

In The Supreme Court of Canada
(On Appeal from the Federal Court of Appeal)

BETWEEN:

Lynne M. Quarmby, et al.

Applicants
(Applicants)

AND:

Attorney General of Canada, et al.

Respondents
(Respondents)

Response of the Respondent
Canadian Association of Petroleum Producers
(Rule 27)

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Memorandum of Argument

Part I

Overview

1. The Applicants bring this case forward in the form of a Charter of Rights violation. Yet they fail in their present argument, as they failed in the prior proceedings, to come to grips with the simple and uncontroversial fact that the National Energy Board (NEB) is a quasi-judicial tribunal charged with conducting public hearings on applications that come before it and like, any such tribunal or court, makes determinations of relevance.
2. The Applicants have views about the development and use of fossil fuels and global climate change. They are critical of the federal government's policies in this regard. They seek to voice their views in a NEB hearing regarding an expansion of the existing Trans Mountain oil pipeline from Edmonton to Burnaby. The NEB defined the issues that are relevant to its consideration of this pipeline expansion. These issues do not include consideration of development and use of fossil fuels and global climate change.
3. The Applicants did not directly challenge this NEB decision on relevance although a different party did. The City of Vancouver in a separate motion from that of the Applicant's did directly challenge the NEB decision on relevance and in Ruling No.25 the NEB confirmed that it would not hear these matters. Leave to appeal Ruling No.25 was dismissed by the Federal Court of Appeal and the City has not pursued the matter further.

Application, v.2, Tabs 12E and 12F

4. The Applicants brought a Charter motion to the NEB alleging that their Charter right of freedom of expression is being violated. The NEB addressed this Charter motion in Ruling No.34. Leave to appeal Ruling No.34 to the Federal Court of Appeal was dismissed, without reasons in accordance with its usual practice. The Applicant's seek leave to appeal this dismissal of leave to appeal.

Application v.1, Tabs 3 and 4

5. In this Honourable Court, the Applicants now complain they are deprived of the opportunity to speak to *relevant* issues. However, that does not engage the Charter because relevance is something the NEB determines for every hearing it conducts in the ordinary exercise of its statutory authority. All tribunals and courts must make rulings on relevance. This is well settled and there is nothing in this well-established reality of quasi-judicial or judicial process that warrants the attention of this Honourable Court.

Applicants Memorandum of Argument, paragraph 4

Application v.1, Tab.5

6. Moreover, to the extent the Applicants argue the NEB ruling on relevance was not correct, their argument becomes an impermissible and redundant attack on the NEB's decision on relevance: impermissible because it seeks to do collaterally what is properly done directly and redundant because this question of relevance has already been challenged directly in other proceedings, namely, Ruling No.25 and the subsequent denial of leave to appeal.

7. The Applicants Charter argument comes down to a claim that, despite the NEB ruling on relevance, they have a right to use the NEB as a platform to speak to issues they consider important. No such right exists. All tribunals and courts limit discussion to what is deemed relevant. The administration of justice would come to a grinding halt otherwise. The NEB is a quasi-judicial body charged with conducting a public hearing on the Trans Mountain pipeline expansion application. The NEB is not the town common. Just as political debate among

the citizenry at large has no place in a court, so too it has no place in the quasi-judicial process. This is settled and there is nothing to warrant the attention of this Honourable Court.

8. The Applicants have a forum for their views. It is in the political arena. It is clear from their affidavits that they have been freely using this arena. There has been no infringement of their Charter rights.
9. There is nothing in their arguments that calls for action by this Honourable Court. This Application for Leave to Appeal should, with respect, be dismissed.

Part II
Questions in Issue

10. The question is whether or not the Application raises an issue that is of public importance or of such nature or significance that it should be heard by this Honourable Court.

11. In regard to the Applicants apparent effort to expand their case to directly attack the NEB determination of issues relevant to its consideration of the Trans Mountain pipeline expansion application and the ruling on participation, they should not be heard as this has already been disposed of in other proceedings, namely, NEB Ruling No.25 on a motion brought by the City of Vancouver and the dismissal of leave to appeal by Federal Court of Appeal. No further appeal was initiated.

12. In so far as the Applicants now attack the integrity of the NEB through the inclusion of exhibits alleging bias in the Affidavit of Dianne Kaiser, Paralegal with Martin and Associates, deposed on information from counsel for the Applicants, (Tabs 12H. I, Q, R, S) and passing allusions to bias in the Memorandum of Argument (paragraphs 6 and 39), this is improper. The allusion to bias is being introduced now for the first time and is not made squarely but rather as a sideswipe. The allusion serves no legitimate purpose in the present Application.

Part III

Argument

13. The essence of the Applicants position is that their Charter right of freedom of expression has been violated because
- the NEB process limits their freedom of expression, as it relates to political freedom of expression, in that they have views, specifically, political views on climate change policy as it relates to the development and use of hydrocarbons that they wish to express to the NEB and
 - the NEB is a proper forum for this expression in that the forum is intended for expression.
14. The NEB dismissed the Applicants motion. The Federal Court of Appeal dismissed the Applicants Application for Leave to Appeal to that Court.
15. In CAPP's submission the present Application for Leave to Appeal should be dismissed in that there is no question of public importance or of such nature or significance that it should be heard by this Honourable Court.
- The Applicants views on climate change and production and use of hydrocarbons relate to matters of public policy. They have a forum for the expression of those views and that forum is in the political arena.
 - The NEB is not the proper forum for the expression in question. The NEB is charged with conducting a quasi-judicial hearing process not with making public policy and that hearing process properly and reasonably allows for meaningful input by those directly affected, those with *relevant* information, and those with *relevant* expertise. Some 1650 individuals, organizations, governments, and companies were granted standing of which 400 obtained intervenor status and 1250 obtained commenter status. Those – some 468 – who were found not to be directly

affected or not to be bringing forward information or expertise relevant to the issues before the NEB were denied standing.

Application, v.1, Tab9(c)

- Climate change and the production and use of hydrocarbons is a matter of public policy that engages every government in the world, that is intensely political and is, by its nature, beyond the jurisdiction of the NEB and beyond the scope of the NEB pipeline hearing process.

16. The Applicants take the position that the NEB is “an existing statutory platform” that they are “entitled to use” to express their views on oil and gas development and climate change.

Applicants Memorandum of Fact and Law para.48

Application v.1 Tab 5

17. However, the Applicants fail now, as they failed before the NEB and the Federal Court of Appeal, to address the fact that the NEB is a quasi-judicial body charged with conducting a public hearing on the Trans Mountain application.

18. The NEB is not the town common. The NEB is none of the kinds of places considered in cases like *City of Montréal* or *GVTA*. The NEB is not the public space of an airport. It is not the side of a bus. It is not a public street or a public park or other similar type of public space. It is not any of the kinds of public places where freedom of expression has been found to be or is expected to be exercised. The NEB correctly considered that, just as political debate among the citizenry at large has no place in a court, so too it has no place in the quasi-judicial process.

19. The NEB has the same need as a court to ensure that the interests of fairness are achieved in an expeditious manner and this cannot be accomplished if the forum is treated as a meeting place for political debate or political protest. What is required is informed decision-making focused on the project that is presented for

approval and based on information relevant to that specific project and the impacts that may be caused along its route from construction and operation including information from experts with due regard for the concerns of those who are affected by the project in a tangible way that is different from the effect on the public at large. The *NEB Act* is designed to do exactly that.

20. The NEB quasi-judicial process is not a forum for political debate or protest. It is not a political forum at all. Attempts to turn it into a political forum should be strenuously resisted. The Applicants have a forum for their views. It is in the political arena.

21. The Applicants affidavit evidence filed with the NEB in support of their Charter challenge is replete with discussion of their activities to mobilize public opinion and engage with governments at all levels in regard to climate change policy. Their affidavit evidence contains literally volumes of material complaining about actions of the Canadian government with which they disagree. In terms of Charter values, they are indeed freely expressing themselves. That said, the content of the affidavits demonstrates that their views belong on a political platform.

22. The Charter rights of the Applicants are not being infringed. There is, with respect, simply no basis for their claims to the contrary. The Application for Leave to Appeal should be dismissed.

Part IV

Submission on Costs

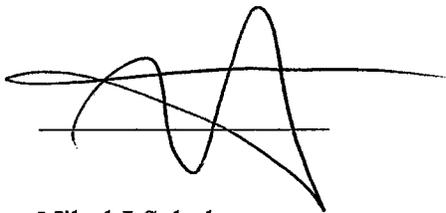
CAPP makes no submission in support of costs.

Part V

Order Sought

CAPP submits that the Application for Leave to Appeal be dismissed with costs.

All of which is respectfully submitted this 21st day of April, 2015

A handwritten signature in black ink, appearing to read 'Nikol J. Schultz', written over a horizontal line.

Nikol J Schultz

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Part VI

Table of Authorities

Nothing additional

Part VII

Statutory Provisions

Nothing additional

Documents

Nothing additional