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Federal Court Grants Alberta Leave to Intervene in TransMountain Proceedings: Has Alberta Earned the Privilege?

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Case Commented On: *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 (CanLII)

In *Tsleil-Waututh Nation v Canada (Attorney General)* Justice Stratas deals with two leave to intervene motions filed in the consolidated Kinder Morgan TransMountain pipeline judicial review proceedings currently before the Federal Court of Appeal. Justice Stratas grants Alberta's application to intervene on the presumption that the Crown represents the interest of Albertans in the proceedings (at paras 11-27) and denies the application to intervene made by the Tsartlip First Nation on the basis it is really an application for judicial review under the guise of an intervention and its submissions would be duplicative of existing parties (at paras 35-54). Both applications were opposed by existing parties – the Tsleil-Waututh Nation opposed Alberta's intervention and Kinder Morgan opposed the Tsartlip intervention. This comment focuses on the reasoning given by Justice Stratas in granting Alberta intervener status in these proceedings, and in particular I question why Alberta was not asked to justify or explain its basis for intervening in these proceedings. The privilege of representing the public interest is something which must be earned, and it isn't clear to me Alberta has done so in this case.

The TransMountain Pipeline Expansion project is a proposal by Kinder Morgan to add approximately 1000 kilometres of new oil pipeline and related infrastructure to a re-activated existing line between Edmonton and Burnaby, as well as to upgrade a marine terminal. Kinder Morgan submitted its project application to the National Energy Board (NEB) in December 2013 for the construction and operation of the pipeline. The NEB subsequently conducted its assessment over the next several years. On May 19, 2016 the NEB issued its report under section 52 of the *National Energy Board Act*, RSC 1985 c N-7 to the Governor in Council recommending the TransMountain pipeline expansion be approved on conditions, and by Order in Council PC 2016-1069 dated November 29, 2016 the Governor in Council approved the pipeline.

Justice Stratas notes that 16 applications for judicial review involving 31 parties were filed with the Federal Court of Appeal challenging the legality of the NEB Report and/or the Governor in Council approval. On March 9, 2017 the Court consolidated these into one set of proceedings and it is my understanding the applications will be heard in Vancouver this fall. The applicants include several First Nations, the cities of Vancouver and Burnaby, several environmental groups, and other public interest advocacy organizations who collectively have raised myriad issues including the failure of the Crown to meet its duty to consult and accommodate First Nations, infringement of Aboriginal title, breaches of natural justice by the NEB, inadequate environmental assessment, and a failure to comply with the *Species at Risk Act*, SC 2002 c 29. In

addition to these legal uncertainties, the TransMountain pipeline project also faces significant political risk with the recent election results in British Columbia. Whether shovels ever hit the ground on this project remains to be seen, although Kinder Morgan recently announced construction may start before these applications are heard which in itself suggests a troubling disregard for the rule of law.

The applicable provisions of the *Federal Courts Rules*, SOR 98/106 are sections 109 and 110 which read as follows:

> Leave to intervene
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> 109 (1) The Court may, on motion, grant leave to any person to intervene in a proceeding.
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> Contents of notice of motion
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> (2) Notice of a motion under subsection (1) shall
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> (a) set out the full name and address of the proposed intervener and of any solicitor acting for the proposed intervener; and
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> (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.
>
> Directions
>
> (3) In granting a motion under subsection (1), the Court shall give directions regarding
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> (a) the service of documents; and
>
> (b) the role of the intervener, including costs, rights of appeal and any other matters relating to the procedure to be followed by the intervener.
>
> Questions of General Importance
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> Notice to Attorney General
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> 110 Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,
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> (a) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;
>
> (b) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and

> (c) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.

Alberta applied to intervene in these proceedings under section 110(c). The Tsleil-Waututh Nation opposed Alberta's intervention on the grounds that Alberta failed to establish how its participation will assist the Court in its determination of the issues (section 109(2)(b)) and that section 110(c) does not apply here because there is no question of general importance and notice was not served on Alberta. Justice Stratas rules the Tsleil-Waututh argument is inconsistent with a purposive interpretation of sections 109 and 110 that respects the role of an attorney general in our system of government as a guardian of the public interest.

Justice Stratas simply looks past the literal reading of section 110 which clearly does place clause (c) as conjunctive with the notice provisions set out in clauses (a) and (b), when he rules "[n]othing in the legislative text of Rule 110 suggests that Rules 110(a) and 110(b) are prerequisites to an application for leave to intervene under Rule 110(c)" (at para 16). The insertion of 'and' instead of 'or' at the end of clause (b) does suggest the three clauses should be read together, rather than reading clause (c) as a stand-alone provision inviting an attorney general to apply to intervene in proceedings.

Having read section 110(c) as such, Justice Stratas goes on to conclude section 109 cannot apply to an attorney general seeking leave to intervene as the result would be absurd, since it would mean an attorney general has to meet a higher burden of satisfying both sections 109 and 110 to obtain leave when any other person only has to meet the requirements of section 109 to intervene in proceedings:

> The Attorneys General would have to satisfy all the prerequisites under Rules 109 and 110 while private parties wishing to intervene would have to satisfy only the prerequisites under Rule 109. Much clearer legislative language would be necessary to persuade me that the legislative drafter intended that Attorneys General--who represent broader interests, potentially the interests of millions of members of the public--should face more impediments to intervention than private parties.
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> This can be put another way. Suppose this Court were holding a hearing on a question of general importance affecting the interests of the government or the population in a jurisdiction. If the Tsleil-Waututh Nation's submission were accepted, the relevant Attorney General would have to stand outside the courtroom waiting for a formal invitation under Rule 110(a) or a notice from the Administrator under Rule 110(b) before he or she could come inside. And even then, she or he would have to persuade the Court that the requirements of Rule 109 and the opening words of Rule 110 are satisfied. All that before they can begin to make submissions on behalf of their governments and the people they serve. (at paras 12, 13)

This takes us to the essence of Justice Stratas' reasoning here which is that in legal proceedings (judicial reviews in particular) under our Westminister system of government, an attorney general enjoys a presumptive right to intervene on the basis that public rights are vested in the Crown and an attorney general enforces those rights and represents the public interest: "Giving Attorneys General a broader right to apply to intervene in order to advance the public interest--as

Rule 110(c) does--is consistent with these foundational principles and constitutional arrangements. There must be clear language in the legislative text to displace them" (at para 15).

Now of course there can be no right *to apply to intervene* as Justice Stratas has framed it here, as the decision to apply to intervene is a liberty and no one is contesting the ability of Alberta to apply to intervene in these proceedings. So Justice Stratas must be intending to reference Alberta's *right to intervene* in the proceedings (with a corollary duty of the Court to allow the intervention). Unfortunately, his reasoning here badly confuses this fundamental point (at paras 11-17).

My own view is that an attorney general should not enjoy a right to intervene in legal proceedings on the historic basis provided for in the jurisprudence cited by Justice Stratas (at paras 14-18). The view of the Crown holding a trump card on what constitutes the public interest is based on an out-of-date vision of governance that fails to acknowledge the public interest is increasingly contested not by the Crown but *against the* Crown. I don't mean to overstate this, and for certain the Crown can and does advocate in the public interest on lots of issues in public law and policy. But I am saying the Crown should have to earn the privilege of doing so – and not be excused from doing so as Justice Stratas has done here.

If we consider this issue in the context of the TransMountain pipeline proceedings, we should ask Alberta to explain how its participation will assist the Court in addressing the issues before it and not blindly assume its participation will not be duplicative of existing parties or otherwise constructive – in other words, hold Alberta to the same standard which was asked of the Tsartlip First Nation in this case. If Alberta's position is as strong as Justice Stratas implies it to be, then surely meeting this standard would not be much of a burden on the Attorney General. Some of the questions we may have asked the Attorney General to answer could include the following: When it comes to jobs and the need to carry bitumen to Asian markets, how is it that Alberta's position will differ from that of the project proponent Kinder Morgan? What exactly will Alberta contribute in relation to the issues of general importance which the Court observes are in play in this case – environmental assessment, endangered species protection, and the rights of Indigenous peoples (at para 21)? Alberta's record on addressing these issues in a transparent, intelligible and reasoned manner is hardly stellar, to say the least.

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