CAMPUT 2018

Intervenors

What they bring to the process and how do they think the hearing process can be improved?

Pithy pronouncements promoting public participation in proceedings – P6

While none of these cases may bear directly upon the point in issue, here they are in my opinion illustrative **of the broad sense in which the words "interested parties" or "interested persons" have been interpreted by the Courts and the corresponding reluctance of the Courts to give them the restrictive meanings** which have been contended for therein.

It is difficult to see how, given the broad interpretation which seems to have found favour with the Courts, the words "interested party" as used in s. 30 of the Alberta Gas Trunk Line Company Act cannot be said to embrace each of the appellants in this case in view of the direct concern each of them has in the rates, tolls and charges of the Trunk Line Company which are an element in the price they pay to Trans-Canada for gas and the effect this may have on their competitive position with distributors of other types of energy (e.g., oil, coal and electricity) in the areas served by them.

Re Consumers' Gas Co. et al. and Public Utilities Board et al., 1971 CanLII 1008 (AB CA)

The Alberta Courts have recognized, with favour, interventions:

> [8] The Board has recognized the importance of intervenors by this passage in its "Position Paper" delivered February 24, 1977:
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> > "The Board's policy and attitude with respect to interventions should be stated simply and unequivocally. **The Board not only welcomes interventions, but considers that it requires interventions to discharge properly its duties as a quasi-judicial tribunal.** The Board is neither structured nor funded so that a total scrutiny of the applicant's case can be done by the Board, its staff or consultants retained by the Board. Even if the Board were so structured and funded and assumed the role of a consumer advocate, it would not be apparent to the public that the company's case had been properly tested. **An aggressive, intelligent and informed intervention is preferable to ensure that public utilities are regulated in accordance with accepted regulatory principles and the appropriate statutes**. Additionally, **competent interveners provide an excellent voice to inform the consuming public they represent** of the facts which the Board has taken into account in approving new rates.
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> Green, Michaels & Associates, Ltd. v. Alberta (Public Utilities Board), 1977 ALTASCAD 115

Further the Court added:

….It is reasonable to suppose that an intervenor would require expert assistance to appraise the material before it could form any judgment on the nature and scope of its intervention, whether it would call witnesses, and finally whether or not, or to what extent, the Board would find value in the contribution. This involves necessary expense in any event, if there are to be any intervenors.

Green, Michaels & Associates, Ltd. v. Alberta (Public Utilities Board), 1977 ALTASCAD 115 At para 9 (emphasis added)

In the final Appeal the Court stated:

[25] The Board was engaged in the balancing of interests. On the one arm there was, and is, the general public interest in the reasonable control of monopolistic utilities serving the public, and interest affirmed by the purpose of the Act itself and extending to the segment of the public served by the utility. That interest is aided by well-considered intervention, a matter recognized explicitly by the Board and inherently by the Act. Thus, on the other arm is the financing of intervenors. **Intervention is in large measure in the public interest undertaken by those who are legitimately concerned in that interest and who are sufficiently good citizens to become active in its aid**. It is patent that in most cases, substantial expense must be incurred for useful intervention, which need be no more than adequate testing of the propositions and figures put forward by an applicant, whether by cross-examination or further evidence. These are factors to which the Board has properly given recognition. The Board is prepared to pass on to the public those costs of intervention which it has found to be of some value to the public interest. There is no error in law in this: rather, it is generally recognized as proper….

Green, Michaels & Associates Ltd. v. Alberta (Public Utilities Board), 1979 ALTASCAD 8
emphasis added

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1979 ALTASCAD

Common sense

[20] **In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to cost to efficiently provide the services they receive**, taking account of both operating and capital costs. **In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive**, and utilities may be assured of an opportunity to earn a fair return for providing those services.

Paragraph 20 Ontario (Energy Board) v. Ontario Power Generation Inc., [2015] 3 SCR 147, 2015 SCC 44.

The Alberta Regulator has referred to intervenors including the CCA as follows: --

"The Board accepts the views of Parties representing a wide cross section of potential RRO customers that this Plan should be approved. These Parties are well known to the Board.

The Board considers these Parties to be experienced and knowledgeable with a long record of representing the citizens of Alberta."

(AEUB Decision 2000 - 73 and 2000 – 74

Practical limitations

As noted by the Alberta Court of Appeal:

[138] The ultimate responsibility for approving negotiated settlements – and ensuring that the process operates in a fair and reasonable manner – must rest with an independent body. That body is the Board. The rationale for impressing this overriding supervisory authority on the Board is to ensure that the negotiated settlement process does not lead to abuse. Further, all consumers cannot be parties to negotiations conducted under the negotiated settlement process. **One or more of the interested parties to the settlement may represent some consumers; but none will represent all.** And even a broad range of Intervenors will not necessarily translate into a wide spectrum of positions since parties may make trade-offs which leave other issues unresolved, unaddressed or compromised.

ATCO Electric Limited v. Alberta (Energy and Utilities Board), 2004 ABCA 215 (CanLII)

This session will bring together a number of prominent intervenors to discuss what they think works, and does not work, in the hearing process.

What do the regulators need to know -

I cannot tell you what tomorrow will bring but I do know that in 2018 you can go anywhere in public and hear voices…

…because people are talking on their mobile phones while wearing headsets.

This is, in my humble opinion akin to Regulation without intervention – you will only hear one half of the conversation and you'll fail at achieving a balance or worse; be prone to misinterpret what you do hear.

Or simplistically – Regulation is like teeter totters or sex – some things are just improved upon or made better with a partner.

In my experience in utility regulation in Alberta, mostly rate regulation, I submit Regulators should, as part of their core mandate of regulating utilities, take steps to hear the whole conversation :

1. act to broadly promote or facilitate **"aggressive, intelligent and informed intervention"** and recognize this involves **"expert assistance"**,

2. encourage a diversity of views from interested parties because "**One or more of the interested parties … may represent some consumers; but none will represent all"**, and

3. develop tools to provide timely and clear feedback to those intervenors.

    Parties **are well known to the Board** and the Board considers these Parties to be **experienced** and **knowledgeable** with a **long record of representing citizens**….

end