Date: 20080613

Docket: T-225-08

Citation: 2008 FC 735

Ottawa, Ontario, June 13, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

BROKENHEAD OJIBWAY NATION, LONG PLAIN FIRST NATION, SWAN LAKE FIRST NATION, FORT ALEXANDER FIRST NATION, also known as "SAGKEENG FIRST NATION", ROSEAU RIVER ANISHINABE FIRST NATION, PEGUIS FIRST NATION AND SANDY BAY FIRST NATION, known collectively as the TREATY ONE FIRST NATIONS

Applicants

and

THE ATTORNEY GENERAL OF CANADA, THE NATIONAL ENERGY BOARD and TRANSCANADA KEYSTONE PIPELINE GP LTD.

Respondents

REASONS FOR ORDER AND ORDER

[1] On this motion, the Canadian Association of Petroleum Producers (CAPP) seeks to be joined in this proceeding as a respondent, contrary to the wishes of the Applicants (collectively, the Treaty One First Nations). CAPP is an industry association representing 150 companies which explore for, develop and produce natural gas and crude oil in Canada and it asserts that it "is adverse in interest" to the position taken by the Treaty One First Nations in this proceeding.

CAPP also asserts in argument that “any factors relevant to the regulatory processes connected with the transportation of Canadian produced crude oil and natural gas have a direct and material impact on [it's] members”.

[2] In the main proceeding, the Treaty One First Nations are seeking declaratory relief against Canada (represented by the Attorney General) in connection with the Governor in Council’s approval of the TransCanada Keystone Pipeline project. That project will impact territory in Manitoba which is claimed by the Treaty One First Nations. In the result, they assert that they had the right to be consulted and accommodated by the Crown before the Governor in Council authorized the National Energy Board (NEB) to issue a Certificate of Public Convenience and Necessity (Certificate) to TransCanada Keystone Pipeline GP Ltd. (TransCanada). That Certificate was issued under section 52 of the *National Energy Board Act*, RSC 1985, c. N-7 and it allowed construction on the project to proceed.

[3] In their Notice of Application, the Treaty One First Nations allege that the Crown has failed to fulfill its duty to consult and accommodate. They are seeking various declarations of rights and an Order quashing the decision of the Governor in Council. The only relief claimed against the NEB is a declaration to the effect that it had a legal duty to ensure that the Crown met its duty to consult and accommodate before a Certificate was issued to TransCanada. No allegation is made by the Treaty One First Nations that the NEB decision was otherwise procedurally or substantively deficient and no relief is claimed directly against TransCanada. Nevertheless, TransCanada has an interest in this proceeding because its economic interests

could be directly impacted by the outcome of this proceeding: see *Canadian Parks and Wilderness v. Canada (Minister of the Environment)*, (1993) 69 F.T.R. 241, 23 Admin. L.R. (2d) 6 at para. 17.

[4] CAPP's motion is brought under Rules 303(1) and 104(1)(b) of the *Federal Courts Rules* which respectfully state:

303. (1) Subject to subsection (2), an applicant shall name as a respondent every person	303. (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	a) toute personne directement touchée par l’ordonnance recherchée, autre que l’office fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d’application qui prévoient ou autorisent la présentation de la demande.
104. (1) At any time, the Court may	104. (1) La Cour peut, à tout moment, ordonner :
(a) order that a person who is not a proper or necessary party shall cease to be a party; or	a) qu’une personne constituée erronément comme partie ou une partie dont la présence n’est pas nécessaire au règlement des questions en litige soit mise hors de cause;
(b) order that a person who	b) que soit constituée comme

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.	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.

[5] CAPP relies principally on three authorities, *Enniss v. Canada*, (1995) 104 F.T.R. 145, F.C.J. 1593, *Tetzlaff v. Canada*, [1992] 2 F.C. 215, 134 N.R. 57 and *Canada (Information Commissioner) v. Canadian Transportation Accident Investigation and Safety Board*, 2001 FCT 659, 2006 F.T.R. 202. It also relies on the fact that it has been added as a respondent in several similar proceedings presently before the Federal Court of Appeal (eg. see the *Sweetgrass First Nation et al. v. the National Energy Board et al.*, 08-A-30).

[6] The decision by Justice Michael Ryer to add CAPP as a Respondent in an appeal before the Court of Appeal, above, has no application to this proceeding. According to the Order of Justice Ryer, the Court of Appeal is dealing with appeals brought by various First Nations parties from decisions made by the NEB. In those NEB proceedings, the First Nations parties and CAPP were intervenors and it was clearly appropriate that CAPP be made a party to any resulting appeals. That is a very different situation from the proceeding before me. In this matter, the Treaty One First Nations were not parties to the NEB proceeding and the NEB

decision is not the subject matter of this application. Here, it is the decision of the Governor in Council that is in issue. I therefore do not consider the involvement of CAPP in those other proceedings to have any relevance to its motion to be added as a Respondent to this application.

[7] The authorities cited by CAPP do not support the position it asserts on this motion. In *Enniss*, above, Justice Marc Nadon remarked at para. 6 that "generally... any party who was heard in the proceedings before [a] federal board and who opposed the Applicant must be named". In *Tetzlaff*, above, it was similarly stated by Justice James Hugessen that a party before a Board should "usually necessarily" be made a party to a resulting judicial review (para. 20). This point would be potentially apt only if the decision being challenged by the Treaty One First Nations in this proceeding were that of the NEB and not the Governor in Council. Furthermore, the Treaty One First Nations were not parties before the NEB and cannot be said to have been adverse to CAPP's interests in that proceeding.

[8] In *Canada (Information Commissioner)*, above, Justice Jean-Eudes Dubé dealt with a motion by Nav Canada to be joined as a Respondent in an application by the Information Commissioner of Canada against the Transportation Safety Board seeking access to audiotape recordings involving Nav Canada employees. In allowing the joinder of Nav Canada as a respondent, the Court noted the value of its evidence and expertise to the proceeding and expressed a concern that Nav Canada's interests might not be adequately looked after by the Transportation Safety Board. The Court also listed with approval the following five considerations that will usually be relevant in some measure to a contested motion to join a party

as a respondent to a proceeding such as this one (as originally set out in *Apotex v. Canada (Attorney General) et al* (1994) 79 F.T.R. 235, 56 C.P.R. (3d) 261):

a. The status of the case. What is the procedural and substantive development of the matter to date? How well have the issues being defined?

b. The impact of the decision. Who will be affected? Are the issues of interest to the parties, to a broader group such as in industry or to the public at large?

c. The nature of the rights which the moving parties assert. Are they direct or remote? Are they substantive, procedural, economic?

d. The nature of the evidence the proposed parties or intervenors are in a position to adduce and whether it will assist the Court in reaching its decision.

e. The ability of the existing parties to adduce all the relevant evidence and their apparent enthusiasm for the task.

[9] There is no question that we are at an early stage of this litigation so that the joinder of CAPP would be unlikely to adversely affect the process through substantial delay or thrown away costs.

[10] On the strength of the evidence presented by CAPP it is impossible to assess the financial impact of this litigation upon its members. Presumably, the industry as a whole has some interest in achieving a degree of regulatory clarity but I question whether CAPP can assert an interest as a surrogate for some of its members whose economic interests might be affected by the outcome of this proceeding. In that sense, CAPP's interests are only indirect and less substantial than a

party like TransCanada whose actual economic interests are clearly at stake. Indeed, I question whether CAPP has any direct interest in this proceeding and that, of course, is a prerequisite to relief under Rule 303(1): see *Reddy-Cheminor, Inc. v. Canada*, 2001 FCT 1065, 212 F.T.R. 129 aff'd 2002 FCA 179, 291 F.T.R. 193.

[11] In terms of the added value that CAPP claims that it can bring to this litigation, the only evidence it has produced is the perfunctory affidavit of its Vice President of Markets and Fiscal Policy who asserts only that CAPP is adverse in interest to the Treaty One First Nations. No evidence has been provided to indicate why or how CAPP's involvement would enhance the process. It is probably implicit that the economic interests of some of CAPP's members could be affected by the outcome of this proceeding but no party is more likely to be adversely affected than TransCanada. What CAPP can bring to this litigation that TransCanada and the other Respondents cannot is left unanswered in the evidence presented. Vague references in argument about potential differences between TransCanada and the industry producers and the need to bring "important" evidence before the Court are simply unconvincing. There is also nothing before me to indicate that TransCanada or the Attorney General lack enthusiasm in the prosecution of their respective defences to the claims asserted against their interests or that they are likely to be indifferent to relevant issues and evidence. It bears repeating here that the only substantive issue so far raised in the pleadings concerns the Crown's duty to consult and accommodate. The resolution of that matter is unlikely to be further advanced by CAPP's involvement. CAPP asserts in argument that it will "bring an important and different perspective to the litigation" but it does not say what that would be. In fact, CAPP's participation is more

likely to result in the duplication of effort and the repetition of argument without any corresponding benefit being realized.

[12] To the extent that CAPP may have a limited interest in the issue of regulatory certainty vis-à-vis the claimed duty to consult and accommodate, it is difficult to understand why that interest could not be met by being joined as an intervenor with appropriate participatory limitations. That option has been extended by the Treaty One First Nations but surprisingly CAPP has not sought such a status even as an alternative form of relief.

[13] I am not satisfied on the evidence presented by CAPP that it is entitled to be added as a party Respondent to this application. Its motion is dismissed with costs payable forthwith to the Applicants in the amount of $2,000.00 inclusive of disbursements.

ORDER

THIS COURT ORDERS that this motion is dismissed with costs payable forthwith to the Applicants in the amount of $2,000.00 inclusive of disbursements.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-225-08
STYLE OF CAUSE:	Brokenhead Ojibway Nation, et al. v. AGC, et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

PLACE OF HEARING:	Ottawa, ON
REASONS FOR ORDER AND ORDER BY:	Mr. Justice Barnes
DATED:	June 13, 2008

APPEARANCES:

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