

Scenario 3

Practical and Procedural Issues When Dealing with Code and Constitutional Issues

A provincial land use and environment tribunal has received several appeals of a rural municipality's approval of a large wind farm project which also abuts a First Nations community. The legislation governing land development, and the jurisdiction of the tribunal provides that the tribunal may either allow an appeal and remit the approval back to the municipality, or dismiss the appeal. The only criteria set out in the legislation is whether the "proposed development will promote economic benefits for the municipality and the province, and is otherwise consistent with good land use principles and environmentally sustainable." The tribunal has the jurisdiction to decide all questions of fact and law that come before it.

The tribunal received a number of appeals by local cottagers and residents, claiming that the development will negatively affect the rural nature of the community, as well as potentially causing environmental damage to sensitive wetlands and harm to wildlife. The tribunal also received a notice of appeal from a member of the First Nations community alleging that the development will negatively affect traditional hunting and fishing activities. The First Nations member, who is self-represented, proposes to call several witnesses, including a community Elder and a number of academics to present evidence about wildlife migration patterns and of the historic traditional use of the land. The First Nations community council has not indicated an intention to appear.

A single tribunal member (a well respected member, non lawyer) was assigned to conduct a case management conference. In an interim decision he set the matter down for 5 days of hearing. While he granted standing to the First Nations member, he refused to allow the calling of the Elder or the experts. He stated that the proposed evidence falls outside the tribunal's jurisdiction, and in any event would unduly delay the resolution of the matter (he found that dealing with the claim would add 10-15 days of hearing). He also noted that the Elder did not speak English or French, and the tribunal's governing legislation provides that "hearings may be conducted in English or French."

The First Nations community member has sought reconsideration of the interim decision. He argues that his claims are based on constitutional grounds, and the tribunal has an obligation to entertain them, regardless of what the statute says. He also says the refusal to provide interpreter services is a violation of the Charter.

This is the first time the tribunal has ever had to address a claim based on First Nations rights, or indeed a constitutional claim, but it is clear more of these may be on the way.

You are the tribunal Chair. How might you address the request for reconsideration? What are the practical issues? Whatever you decide, what steps might you take into the future.

Would your approach be different if the proposed development was a small cottage?