



UPDATE

February 18, 2015

## Jet Fuel Transport and Storage in the Fraser River Estuary

### Judicial Review of Environmental Certificate Completed in B.C. Supreme Court on February 13, 2015.

After six full days in the Supreme Court of BC the judicial review which many have so generously supported wrapped up last Friday. We especially wish to thank the many who helped maintain an ongoing presence of 6-12 supporters in the courtroom during the six days of arguments to impress upon the Court that VAPOR does truly represent the public interest and is supported by a broad spectrum of citizens.

To those of us attending it was frustrating to know that because the BC Government had already approved the tank-farm, pipeline and supertanker proposal, our lawyers could not speak to the nature, wisdom or risks of the project. We could challenge only the procedural fairness of the public consultation process conducted by the BC Environmental Assessment Office (EAO) for the Vancouver Airlines Fuel Facility Corporation (VAFFC). We petitioned the court to review the process and quash the Environment Certificate granted by Environment Minister Mary Polak and Natural Gas Development Minister Rich Coleman.

Justice Madame Dillon presided and, in spite of the long delay between court dates and intense and often convoluted presentations, she appeared intent on thoroughly understanding the facts and to be open and fair minded.

Our lawyer took two and a half days to present our case. This was longer than anticipated but the Environmental Assessment Act is designed in a manner that is difficult to follow and it was our lawyer's responsibility to build the foundation upon which our challenge rested. It was an eye opener to many that of course a judge would not be familiar with the details of every piece of BC law. For us to have a fair review, Justice Dillon had to thoroughly understand this law and it's often overly discretionary procedures in order to follow our reasons for claiming it hadn't been properly followed.

### SUMMARY OF ARGUMENTS:

#### A. VAPOR & Otto Langer (Petitioners) (Legal Counsel Cheryl Tobias of CliffeTobias, Vancouver).

##### Deficiencies in the Process were noted in the following areas:

- Notice of the process and opportunity to comment (eg English ads in Chinese newspaper).
- Time allotted for responses was inadequate. The public was expected to comment on a 1500 page report in less than 60 days and only written responses were accepted. The Act allows for 180 days of comment and VAFFC had the process of public input suspended twice giving it 1025 days to produce additional reports and consult with a Technical Working Group of First Nations, federal, provincial and municipal government agencies. But the general public was not allowed further comment, even on the many new reports. The one exception was when the VAFFC changed the route for the proposed pipeline - 20 more days were allotted to the general public but comment was limited to the route only.
- The 180 day limit constrained adequate and meaningful public consultation.
- The EAO delegated the Environmental Assessment, including public consultation, to the proponent - VAFFC. The EAO subsequently failed to independently and properly evaluate what the VAFFC reported as

the public's concerns of the project's shortcomings and the adequacy of the VAFFC response to those issues raised.

- The Ministers to whom the EAO reported were thus misinformed of the adequacy of the Environmental Assessment when they approved the project.
- Contrary to what the AG's and the VAFFC lawyers stated, the EAO did not exceed the minimum requirement for public comment in Sec 11 of the Order and could have extended the times for such comment.
- The VAPOR - Langer arguments were backed up by detailed affidavits from four VAPOR directors – Langer, Ronback, Day and Carswell.

### **B. The BC AG and VAFFC (Respondents)**

The Ministers, BC EAO and the EAO Executive Director were represented by a BC Attorney General lawyer and VAFFC by another lawyer. Both respondent parties argued essentially the same points supporting the EAO environmental evaluation (EA) process and its procedural fairness. VAFFC portrayed early pre EA consultations with invited industry groups as public consultations. They also claimed that closed door Technical Working Group meetings with First Nations, and three levels of government representatives were public consultations. In the first EA open house the public was limited to two minutes of questions and their comments were not recorded for any future consideration. People could only submit written comment in a specified time frame.

**In addition the AG and VAFFC;**

- Challenged the private versus public standing of VAPOR and Langer. They accepted that Otto Langer had legitimate standing to represent his own interest but VAPOR as a group had no standing as a public representative. Claimed if a member wanted standing they would have had to enjoin Otto's case. Accordingly Day, Ronback and Carswell did not have any standing. (*note: This is one reason why Otto Langer became a separate petitioner in this Judicial Review.*)
- Claimed that the key role for public comment was before the actual EA began, i.e., during the Scoping Phase which determines the parameters of the assessment (i.e., what should be considered). Since neither Langer nor VAPOR (which did not exist at the time) had attended those open houses the Ag and VAFFC argued VAPOR/Langer had no right to complain about the subsequent processes inadequacies. The Judge, during later summation characterized this claim as a "slur" that should not be taken seriously.
- Argued that VAPOR and Langer had attended the open house of the subsequent Application Review Stage of the EA and did submit written comment on the 1500 page report. Thus VAPOR/Langer had had all the time and input they were entitled to. Their comments were tracked (except for Carol Day's which they speculated had not been sent on time) so they had no cause for complaint. Also their public comment was not needed on the adequacies of subsequent reports prepared for the EA as their comments had already been categorized into the Key Issues identified and were essentially the same as everyone else's.
- Insisted that the VAPOR and Langer complaints related to just small errors in the consultation process and if made, were only of a technical nature with no consequence that would alter the end decision.
- Argued that the EA process is *polycentric*: EAO receives input from numerous sources and draws its conclusions without the requirement of a public hearing and does not have to provide any feedback to the public. The city bylaw process is *bilateral* in nature, negotiated between parties and requires public hearing for a council to vote on. Thus case law used by the VAPOR lawyer that references city bylaw cases is not applicable.
- Insisted that the EAO did not err in its report to the ministers and if the Ministers felt it had defects, it was their responsibility to turn it back to the EAO for additional data.
- Argued that EAO independently considered all input that was in the EA report.

### C. VAPOR and Langer Summation

We were pleased with our lawyer's ability to tie up loose ends, restate our main arguments and refute the opposition's misrepresentation of our case. She noted that there was no indication that the EAO had independently assessed public comments. Indeed, she could find only five of the many detailed comments made by our four members which were even partly considered in the final EA report.

The Judge asked for input into remedies somewhere between quashing the EA certificate and dismissing our case. The Attorney General Lawyer said if there were deficiencies in the process, the Justice could declare such and order the EAO to come up with a plan to address them rather than starting all over. The VAFFC would only support dismissal of our petition. VAPOR and Langer prefer the Ministers' approval be quashed and an order for a new process to address defects.

**Madame Justice Dillon has reserved judgment on this case.** A written judgment will be issued.

### D. Post mortem considerations (O. Langer views):

*Such legal challenges cost a great deal of money. We thank the many individuals and others that have supported our case with great generosity. Our entire series of legal bills will be about \$50,000 and that is with a generous economical fee rate from our team of lawyers (Case lead Cheryl Tobias, QC, Adviser John Cliffe QC and Articling Student James Patterson).*

*It would be unproductive to speculate whether we will win or lose the case or see an 'in between' decision. Either way, there could be an Appeal from us or the Respondents. We will have control of our own appeal considerations but if the AG did lose the case, they could appeal since any loss could affect the very way they now do business and they will resist changes to their laws, regulations and procedures. If the AG appealed any loss or quashing of their Environmental Certificate (permit) we would have no choice but to again argue against maintaining the status quo and an unfair public consultation process. That will cost us additional monies.*

*Win or lose, we have made a point - the governments are white washing environmental reviews and protection and someone has to challenge what the BC and Federal Governments are doing to our living legacies, quality of life and our children's futures. We must have a clearly understandable environmental review system that truly facilitates procedural fairness and considers public input and is powerful on protecting the environment and the public safety.*

*Considering our legal advice VAPOR/Langer ignored the role of Port Metro Vancouver (PMV) in this Judicial Review. PMV were purported to be partners in this supposed harmonized review but seemed to be hiding in the bushes during much of the public consultation and review process. The role of PMV, who will benefit greatly from this project (will lease land for the tank farm to VAFFC and govern tanker traffic) is very confusing as is the role of the Federal EA process (i.e., Canadian Environmental Assessment Act was delegated to PMV for this project review). It is ironic that the Federal review process led the 1988 review that rejected the VAFFC plans to ship jet fuel into the North Arm of the Fraser River via barges as too great a risk to the Fraser River. Unfortunately PMV seems to operate with no accountability to local governments, the environment and the public.*

*If you have any need for our Petition, Respondent responses or the written arguments of the parties or affidavits please email me or look at our website – <http://www.vaporbc.com>*

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**\*VAPOR** is a citizens' society formed to oppose jet fuel tankers and fuel handling and storage in the Fraser River and estuary. VAPOR promotes an environmentally safer, more reliable land based pipeline option to supply jet fuel to YVR that will remove all jet fuel barges and supertankers in the Fraser River, its estuary and Burrard Inlet.