In the Court of Appeal of Alberta

Citation: Lynnview Ridge Residents' Action Committee v. Imperial Oil Limited, 2005 ABCA 375

Date: 20051104
Docket: 0301-0290-AC
Registry: Calgary

Between:

Imperial Oil Limited
and Devon Estates Limited

Respondents
(Appellants)

- and -

Her Majesty the Queen in Right of Alberta
(as represented by the Minister of the Environment),
Alberta Environmental Appeals Board, and
Director, Enforcement and Monitoring, Bow Region,
Regional Services, Alberta Environment

Respondents
(Respondents)

- and -

Lynnview Ridge Residents' Action Committee
and The City of Calgary

Applicants
(Interveners)

Reasons for Decision of
The Honourable Madam Justice Constance Hunt
In Chambers

Application for Costs

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[1] The applicant, Lynnview Ridge Residents' Action Committee ("Lynnview"), seeks costs against the appellants, Imperial Oil Limited and Devon Estates Limited ("Imperial"), under Column 5 of Schedule C of the ***Alberta Rules of Court***, concerning an appeal in which Lynnview was granted intervener status. The appeal was discontinued by the parties on a no-costs basis shortly before a scheduled oral hearing. Lynnview's consent to the discontinuance was not sought, Imperial being of the view that it was not necessary.

[2] The appeal concerned a judicial review decision of the Court of Queen's Bench, which upheld an Environmental Protection Order ("EPO") made against Imperial by an official of Alberta Environment and upheld by the Environmental Appeal Board ("EAB"). The main issues on the appeal concerned the fairness of the statutory appeal process and the proper interpretation of the ***Environmental Protection and Enhancement Act***, R.S.A. 2000, c. E- 12 ("***EPEA***"). The respondents were Alberta Environment and the EAB ("Respondents"). The City of Calgary was also granted intervener status.

[3] Lynnview is a society incorporated by a majority of the residents of Lynnview Ridge, whose properties (adjacent to former Imperial lands that had been used as a petroleum refinery) were contaminated with lead and hydrocarbons. Its purpose is to represent residents in dealing with the neighbourhood's contamination.

[4] Lynnview was granted intervener status before the EAB, in the Court of Queen's Bench for the purposes of the judicial review, and before this Court. In this Court, Lynnview's participation was restricted to responding to the issues raised by Imperial, with limits on the length of its factum and oral submissions: Order of O'Leary, Fruman and Paperny JJ.A. of December 12, 2003. Although by that time 135 of the 160 single family dwellings in the neighbourhood had been purchased by Imperial, Lynnview still had 49 members. Of these, 38 members had not accepted Imperial's offer to purchase their property and were still living in Lynnview Ridge: Exhibit G and para. 10 of Lynnview's Affidavit in support of its intervener application

[5] In granting intervener status to Lynnview, the EAB said:

> The members of the Residents Committee live, or have lived, in the area that is contaminated. It is their health, more than anyone else in the province, that could potentially be affected by the contamination on the site.... **The residents of the subdivision are the ones directly affected by the decision of the Director and, ultimately, the Board**.
>
> [emphasis added]
> A.B., Vol. III, p. 227

[6] The EAB also granted Lynnview the costs of its intervention. In so doing, it noted Lynnview's substantial contribution to its proceedings and the fact that, compared to other participants, Lynnview had limited financial resources: Alberta Environmental Appeal Board, Costs Decision September 8, 2003, Appeal No. 01-062-CD at paras. 74, 85, and 90.

[7] Lynnview was granted costs under Column 5 by the Court of Queen's Bench, but without written reasons.

[8] Leading up to the hearing of the appeal, Lynnview participated with the other parties in coming to an agreement about the contents of the appeal books, which totaled 105 volumes. Its lawyer also prepared a 15 page factum, the maximum length allowed under the intervener Order. Imperial advanced five grounds on appeal. By agreement among the two interveners and the Respondents, Lynnview was the only party adverse to Imperial which addressed Imperial's appeal issue of fairness. On paper, these formed the bulk of Imperial's submissions. Presumably, Lynnview would also have argued that issue before this Court.

[9] I have concluded that Lynnview should have its costs under Column 5.

LEGISLATION

[10] ***EPEA***, s. 2 (a)

> 2 The purpose of this Act is to support and promote the protection, enhancement and wise use of the environment while recognizing the following:
>
> (a) the protection of the environment is essential to the integrity of ecosystems and **human health** and to the well-being of society;
>
> [emphasis added]

[11] ***Court of Appeal Act***, R.S.A. 2000, c. 30, s.12

> 12 Subject to an express provision to the contrary in any enactment, the costs of and incidental to any matter authorized to be taken before the Court or a judge are in the discretion of the Court or judge and the Court or judge may make any order relating to costs that is appropriate in the circumstances.

[12] ***Alberta Rules of Court***, AR 390/68, Rules 516 and 525

> 516 A judge may make any order in chambers in respect to any matters incidental to an appeal which the court could make either ex

> parte or on such notice as he may direct, and any such order may be set aside or varied by a judge if the order was obtained ex parte.
>
> [...]
>
> 525(1) An appellant may discontinue his appeal by filing with the registrar and serving upon the respondent a notice signed by the appellant or his solicitor stating that he has so discontinued it and thereupon the appeal is at an end and the respondent is entitled to his costs of the appeal.

ANALYSIS

1. Jurisdiction of a Single Judge to Hear This Application

[13] At the start of the oral hearing, I raised the question of whether a single judge had authority to hear the motion. Although both parties consented to this procedure, neither was able to offer any authority on the point.

[14] Decisions as to the granting of intervener status are generally heard by a motions panel: ***Doe v. Canada*** (2000), 2 C.P.C. (5th) 243 (Alta. C.A.), 2000 ABCA 217 at para. 5; ***Elizabeth Metis Elizabeth Metis Settlement v. Metis Settlements Appeal Tribunal***, 2004 ABCA 418 at para. 18. In several cases, however, a single judge has granted intervener status: ***Doe v. Canada***, *supra*, ***Frog Lake First Nation v. Alberta (Energy and Utilities Board)***, 2003 ABCA 373 at para. 5, and ***United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City of)*** (2002), 312 A.R. 351 (C.A.), 2002 ABCA 243. There is no comprehensive discussion in the cases about the appropriateness of one or the other procedure. There appears to be no authority on the issue of jurisdiction over intervener costs when an appeal has been discontinued.

[15] Section 12 of the ***Court of Appeal Act*** gives the Court or a judge the power to make any costs order "that is appropriate in the circumstances", when the costs are "incidental to any matter authorized to be taken before the Court or a judge".

[16] Rule 518(f) gives a panel jurisdiction to make a costs award. Since its language is permissive ("may") rather than mandatory ("shall"), it does not prevent a single judge having jurisdiction in this case. Rule 516 authorizes a single judge to make an order in matters "incidental to an appeal". If this application meets that description, a combination of Rule 516 and s. 12 of the ***Court of Appeal Act*** provides me the necessary authority to deal with the issue of intervener costs here.

[17] There has been little analysis of the meaning of "incidental to an appeal" in Rule 516. Justice Côté has suggested that one determining point is whether the matter is substantive or procedural: ***Zukiwski v. Yakmac Investments Ltd.***, 1999 ABCA 226 at para. 8. Stevenson & Côté's ***Alberta***

Civil Procedure Handbook 2006 opines that a single judge will hear motions that do not dismiss or allow an appeal, involve new evidence, reconsider a previous decision of the Court, (maybe) find legislation unconstitutional, or grant a stay previously refused by another judge: Juriliber: Edmonton 2006 at p. 481.

[18] In my view, the question of intervener costs following a discontinuance is incidental to an appeal. Such a decision does not determine substantive issues between the parties (such as those that would have been decided had the appeal proceeded).

[19] Putting this question before a single judge also makes sense from the point of view of judicial economy (which is one policy reason behind Rule 516). When an appeal has been heard, the panel is best-situated to award costs, since its members will be familiar with the strengths and weaknesses of each side's arguments, as well as with the conduct of the case. But when an appeal has been discontinued, no judge has detailed information about it. It is logical that only one judge, and not three, expends time to resolve the issue.

[20] I conclude that a single judge has authority to determine whether interveners should be awarded the costs of a discontinued appeal.

2. Positions of Lynnview and Imperial

[21] Lynnview concedes that the general rule requires an intervener to bear its own costs: ***Stoney Tribal Council v. Pancanadian Petroleum Ltd.***, (2000) 266 A.R. 374 (C.A.), 2000 ABCA 164 at para 7. It asserts, however, that there are applicable exceptions to the general rule. It emphasizes Lynnview's special interests from the point of view of its members' health and property ownership.

[22] Imperial says the general rule should be applied because, otherwise, there is a danger that parties will lack financial incentives to resolve their disputes. Granting costs to interveners would give them an inappropriate degree of influence in litigation. Imperial also argues that the Respondents could have adequately protected Lynnview's interests. If Lynnview's concern in the case was sufficiently large, it ought to have applied to become a party, thereby running the risk of having costs awarded against it. It submits that the use of the word "respondent" in Rule 525 is deliberate and excludes interveners.

3. Exceptions to the General Rule

[23] The Rules do not shed any light on the issue raised in this application. The most that can be said is that they are silent on the question of intervener costs when an appeal is discontinued. It must be determined whether there are exceptions to the general rule, and whether Lynnview meets one or more exception.

[24] When a party intervenes in the public interest but is seriously affected by the result, a costs award may be appropriate: ***B. (R.) v. Children's Aid Society of Metropolitan Toronto***, [1995] 1

S.C.R. 315 at para 176, (1995), 122 D.L.R. (4th) 1 (S.C.C.). In ***Lavigne v. Ontario Public Service Employees Union*** the interveners (Canadian Labour Congress, the Ontario Federation of Labour and the National Union of Provincial Government Employees) were awarded costs in a case which affected those organizations' members: (1991), 81 D.L.R. (4th) 545 at pp. 612-13 (per Wilson J.) and 641 (per La Forest J., [1991] 2 S.C.R. 211. See also ***Turner Lienaux v. Nova Scotia (A.G.)***, where the trial judge's award of costs for the intervener was upheld by the Court of Appeal, the trial judge having held that the intervener had a significant financial interest in the outcome of the case: Supplementary Reasons in (1992), 115 N.S.R. (2d) 200 (T.D.), [1992] N.S.J. No. 334, aff'd (1993), 122 N.S.R. (2d) 119 (C.A.), [1993] N.S.J. No. 201; and ***Hines v. Registrar of Motor Vehicles*** (1990), 105 N.S.R. (2d) 240 at para. 17 (N.S. T.D.).

[25] I conclude that there are circumstances where an intervener with a special interest should be awarded costs. Although the circumstances will vary, the factors to be taken into account in determining whether it is appropriate to deviate from the general rule include:

- Has the intervener contributed to the court's deliberations by adding a viewpoint that otherwise would not have been considered? Alternatively, did the parties themselves present the same arguments or points of view?

- Is there legislation relevant to the case to suggest whether the intervener has a special interest or an important role to play?

- What is the nature of the intervener's special interest? The interest might be financial, proprietary, non-pecuniary or other.

[26] Generally, the resources of interveners should not be taken into account in determining whether or not they are entitled to costs: ***B. (R.) v. Children's Aid Society of Metropolitan Toronto***, *supra* per L'Heureux-Dubé at para 161. Different or additional principles may apply in cases involving constitutional issues, which this case does not.

4. Application to this Case

[27] I am not persuaded by Imperial's argument that awarding costs to interveners in a case like this would reduce the likelihood of settlements being reached by the parties. Indeed, in some circumstances, costs have been awarded against successful interveners. The majority of the Supreme Court of Canada in ***B. (R.) v. Children's Aid Society of Metropolitan Toronto***, *supra* upheld a trial award of costs against the Ontario Attorney General, who had intervened and successfully argued in favor of upholding legislation challenged on constitutional grounds.

[28] The fact that Lynnview was awarded costs by the EAB and in the Court of Queen's Bench is not especially pertinent to the appeal. The EAB, an independent tribunal, has wide discretion over its proceedings, including who should be given intervener status and who ought to be awarded costs:

Environmental Protection and Enhancement Act Regulation AR 114/93, ss. 1(f)(iii) and 20. Its proceedings were broader than the judicial review and it made its own assessment of Lynnview's contribution.

[29] Although there is a closer relationship between the judicial review and the appeal, appeals are often more narrow in scope. In any event, it is not known why Lynnview was granted costs in the Court of Queen's Bench.

[30] Because the appeal was discontinued, it is difficult to assess what role Lynnview might have played. Some indication, however, is found in the agreement among the Respondents and interveners concerning their division of labour on the appeal. If Imperial's factum (which devoted 12 pages to the issue to which Lynnview undertook to respond) provides any indication, this would have been a significant question on appeal and Lynnview's contribution would have been substantial.

[31] In respect of the second factor listed above, the purposes section of the ***EPEA*** at s. 2(a) recognizes that "the protection of the environment is essential to the integrity of ... human health". As the EAB noted, Lynnview's members had a greater stake in this case than anyone else because of the effects of the contamination on their health. It also pointed out at para. 66 of its costs decision that Lynnview's members were entitled to have information on the effects of the contamination on their health. While that perspective may be less pertinent on an appeal from an unsuccessful judicial review application than it was before the EAB, when Lynnview was granted intervener status a number of its members were still living in Lynnview Ridge. Thus, it continued to have a special interest, from property and health perspectives, in having the EPO upheld. In its intervention application Affidavit, Lynnview stated that if Imperial's appeal to overturn the EPO were allowed "the clean up of Lynnview Ridge, the neighbourhood where we live, will be thrown into jeopardy. The future of our neighbourhood is at stake in this Appeal." (para. 17). Its need to participate in the proceedings, moreover, was a direct result of Imperial's actions while owner of the refinery.

CONCLUSION

[32] Based on Lynnview's special interests as well as its foreseeable contribution to the appeal, it ought to be exempted from the general rule concerning intervener costs. Accordingly, it will have costs under Column 5.

Application heard on October 18th, 2005

Reasons filed at Calgary, Alberta
this 4th day of November, 2005

Hunt J.A.

Appearances:

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