File No.: 36353

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

LYNNE M. QUARMBY, ERIC DOHERTY, RUTH WALMSLEY,
JOHN VISSERS, SHIRLEY SAMPLES, FORESTETHICS ADVOCACY ASSOCIATION,
TZEPORAH BERMAN, JOHN CLARKE, and BRADLEY SHENDE

Applicants
(Appellants)

and

ATTORNEY GENERAL OF CANADA,
TRANS MOUNTAIN PIPELINE ULC,
CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, and
NATIONAL ENERGY BOARD

Respondents
(Respondents)

RESPONDENT ATTORNEY GENERAL OF CANADA'S
MEMORANDUM OF ARGUMENT
IN RESPONSE TO APPLICATION FOR LEAVE TO APPEAL of the Appellants
Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Federal Court of Appeal concluded that the applicants had not raised an arguable question in respect of the National Energy Board's rejection of their application for standing.[1] In this application for leave to appeal from the Federal Court of Appeal's refusal of leave to appeal, the applicants presume that the public importance of their case is self-evident and re-argue their submissions on the main issue. There is nothing in their submissions that would satisfy the test for granting leave to appeal.

2. On October 2, 2014, the National Energy Board ("NEB") dismissed the applicants' motion seeking - among other things - a declaration that section 55.2 of the *National Energy Board Act*[2] breaches the right to freedom of expression or that the NEB determined their individual applications for participant status in proceedings before the NEB in contravention of section 2(b) of the *Charter of Rights and Freedoms* (the "*Charter*"). On January 23, 2015, the Federal Court of Appeal refused to grant leave to appeal from the NEB's decision.

3. The NEB's discretionary determinations with regard to participation in its hearings are case-specific rather than being of general public importance. Further, this Court's section 2(b) jurisprudence is clear, coherent and does not require clarification in the context of this case. In particular, contrary to the applicants' assertions, that jurisprudence is unaffected by the Federal Court of Appeal's denial of leave to appeal in this case.

4. Courts, boards and tribunals are regularly called upon to apply rules of standing in order to determine whether would-be participants can participate in their proceedings. Such decisions do not, in and of themselves, engage the right to freedom of expression under section 2(b) of the *Charter*. The applicants' dissatisfaction with the result in this case, does not imbue their claim with public importance such as to merit this Court's attention.

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[1] *Quarmby et al v National Energy Board et al*, (23 January 2015), Ottawa 14-A-62, (FCA) / Application, Tab 4 page 22

[2] RSC 1985, c N-7, as amended ["*NEB Act*"]

B. STATEMENT OF FACTS

5. Trans Mountain Pipeline ULC has applied to the NEB under section 52 of the *NEB Act* for a Certificate of Public Convenience and Necessity and related approvals for a pipeline expansion project (the "Project").

6. Section 55.2 of the *NEB Act* provides:

> 55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.

7. The NEB initially reviewed 2,118 applications to participate from persons who wished to make representations with regard to the Project pursuant to section 55.2 of the *NEB Act*. Of those, 1,650, or 78%, were granted participant status. Specifically:

(a) 400 requested and were granted intervener status;

(b) 798 requested and were granted commenter status;

(c) 452 requested intervener status and were granted commenter status;

(d) 468 were denied intervener or commenter status.[3]

8. Those who were denied standing included both opponents of and advocates for the Project.[4]

9. The NEB only denied standing where it was not satisfied an applicant was directly affected or had relevant information or expertise. As set out in its initial ruling on participation, the NEB did not deny standing to any individual or group that it concluded had relevant information or expertise.[5]

10. Of the nine applicants, eight are individuals and one is an organization. Most of the applicants sought intervener or commenter status in the context of the NEB's consideration of the

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[3] Ruling on Participation, April 2, 2014 / Application, Tab 9-C, pages 157 and 165
[4] *Ibid*, at pages 165 to 166
[5] *Ibid*, pages165 to 166

Project. Some were successful in obtaining that status, while others were not.[6] One of the applicants chose not to apply for intervener or commenter status because she concluded that the matters on which she wanted to make submissions fell outside the scope of the issues the NEB would be considering.[7]

11. By Notice of Motion dated May 6, 2014, the applicants sought various orders in response to the NEB's Ruling on the applications to participate, including a declaration that section 55.2 of the *NEB Act* breached section 2(b) of the *Charter*, or a declaration that the Board had applied section 55.2 of the *NEB Act* contrary to section 2(b) of the *Charter*.[8] They also served a Notice of Constitutional Question, pursuant to which Canada intervened before the NEB. [9] Canada's submissions before the NEB were limited to the constitutionality of section 55.2 of the *NEB Act*.

12. By decision dated October 2, 2014, the NEB dismissed the applicants' motion (the "Decision"). The NEB concluded, among other things, that section 2(b) of the *Charter* was not engaged by either section 55.2 of the *NEB Act* itself or the individual decisions on standing. Quasi-judicial tribunals like the NEB invariably establish rules of procedure, relevance and decorum and have never been for a for free and open-ended expression.[10] The relevance requirement is indispensable to the just and efficient management of the NEB's hearings. [11]

13. On October 30, 2014, the applicants filed their motion for leave to appeal from the NEB's Decision to the Federal Court of Appeal.[12] The question at leave was whether the

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[6] ForestEthics Advocacy Organization requested and was granted intervener status. Three other applicants were also granted participant status, though they were granted commenter status instead of intervener status as they had requested. Four other applicants were denied participant status. See Affidavit of Tzeporah Berman, made May 5, 2014 / Application, Tab 11-B; Affidavit of Eric Doherty, made April 28, 2014 / Application, Tab 11-F; Affidavit of Sven Biggs, made May 1, 2014 / Application, Tab 11-D; Affidavit of Ruth Walmsley, made April 28, 2014 / Application, Tab 11-G; Affidavit of John Vissers, made April 28, 2014 / Application, Tab 11-H; Affidavit of Shirley Samples, made April 29, 2014 / Application, Tab 11-I; Affidavit of John Clarke, mate April 30, 2014 / Application, Tab 11-J; Affidavit of Bradley Shende, made April 30, 2014 / Application, Tab 11-K

[7] Affidavit of Lynne Quarmby, dated April 29, 2014, at para. 13 / Application, Tab 11-E

[8] Notice of Motion, dated May 6, 2014 / Application, Tab 11

[9] Notice of Constitutional Question, dated May 5, 2014 / Application, Tab 10

[10] Decision, pages. 10 to 11, Application, Tab 3

[11] *Ibid*, pages 13 to 14

[12] *NEB Act*, s 22

applicants had raised an arguable question of law or jurisdiction with the meaning of section 22 of the *NEB Act*.[13]

14. On January 23, 2015, the Federal Court of Appeal made its order dismissing the applicants' leave application, with costs. As is customary on leave to appeal, no reasons were provided.

15. On March 24, 2015, the applicants filed their application for leave to appeal to this Court.

PART II – STATEMENT OF QUESTIONS IN ISSUE

16. The sole issue is whether this application for leave to appeal raises an issue of public importance or an issue that is otherwise of such a nature or significance as to warrant decision by this Court.[14] That issue falls to be determined in consideration of the following questions:

a. Have the applicants raised an issue of public importance with regard to the NEB's conclusion that they did not have relevant information or expertise for the purposes of the hearing in which they sought standing?

b. Have the applicants raised an issue of public importance by invoking section 2(b) of the *Charter*?

c. Have the applicants raised an issue of public importance with regard to any conflict in, or expansion of, section 2(b) jurisprudence?

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[13] *Rockwood Park Inc v Emera Brunswick Pipeline Company Ltd*, 2007 FCA 300
[14] *Supreme Court Act*, RSC 1985, c S-26 as amended, s 40(1)

PART III - STATEMENT OF ARGUMENT

A. No Issue of Public Importance with regard to Individual Assessments of Relevance

17. Whether the NEB erred in making individual assessments of relevance is not an issue of public importance. It is specific to the applicants in issue.

18. In addressing the constitutionality of section 55.2 of the *NEB Act*, and framing an issue they say is of public importance, the applicants improperly focus on the fact that they believe their submissions would be relevant, despite the NEB's conclusion otherwise. Thus, the applicants say the Decision stands for the proposition that persons with "relevant concerns" are precluded from participating before the NEB based on the content of their expression. They say the NEB's exclusion of "relevant" information is a matter of public importance. Yet a review of the Decision itself makes clear that it does not stand for that proposition at all. No individual or group the NEB concluded had relevant information or expertise was denied standing.

19. The Decision actually stands for the proposition that standing is not conferred upon demand. The NEB has here correctly applied the requirement of its enabling statute that persons seeking standing be directly affected or have relevant information or expertise. Relevance is not determined based on applicants' own subjective assessment of whether their information or expertise is relevant, but rather based on the NEB's assessment of relevance, as is the case with any quasi-judicial tribunal.

20. The NEB concluded that four of the nine applicants in these proceedings did not have relevant information or expertise, and so denied them standing. The remaining applicants either were granted standing, or simply chose not to apply for it.

21. Section 55.2 expressly contemplates that standing may be granted to those who have relevant information or expertise. Whether the applicants agree with the NEB's conclusions on what will meet the "relevance" requirement for these purposes is irrelevant to whether section

55.2 in itself is *Charter* compliant, and provides no basis to conclude that the proposed appeal raises issues that warrant scrutiny by this Court.[15]

B. No Issue of Public Importance Based on Mere Invocation of the *Charter*

22. The applicants' argument against an uncontroversial rule of standing that is fundamental to Canadian courts' and tribunals' procedures cannot, by mere dint of the fact that it is advanced on *Charter* grounds, be imbued with public importance.

23. The applicants say that their proposed appeal raises an issue of public importance because "it is a matter of public interest for the public to know whether the NEB is correct in upholding the constitutionality of section 55.2 of the *NEB Act*."[16] That submission is tautological. Though the basis for this submission remains somewhat unclear, it appears to be that public importance is made out simply by virtue of the fact that the applicants have challenged the validity of a legislative provision on a *Charter* ground.

24. That cannot, in itself, be sufficient. The NEB, which is a Court of record,[17] is no different from any other judicial or quasi-judicial body called upon make determinations with regard to process and participation before it in the discharge of its duties.

25. Section 55.2 of the *NEB Act* imposes a standard that is more generous than that recognized by common law rules of procedural fairness, which generally only require that standing be granted to individuals who will be directly and necessarily affected by the decision being made.[18]

26. Even rules with regard to public interest standing, which are applied in a "generous and liberal" manner in the context of *Charter* litigation, are more restrictive than section 55.2 of the

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[15] *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038, at paras 90 to 91 (per Lamer J., as he then was, dissenting in part but not on this point)
[16] Applicants' Memorandum of Fact and Law, at para 25 / Application, Tab 5
[17] *NEB Act*, s 11(1)
[18] Macauley & Sprague, Chap. 12.3(c), 12-26.1, citing *Canadian Transit Co. v Public Service Staff Relations Board (Canada)* (1989), 99 NR 330 (FCA)

NEB Act, insofar as they require applicants for public interest standing to satisfy criteria beyond mere relevance.[19]

27. Notably, the applicant ForestEthics Advocacy Organization was granted full intervener status by the NEB as it had requested. [20] Three other applicants were also granted standing, though not full intervener status. [21]

28. Further, the record establishes that the NEB granted at least 1,650 individuals or groups standing in the context of its consideration of the Project.

29. The applicants' assertions that the NEB has sought to stifle alternative views and perspectives[22] and that section 55.2 of the *NEB Act* imposes "an unjustifiably high-threshold standing test"[23] are therefore not borne out by the record, and do not raise an issue of public importance, whether advanced on *Charter* grounds or otherwise.

C. No Issue of Public Importance Because No Conflict in or Expansion of the Jurisprudence

30. There is no conflict in, or extension of, existing section 2(b) of the *Charter* jurisprudence at issue on the proposed appeal that would warrant this Court's scrutiny. The applicants seek to change the law, but have provided no analysis that might attempt to show the public importance of such a change. In particular, the applicants' argument that "unfettered public comments"[24] in the context of hearings conducted by this administrative tribunal would further the values underlying s. 2(b) of the *Charter* is unfounded and fails to raise an issue of public importance.

31. The Federal Court of Appeal concluded that the applicants had not raised an arguable issue for appeal, and dismissed their application for leave to appeal from the NEB's Decision. Despite

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[19] *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524, at paras 33 and 37
[20] ForestEthics Advocacy Organization was granted intervener status
[21] John Vissers, Shirley Samples and John Clarke were granted commenter status
[22] See Applicants' Memorandum of Fact and Law, at paras 1, 2, 6 and 16 / Application, Tab 5
[23] Applicant's Memorandum of Fact and Law, at para 7 / Application, Tab 5
[24] Applicants' Memorandum of Fact and Law, at para 31(b) / Application, Tab 5

this, the applicants suggest that the NEB's Decision, broadens the application of a "positive rights" framework "far beyond existing jurisprudence". [25]

32. The applicant's submission regarding a "broadening" of the law is not persuasive and thus provides no basis for granting leave to appeal to this Court, for at least two key reasons.

33. First, the NEB's decision is not binding on any court or other administrative tribunal. As the Federal Court of Appeal dismissed the ensuing application for leave to appeal without reasons, there is no pronouncement from that Court that might be argued to have an impact on the law. The applicants are likewise unable to point to any conflicting appellate or other jurisprudence.

34. Consequently, it is inaccurate to suggest that the future interpretation of this Court's jurisprudence could be affected in any way by the decision of this administrative board.

35. Second, in all aspects of its analysis, the NEB simply applied established jurisprudence from this Court that is clear, coherent and does not require clarification in the context of the proposed appeal.

36. On this front, in seeking leave to appeal to this Court, the applicants place significant emphasis on the NEB's application of *Baier v Alberta*.[26] The applicants say that the NEB should not have applied *Baier* but that the *Irwin Toy*/*City of Montreal*[27] test applied instead.[28] In *Baier*, this Court explained that the *Irwin Toy*/*City of Montreal* test for determining an alleged breach of section 2(b) of the *Charter* does not apply where access is being sought to a particular statutory platform for expression, and instead set out an alternative test that applies in determining such so-called "positive rights" claims.[29]

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[25] See e.g. Applicants' Memorandum of Fact and Law, at paras 25, 44 to 48 / Application, Tab 5.
[26] *Baier v Alberta*, 2007 SCC 31, [2007] SCR 673 ["*Baier*"]
[27] *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 ["*Irwin Toy*"]; *City of Montreal v 2952-1366 Quebec Inc*, 2005 SCC 62, [2005] 3 SCR 141 ["*City of Montreal*"]
[28] Applicants' Memorandum of Fact and Law, at para 25 / Application, Tab 5
[29] See also: *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31, [2009] 1 SCR 295, at para 29; *Haig v Canada*, [1993] 2 SCR 995; *Native Women's Assn. of Canada v Canada*, [1994] 3 SCR 627 at page 651; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989, at para 26

37. The applicant's submission, however, ignores that the NEB considered their motion on both the *Baier* framework and the *Irwin Toy*/*City of Montreal* framework and concluded that section 55.2 of the *NEB Act* did not engage section 2(b) of the *Charter* either way.

38. All judicial and quasi-judicial bodies apply and enforce rules of standing, many of which are less generous than section 55.2 of the *NEB Act*. Section 55.2's purpose is to make NEB hearings "fair but more focused and efficient."[30] The applicants cite no authority in support of the proposition that traditional rules of standing engage section 2(b) of the *Charter*.

39. Though the applicants appear to wish it were otherwise, the purpose of the NEB is not to be a forum for expression. The NEB is an administrative tribunal charged with making decisions about the construction, operation and regulation of international and inter-provincial pipelines and power lines. Further the NEB is a court of record.[31] The purpose of an NEB hearing is to gather in evidence and argument allowing the NEB to fulfil its mandate.[32] There is nothing controversial in the statement that "quasi-judicial tribunals […] have never been forums for free, open-ended expression. Like in a court, one cannot simply 'intrude and present one's message.'"[33]

40. The Court's section 2(b) jurisprudence is not only unaffected by the Decision, but governs it in all respects. The Court should dismiss the applicants' motion for leave to appeal.

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[30] *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 245, at paras 76 to 77
[31] *NEB Act*, s. 11(1)
[32] Macaulay & Sprague, at 12.2(a), 12-9
[33] Decision, page 10 / Application, Tab 3

PART IV – SUBMISSIONS ON COSTS

41. Costs should follow the result on this application.

PART V – STATEMENT OF ORDER SOUGHT

42. That this motion for leave to appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 17th day of April, 2015.

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PART VI - TABLE OF AUTHORITIES

Authorities	Para(s) in Memorandum
Baier v Alberta, 2007 SCC 31, [2007] SCR 673	36,37
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PART VII - STATUTORY PROVISIONS

Statutes	**Para(s) in Memorandum**
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b)	2,3,4,11,12 16,21,22,23 26,29,30,36 37,38,40
National Energy Board Act, RSC 1985, c N-7, ss 22, 52 and 55.2	2,5,6,7,11 12,13,18,23 24,25,26,29 37,38,39
Supreme Court Act, RSC 1985, c S-26 as amended, s 40(1)	16

Additional Materials	**Para(s) in Memorandum**
Robert W. Macaulay & James L.J. Sprague, *Practice and Procedure Before Administrative Tribunals,* looseleaf (Toronto, Thomson Canada, 2004) at pages 12-9 and 12-26.1	25,39