Federal Court of Appeal  Cour d'appel fédérale

Date: 20131004

Docket: A-273-13

Citation: 2013 FCA 236

Present: **STRATAS J.A.**

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 4, 2013.

REASONS FOR ORDER BY: STRATAS J.A.

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REASONS FOR ORDER

STRATAS J.A.

[1] Enbridge Pipelines Inc. and Valero Energy Inc. each move for an order adding it as a party respondent in this application for judicial review. In the alternative, they each move for an order adding it as an intervener.

A. The nature of the application for judicial review

[2] The application for judicial review comes to this Court under paragraph 28(1)(*f*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. It arises from proceedings before the National Energy Board.

[3] The proceedings before the National Energy Board concern Enbridge's application to the Board for approval to expand the capacity of a pipeline and to reverse a segment of that pipeline. Also included in Enbridge's application is a request to allow the pipeline to transport bitumen, the petroleum product derived from the Alberta oil sands. The Board's proceedings are ongoing.

[4] The application for judicial review targets a section recently added to the *National Energy Board Act*, R.S.C. 1985, c. N-7, and the Board's interpretation and application of that section.

[5] The section, section 55.2, affects who may make representations to the Board. Section 55.2 reads as follows:

55.2. On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.	**55.2.** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive.

[6] In their notice of application in this Court, the applicants say that the Board interpreted its power under this section "to create a rigorous application process for those individuals and groups who seek to participate in [the Board's] proceedings." Among other things, the Board required those intending to participate to complete a detailed form.

[7] The applicants, Forest Ethics Advocacy Association and Donna Sinclair, are, respectively, an environmental organization and an individual. The Board denied Donna Sinclair the right to submit a letter of comment on Enbridge's application for approval. The applicants seek a declaration that section 55.2 violates the guarantee of freedom of expression in subsection 2(*b*) of the Charter and, thus, is invalid. They also seek an order setting aside the Board's decision to issue the form and require that it be completed, and an injunction preventing the Board from acting until the judicial review has been decided. Finally, they seek an order requiring the Board to accept all letters of comment from those wanting to participate in the proceedings.

[8] Enbridge, the applicant for approval before the Board, is the proponent of the pipeline project under scrutiny. Valero is an intervener in the Board's proceedings, supporting Enbridge's application for approval. Valero stands to benefit from a Board approval of Enbridge's application. Approval would permit Valero to receive western Canadian crude oil, oil that is cheaper than that from offshore sources. To that end, Valero has entered into a transportation services agreement with Enbridge, contingent upon the approval of Enbridge's project. Valero plans to invest between $110 million and $200 million to upgrade its facilities in order to handle the anticipated supply of western Canadian crude oil.

B. The provisions of the *Federal Courts Rules* that govern these motions

[9] Three provisions in the *Federal Courts Rules*, SOR/98-106, govern the motions before me: Rule 104(1)(*b*) (adding a party); Rule 109(1) and (2) (intervening in proceedings); and Rule 303(1)(*a*) (who must be named as a respondent to an application for judicial review).

[10] These Rules read as follows:

104. (1) At any time, the Court may	**104.** (1) La Cour peut, à tout moment, ordonner :
…	…
(*b*) order that a person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined be added as a party, but no person shall be added as a plaintiff or applicant without his or her consent, signified in writing or in such other manner as the Court may order.	*b*) que soit constituée comme partie à l'instance toute personne qui aurait dû l'être ou dont la présence devant la Cour est nécessaire pour assurer une instruction complète et le règlement des questions en litige dans l'instance; toutefois, nul ne peut être constitué codemandeur sans son consentement, lequel est notifié par écrit ou de telle autre manière que la Cour ordonne.
109. (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.	**109.** (1) La Cour peut, sur requête, autoriser toute personne à intervenir dans une instance.
(2) Notice of a motion under subsection (1) shall	(2) L'avis d'une requête présentée pour obtenir l'autorisation d'intervenir :

(*a*) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and

(*b*) describe how the proposed intervener wishes to participate in the proceeding and how that participation will assist the determination of a factual or legal issue related to the proceeding.

a) précise les nom et adresse de la personne qui désire intervenir et ceux de son avocat, le cas échéant;

b) explique de quelle manière la personne désire participer à l'instance et en quoi sa participation aidera à la prise d'une décision sur toute question de fait et de droit se rapportant à l'instance.

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person

(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; …

303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;…

C. Should Enbridge and Valero be added as respondents?

[11] Under Rule 104(1)(*b*), parties may be added as respondents where

(1) they should have been respondents in the first place; or

(2) their presence before the Court is necessary.

Satisfaction of either of these requirements is sufficient. Enbridge and Valero say they satisfy both requirements.

(1) Should Enbridge and Valero have been respondents in the first place?

[12] Whether Enbridge and Valero should have been respondents in the first place is determined by Rule 303(1)(*a*). Under that rule, those who are "directly affected" by the order sought in the application for judicial review must be named as respondents.

[13] What is the meaning of "directly affected" in Rule 303(1)(*a*)? There are very few authorities on point.

[14] All parties cite the order made by this Court in *Sweetgrass First Nation v. National Energy Board*, file 08-A-30 (May 30, 2008) but that order does not shed light on the meaning of "directly affected" in Rule 303(1)(*a*).

[15] All parties cite *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, 2008 FC 735. However, that case is of limited usefulness. In *Brokenhead*, the Federal Court did not examine in any detail the words "directly affected."

[16] Further, most of the cases placed before the Federal Court in *Brokenhead* were decided under Rule 1602(3) of the old *Federal Court Rules*, C.R.C. 1978, c. 663 (now repealed) or relied upon cases interpreting old Rule 1602(3). But old Rule 1602(3) is quite different from today's Rule 303(1)(*a*).

[17] Old Rule 1602(3) required that an "interested person who [was] adverse in interest to the applicant" before the tribunal being reviewed be named as a respondent. Rule 303(1)(*a*) is narrower, requiring that a party be "directly affected" by the order sought in the application for judicial review. Accordingly, cases based on old Rule 1602(3) should be regarded with caution.

[18] The words "directly affected" in Rule 303(1)(*a*) mirror those in subsection 18.1(1) of the *Federal Courts Act*. Under that subsection, only the Attorney General or "anyone directly affected by the matter in respect of which relief is sought" may bring an application for judicial review. Rule 303(1)(*a*) restricts the category of parties who must be added as respondents to those who, if the tribunal's decision were different, could have brought an application for judicial review themselves.

[19] Accordingly, guidance on the meaning of "direct interest" in Rule 303(1)(*a*) can be found in the case law concerning the meaning of "direct interest" in subsection 18.1(1) of the *Federal Courts Act*. This was the approach of the Federal Court in *Reddy-Cheminor, Inc. v. Canada*, 2001 FCT 1065, 212 F.T.R. 129, aff'd 2002 FCA 179, 291 F.T.R. 193 and seems to have been the approach implicitly adopted by the Federal Court in *Cami International Poultry Inc. v. Canada (Attorney General)*, 2013 FC 583 at paragraphs 33-34.

[20] A party has a "direct interest" under subsection 18.1(1) of the *Federal Courts Act* when its legal rights are affected, legal obligations are imposed upon it, or it is prejudicially affected in some direct way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307 at

paragraphs 57-58; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116.

[21] Translating this to Rule 303(1)(*a*), the question is whether the relief sought in the application for judicial review will affect a party's legal rights, impose legal obligations upon it, or prejudicially affect it in some direct way. If so, the party should be added as a respondent. If that party was not added as a respondent when the notice of application was issued, then, upon motion under Rule 104(1)(*b*), it should be added as a respondent.

[22] The relief sought in the judicial review is described in paragraph 7, above. The interests of Enbridge and Valero are described in paragraph 8, above.

[23] I accept that the relief sought in the judicial review, if granted, would cause real, tangible prejudice to Enbridge and Valero within the meaning of the *Odynsky* test, not just general inconvenience or general impact on their businesses as a result of detrimental or unhelpful jurisprudence. But Enbridge and Valero must go further under the *Odynsky* test and show that they will be prejudiced in a direct way.

[24] In Enbridge's case, the prejudice is direct. The Board's proceeding is about whether Enbridge's project should be approved. If the relief sought in the judicial review is granted, the proceedings before the Board will have to be rerun to some extent, delaying Enbridge's project. Further, if the relief sought is granted, potentially many persons and organizations from different perspectives will have rights of participation where, before, they did not. The Board might accept

some of the new participants' arguments, leading to the rejection of Enbridge's application for approval of its project. The risk of that happening directly affects Enbridge, the proponent of the project.

[25] Valero, however, stands in a different position. It is in a commercial relationship with Enbridge, the proponent of the project. The success of that relationship depends upon the approval of the project. But it is not itself the proponent of the project.

[26] Those in a commercial relationship with the proponent of a project who stand to gain from the approval of the project of course will suffer financially if the project is not approved. But that financial interest is merely consequential or indirect.

[27] Valero stands in the same position as any suppliers of materials for the project and any workers involved in the construction of the project. The project will provide them with income and work. But if it is not approved, it will not go forward, and the income and work will be lost. Their interests, no doubt significant, are consequential or indirect, contingent on the proponent of the project getting its approval.

[28] One way to test this result is to consider a hypothetical situation and the concept of "direct interest" under subsection 18.1(1) of the *Federal Courts Act*. Suppose that the Board rules against Enbridge's application for approval. Suppose that Enbridge decides not to bring an application for judicial review. In those circumstances, could Valero maintain that since it stood to benefit economically from the approval it has a "direct interest" and, thus, has standing to bring an

application for judicial review? Could all others who also stood to benefit economically in some way from the pipeline approval – construction companies and their employees, suppliers and transporters of construction materials, potential buyers of refined petroleum products – say the same thing? I think not.

[29] I do not doubt that Valero's interest is most significant: see Exhibit "A" to the Affidavit of Louis Bergeron. However, Rule 303(1)(*a*) refers to a "direct interest," not a "significant interest." Valero does not have a "direct interest" and so it could not have been named as a respondent in the first place.

(2) Is Valero's presence in the judicial review necessary?

[30] Valero also submits that it should now be a respondent in the judicial review because it falls under the second branch of under Rule 104(1)(*b*): its presence before the Court is "necessary to ensure that all matters in dispute in the application for judicial review may be effectually and completely determined."

[31] To succeed in this submission, Valero must satisfy the demanding test of necessity set out in cases such as *Shubenacadie Indian Band v. Canada (Minister of Fisheries and Oceans)*, 2002 FCA 509, 236 F.T.R. 160 and *Laboratoires Servier v. Apotex Inc.*, 2007 FC 1210.

[32] In my view, Valero has not satisfied that test. It has not pointed to "a question in the [application for judicial review] which cannot be effectually and completely settled unless [it] is a party": *Shubenacadie Indian Band, supra* at paragraph 8, citing *Amon v. Raphael Tuck & Sons Ltd.*, [1956] 1 Q.B. 357 at page 380.

[33] Therefore, Valero's motion to be added as a respondent must fail.

D. Should Valero be permitted to intervene?

[34] As we have seen, not all parties before an administrative tribunal will be parties with a "direct interest" or necessary for the judicial review – in other words, not all parties will be entitled to be respondents in the application for judicial review. But many may be able to satisfy the test for intervention and become interveners in the judicial review. Their level of participation as interveners varies depending on the circumstances. Where warranted, their level of participation can approach that of respondents. The grand prize of being a respondent is one thing. But the consolation prize of being an intervener is often not bad.

[35] Mindful of this, Valero seeks an order permitting it to intervene in the judicial review. However, Valero has failed to discharge the legal burden of proof upon it.

[36] Under Rule 109(2)(*b*), Valero must describe "how [its] participation will assist the determination of a factual or legal issue related to the proceeding." This requires not just an

assertion that its participation will assist, but a *demonstration* of *how* it will assist. Valero has not done this.

[37] In its notice of motion, Valero submits that "there is a justiciable issue and a veritable public interest that could benefit from Valero's participation in this proceeding." This does not discharge the burden of proof imposed upon it by Rule 109(2)(*b*).

[38] In the affidavit offered in support of its motion, Valero asserts that it "has a perspective which is unique and distinct from that of Enbridge" as "a refiner which proposes to access western crude" through the pipeline. Valero does not explain how a refiner's perspective differs from that of a pipeline builder and how that difference will assist in determining the administrative law and constitutional law issues before the Court.

[39] Finally, in its written submissions, Valero asserts – without explanation – that the "interests of justice would be served" and the Court "would [be] assist[ed]…in coming to a fair and just conclusion" by allowing it to intervene. It says nothing more. The Court is left to speculate as to what role Valero would play as an intervener and whether that role would be of any assistance at all.

E. Disposition of the motions

[40] Enbridge Pipelines Inc. shall be added as a party respondent and the style of cause shall be amended to reflect that fact. It shall receive its costs of the motion in any event of the cause. The motion of Valero Energy Inc. shall be dismissed with costs in any event of the cause.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-273-13

STYLE OF CAUSE: FOREST ETHICS ADVOCACY ASSOCIATION AND DONNA SINCLAIR v. THE NATIONAL ENERGY BOARD AND THE ATTORNEY GENERAL OF CANADA

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: OCTOBER 4, 2013

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