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Date: 20060228

Docket: T-867-05

Citation: 2006 FC 265

Ottawa, Ontario, February 28, 2006

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

DENE THA' FIRST NATION

Applicant

and

MINISTER OF ENVIRONMENT,

MINISTER OF FISHERIES AND OCEANS,

MINISTER OF INDIAN AND NORTHERN AFFAIRS CANADA,

MINISTER OF TRANSPORT,

IMPERIAL OIL RESOURCES VENTURES LIMITED,

on behalf of the Proponents of the Mackenzie Gas Project,

NATIONAL ENERGY BOARD, AND

ROBERT HORNAL, GINA DOLPHUS, BARRY GREENLAND,

PERCY HARDISTY, ROWLAND HARRISON, TYSON PERTSCHY AND

PETER USHER, all in their capacity as panel members of a Joint Review Panel

established pursuant to the *Canadian Environmental Assessment Act*

to conduct an environmental review of the Mackenzie Gas Project

Respondents

REASONS FOR ORDER AND ORDER

[1] The Attorney General of Alberta (Alberta) seeks two orders - (1) an order granting it intervenor status on broad terms and, originally, with broad scope; and (2) an order requiring the Applicant to serve and file a Notice of Constitutional Question pursuant to s. 57 of the *Federal Courts Act*.

[2] In summary, the Applicant challenges the creation of the process created for the approval of the environmental and regulatory aspects of the MacKenzie Gas Project on the basis that the Respondents failed to consult with them as required by law. As part of the relief sought by the Dene Tha', they ask for a declaration that the MacKenzie Gas Project (Project), including Connecting Facilities, is a single undertaking and a "federal work or undertaking".

[3] Alberta is concerned that this raises a constitutional issue in which it has a vital interest which other parties may not adequately protect. It is also concerned that without a Notice of Constitutional Question, it will not know the scope of the constitutional question posed and further that other Attorneys General will not be able to participate in the judicial review on an important point of constitutional law.

I. Intervenor Status

[4] There is no doubt that Alberta has an interest in this judicial review sufficient to justify being granted intervenor status pursuant to Rule 109 of the *Federal Courts Rules* - the Dene Tha' acknowledge that interest. The issue is the scope and terms of intervenor status.

[5] At this stage of the proceedings, it is difficult to determine how central the relief of declaration will be in this judicial review. The Court must always be concerned that an intervenor not expand the issues and the scope of the proceedings, including the evidence and issues to be determined, beyond that which the parties intend. No doubt Alberta does not intend that result.

II. Re: Scope of Intervention

[6] Alberta's motion originally sought to be an intervenor in all issues and matters and in effect, to have the rights of a party. It has modified its position. Its principal concern is with the declaration of a federal work or undertaking. It also expressed concern for the issue of its consultation with the Dene Tha' referred to in some of the Applicant's materials.

[7] In my view, the scope of Alberta's intervention must be limited. This case is about the failure of federal bodies to engage in consultation with the Applicant when they created a process to review the various aspects of the Project. The declaration of a federal work or undertaking is, at best, ancillary relief and may not be necessary or appropriate to address at the end of the day.

[8] The even more tangential issue of Alberta's consultation with the Applicant is largely irrelevant. It may be background but it is not an issue over which this Court appears to have jurisdiction.

[9] Therefore, Alberta will be granted intervenor status in respect of the issue of the declaration of a "federal work or undertaking".

III. Re: Term of Intervention

[10] Although Alberta seeks the right to file evidence in these proceedings, there is no basis to conclude, at this time, that the evidentiary record will not be sufficient for purposes of dealing with the issue of "federal work or undertaking". Therefore, I am not prepared to grant Alberta an open-ended right to file additional evidence to supplement the record.

[11] However, since there is some basis for concern that the parties themselves may not canvass this issue from the perspective of the affected province, Alberta will have the right to supplement the evidentiary record with leave of the Court upon establishing the necessity for such additional evidence.

[12] Alberta will have the right to examine the parties on this issue only and will, if permitted to file evidence, likewise be subject to cross-examination.

[13] Alberta may file a memorandum of fact and law, not to be greater than 10 pages, to which each of the parties may file a reply.

[14] The issue of whether Alberta shall have a right of appeal will be left to be addressed at the hearing of the judicial review.

[15] Nothing in this decision granting Alberta intervenor rights shall be considered to preclude the Court from varying, rescinding or expanding those rights as may be established to be necessary or appropriate.

IV. Section 57 - Notice of Constitutional Question

[16] Alberta contends that a declaration that the Project is a federal work or undertaking is a matter for which a s. 57 *Federal Courts Act* notice is required. As such, Alberta asks that this Court order the Applicant to serve and file the Notice and to do so at an early date to allow time for the participation of interested Attorneys-General. S. 57 reads:

<p>57. (1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the National Defence Act, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).</p>	<p>57. (1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la Loi sur la défense nationale, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).</p> <p>(2) L'avis est, sauf ordonnance contraire de la Cour d'appel fédérale ou de la Cour fédérale ou de l'office fédéral en cause,</p>
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(2) The notice must be served at least 10 days before the day on which the constitutional question is to be argued, unless the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, orders otherwise.

signifié au moins dix jours avant la date à laquelle la question constitutionnelle qui en fait l'objet doit être débattue.

(3) The Attorney General of Canada and the attorney general of each province are entitled to notice of any appeal or application for judicial review made in respect of the constitutional question.

(3) Les avis d'appel et de demande de contrôle judiciaire portant sur une question constitutionnelle sont à signifier au procureur général du Canada et à ceux des provinces.

(4) The Attorney General of Canada and the attorney general of each province are entitled to adduce evidence and make submissions to the Federal Court of Appeal or the Federal Court or the federal board, commission or other tribunal, as the case may be, in respect of the constitutional question.

(4) Le procureur général à qui un avis visé aux paragraphes (1) ou (3) est signifié peut présenter une preuve et des observations à la Cour d'appel fédérale ou à la Cour fédérale et à l'office fédéral en cause, à l'égard de la question constitutionnelle en litige.

(5) If the Attorney General of Canada or the attorney general of a province makes submissions, that attorney general is deemed to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

(5) Le procureur général qui présente des observations est réputé partie à l'instance aux fins d'un appel portant sur la question constitutionnelle.

[17] Even if the Court were to accept as an obvious premise that the declaration requires a s. 57 Notice, there is no jurisdiction in the Court to make such an order. As I read s. 57(2), upon which Alberta says one can infer such compulsory power, the section is a timing provision - often used when the Notice is not filed within the 10 days required.

[18] The purpose of the s. 57 Notice was well described by Rothstein J.A. (as he is at the time of these Reasons) in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2004] 3 F.C.R. 436:

Notice of a constitutional question under section 57 of the *Federal Court Act* is not required in every case where a constitutional issue is raised, or in every case where a party asserts a constitutional right. It is the nature of the remedy sought in a particular case that will determine whether a section 57 notice is

required.

The objective of section 57 is to preclude a court from making a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds, unless the constitutional question underlying the judgment is the subject of prior notice to Canada and the provinces. A notice of constitutional question under section 57 is simply a means of ensuring that appropriate notice is given. It is axiomatic that there is no need for a section 57 notice in a case where the judicial remedy is something other than a judgment that a statute or regulation is invalid, inapplicable or inoperable on constitutional grounds.

(Emphasis added)

[19] If a s. 57 Notice is required and the Applicant fails to serve the notice, it bears the consequences that a Court may not grant the constitutional relief sought. The Applicant is aware of the risk and is prepared to stand on its ground. The Court has no jurisdiction to compel the Applicant to do otherwise.

[20] The issue of whether s. 57 Notice is required can be more fully argued at the time of the judicial review. The result of the hearing on this issue could range, at least, from a refusal to make the declaration, to a finding that the declaration is unnecessary, to an adjournment to allow the issue to be more fully argued.

[21] Alberta has provided no precedent where a court has ordered a s. 57 Notice to be issued by an unwilling party. The Court is likewise not aware of any such instance.

[22] As a result of the Court's conclusion as to its jurisdiction in this matter, Alberta's motion in this regard is dismissed.

[23] The results of Alberta's motion to intervene is mixed, no costs will be ordered. The results of the motion regarding the s. 57 Notice being against Alberta, the Applicant shall have its costs to be determined in the cause.

ORDER

THIS COURT ORDERS THAT the Attorney General of Alberta's motion for intervenor status is granted on the following terms:

1. Alberta is granted intervenor status restricted to the issue of whether the MacKenzie Gas Project, including Connecting Facilities, is a single undertaking and a federal work or undertaking.
2. Alberta may, with leave of the Court, supplement the Record with additional evidence.
3. Alberta may be cross-examined on any evidence it submits and may cross-examine the parties only in respect of this declaration.
4. Alberta may file a Memorandum of Fact and Law of no more than 10 pages, to which each of the parties may reply.
5. Alberta shall receive notice of and may participate in any motions, case conferences and other

matters consistent with the terms of its intervenor status.

6. Alberta shall reimburse the relevant party for the cost of reproduction, delivery and other incidental costs of receiving materials filed in this matter.
7. The issue of any appeal rights shall be determined in the judicial review.
8. No order as to costs will be made in respect of the motion for intervenor status.

AND THIS COURT FURTHER ORDERS THAT the Attorney General of Alberta's motion in respect of the issuance of a Notice of Constitutional Question is dismissed with costs to the Applicant.

"Michael L. Phelan"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-867-05

STYLE OF CAUSE: Dene Tha' First Nation

v.

Minister of Environment et al

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 21 and 22, 2006

REASONS FOR ORDER: Phelan J.

DATED: February 28, 2006

APPEARANCES:

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Mr. Andrew Hudson	RESOURCES VENTURES LIMITED FOR THE RESPONDENT,

Ms. C.J.C. (Jill) Page	NATIONAL ENERGY BOARD FOR NON-PARTY,
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