

MACKENZIE VALLEY PIPELINE INQUIRY

BRANCH OFFICE:

2nd Floor North,
Export Development Building,
110 O'Connor Street,
Ottawa, Ontario K1P 5M9
Telephone: (613) 235-6159
235-7428
235-7449

COMMISSIONER

Mr. Justice Thomas R. Berger

HEADQUARTERS:

Resources Building
51st Street,
Yellowknife, N.W.T.
P.O. Box 2817

Telephone: (403) 873-3580

PRELIMINARY RULINGS (II)

by the Honourable Mr. Justice T. R. Berger

PRACTICE AND PROCEDURE

Yellowknife, N.W.T.
Ottawa, Ontario.

October 29, 1974.

MACKENZIE VALLEY PIPELINE INQUIRY

BRANCH OFFICE:

2nd Floor North,
Export Development Building,
110 O'Connor Street,
Ottawa, Ontario K1P 5M9
Telephone: (613) 235-6159
235-7428
235-7449

COMMISSIONER

Mr. Justice Thomas R. Berger

HEADQUARTERS:

Resources Building
51st Street,
Yellowknife, N.W.T.
P.O. Box 2817

Telephone: (403) 873-3580

PRELIMINARY RULINGS (II)

by the Honourable Mr. Justice T. R. Berger

PRACTICE AND PROCEDURE

Mr. Scott, Commission Counsel, has presented certain proposals regarding practice and procedure. I held further preliminary hearings at Yellowknife on September 12th and 13th, 1974 to consider representations regarding these proposals by counsel for Arctic Gas, counsel for the other participants who appeared, as well as by Commission Counsel. I also considered the submissions made in writing by other participants.

I said in my Preliminary Rulings of July 12th, 1974, that I wanted this Inquiry to be fair and complete. I have had that consideration uppermost in mind in deciding upon these issues of practice and procedure. The Rulings I am handing down today are intended to bring about full disclosure of all the evidence, and to give to all concerned the fullest opportunity to present their case.

As soon as the Inquiry has received the report of the Assessment Group assembled by the Government of Canada to analyze the material filed by Arctic Gas in support of its application for a right-of-way, I will set a date for the commencement of the Formal Hearings of the Inquiry.

I. APPLICATION OF THE RULES:

A. Definition of Participant

Any person shall be deemed a participant if he appears at any Formal Hearing of the Inquiry (including Preliminary Hearings) and gives his name and address to the Inquiry, or if he advises the Inquiry in writing of his intention to appear. Special Counsel shall maintain a list of participants which shall be available for inspection by any person at the offices of the Inquiry in Yellowknife and in Ottawa.

B. These rules shall apply only to the following participants in the Inquiry:

Canadian Arctic Gas Pipeline Limited

Foothills Pipe Lines Ltd.

Canadian Arctic Resources Committee*

Environment Protection Board

Indian Brotherhood of the North West Territories

Metis Association of the North West Territories

Inuit Tapirisat of Canada

Committee for Original Peoples' Entitlement

Yukon Native Brotherhood

North West Territories Association of Municipalities

Commission Counsel

*Mr. Anthony and Mr. Lucas, counsel for Canadian Arctic Resources Committee, have advised the Inquiry that the Northern Assessment Group, established by Canadian Arctic Resources Committee, the Canadian Nature Federation, the Federation of Ontario Naturalists, Pollution Probe, and the Canadian Environmental Law Association, for purposes of this Inquiry, will comply with any Rules of this Inquiry applicable to Canadian Arctic Resources Committee.

C. These Rules will not apply to any other participants at the Formal Hearings.

D. These Rules will not apply to the Community Hearings.

II. OVERVIEW HEARINGS

Witnesses called at the Overview Hearings will not be cross-examined during the Overview Hearings, unless it is essential to a fair hearing. In any event, all overview witnesses will be subject to recall for further examination and for cross-examination at the Formal Hearings.

III. FORMAL HEARINGS

A. Division of Formal Hearings:

The Formal Hearings will be divided into four phases.

Phase 1. Engineering and Construction of the Proposed Pipeline

This phase of the hearings will include such matters as the size of the pipeline, its location, the timing of construction, the composition and deployment of construction crews, the construction of compressor stations, etc.

Phase 2. The Impact of a Pipeline and Mackenzie Corridor Development on the Physical Environment:

This phase of the hearings will include the impact on the land, the air and the water, and will cover such things as the effect on permafrost, river crossings, slope stability, gravel and other borrow locations, etc.

Phase 3. The Impact of a Pipeline and Mackenzie Corridor Development on the Living Environment:

This phase of the hearings will include the impact on plant and animal life, including wildlife, mammals and fishes.

Phase 4. The Impact of a Pipeline and Mackenzie Corridor Development on the Human Environment:

This phase of the hearings will include social and economic impact.

This division is for purposes of convenience only. The four phases will not necessarily encompass all of the evidence that will be brought forward at the Formal Hearings.

Commission Counsel will therefore invite the participants to consult with him from time to time with a view to determining whether there should be any further division of the hearings within each phase. In any event, it will be open to any participant to call evidence out of order when that is appropriate.

Special Counsel will provide to each participant Notice of Hearing with respect to each of the four phases of the Formal Hearings and will advise the public generally of the matters to be considered at each phase of the Formal Hearings.

B. Calling Evidence and Examination of Witnesses

At the Formal Hearings, as a general rule, Arctic Gas will lead its evidence first, followed by the other participants and Commission Counsel. Arctic Gas will be entitled to call evidence in rebuttal. From time to time other participants will lead off; when they do they will have the right to call evidence in rebuttal after the evidence for the other participants has been heard; in any event the rights of all concerned to bring forward all their evidence on every issue will be preserved.

With respect to witnesses, counsel for any participant calling a witness will examine him in chief, the witness will then be cross-examined by Counsel for each of the other participants and by Commission Counsel. Counsel for the participant calling the witness will be entitled to re-examine.

Commission Counsel will have the responsibility of calling the evidence of the members of the Assessment Group assembled by the Government of Canada, with a view to a complete canvass of all relevant evidence that the Group has to give. The Group will be subject to cross-examination.

Commission Counsel will also be responsible for calling the evidence of members of the public service of Canada not included in the Assessment Group, whose evidence is regarded as necessary to the completeness of the Inquiry.

It will also be the responsibility of Commission Counsel to obtain evidence, pursuant to subpoena if necessary, to enable the Inquiry to consider the location and extent of the gas fields in the Mackenzie Delta, and the likely extent of further oil and gas exploration in the Delta, and the Beaufort Sea, the likely location, design and construction of the gathering lines there, and the processing plants that will be needed to render the gas acceptable to the trunk pipeline, and the social, environmental and economic impact that the development

of the gas fields and the construction of these lines will have in the Delta and elsewhere in the North.

All of the witnesses giving this evidence will be subject to cross-examination, and Commission Counsel will be entitled to re-examine each of them.

Evidence can be introduced through individual witnesses or panels of witnesses.

C. Place of Formal Hearings

Yellowknife will be the main centre for the Formal Hearings. At the same time I am anxious that as much as possible of the evidence relating to oil and gas activity in the Mackenzie Delta and the Beaufort Sea and relating to the impact of such activity should be heard at Inuvik.

It may be appropriate for some of the evidence at the Formal Hearings to be heard in Ottawa. In any event, it will be necessary in due course to hold hearings in major southern centres to enable Canadians who cannot appear in the North to express their views.

IV. COMMUNITY HEARINGS

Community Hearings will be held in each community in the Mackenzie Valley, the Mackenzie Delta and the Yukon likely to be affected by the construction of a pipeline and by corridor development. I have appointed Professor Michael Jackson of the Inquiry staff to act as Co-ordinator of the Community Hearings. He has established a committee which consists of counsel representing the participants chiefly concerned with the organizing of the Community Hearings.

With regard to those communities which have primarily a native population, I expect that the native organizations will bring proposals to Professor Jackson's committee as to the way in which the hearings in those communities ought to be conducted. These proposals should be considered by the committee, and the committee's recommendations referred to me.

In the same way, with regard to those communities which have primarily a white population, I expect that the North West Territories Association of Municipalities will come forward with proposals regarding the conduct of those hearings and that they will be considered by Professor Jackson's committee and the recommendations of the committee referred to me.

If the Committee does not reach agreement on any matter, I will consider the recommendations of each of its members. In any event, I will be prepared to consider the views of any participant regarding the conduct of the Community Hearings.

The Inquiry is arranging with the Canadian Broadcasting Corporation for summaries of the evidence given at the Formal Hearings to be broadcast to Northern communities likely to be affected by the construction of a pipeline and the development of a Mackenzie Valley Transportation Corridor. The broadcasts will be on a regular basis, and will consist of summaries of the evidence given at the Formal Hearings. I expect that these broadcasts will be in English and in the native languages, so that the people in the communities will know what has been said at the Formal Hearings and will be able to respond to it when the Inquiry reaches the communities.

I should make it plain that I intend at the Community Hearings to give every one who wishes to express his point of view, whether it is one widely held in the community or not, an opportunity to be heard.

V. EVIDENCE RELATING TO NATIVE CLAIMS

I said, when I handed down my Preliminary Rulings on July 12th, that it would be open to the native peoples in this Inquiry to argue that no right of way should be granted for a pipeline until their land claims were settled.

Native claims are based on traditional use and occupation. Evidence relating to current use and occupation will obviously include such things as the location of trap lines, fishing camps and hunting grounds, berry picking areas and so on. I want to hear from the trappers, hunters and fishermen and others in the native communities not only about their present use of the land, and the extent of their reliance upon it, but also their views on the likely efficacy of any measures proposed by Arctic Gas to build a pipeline without damaging these native interests; by that I mean that I want to hear the evidence they have to give, and the representations they wish to make, regarding likely interference with trap lines, obstruction of streams, spoliation of hunting grounds and so on.

It seems to me that in order to be fair to Arctic Gas, such evidence should be laid before the Inquiry, so that Arctic Gas will be in a position to indicate what terms and conditions they are prepared to submit to, what safeguards they are prepared to adopt, and what measures they are prepared to

take, in support of their contention that a pipeline can be built without impairing the native people's current use and occupation of the land.

Now such evidence would be of the first importance to this Inquiry even if the issue of native land claims had never been raised. That brings me to the problem of how to deal fairly with the contention of the native organizations that no pipeline should be built until their land claims have been settled. Their claims are based on traditional use and occupation and, according to Professor Cumming, senior counsel for the Inuit Tapirisat of Canada and the Committee for Original Peoples' Entitlement, they include not only lands which are subject to current use and occupation, but extend to lands they do not use and occupy today. Mr. Sutton, counsel for the Indian Brotherhood of the North West Territories and the Metis Association of the North West Territories, took the same position. So did Mr. Lueck, counsel for the Yukon Native Brotherhood.

How then can this Inquiry come to grips with a contention that no pipeline should be built until native land claims are settled, when those land claims relate to ancestral lands which the native people no longer use or occupy?

It is not for this Inquiry to decide the legitimate extent of native land claims in the North. But the native organizations have said to this Inquiry that no pipeline should be built until their land claims have been settled. Those who want to build the pipeline are entitled to an opportunity to meet this by showing that the pipeline can be built without prejudice to native land claims.

I think, therefore, that the native organizations should indicate the nature and extent of their land claims. Given that their view is that any settlement ought to acknowledge that the native people have certain rights that they should be entitled to assert in respect of the lands they claim, there should be some indication of the nature of the rights they assert and of their extent. (The land use studies being carried out by the native organizations relate, as I understand it, not only to land which is the subject of current use and occupation, but also land which, though the native people no longer use or occupy it, they used to. These studies should be of real assistance to the Inquiry. Some of these studies are complete. Some are not yet complete. But, even where they are not complete, the work done so far may well be helpful). The Inquiry will then be in a position to indicate to the Minister what measures ought to be taken to ensure that the native peoples, in their negotiations with the Government, do not find themselves at any disadvantage owing to the building of the pipeline, and, looking to the consummation of negotiations, what measures ought to be taken to ensure that whatever the extent of the native interest that may ultimately be recognized

by any settlement, it will not be diminished by the construction of the pipeline in the meantime.

It should, of course, be remembered that it will be for the Government of Canada and the native peoples to negotiate a settlement of the native claims in the North. It is only the Government of Canada and the native peoples of the North that are parties to the negotiations to settle native land claims. Nothing said at this Inquiry can bind either side. Any delineation of native claims before the Inquiry will be for the purpose merely of ensuring that the Inquiry can fairly consider the principal contention of the native organizations regarding the construction of the pipeline and the answer that those who propose to build the pipeline have to make to that contention.

VI. DISCOVERY

A. Discovery of Witnesses

Every participant shall before giving evidence himself or calling witnesses on his behalf file with Special Counsel at least two weeks before giving evidence or calling such evidence, a synopsis of the evidence of the witness intended to be called, together with a list of any reports, studies or other documents to which that witness may refer or upon which he may rely.

This Rule was suggested by Commission Counsel to expedite the hearings. It will sometimes be difficult to comply with. If any participant cannot comply with the Rule that will not necessarily preclude the calling of the witness in question, at the time the witness is presented to the Inquiry, but it may mean the witness will have to be recalled later on for cross-examination.

B. Production of Studies and Reports

All of the participants, except Arctic Gas, expressed their willingness to provide a list of all studies and reports in their possession or power relating to the Inquiry, including those for which privilege might be claimed.

Mr. Goldie, counsel for Arctic Gas, was not prepared to go along with this. Instead, he suggested that, as each of the witnesses for Arctic Gas is called, there should simply be provided a list of all studies and reports which that witness relies upon, or which touch upon his testimony. It was said that this would be sufficient, and that it would be impracticable for Arctic Gas to provide a list of all its studies and reports before the Formal Hearings begin.

In my judgment there is a paramount public interest in the fullest disclosure of all the facts, which requires that a list of all studies and reports in the possession or power of Arctic Gas relating to the Inquiry should be supplied to the Inquiry. It was not suggested that this would be impossible, it was simply urged that it would be difficult for Arctic Gas to comply with such a direction.

It would not be satisfactory for Arctic Gas merely to provide a list of studies and reports to accompany the testimony of each witness. If we were to proceed in that way, we would only get the material in a piecemeal fashion. If we do not require a complete list, there can be no guarantee that there will be full disclosure of all studies and reports prepared by Arctic Gas relating to the Inquiry. It would be open to Arctic Gas to decide for itself which witnesses it ought to call and thus avoid the necessity of disclosing the existence of a study or a report which might be damaging to its case but which would be useful to the Inquiry. That will be avoided if a complete list is supplied.

I therefore direct that all of the participants to whom these Rules apply, including Arctic Gas, must provide a list of all studies and reports in their possession or power relating to this Inquiry. These lists should be filed with the Inquiry by November 30th, 1974, and copies provided to all of the participants to whom these Rules apply. If they are ready earlier they should be filed as soon as they are ready and distributed to the other participants; in fact, each participant may well decide to circulate a list of all studies and reports in its possession relating to Phase I of the Inquiry, without waiting until its list is ready covering all phases of the Inquiry. I appreciate that by November 30th, 1974, some of the participants will not have completed all the studies and reports they intend to prepare. They should file a list nevertheless, and add to it as they go along. Commission Counsel will be responsible for providing a list of all studies and reports of the Government of Canada.

When the lists have been provided, it will be open to the other participants to demand that any study or report on any list should be produced. If any participant wishes to raise a claim of privilege as the basis for an objection to production at that stage, the Inquiry will of course consider it then. It should be remembered that under Section 19(f) of the Territorial Lands Act, R.S.C. 1970, c.T-6, any one appointed to conduct an inquiry has the power:

"for the purposes of the inquiry, to summon and bring before him any person whose attendance he considers necessary to the inquiry, examine such persons under oath, compel the production of documents and do all things necessary to provide a full and proper inquiry."

These powers have been conferred on this Inquiry by the Order-in-Council of March 21st, 1974.

In addition, any participant may in the meantime request of any other participant a copy of any study or report whether or not it appears on the list filed by the participant of whom it is requested, and whether or not such a list has already been filed.

VII. APPLICATIONS TO THE INQUIRY

Any applications made by participants to the Inquiry for subpoenas or any relief whatever shall be made upon reasonable notice to the Inquiry and Commission Counsel as well as any participant directly affected by the application and any other participant that the Inquiry decides should be given notice of the application. If the hearings are in progress the application can be made to the Inquiry at the hearing on the day when it is returnable.

VIII. CHANGES IN THESE RULES

The Inquiry retains the power to add to, alter or modify these Rules, or to require that any participant not already bound by them should comply with them in whole or in part, as well as the power to exempt any participant from complying with them in whole or in part.

IX. INSPECTION BY THE PUBLIC

Copies of the material filed by any participant, or other person or organization, including lists of studies and reports, the transcript of the hearings, and copies of the exhibits, will be on file during office hours, and available for inspection by the public, at the Inquiry offices at Yellowknife and at Ottawa.

Thos R. Berger