibility question, the AER finds that Mr. Hanne is directly and adversely affected by the Decision, which imposes both obligations and restrictions on him, which of course is the very purpose of declarations issued under section 106. He is therefore an eligible person to request the regulatory appeal. The Decision is made pursuant to an energy enactment and is an appealable decision in accordance with the applicable provisions REDA and the Rules.

Consequently, the Request is granted and the matter is referred to a hearing before an AER panel of hearing commissioners for a further process to be determined by that panel. Given this, it is unnecessary to determine Mr. Hanne's request for reconsideration.

Sincerely,

<Original signed by>

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