

Obtaining Leave to Intervene in a Leave to Appeal Application

By Nickie Vlavianos

Cases Considered:

[*Provident Energy Ltd. v. Alberta \(Utilities Commission\)*, 2008 ABCA 316](#)

This decision deals with a unique and interesting point of civil procedure. It answers the following question: what is the test for obtaining leave to intervene in a leave to appeal application before Alberta's Court of Appeal?

The decision relates to three applications for leave to intervene in a leave to appeal application brought by Provident Energy Ltd. (Provident) with respect to a decision of the Alberta Utilities Commission. The applicants seeking leave to intervene were the Canadian Association of Petroleum Producers (CAPP), Syncrude Canada Ltd. (Syncrude) and Suncor Energy Marketing Inc. (Suncor) jointly, and Imperial Oil Resources (Imperial) and ExxonMobil Canada Energy (ExxonMobil) also jointly. The stakes must be pretty high to garner such interest at this preliminary stage in the proceedings.

In November 2007, Nova Gas Transmission Ltd. (NGTL) applied to the (now) Alberta Utilities Commission (AUC) for a permit to authorize the construction of natural gas pipeline segments and associated compressor stations as part of the NGTL Alberta System. An issue of jurisdiction arose and TransCanada Pipelines Ltd. subsequently applied to the federal National Energy Board (NEB) for approvals for the Alberta system on the basis that the Alberta System was within federal jurisdiction and thus regulated by the NEB. Provident then applied to the AUC for dismissal of NGTL's application before the Commission arguing that the application was outside the Commission's jurisdiction or, alternatively, that a stay should be granted pending the NEB's determination of jurisdiction.

The AUC denied Provident's application. It held that Alberta's *Pipeline Act*, R.S.A. 2000, c. P-15, precluded it from determining the constitutional question and required it to continue to regulate NGTL until an NEB-issued certificate of public convenience and necessity was in force. It is with respect to this decision of the AUC that Provident has brought an application for leave to appeal to the Court of Appeal. In its application for leave, Provident submits that the AUC erred in concluding that it was not empowered to answer questions of law, and also on the question of whether it has jurisdiction over the Alberta System for purposes of NGTL's

application. Along with AUC, the Court of Appeal added NGTL as a respondent in Provident's pending leave to appeal application.

Before a three-member panel of the Court (Justices Clifton O'Brien, Peter Martin and Patricia Rowbotham), the applicants seeking leave to intervene in Provident's leave to appeal application submitted that they would be directly affected by any appeal decision should leave be granted. The applicants Imperial Oil and ExxonMobil are major producers and shippers of natural gas on the NGTL system. Syncrude and Suncor have oil sands projects dependent on the gas transmission system of NGTL, and CAPP represents 130 producers of natural gas and crude oil that are dependent on the NGTL pipeline system.

The Court's decision begins by noting that the Court of Appeal does not have specific rules for such leave to intervene applications. Rather, the Court acknowledged that these applications are rare and that they are difficult to assess, especially because it is "difficult to know what interests may be affected and what contributions the applicants can make when it is unknown if leave to appeal will be granted and on what questions" (at para. 8). Looking to Supreme Court of Canada jurisprudence for guidance, the Court of Appeal concluded that leave to intervene prior to the granting of leave to appeal will rarely be granted, and only in "very exceptional circumstances" (at para. 8).

Applying this vague test of "very exceptional circumstances" to this case, the Court held that none of the applicants were able to show exceptional circumstances in support of their proposed intervention in the leave application. In particular, the Court was not satisfied that the applicants had demonstrated any special expertise or that "they would provide a unique or different perspective in the leave application from that of the respondents, namely, the Commission and NGTL" (at para. 9). In short, the Court was not satisfied that any of these applicants would have anything to add on the leave application. Thus, the leave to intervene applications were dismissed. The Court did note, however, that should leave to appeal be granted on the Provident application, the applicants would be free to bring an application for leave to intervene in the appeal at that time.

Clearly, this decision tells us that the test for obtaining leave to intervene in a leave to appeal application is an onerous one. Only where "very exceptional circumstances" exist with respect to the expertise or perspective that the applicant would bring to the leave application will leave to intervene be granted. In practice, these are rare applications; the test enunciated by the Court means that *successful* applications will be even rarer.