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Oil and Gas Consortium Intervenes in the Jurisdictional Challenge to the Alberta Inquiry into Anti-Alberta Energy Campaigns

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Case Commented On: *Ecojustice Canada Society v Alberta*, 2020 ABQB 364 (CanLII)

In July 2019, the Lieutenant Governor in Council commissioned the Allan Inquiry with Order in Council OC 125/2019, issued under section 2 of the *Public Inquiries Act*, RSA 2000, c P-39. The Order in Council directs Commissioner Steve Allan to investigate and report on any anti-Alberta energy campaigns that are supported, in whole or in part, by foreign organizations. Several ABlawg posts have been critical of the Allan Inquiry, commenting on its mandate, process, interference with the freedom of expression protected by the *Charter*, and lack of transparency. Ecojustice has brought an application for judicial review seeking an order quashing Order in Council 125/2019 and prohibiting the Allan Inquiry from proceeding. This post comments on a decision by Justice Karen M. Horner granting an application made by an "Industry Consortium" for leave to intervene in this proceeding.

The Indian Resource Council (IRC), the Explorers and Producers Association of Canada (EPAC), and Brett Wilson applied for leave to intervene collectively on the basis of one written argument and separate affidavits in support of that argument. They described themselves as the "Industry Consortium." The IRC website describes the Council mandate as including activities "[t]o support First Nations in their efforts to attain greater management and control of their oil and natural gas resources." The EPAC website describes itself as "…the voice of Canada's conventional energy producers and advocates on behalf of its entrepreneurial members for sound government policy that promotes a thriving energy sector." In his affidavit filed with the court, Mr. Wilson describes himself as "an investor in the Alberta oil and gas industry, philanthropist, entrepreneur, published author, business and sports team owner and commentator on public policy and investing" (at para 27).

The decision by a court on whether to grant leave to intervene is guided by a list of considerations set out in caselaw. The Alberta Court of Appeal summarized these considerations in *Orphan Well Association v Grant Thornton Limited*, 2016 ABCA 238 (CanLII) at paras 8–13:

> [8] Granting intervener status is a two-step process. The court first considers the subject matter of the appeal and then determines the proposed intervener's interest in it: *Papaschase Indian Band (Descendants of) v Canada (Attorney General)*, 2005 ABCA 320 at para 5, 380 AR 301. In determining a proposed intervener's interest, a court should examine (a) if the intervener will be directly and significantly affected by the appeal's outcome, and (b) if the intervener will provide some expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal.

[9] *Papaschase* stated parties could be granted intervener status if they met either criterion. However, subsequent decisions have set out that simply establishing an affected interested is not enough to grant leave. A proposed intervener must also provide fresh information or a fresh perspective: *Pedersen v Alberta*, 2008 ABCA 192 at para 10, 432 AR 219. If parties can intervene simply because they have affected interests, the number of potential interveners would greatly increase and unduly delay the appeal process without a corresponding benefit.

[10] In *Pedersen*, this court stated (at para 3) that the following questions are relevant factors to consider when determining whether to grant intervener status:

1. Will the intervener be directly affected by the appeal;
2. Is the presence of the intervener necessary for the court to properly decide the matter;
3. Might the intervener's interest in the proceedings not be fully protected by the parties;
4. Will the intervener's submission be useful and different or bring particular expertise to the subject matter of the appeal;
5. Will the intervention unduly delay the proceedings;
6. Will there possibly be prejudice to the parties if intervention is granted;
7. Will intervention widen the *lis* between the parties; and
8. Will the intervention transform the court into a political arena?

[11] The power to allow interveners is discretionary and should be exercised sparingly: *R v Neve* (1996), 1996 ABCA 242 at para 16, 184 AR 359. However, interveners have been allowed when they add significantly to complex constitutional issues, especially those, like the case at bar, with serious and wide ranging policy implications.

[12] As explained in *R v Morgentaler*, 1993 CanLII 158 (SCC), [1993] 1 SCR 462 (SCC) at para 1, "[t]he purpose of an intervention is to present the court with submissions which are useful and different from the perspective of a non-party who has a special interest or particular expertise in the subject matter of the appeal."

[13] The court's ability to assess whether an intervener has something useful and different to add is tied to how clearly the intervener articulates the submissions they seek to advance. A bare assertion that one has a unique perspective is far less helpful than an overview of the arguments the intervener seeks to advance. The Supreme Court requires applicants to identify the position of the intervener intends to take, set out the submissions to be advanced, the questions on which they propose to intervene, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties. See rule 57(2) of the *Rules of the Supreme Court of Canada*, SOR/83-74. This level of specificity is to be encouraged in this court as well.

These principles were summarized by Justice Horner at paras 41–44. For a more recent articulation by the Court of Appeal on these considerations, see *Reference re Impact Assessment Act*, 2020 ABCA 94 (CanLII) at paras 10–13.

The essence here is that an applicant seeking leave to intervene in a proceeding before an Alberta court must establish that (1) they are directly affected by the outcome of the legal dispute – i.e. have some 'skin in the game'; (2) they can provide the court with relevant legal submissions which will not otherwise be provided by the parties – i.e. offer some 'legal additionality'; and (3) their participation will not unduly lengthen, complicate or otherwise bring the proceedings into disrepute – i.e. don't turn the court into a 'political arena'. While these factors seem straightforward enough on their face, their application is often problematic – particularly when courts purport to apply them as an absolute 'yes' or 'no' consideration, rather than acknowledge that these considerations fall along a spectrum. Persons who seek to intervene in a legal dispute usually have a genuine interest in the outcome, but that interest is often indirect and has more of a social or political character than a legal one. So, it is really the degree of interest, potential contribution, and socio-political flavour of an intervention that a court is concerned with in these applications, although this is rarely acknowledged.

Skin in the Game

Ecojustice is asserting that the Allan Inquiry is unlawful on three grounds: (1) it has been brought for an improper purpose and not as a matter of public interest pursuant to the *Public Inquiries Act*; (2) it concerns matters of exclusive federal jurisdiction and therefore is *ultra vires* the constitutional authority of Alberta; and (3) there is a reasonable apprehension of bias in the conduct of the Allan Inquiry in the circumstances. The Industry Consortium sought leave to intervene on the first two grounds.

Justice Horner observes that the Industry Consortium does not have a legal interest in the outcome of this proceeding (at para 78). She also observes that the Industry Consortium provided no evidence of direct harm arising from any alleged anti-Alberta energy campaigns (at para 51). Readers familiar with how Alberta courts and tribunals such as the Alberta Energy Regulator or the Alberta Environmental Appeals Board have interpreted the phrase "directly affected" in the jurisprudence will know that these two findings would be fatal for the Industry Consortium seeking directly affected status before an energy or environmental tribunal in Alberta (see here for my analysis of the law on "directly affected"). Indeed, as Ecojustice submits, the persons who really are directly affected by the outcome of this proceeding are those organizations who may find themselves the target of recommendations made by the Allan Inquiry.

Nevertheless, Justice Horner provides three justifications for concluding the Industry Consortium is directly affected by the outcome of these proceedings:

1. It does not make sense to require the Industry Consortium to provide evidence of direct harm because the purpose of the Allan Inquiry is to produce that evidence (at para 52);
2. The Industry Consortium and its members share in the public interest of having the Allan Inquiry proceed with its mandate (at para 55);

3. The law requiring a legal interest doesn't apply in every case (at para 78).

With respect, none of these justifications are convincing. The burden on the Industry Consortium to provide evidence of direct harm is a legal requirement which should not be cast aside by simply stating it is nonsensical. The fact that the Industry Consortium shares in the public interest falls far short of establishing the direct, personal interest that the phrase "directly affected" represents in the caselaw. Environmental groups in Alberta have faced the challenge of meeting the "directly affected" requirement in countless efforts to participate in legal proceedings over the past several decades. What is sauce for the goose is sauce for the gander.

In *Reference re Impact Assessment Act*, the Court of Appeal explicitly states: "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" (at para 12, citing *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 at para 29). In the face of her acknowledgement that the Industry Consortium failed to establish a legal interest in these proceedings, Justice Horner chooses to apply the "generally not sufficient" component of this factor (at para 78).

The crits (critical legal scholars) will be quick to point out that courts apply the need for a direct legal interest only when it serves their preference in deciding an intervention application. To support her relaxed approach in this case, Justice Horner (at para 78) references *Wilcox v Her Majesty the Queen in right of Alberta*, 2019 ABCA 385 (CanLII), where the Court of Appeal granted intervener status to the Alberta Prison Justice Society on the basis that the outcome in the case would have a "special" impact on its mandate (*Wilcox* at para 14). However, where a court denies an intervention application it usually applies a much stricter view. Consider what the Court of Appeal wrote in *Stewart Estate (Re)*, 2014 ABCA 222 (CanLII), denying a leave to intervene application by the Freehold Petroleum and Natural Gas Association:

> The application is supported by the affidavit of David Speirs, a director of the association. He deposes that the association has a material interest in the outcome of the appeal which arises as a result of the association's role as an advocate for freehold owners. He further says that as the leases at issue in this appeal are of the same or similar form to many of the leases entered into during the 1960s and 1970s, the outcome of the appeal will affect not only the rights of the appellants but the will "*specially affect* the rights of all Freehold Owners". When cross-examined on his affidavit, Mr. Speirs acknowledged that aside from the precedent that this appeal might establish, the members of the association were not directly affected by the appeal. In my view, *there is nothing about the association that sets it apart from any other member of the public* who might be interested in the development of the jurisprudence in a particular area of the law. (at para 6, emphasis added)

Offer Some 'Legal Additionality'

The evidence provided by the Industry Consortium on the perspective and expertise it offers to the proceeding is summarized by Justice Horner as follows (at para 61):

The affidavit evidence filed by the Industry Consortium on the Intervenor Application sets out the perspective and expertise that each of the applicants will bring if leave to intervene is granted:

(a) IRC members have decades of experience in oil and gas production and development. In the Buffalo Affidavit, Mr. Buffalo discusses the benefits from oil and gas production and development that flow to First Nations and Indigenous communities, including significant opportunities for employment, as well as for Indigenous-owned businesses and entrepreneurs. In their written submissions, the Industry Consortium describes these benefits in some cases as transformational for community development and individual quality of life. The IRC seeks leave to intervene because it is concerned that if the IRC is not at the table, the long history of political, policy and legal determinations with profound impacts on Indigenous peoples will continue without an Indigenous voice present.

(b) EPAC is experienced with law and policy development in the oil and gas industry. EPAC seeks leave to intervene to provide its perspective as junior, mid-sized, and independent oil and gas producers operating in Alberta. Mr. Goodman expressed EPAC's concern that if it is not permitted to intervene, no party that represents the views of the oil and gas industry will have the opportunity to present its perspective on the need for inquiry powers to be interpreted broadly to protect the property, jobs and economic rights of oil and gas producers.

(c) Mr. Wilson is an investor in the Alberta oil and gas industry, and is experienced in global financial markets and capital investment. He seeks leave to intervene to provide that perspective, which is not currently before the Court.

Ecojustice argued that this evidence failed to demonstrate the Industry Consortium would provide anything different from what Alberta would offer the court in relation to whether the Allan Inquiry is a matter of public interest or is considering matters *ultra vires* the constitutional authority of Alberta. On the constitutional issue, Justice Horner agrees with Ecojustice and denies leave to intervene on that matter (at para 64).

On the question of public interest, Justice Horner simply finds "[t]he industry perspective represented by the Industry Consortium is necessary for this Court to properly consider the public interest aspect of this issue" (at para 65). Justice Horner cites *Gitxaala Nation v Canada*, 2015 FCA 73 (CanLII) and *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2014 ABCA 340 (CanLII) in support of this finding (at paras 66–67), however she does not acknowledge that both of these decisions concerned a dispute over an actual project to which industry would have particular knowledge. That is unlike the case here, where the dispute is focused on what constitutes the *public interest*.

Justice Horner's conclusion that there is a need for the court to hear an industry perspective on the public interest is also difficult to reconcile with the conclusion in *Stewart Estate*, where the

Court of Appeal dismissed any uniqueness to the perspective offered by the Freehold Petroleum and Natural Gas Association – an association reported at the time of the decision as having over 4900 individual members representing 30,000 of the estimated 40,000 to 50,000 individuals who own freehold mineral rights in Alberta (*Stewart Estate* at para 4) – in relation to the legal status of disputed freehold petroleum and natural gas leases.

Alberta took no position on the Industry Consortium's application (at para 4). This alone is very revealing in light of the common law which clearly vests the power to assert the public interest in the Crown and Attorney General (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 (CanLII) at para 14). In my experience, Alberta always seems keen to assert its jurisdiction to speak to the public interest on environmental disputes, and therefore its failure to do so here strongly suggests to me that the Crown has aligned with industry in this case. At the very least, the common law on the role of the Crown as sole guardian of the public interest raises significant questions on Justice Horner's finding that the perspective of the Industry Consortium is necessary in these proceedings (at para 81).

Don't Turn the Court into a 'Political Arena'

The evidence placed before the court by Ecojustice in response to this application included screenshots of Mr. Wilson's Twitter account with what Justice Horner describes as "politically charged and combative" tweets (at paras 28–29):

> -In response to a tweet that he ""jokes" about hanging anti-pipeline activists as traitors", Mr. Wilson tweets: "I didn't joke. I was serious about hanging foreign funded protestors – undermining our nation – for treason."
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> -In a tweet directed at @ElizabethMay, @DavidSuzukiFDN and @Greenpeace, Mr. Wilson tweets: "[T]he likes of you have outlived your welcome in Canada. Your eco-terrorism tactics – misleading – misguiding – anti-Canadian rhetoric is toast. Please leave. Now. If another country will have you. Or – join our nation."
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> -After referencing an article on Western fury published in the Toronto Sun, Mr. Wilson tweets: "Basically we need to conceptually castrate eco-terrorists who through acts of treason are killing Canada. Maybe we should hang them for treason? Dunno. All Canadians need to feel Western fury."
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> -In another tweet, he refers to "foreign funded eco-morons (aka terrorists)".
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> -Again directing a tweet at environmental organizations, Mr. Wilson states: "We allow @Greenpeace and @leadnowca and @Change and @DavidSuzukiFDN to commit treason. ... RT kill their charity tax status?" In another tweet directed at these organizations, he refers to them as "eco-terrorists" and states they "are allowed to use lies to capture the "eco-flag" without accountability for their lies. It's a form of treason and they need to be stopped. Harshly."

-Mr. Wilson posts an article from the Financial Post in his Twitter account and tweets: "Why would the @liberal_party destroy our nation with Bills C69 and C48? Misguided input from eco-terrorists and eco-alarmist organizations like @DavidSuzukiFDN and @ecojustice_ca and @Pembina and @Greenpeace Worlds greatest hypocrites – campaigning against ONLY #CANADA"

-In his Twitter feed, Mr. Wilson comments on a job posting from Greenpeace: "So here goes @GreenpeaceCA attempting to hire a Campaign NutJob – for the express purpose of sodomizing Canada's energy industry. ... As to @Greenpeace – watch your steps carefully."

-Mr. Wilson tweets an article from the Calgary Herald with the headline "Alberta inquiry into oil and gas foes could face legal challenge from @ecojustice_ca". He then comments: "A quick review of the eco-justice banter leads many Albertans to offer: #KindlyF[**]kOff"

-In another tweet, Mr. Wilson states: "Hey @ecojustice_ca – had coffee with a few fellow Albertans – who are tired of the bullshit you espouse – cut the crap (ie the threatened lawsuit) and file the lawsuit – show us your stuff. AND watch your back."

-In a later tweet in the same thread, Mr. Wilson comments: "We are seeing moronic courage of a tiny minority who are defending the hypocritical @ecojustice_ca who are in turn threatening our great province w/ legal action when AB is simply searching for evidence of bad guys doing bad things to the non-BC West. What are they scared of?"

It is difficult to envision stronger evidence in support of an argument that this intervention would unduly politicize these proceedings. Moreover, as Justice David Stratas remarks in *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, [2015] 4 FCR 75, 2014 FCA 245 (CanLII), legal proceedings (before the National Energy Board in that case) are not an "open-line radio show where anyone can dial in and participate" (*Forest Ethics* at para 76). Justice Horner expresses mild concern in relation to Mr. Wilson's tweets, but nonetheless refuses to deny leave to Mr. Wilson because the IRC, EPAC and Mr. Wilson "have requested leave to intervene collectively and have demonstrated an intention to cooperate and coordinate their submissions" (at para 75). This justification simply fails to address the evidence placed before the court on this factor.

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