

In the Court of Appeal of Alberta

Citation: Reference re Impact Assessment Act, 2020 ABCA 94

Date: 20200304
Docket: 1901-0276-AC
Registry: Calgary

In the Matter of An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, SC 2019, c. 28 and the Physical Activities Regulations, SOR/2019-285

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c. J-2, s. 26

**Reasons for Decision of
The Honourable Madam Justice Patricia Rowbotham**

Application for Advice and Directions #2

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The Honourable Madam Justice Patricia Rowbotham**

Introduction

[1] This is the second case management meeting in the constitutional reference which seeks the court's opinion on the constitutionality of Part 1 of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c 28; and the *Physical Activities Regulations*, SOR/2019-285.

[2] The hearing on February 27, 2020 addressed the following:

1. Intervener applications;
2. Factum page limits, records and time limits for oral argument for interveners;
3. Reply facta from Alberta and Canada; and
4. Amendments to the timetable for filings.

[3] Most counsel appeared in person although four parties appeared by teleconference.

Interveners

[4] Attorneys General were granted leave to intervene provided they expressed their intention to do so by January 31, 2020. The Attorneys General of Ontario and Saskatchewan did so and are, accordingly, interveners.

[5] Twelve non-governmental organizations applied to intervene. In support of Alberta's position are:

1. Woodland Cree First Nation;
2. Canadian Association of Petroleum Producers;
3. Canadian Energy Pipeline Association;
4. Explorers and Producers of Canada;
5. Indian Resource Council; and

6. Independent Contractors and Businesses Association and Alberta Enterprise Group.

[6] Five proposed interveners support Canada's position:

1. The Canadian Environmental Law Association, Environmental Defence Canada Inc, and Mining Watch Canada Inc;
2. Nature Canada;
3. Ecojustice Canada Society;
4. Mikisew Cree First Nation; and
5. Athabasca Chipewyan First Nation.

[7] One proposed intervener, Canadian Taxpayers Federation, submits that it does not technically support either party.

[8] Alberta does not oppose any of the proposed interventions. Canada opposed two applications: the Canadian Taxpayers Federation, and the joint application of the Independent Contractors and Businesses Association and Alberta Enterprise Group. It consents to the remaining applications.

[9] Even where there is no opposition to an application to intervene, it is the court that controls its process and must still determine whether to grant the application. That said, I grant the uncontested applications.

Contested Applications

[10] Rules 14.37(2)(e) and 14.58 of the *Alberta Rules of Court*, AR 124/2010, authorize an appeal judge to grant permission to any person to intervene in an appeal and impose terms and conditions on the intervention.

[11] The test for intervention requires the court to first consider the subject matter of the proceedings and then determine the proposed intervener's interest in that subject matter (*Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 5). The court then considers whether the proposed intervener's interests are specially affected by the decision, or whether the proposed intervener has some special expertise or insight to bring to bear on the issues: *R v Morgentaler*, [1993] 1 SCR 462, CarswellNS 429 at para 1; *Pedersen v Alberta*, 2008 ABCA 192 at para 3 [*Pedersen*].

[12] The proposed intervener's interest must be a legal interest. It is generally not sufficient for that interest to be a mere curiosity, an intellectual interest, a policy-based concern, a personal

interest or a jurisprudential interest: *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 at para 29. Other considerations are summarized in *Pedersen* and include: (1) whether the presence of the intervener is necessary for the court to properly decide the matter; (2) whether the intervener's interest in the proceedings will not be fully protected by the parties; (3) whether the intervention will unduly delay the proceedings; and (4) whether there would be possible prejudice to the parties if intervention is granted.

[13] In assessing whether a proposed intervener can meet the second branch of the test by bringing a different perspective or expertise to the appeal, regard must be had to the existing participants: *Reference re Greenhouse Gas Pollution Pricing Act*, at para 30.

[14] Alberta submits that the *Impact Assessment Act* represents a significant departure from prior federal environmental assessment schemes and purports to apply to a broad range of activities, many of which are squarely within provincial jurisdiction and involve no mandatory federal function outside of the process under the Act itself. Alberta contends that the *Impact Assessment Act* intrudes into areas of core provincial jurisdiction, including jurisdiction over natural resources, and results in a veto power over projects which have been reviewed and approved by the province and which have no link to federal power. As Canada has not yet filed its factum (due April 17, 2020), its specific arguments upholding the constitutionality of the legislation are unknown.

The Canadian Taxpayers Federation

[15] The Canadian Taxpayers Federation is a non-profit organization whose mandate includes the promotion of responsible, efficient use of tax money and accountable government for the benefit of all Canadian taxpayers. It submits that it has a particular interest in the *Impact Assessment Act*, stemming from its core mandate. First, when two governments duplicate a process, this is of concern to taxpayers in terms of waste. Second, any time two governments duplicate a process, this muddles accountability to taxpayers. Further, when there is a duplicative or blended process, transparency often suffers.

[16] Canada opposes the application. It submits that the Canadian Taxpayers Federation has not demonstrated that the matter directly affects its interests any more than any other citizen. It further contends that the existing parties or the interveners consented to by Canada, including the Canadian Association of Petroleum Producers, the Canadian Energy Pipeline Association and the Explorers and Producers of Canada can address the effect of the *Impact Assessment Act* on resource projects and jobs.

[17] I note that the Canadian Taxpayers Federation does not defend any particular level of government, so its views will not necessarily be included in the submissions of the parties. The Canadian Association of Petroleum Producers, the Canadian Energy Pipeline Association and the Explorers and Producers of Canada are highly specialized groups which will cover topic specific

to their expertise. For example, the Explorers and Producers of Canada's submissions are narrow and concentrate on *in situ* facilities under the regulations. The Canadian Energy Pipeline Association's submissions reflect a narrow interest in pipeline approval and its effects on its members and investors.

[18] In my view the court would be assisted by a submission from the perspective of the tax payer. It can provide a broader analysis of the effects of the impugned legislation on the taxpayers of Alberta. Although not determinative, I note that the Canadian Taxpayers Federation intervened in the three provincial appellate references on the constitutionality of the *Greenhouse Gas Pollution and Pricing Act*, SC 2018, c 12, s 186 and will intervene at the upcoming appeal of those references at the Supreme Court of Canada. Accordingly, I grant the application to intervene.

Independent Contractors and Business Association and the Alberta Enterprise Group

[19] The second opposed application is the joint application of the Independent Contractors and Business Association and the Alberta Enterprise Group. The two groups represent a broad range of business and industry in Alberta and British Columbia, including many construction and resource extraction firms. The Independent Contractors and Business Association is a voluntary association of businesses in British Columbia, whose mandate is to advocate on behalf of free enterprise and the construction industry in British Columbia. The Alberta Enterprise Group is a business advocacy organization.

[20] Canada submits that these proposed interveners do not provide a different perspective or expertise on the constitutional issues in this case. It says that Alberta, Ontario and Saskatchewan will adequately cover the proposed submissions of these interveners on the issue of division of powers under the Constitution. The parties, the Canadian Association of Petroleum Producers, the Canadian Energy Pipeline Association and the Explorers and Producers of Canada will cover the submissions on the efficiency and timeliness of approval of large scale projects.

[21] These proposed interveners contend that most of the other interveners represent Alberta interests, while the Independent Contractors and Business Association will bring the interests of British Columbia. Counsel emphasized that while this challenge is brought by Alberta, the *Impact Assessment Act* will apply throughout the country. The Alberta Enterprise Group speaks for a different sector than the other resource-based interveners as its emphasis is on the downstream sectors and the effect of the legislation on those sectors. These interveners expect to provide the court with practical submissions on the efficiency and timeliness of approvals of large-scale resource extraction and construction projects.

[22] I am satisfied that this joint application brings a different perspective to this reference, will not duplicate the submissions of others, and meets the test for intervention. I grant the application.

Factum Page Limits, Oral Submissions and Records

Facta

[23] I appreciate the offer from all interveners to do their utmost to co-operate with one another and to avoid duplication. I received a considerable range of proposed page limits for facta: from 10 to 30 pages. I have a concern about the number of interveners before the court. In my view a useful factum on the narrower issues proposed by the interveners can be prepared in 10 pages. I note this is the page limit mandated by the Supreme Court of Canada in interventions before that court. Accordingly, page limits shall be:

1. Facta of the Attorneys General interveners – 20 pages;
2. Facta of all other interveners – 10 pages.

Oral Submissions

1. For the Attorneys General – 30 minutes
2. For all other interveners – 15 minutes.

Records of Intervenors (other than the Attorneys General)

[24] I have serious concerns about supplementing the record beyond what is filed by the parties. Canada's record is due March 6, 2020. Some interveners confirmed that they would not be supplementing the record: Canadian Environmental Law Association group, Canadian Association of Petroleum Producers, Explorers and Producers of Canada, Canadian Taxpayers Association, and Independent Contractors and Businesses Association and Alberta Enterprise Group. Other interveners were able to identify those items they wished to submit as part of the record: Nature Canada, Canadian Energy Pipeline Association, Ecojustice Canada Society, and the Athabasca Chipewyan First Nation. The remaining interveners wish to supplement the record but were not yet in a position to identify the evidence they needed: Woodland Cree First Nation, Indian Resource Counsel, and Mikisew Cree (who agreed to work with the Athabasca Chipewyan First Nation).

[25] I directed the following process for supplementing the record:

1. On or before March 20, 2020 any intervener who wishes to supplement the record, will write to the court indicating (1) the specific material it proposes to introduce into the record; (2) a description of the relevance of that evidence; and (3) the estimated length (page numbers) of the evidence.

2. No later than March 27, 2020 Alberta and Canada may write to the court indicating their acceptance or opposition to the proposed additions to the record, and the reasons therefor;
3. The court will review the submissions and provide written directions on or before April 9, 2020.

Amendments to the Timetable

[26] The parties agreed to the following amended timetable.

1. Intervener facta and records to be filed by April 30, 2020;
2. Reply factum of Canada is to be filed by May 15, 2020;
3. Reply factum of Alberta is to be filed by May 22, 2020.

[27] Alberta and Canada agreed to facta of 40 pages and reply facta of 20 pages.

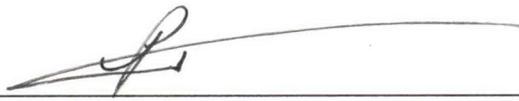
Miscellaneous

[28] Prior to filing, I direct all interveners, including the Attorneys General, to contact the court's Case Management Officer who will provide instructions regarding colour of covers on all materials.

Application heard on February 27, 2020

Reasons filed at Calgary, Alberta
this 4th day of March, 2020





Rowbotham J.A.

Appearances:

B. Gilmour/ S. Assie
for the Appellant Attorney General of Alberta

K. Boyd
for the Respondent Attorney General of Canada

J. Hunter/ Y. Ranganathan
for the Intervenor Attorney General of Ontario

T. Irvine/N. Wernikowski
for the Intervenor Attorney General of Saskatchewan

J. Castrilli
for the proposed Intervenor Canadian Environmental Law Association, Environmental
Defence Canada Inc, and Miningwatch Canada Inc

A. Johnston
for the proposed Intervenor Nature Canada

R. Reynolds, Q.C./ E. Picard
for the proposed Intervenor Woodland Cree First Nation

R. Martz
for the proposed Intervenor Canadian Association of Petroleum Producers

M. Marion/ B. Carlson
for the proposed Intervenor Canadian Energy Pipeline Association

R. Martz
for the proposed Intervenor Explorers and Producers of Canada

L. D. Rae
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A. Laskin
for the proposed Intervenor Mikisew Cree First Nation

A. McIntosh
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R. B. E. Hallsor, Q.C.
for the proposed Intervenor Canadian Taxpayers Federation

A. L. Zwack
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M.S. Hulse
for the proposed Intervenor Athabasca Chipewyan First Nation