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SILENCING ENVIRONMENTAL DISSENT?

Charter challenge of NEB Act throws light on provisions regarding standing

On August 13, ForestEthics Advocacy Association, a Vancouver-based environmental group, and Donna Sinclair, a retired journalist, filed a notice of application in the Federal Court of Canada seeking a declaration that a section of the National Energy Board Act violates the Canadian Charter of Rights and Freedoms. The action concerns s. 55.2 of the act, which was enacted in 2012 and governs a person's standing to participate in hearings before the board. It provides that, "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 and expertise. A decision of the Board as to whether it will consider the representation of any person is conclusive."

Further to the enactment of s. 55.2, all individuals and groups wishing to participate in the upcoming hearings into energy company Enbridge Inc.'s Line 9B proposal are required to submit a new, nine-page "Application to Participate Form." Line 9B is part of an existing 693-kilometre pipeline that runs adjacent to the northern shore of Lake Ontario and transports approximately 240,000 barrels per day of offshore crude from Montreal to Sarnia. In November 2012, Enbridge filed an application with the NEB to reverse its flow, increase its capacity to 300,000 barrels per day, and permit the transportation of bitumen from Alberta's oil sands. ForestEthics takes particular issue with page six of the Line 9B application form, which states, "The Board will not consider the environmental and socio-economic effects associated with upstream activities, the development of the oil sands, or the downstream use of oil transported by the pipeline."

ForestEthics contends that s. 55.2 and the Line 9B application form effectively silence critics by severely restricting the ability of the public to engage in the board's review process. To this end they claim that during the Northern Gateway hearings (which occurred prior to the enactment of s. 55.2), 4,455 individuals and groups made submissions to the board. However, during the upcoming Line 9B hearings, only 170 parties have satisfied the criteria of s. 55.2 and will be permitted to make submissions.

The action arose when the board turned down Sinclair's application to submit a letter of comment on Line 9B. Having family members along the pipeline route, Ms. Sinclair raised concerns in her submission about the environmental impact of the project, including the expansion of Alberta's oil sands. In denying her



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application, the board held that she did not possess the requisite level of expertise or live close enough to the pipeline to make her directly affected by it (she resides in North Bay, which is approximately 350 kilometres away from the pipeline route).

In their application to the FCC, ForestEthics and Sinclair contend that the board's denial is an infringement of Sinclair's right to freedom of expression under s. 2(b) of the Charter, arguing that the board cannot justify its infringement of Sinclair's Charter rights because the criteria set out in s. 55.2 of the act (namely, whether she is "directly affected" by Enbridge's application) is vague and arbitrary. The applicants further contend that requiring parties to submit the Line 9B application form and limiting the content of their submissions are an unreasonable and unconstitutional exercise of the board's powers. They are seeking a declaration that s. 55.2 is unconstitutional and of no force and effect, along with an order quashing the decision to require the Line 9B application form, and an injunction restraining the board from making its recommendation on Line 9B until the FCC disposes of their application.

While the respondents have yet to file their response, Minister of Natural Resources Joe Oliver has defended the enactment of s. 55.2 and the new application form, arguing that they were required to "focus submissions" and stop groups like ForestEthics from using the board's review process as "a tool to delay decisions." He also contends that the board wanted to avoid a repeat of the Northern Gateway hearings where, according to Oliver, large numbers of people signed up to speak but only a third actually showed up.

Regardless of its outcome, the action commenced by ForestEthics and Sinclair is emblematic of a larger dialogue happening across the country between government, industry and citizens over the future of petroleum transportation in Canada. The tragedy of Lac Mégantic, and the proposed Northern Gateway and Keystone XL pipelines have all brought this issue to the national spotlight, and the forthcoming decisions of the federal cabinet will undoubtedly shape the direction that petroleum transportation will take in Canada for many years to come.

