Federal Court of Appeal | Cour d'appel fédérale

Date: 20141031

Docket: A-273-13

Citation: 2014 FCA 245

CORAM: **TRUDEL J.A.**
STRATAS J.A.
NEAR J.A.

BETWEEN:

FOREST ETHICS ADVOCACY ASSOCIATION and DONNA SINCLAIR

Applicants

and

THE NATIONAL ENERGY BOARD, THE ATTORNEY GENERAL OF CANADA AND ENBRIDGE PIPELINES INC.

Respondents

and

COUNCIL OF CANADIANS – THUNDER BAY CHAPTER

Intervener

Heard at Toronto, Ontario, on October 27, 2014.

Judgment delivered at Ottawa, Ontario, on October 31, 2014.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: TRUDEL J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicants, Forest Ethics Advocacy Association and Ms. Sinclair, apply for judicial review of three interlocutory decisions of the National Energy Board. The Board made these decisions as part of a larger proceeding before it.

[2] In these interlocutory decisions, the Board devised a process to determine who could participate in the larger proceeding, ruled that certain issues were irrelevant and would not be considered in the larger proceeding, and denied the Applicant, Ms. Sinclair, participation in the larger proceeding.

[3] In this Court, Forest Ethics and Ms. Sinclair challenge the interlocutory decisions on two bases: the constitutional guarantee of freedom of expression in section 2(*b*) of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11) and administrative law unreasonableness.

[4] For the reasons set out below, I would dismiss the application for judicial review with costs. The applicants cannot raise the Charter issue for the first time on judicial review. Further, the three interlocutory decisions are reasonable.

A. The facts

(1) The larger proceeding before the Board

[5] In the larger proceeding, the respondent, Enbridge Pipelines Inc., asks the Board for approval and certain relief concerning a pipeline project known as the Line 9B Reversal and Line 9 Capacity Expansion Project.

[6] The larger proceeding has now concluded and the Board has released its decision (no. OH-002-2013). The Board has approved the pipeline project on certain conditions.

(2) The Board's interlocutory decisions

[7] As mentioned above, in this Court the applicants challenge three interlocutory decisions made by the Board. The following are the decisions and the applicants' position in this Court on each.

– I –

[8] *The irrelevance of certain issues.* The Board ruled that in the larger proceeding before it, it would not consider the environmental and socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline. To the Board, these issues were irrelevant.

[9] Subsection 52(2) of the *National Energy Board Act*, R.S.C. 1985, c. N-7 underpins the Board's decision. Among other things, it requires the Board to "have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant." Subsection 52(2) provides as follows:

52. (2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:	**52.** (2) En faisant sa recommandation, l'Office tient compte de tous les facteurs qu'il estime directement liés au pipeline et pertinents, et peut tenir compte de ce qui suit :
(*a*) the availability of oil, gas or any other commodity to the pipeline;	*a*) l'approvisionnement du pipeline en pétrole, gaz ou autre produit;
(*b*) the existence of markets, actual or potential;	*b*) l'existence de marchés, réels ou potentiels;
(*c*) the economic feasibility of the pipeline;	*c*) la faisabilité économique du pipeline;
(*d*) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and	*d*) la responsabilité et la structure financières du demandeur et les méthodes de financement du pipeline ainsi que la mesure dans laquelle les Canadiens auront la possibilité de participer au financement, à l'ingénierie ainsi qu'à la construction du pipeline;
(*e*) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.	*e*) les conséquences sur l'intérêt public que peut, à son avis, avoir la délivrance du certificat ou le rejet de la demande.

[10] In this Court, the applicants submit that the Board's decision to remove certain issues from the table was unreasonable. In their view, the *National Energy Board Act* and, in particular, subsection 52(2) of the Act require the Board to consider the larger environmental effects of the project. These include the contribution to climate change made by the Alberta oil sands and facilities and activities upstream and downstream from the pipeline project.

[11] Further, in the applicants' submission, the Board's decision prevented the parties from expressing themselves before the Board on this issue, thereby violating their freedom of expression protected by section 2(*b*) of the Charter.

– II –

[12] *The process to determine participation rights.* The Board required parties who wished to participate in the larger proceeding to provide certain information in an Application to Participate Form. The Board considered this information relevant to and necessary for the exercise of its discretion concerning participation rights under section 55.2 of the *National Energy Board Act*, *supra*.

[13] Section 55.2 has a mandatory part and a discretionary part. In the mandatory part, the Board must consider representations from parties directly affected by the application before it. In the discretionary part, the Board may permit others with relevant information or expertise to make representations. Section 55.2 reads as follows:

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.	**55.2** Si une demande de certificat est présentée, l'Office étudie les observations de toute personne qu'il estime directement touchée par la délivrance du certificat ou le rejet de la demande et peut étudier les observations de toute personne qui, selon lui, possède des renseignements pertinents ou une expertise appropriée. La décision de l'Office d'étudier ou non une observation est définitive.

[14] In this Court, the applicants submit that section 55.2 offends the guarantee of freedom of expression in the Charter. They seek a declaration that section 55.2 is of no force or effect under subsection 52(1) of the *Constitution Act, 1982*.

– III –

[15] *The applicant Sinclair's participation.* On the facts before it, the Board denied the applicant, Ms. Sinclair, participation in the larger proceeding.

[16] In this Court, the applicants submit that the Board failed to take into account the constitutional value of freedom of expression and unconstitutionally prevented Ms. Sinclair from expressing herself.

[17] Quite aside from the constitutional issues involved, the applicants also submit that the Board's decision was substantively unreasonable because Ms. Sinclair had information and expertise relevant to the issues the Board had to consider. She stated that she had a specified and detailed interest in the matter before the Board based on her religious faith. In her view, a spill from a pipeline, even far away from her home, is "an insult to [her] sense of the holy." As for information and expertise, she invoked her experience with aboriginal peoples, her involvement in apologies to aboriginal peoples, and her work exploring the relationship between aboriginal peoples and the land. She also intended to discuss the environmental record of the proponent of the pipeline project, how the relationship of aboriginal people to the land has influenced her faith, and the importance of consultation with aboriginal peoples.

[18] In all, the Board received 177 Application to Participate Forms and granted 158 applicants the participation rights they sought. It granted a further eleven the opportunity to submit a letter of comment. Ms. Sinclair was one of only eight whom the Board denied any opportunity to participate in any way.

(3) The interlocutory nature of the decisions

[19] In this application for judicial review, the Board has intervened. It was open to the Board to object to the application on the basis of prematurity and to submit that this Court should not review the three interlocutory decisions until after the Board has finally decided the larger proceeding. However, the Board has not objected.

[20] Further, both the respondent Enbridge and the Attorney General object only to the constitutional issues being heard, in part on the ground that it is premature to do so. They do not object on the basis of prematurity generally.

[21] Perhaps the parties are not objecting because the Board has now decided the larger proceeding. The usual concerns about large proceedings being bifurcated and delayed may not exist here.

[22] I note that, for good reason, much law forbids this Court from hearing premature matters on judicial review: see, *e.g.*, *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332 at paragraphs 30-33. As that case demonstrates, this Court can and almost always should refuse to hear a premature judicial review on its own motion in the public

interest – specifically, the interests of sound administration and respect for the jurisdiction of an administrative decision-maker.

[23] As I have noted, however, the Board – the main guardian of the public interest in this regulatory area – has chosen to intervene and does not assert the prematurity objection. This Court will not apply the prematurity bar in this case because of the position the Board has taken and the need for this Court to defer to the Board's implicit assessment that the public interest is not hurt by reviewing the interlocutory decisions in this case.

(4) The applicants' request for an adjournment

[24] Before the hearing of this application for judicial review, this Court noted that the applicants had not raised the Charter issue before the Board. It directed the parties to address certain cases concerning whether the applicants could raise the Charter issue for the first time in this Court.

[25] Soon afterward, the applicants drew to this Court's attention a recent decision of the Board: *Re: Trans Mountain Expansion Project* (2 October 2014), Hearing Order OH-001-2014, File No. OF-Fac-Oil-T260-2013-03 02. In that decision, the Board dismissed a challenge to section 55.2 based on the Charter guarantee of freedom of expression. The applicants asked that the present applications be adjourned and heard with the challenge to section 55.2 in the *Trans Mountain* matter.

[26] In response, this Court issued a further direction to the parties. In its direction, it advised that it would hear the parties in the present applications on two issues:

(a) whether the applicants are barred from seeking Charter relief on the application for judicial review because they did not raise the Charter before the National Energy Board; and

(b) whether the National Energy Board's decision should be quashed for unreasonableness (*i.e.*, the submissions contained in the applicants' memorandum, at paragraphs 89-95).

In its direction, the Court advised the parties that if it decided these issues against the applicants, the judicial review would be dismissed.

[27] This Court heard the parties on these two issues. The following is my analysis of these two issues.

B. Analysis

(1) Are the applicants barred from seeking Charter relief because they did not raise the Charter before the National Energy Board?

[28] In my view, the applicants are indeed barred from seeking Charter relief in the present applications before this Court. Forest Ethics is barred for two reasons; Ms. Sinclair is barred for one.

(a) Forest Ethics lacks standing

[29] Under subsection 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, only those who are "directly affected" can ask this Court to review a decision.

[30] Forest Ethics is not "directly affected" by the Board's decisions. The Board's decisions do not affect its legal rights, impose legal obligations upon it, or prejudicially affect it in any way: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298; *Rothmans of Pall Mall Canada Ltd. v. Canada (M.N.R.)*, [1976] 2 F.C. 500 (C.A.); *Irving Shipbuilding Inc. v. Canada (A.G.)*, 2009 FCA 116, [2010] 2 F.C.R.488. Therefore, Forest Ethics does not have direct standing to bring an application for judicial review and invoke the Charter against the Board's decisions.

[31] In oral argument, Forest Ethics submitted that it had status in this Court as a litigant with public interest standing.

[32] However, Forest Ethics falls well short of establishing that it satisfies the criteria for public interest standing: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 S.C.R. 524 at paragraph 37 and the more detailed discussion at paragraphs 39-51.

[33] Indeed, in this application and on this record, Forest Ethics is a classic "busybody," as that term is understood in the jurisprudence. Forest Ethics asks this Court to review an administrative decision it had nothing to do with. It did not ask for any relief from the Board. It

did not seek any status from the Board. It did not make any representations on any issue before the Board. In particular, it did not make any representations to the Board concerning the three interlocutory decisions.

[34] The record filed by Forest Ethics does not show that it has a real stake or a genuine interest in freedom of expression issues similar to the one in this case. Further, a judicial review brought by Forest Ethics is not a reasonable and effective way to bring the issue before this Court. Forest Ethics' presence is not necessary – Ms. Sinclair, represented by Forest Ethics' counsel, is present and is directly affected by the Board's decision to deny her an opportunity to participate in its proceedings.

[35] Also, as is seen from the adjournment request, discussed above, the issue before this Court is not evasive of review – others can be expected to raise the issue and, indeed, are now raising it.

[36] If Forest Ethics were allowed to bring an application for judicial review in these circumstances, it and similar organizations would be able to bring an application for judicial review against any sort of decision anywhere at any time, pre-empting those who might later have a direct and vital interest in the matter. That is not the state of our law.

(b) To assert the Charter issue in this Court, Forest Ethics and Ms. Sinclair had to first raise it before the Board

[37] Forest Ethics and Ms. Sinclair could have raised the Charter issue before the Board but did not. In the circumstances of this case, their failure to raise the Charter issue before the Board prevents them from raising it for the first time on a judicial review in this Court.

[38] After receiving the Board's decision under section 55.2 of the Act denying her participation in the larger proceeding, Ms. Sinclair could have brought a motion asking the Board to rescind or vary its decision based on the Charter or other considerations: *National Energy Board Act*, *supra*, subsection 21(1); *National Energy Board Rules of Practice and Procedure, 1995*, SOR/95-208, Rule 35. Board decisions under section 55.2 of the Act qualify as "decisions" that can be revisited under subsection 21(1) of the Act. By way of exception, subsection 21(3) of the Act lists certain decisions that cannot be revisited. Section 55.2 decisions are not listed in subsection 21(3).

[39] Similarly, both Forest Ethics and Ms. Sinclair could have moved against the Board's decision that certain issues were irrelevant or the Board's decision to use an Application to Participate Form, relying on Charter or other grounds. But they did not.

[40] In any of these motions, Forest Ethics and Ms. Sinclair could have raised the Charter guarantee of freedom of expression. The Board can hear and decide questions of law, including Charter issues: *National Energy Board Act*, *supra*, subsection 12(2); *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, [2003] 2 S.C.R. 504 at paragraph 48. Although the Board was an available forum to

hear and decide the Charter issues, Forest Ethics and Ms. Sinclair chose not to avail themselves of it.

[41] As a result, the Board has never had a chance to consider the constitutional issues the applicants now place before this Court.

[42] This matters. Had the constitutional issue been raised before the Board, the Board could have received evidence relevant to it, including any evidence of justification under section 1 of the Charter. The Board would also have had the benefit of cross-examinations and submissions on the matter, along with an opportunity to question all parties on the issues. Then, with those advantages, it would have reflected and weighed in on the matter and expressed its views in its reasons. In its reasons, it could have set out its factual appreciations, insights gleaned from specializing over many years in the myriad complex cases it has considered, and any relevant policy understandings. At that point, with a rich, fully-developed record in hand, a party could have brought the matter to this Court on judicial review.

[43] The approach of placing the constitutional issues before the Board at first instance respects the fundamental difference between an administrative decision-maker and a reviewing court: here, the Board and this Court. Parliament has assigned the responsibility of determining the merits of factual and legal issues – including the merits of constitutional issues – to the Board, not this Court. Evidentiary records are built before the Board, not this Court. As a general rule, this Court is restricted to reviewing the Board's decisions through the lens of the standard of review using the evidentiary record developed before the Board and passed to it. See generally

Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright), 2012 FCA 22, 428 N.R. 297.

[44] Were it otherwise, if administrative decision-makers could be bypassed on issues such as this, they would never be able to weigh in. On a judicial review, administrative decision-makers do not have full participatory rights as parties or interveners. They cannot make submissions to the reviewing court with a view to bolstering or supplementing their reasons. They face real restrictions on the submissions they can make. See generally *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at paragraphs 16-17. As a result, often their only opportunity to supply relevant information bearing upon the issue – such as factual appreciations, insights from specialization and policy understandings – is in their reasons.

[45] If administrative decision-makers could be bypassed on issues such as this, those appreciations, insights and understandings would never be placed before the reviewing court. In constitutional matters, this is most serious. Constitutional issues should only be decided on the basis of a full, rich factual record: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357 at pages 361-363. Within an important regulatory sector such as this, a record is neither full nor rich if the insights of the regulator are missing.

[46] The Supreme Court has strongly endorsed the need for constitutional issues to be placed first before an administrative decision-maker who can hear them: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 38-40. Where, as here, an administrative

decision-maker can hear and decide constitutional issues, that jurisdiction should not be bypassed by raising the constitutional issues for the first time on judicial review. Parliament's grant of jurisdiction to the Board to decide such issues must be respected.

[47] This rule can be relaxed in cases of urgency: *Okwuobi, supra* at paragraphs 51-53. And a direct challenge in Court to the constitutionality of legislation is possible as long as the challenge is not "circumventing the administrative process" or tantamount to a collateral attack on an administrator's power to decide the issue (outside the circumstances where prohibition is permitted): *Okwuobi, supra* at paragraph 54.

[48] Counsel for the applicants resists the application of *Okwuobi* to the case at bar.

[49] First, counsel for the applicants noted that the administrative tribunal in *Okwuobi* enjoyed exclusive jurisdiction to decide matters under its governing statute. But that is the same here. The Board has the exclusive power to hear all issues of fact and law, including constitutional issues, that arise during its proceedings: *National Energy Board Act*, *supra*, subsection 12(2), and *Martin*, *supra*. For good measure, the Board's decisions on such matters are "final and conclusive": *National Energy Board Act*, *supra*, subsection 23(1).

[50] Next, counsel for the applicants submitted that the Board does not have the power to declare section 55.2 of no force or effect. That is true. But in *Okwuobi* the Supreme Court gave a full answer to that point, rejecting it (at paragraphs 45-46):

> On the question of remedies, the appellants correctly point out that the [Tribunal] cannot issue a formal declaration of invalidity. This is not, in our opinion, a

> reason to bypass the exclusive jurisdiction of the Tribunal. As this Court stated in *Martin*, the constitutional remedies available to administrative tribunals are indeed limited and do not include general declarations of invalidity (para. 31). Nor is a determination by a tribunal that a particular provision is invalid pursuant to the *Canadian Charter* binding on future decision makers. As Gonthier J. noted, at para. 31: "Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases."
>
> That said, a claimant can nevertheless bring a case involving a challenge to the constitutionality of a provision before the [Tribunal]. If the [Tribunal] finds a breach of the *Canadian Charter* and concludes that the provision in question is not saved under s. 1 it may disregard the provision on constitutional grounds and rule on the claim as if the impugned provision were not in force (*Martin*, at para. 33). Such a ruling would, however, be subject to judicial review on a correctness standard, meaning that the Superior Court could fully review any error in interpretation and application of the *Canadian Charter*. In addition, the remedy of a formal declaration of invalidity could be sought by the claimant at this stage of the proceedings.

[51] Finally, counsel for the applicants submitted that the more recent, somewhat more flexible holding of the Supreme Court in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 governs this case, not *Okwuobi*.

[52] In *Alberta Teachers*, supra, the Supreme Court offered guidance on when a reviewing court may consider new issues on judicial review, *i.e.*, issues that were not raised before the administrative decision-maker. At paragraph 22, Justice Rothstein, writing for the majority of the Court, stated that "[j]ust as a court has discretion to refuse to undertake judicial review where, for example, there is an adequate alternative remedy, it also has a discretion not to consider an issue raised for the first time on judicial review where it would be inappropriate to do so."

[53] Relying upon *Alberta Teachers, supra,* counsel for the applicants invites us to exercise our discretion in favour of hearing the constitutional issues for the first time on judicial review in this Court.

[54] I doubt that *Alberta Teachers, supra*, applies to constitutional issues that were not raised before an administrative decision-maker that had the power to consider them. *Alberta Teachers* does not refer to *Okwuobi* at all, nor does it speak even once about *constitutional* issues. *Okwuobi* remains on the books, unaffected by *Alberta Teachers*.

[55] This makes sense. In cases such as *MacKay, supra,* the Supreme Court has repeatedly insisted that courts have the benefit of a full factual record in constitutional matters, including the benefit of the decision-maker's factual appreciations, insights from specialization and policy understandings. As I have explained above, that sort of record can only be developed before the administrative decision-maker.

[56] However, even if *Alberta Teachers* applies to the case at bar, I would exercise my discretion against entertaining the constitutional issues for the first time on judicial review.

[57] *Alberta Teachers* instructs us that the general rule is that "this discretion will not be exercised in favour of an applicant on judicial review where the issue could have been but was not raised" before the administrative decision-maker (at paragraph 23). In support of this, the Supreme Court invoked many of the reasons set out above, including the administrative decision-maker's role as fact-finder and merits-decider, its appreciation of policy considerations, and

possible prejudice to other parties (at paragraphs 23-26). In this case, the Board's contribution to the constitutional issues at hand – involving as they do issues of the Board's management of the complex proceedings before it and its appreciation of its statutory mandate and the policy considerations inherent in it – would have been significant.

[58] For the foregoing reasons, Forest Ethics and Ms. Sinclair are barred from invoking the Charter for the first time on judicial review.

[59] In light of my finding concerning the standing of Forest Ethics, in the remainder of my reasons I shall refer exclusively to the applicant Ms. Sinclair.

(2) Are the decisions unreasonable?

[60] The parties agree that the standard of review of all three decisions is reasonableness. Notwithstanding the parties' agreement, this Court must apply the proper standard of review – our own analysis is necessary. See *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152 at paragraph 6.

[61] I shall consider the Board's decisions separately. The parties proceeded on that basis and there is analytical clarity in that approach. However, that approach also smacks of artificiality. The decisions are linked and dependent upon each other. As mentioned above, Ms. Sinclair wanted to raise with the Board larger substantive issues such as climate change. In its decision concerning the relevancy of certain issues, the Board ruled that it would not consider that larger issue. As rightly conceded by the respondents, this affected Ms. Sinclair's case to participate,

though, as we shall see, the Board did invoke other reasons based on other considerations of relevance to deny her participation. Further, Ms. Sinclair submits that the Application to Participate Form, shaped in part by the Board's decision on relevancy, unduly constrained the Board's decision regarding participation rights and, by its length and complexity, frustrated her and drove other potential participants away, preventing some substantive matters from being aired and considered. In reality, this Court is faced with an inseparable triumvirate of decisions with intertwined procedural and substantive attributes.

[62] Given this, the reasonableness or unreasonableness of one decision can affect the reasonableness or unreasonableness of the others. It follows that in cases such as this, there is considerable merit in the Supreme Court's recent approach of not artificially parsing a matter and segmenting it into separate decisions, but rather focusing on the outcome reached by the administrative decision-maker with due regard to any significant problems in its reasoning: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraph 53; *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114 at paragraphs 27-38. This is especially so if, as we shall see, we review the substantive decisions and procedural decisions in this case in the same way. Nevertheless, at the risk of some duplication in the analysis, I shall analyze the decisions separately, as the parties have suggested.

(a) The Board's decision that certain issues were irrelevant

[63] The Board's decision that certain issues were irrelevant to the larger proceeding is one of substance. Therefore, the traditional analysis for the review of substantive decisions set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 applies.

[64] In reaching its decision that certain issues, such as climate change, were irrelevant, the Board had to interpret subsection 52(2) of the *National Energy Board Act*, *supra*, a provision that instructs the Board what it must consider in cases before it. Then it had to apply that interpretation to the facts before it. As set out in *Dunsmuir*, *supra*, and most recently in *Alberta Teachers*, *supra*, and *Agraira*, *supra*, the standard of review in such matters is reasonableness. We are to assess whether the outcome is acceptable and defensible on the facts and the law, bearing in mind that the ranges are flexible and can be broad or narrow in different circumstances: *Dunsmuir*, *supra*, paragraph 47; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5. In other words, the Board is entitled to a margin of appreciation that can be wide or narrow, depending on the circumstances: *Canada (Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56 at paragraphs 91-95.

[65] Ms. Sinclair suggested that another approach to reasonableness review should be adopted. She submitted that the Board's failure to take into account larger matters such as climate change automatically rendered its decision-making invalid.

[66] Ms. Sinclair's submission smacks of the old nominate category of review known as "failing to take into account a relevant consideration." Long ago, if an administrative decision-maker failed to take into account a consideration viewed by the Court as relevant, the Court would automatically quash the decision. In reality, this was a form of correctness review – the Court created its own yardstick of relevance and then applied it to the administrator's decision to see whether it conforms with the Court's view of the matter.

[67] This Court has now rejected this approach – the one urged upon us by Ms. Sinclair – in favour of the modern approach exemplified in cases such as *Dunsmuir* and *Alberta Teachers* and described in paragraph 64, above:

> At one time, the taking into account of irrelevant considerations and the failure to take into account relevant considerations were nominate grounds of review – if they happened, an abuse of discretion automatically was present. However, over time, calls arose for decision-makers to be given some leeway to determine whether or not a consideration is relevant: see, *e.g.*, *Baker*, *supra* at paragraph 55; *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at paragraph 24. Today, the evolution is complete: courts must defer to decision-makers' interpretations of statutes they commonly use, including a decision-maker's assessment of what is relevant or irrelevant under those statutes: *Dunsmuir*, *supra* at paragraph 54; *Alberta Teachers' Association*, *supra* at paragraph 34. Accordingly, the current view is that these are not nominate categories of review, but rather matters falling for consideration under *Dunsmuir* reasonableness review: see *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paragraphs 53-54.

(*Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250 at paragraph 74.)

[68] Turning to reasonableness review under *Dunsmuir*, and by way of recap, the Board decided that, in the larger proceeding before it, it would not consider the environmental and

socio-economic effects associated with upstream activities, the development of the Alberta oil sands, and the downstream use of oil transported by the pipeline.

[69] In my view, this decision is reasonable in that it reaches an outcome within a range of acceptability and defensibility on the facts and the law or, in other words, the margin of appreciation this Court must afford to it. I offer the following reasons in support of this conclusion:

- The Board's main responsibilities under the *National Energy Board Act*, *supra* include regulating the construction and operation of inter-provincial oil and gas pipelines (see Part III of the Act).

- Nothing in the Act expressly requires the Board to consider larger, general issues such as climate change.

- The Board submitted, and I accept, that in a section 58 application such as this, the Board must consider issues similar to those required by subsection 52(2) of the Act.

- Subsection 52(2) of the Act empowers the Board to have regard to considerations that "to it" appear to be "directly related" to the pipeline and "relevant." The words "to it," the imprecise meaning of the words "directly," "related" and "relevant," the privative clause in section 23 of the Act, and the highly factual and

policy nature of relevancy determinations, taken together, widen the margin of appreciation that this Court should afford the Board in its relevancy determination: *Farwaha*, *supra* at paragraphs 91-95.

- Further, in applying subsection 52(2) of the Act, the Board could reasonably take the view that larger, more general issues such as climate change are more likely "directly related" to the environmental effects of facilities and activities upstream and downstream from the pipeline, not the pipeline itself.

- The Board does not regulate upstream and downstream facilities and activities. These facilities and activities require approvals from other regulators. If those facilities and activities are affecting climate change and in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act.

- Subsection 52(2) of the Act contains a list of matters that Parliament considered to be relevant: see paragraphs 52(2)(*a*) through 52(2)(*d*). Each of these is relatively narrow in that it focuses on the pipeline, not upstream or downstream facilities and activities. Paragraph 52(2)(*e*) refers to "any public interest." It was for the Board to interpret that broad phrase. It was open to the Board to consider that the "public interest" somewhat takes its meaning from the preceding paragraphs in subsection 52(2) and the Board's overall mandate in Part III of the Act. Thus, it was open to the Board to consider that the "public interest" mainly relates to the pipeline project itself, not to upstream or downstream facilities and

activities. (In this regard, pre-*Dunsmuir* authorities that engaged in correctness review of the meaning of "public interest" or quashed Board decisions for failing to take into account a factor the Court considered relevant are to be regarded with caution: see, *e.g.*, *Nakina (Township) v. Canadian National Railway Co.* (1986), 69 N.R. 124 (F.C.A.) and *Sumas Energy 2, Inc. v. Canada (National Energy Board)*, 2005 FCA 377, [2006] 1 F.C.R. 456.)

- Parliament recently added subsection 52(2) and section 55.2 to the Act in order to empower the Board to regulate the scope of proceedings and parties before it more strictly and rigorously: *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, s. 83. The Board's decision is consistent with this objective. Consistency of a decision with statutory objectives is a badge or indicator of reasonableness: *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203 at paragraph 21; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paragraphs 42-47.

- The Board's task was a factually suffused one based on its appreciation of the evidence before it. This tends to widen the margin of appreciation this Court should afford the Board: *Farwaha*, *supra*. In my view, the Board's decision was within that margin of appreciation.

(b) The Board's decision on its process, including the Application to Participate Form

[70] This decision is procedural in nature. On the current state of the authorities in this Court, the standard of review is correctness with some deference to the Board's choice of procedure (see *Re:Sound v. Fitness Industry Council of Canada*, 2014 FCA 48 at paragraphs 34-42) though, as noted in my reasons in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59 at paragraphs 50-56, some authorities from this Court prescribe deference as the proper approach. *Re:Sound* urges us to be "respectful of the agency's choices," and exercise a "degree of deference" when assessing the Board's procedural decision.

[71] In *Maritime Broadcasting, supra* at paragraph 61, I explained *Re:Sound* as follows:

> I prefer to interpret *Re:Sound* in a manner faithful to *Dunsmuir*, the later cases of the Supreme Court and the settled cases of this Court, all of which bind us. These cases tell us that review conducted in a manner "respectful of the agency's choices" or with a "degree of deference" to those choices is really a species of deferential review – *i.e.*, the reasonableness standard, a standard the Supreme Court in *Dunsmuir*, *supra* described (at paragraphs 47-48) as the only "respectful" or "deferential" one.

[72] Here, in its process decision, the Board is entitled to a significant margin of appreciation in the circumstances of this case. Several factors support this:

- The Board is master of its own procedure: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 685.

- The Board has considerable experience and expertise in conducting its own hearings and determining who should not participate, who should participate, and

how and to what extent. It also has considerable experience and expertise in ensuring that its hearings deal with the issues mandated by the Act in a timely and efficient way.

- The Board's procedural choices – in particular, the choice here to design a form and require that it be completed – are entitled to deference: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 27.

- The Board must follow the criteria set out in section 55.2 of the Act – whether "in [its] opinion" a person is "directly affected" by the granting or refusing of the application and whether the person has "relevant information or expertise." But these are broad terms that afford the Board a measure of latitude, and so in obtaining information from interested parties concerning these criteria, it should be also given a measure of latitude.

- Finally, as mentioned above, the Board's decisions are protected by a privative clause.

[73] I add that the Application to Participate Form is based to some extent on the Board's own assessment of what issues are relevant, a question on which, as I have stated above, the Court should afford the Board a margin of appreciation.

[74] Bearing in mind that the margin of appreciation that this Court must afford the Board, I cannot find that the Application to Participate Form is outside of that margin.

[75] Ms. Sinclair alleges that the Application to Participate Form is too complicated, takes too much time and frightens interested people from participating in the proceedings. I disagree. The form is no worse than other forms of application in other *fora*, such as motions to intervene in this Court. The Board is entitled to take the position that, consistent with the tenor of section 55.2 of the *National Energy Board Act*, *supra*, it only wants parties before it who are willing to exert some effort.

[76] Board hearings are not an open-line radio show where anyone can dial in and participate. Nor are they a drop-in center for anyone to raise anything, no matter how remote it may be to the Board's task of regulating the construction and operation of oil and gas pipelines.

[77] Parliament has recently enacted section 55.2 to make Board hearings fair but more focused and efficient: *Jobs, Growth and Long-term Prosperity Act*, *supra* at section 83. It requires that persons who are not directly affected show that they have "relevant information or expertise." This requires rigorous demonstration. The Application to Participate Form is commensurate with that requirement.

(c) The Board's decision to deny Ms. Sinclair participation

[78] At the outset, we must ask whether the Board's decision to deny Ms. Sinclair participation was substantive or procedural. As can be appreciated from the foregoing discussion,

the test for judicial review has historically varied according to whether the decision is substantive or procedural.

[79] In my view, the decision to deny Ms. Sinclair participation is a mix of substance *and* procedure.

[80] Part of the decision concerns substance. At its root, it concerns the relevance and materiality of what Ms. Sinclair had to offer to the Board. In the Board's view, Ms. Sinclair had nothing of relevance, materiality or both to contribute to the decision. Viewed in this way, we must review the decision using the test set out in *Dunsmuir*, *supra*: does the substantive outcome reached by the Board fall within a range of outcomes that is acceptable and defensible on the facts and the law?

[81] On the other hand, the Board's decision can be seen as one of procedure. Admitting a party to a proceeding and deciding what level of participation the party should have has often been considered to be procedural in nature: see, *e.g.*, *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176. If we view the Board's decision as procedural, then, as mentioned above, the standard of review is correctness with some deference to the Board's choice of procedure: *Re:Sound*, *supra* at paragraphs 36-42. Under the *Re:Sound* approach, we are to be "respectful of the agency's choices" and exercise a "degree of deference." See also the articulation of deference in *Maritime Broadcasting*, *supra* at paragraph 61.

[82] Regardless of how we characterize the Board's decision, the Board deserves to be allowed a significant margin of appreciation: *Dunsmuir*, *supra* at paragraphs 53-54; *Farwaha*, *supra* at paragraphs 88-92. The Board engaged in a factual assessment, drawing upon its experience in conducting hearings of this sort and its appreciation of the type of parties that do and do not make useful contributions to its decisions. Matters such as these are within the ken of the Board, not this Court.

[83] Bearing in mind the margin of appreciation that we must afford to the Board, the Board's decision to deny Ms. Sinclair participation in the larger proceeding was reasonable. I offer the following reasons:

- The Board interpreted section 55.2, a task incumbent upon it as part of its decision. The Board saw the section as being concerned with "fairness and efficiency" by "focusing consultation on individuals directly affected by an application and persons with relevant information or expertise." The Board's interpretation is acceptable and defensible, in that it closely aligns with the text and purpose of the section.

- Further, the Board's reference to "fairness" signals a sensitivity to the interests, including free expression interests, of each applicant before it. It was well aware that those applying to participate wanted to express themselves. To the extent that it was incumbent on the Board to consider the Charter value of free expression, even though that was never put to it, I consider that in substance it did do so by

considering "fairness" and assessing whether the message the applicants before it intended to communicate in the larger proceeding were outweighed by the need for the submissions to be relevant and useful in accordance with section 55.2: see *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paragraph 24. The result it reached was reasonable.

- The Board explained the purposes behind the Application to Participate Form – a means to get particular information so it could consider each application "on a case-by-case basis" alongside the "the specific facts and circumstances" of the project application before it. This was an acceptable and defensible approach to the problem before it.

- The Board explained that it denied certain persons participation rights because in its view they did not satisfy the test under section 55.2. In other words, it was mindful of the need to apply the statutory standard to each application for participation before it, a matter incumbent upon it.

- The Board went further and discussed Ms. Sinclair's application specifically. It accurately recounted her submission – that her interest lay in her religious beliefs and her Canadian citizenship in general. The Board held that this was "only a general public interest in the proposed Project." It added that she lives in North Bay, Ontario, a community "not in the vicinity of the Project." On the facts and the law, bearing in mind the Board's experience in determining what is and is not

useful in proceedings before it and its interest in efficient, timely proceedings, this was an acceptable and defensible outcome.

[84] For the foregoing reasons, I conclude that the Board's three decisions are reasonable.

C. Proposed disposition

[85] Therefore, I would dismiss the application for judicial review. With the exception of the Board, the applicants and the respondents all sought costs in the event of success. Therefore, following the result of the application, I would grant costs to the respondents, the Attorney General of Canada and Enbridge Pipelines Inc.

"David Stratas"

J.A.

"I agree
Johanne Trudel J.A."

"I agree
D.G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-273-13
AN APPLICATION FOR JUDICIAL REVIEW OF THREE INTERLOCUTORY DECISIONS OF THE NATIONAL ENERGY BOARD.	
STYLE OF CAUSE:	FOREST ETHICS ADVOCACY ASSOCIATION, AND DONNA SINCLAIR v. THE NATIONAL ENERGY BOARD, THE ATTORNEY GENERAL OF CANADA and ENBRIDGE PIPELINES INC.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 27, 2014
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	TRUDEL J.A. NEAR J.A.
DATED:	OCTOBER 31, 2014

APPEARANCES:

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