Court of Queen's Bench of Alberta

Citation: Ecojustice Canada Society v Alberta, 2020 ABQB 736

Date:
Docket: 1901 16255
Registry: Calgary

Between:

Ecojustice Canada Society

Applicant

- and -

Her Majesty the Queen in Right of Alberta, the Lieutenant Governor in Council, the Minister of Justice and Solicitor General for Alberta, and Jackson Stephens Allan in his capacity as Commissioner under the *Public Inquiries Act*

Respondents

- and -

Indian Resource Council Inc., the Explorers and Producers Association of Canada, and W. Brett Wilson

Interveners

Memorandum of Decision / Injunction Application
of the
Honourable Madam Justice K.M. Horner

I. Introduction

[1] These Reasons can be read for background purposes in conjunction with paragraphs 1, 2 6,7, 8, 9,10,and 11 of the Memorandum of Decision (Decision) issued by this court June 11,

2020 in the Intervenor Application in this matter. Abbreviations and references to Applicant and Respondents are to be considered the same.

[2] On July 17, 2020, Ecojustice Canada Society (Ecojustice) brought the within Application for an Injunction staying the Inquiry until this court had disposed of its Application for Judicial Review (as described in the prior Decision).

[3] One of the grounds of the within Application is that the Inquiry had not published rules of procedure, had not created a public record of submissions to or evidence before the Inquiry, and had not made public any list of who the Commissioner had spoken to in conjunction with the Inquiry, nor had the Inquiry set forth a process for advising organizations of the evidence before the Inquiry or the process for testing or responding to any allegations raised in such evidence.

[4] Pursuant to an Application by the Commissioner, Mr. Allan, this court granted a Consent Order on October 2, 2020 whereby Mr. Allan was granted leave to file a Supplemental Affidavit of Cindy Carrol in response to the Application for an Injunction by Ecojustice and deadlines for filing materials in that Application were extended.

[5] Ms. Carrol's Supplemental Affidavit was filed and attached at exhibit D are six documents which had been posted to the Inquiry website as at September 14 or 15, 2020. These documents *inter alia*, include Rules of Procedure and Practice, the Engagement Process, the Inquiry Framework,a Ruling on the Interpretation of the Terms of Reference, a form of Application for Standing as a Participant for Commentary, a press release and a sheet of frequently asked questions.

[6] These documents largely address the one ground noted above that Ecojustice relied on in bringing its Injunction Application.

[7] The parties to this Application, which does not include the Intervenors, have agreed that it proceed as an application in writing, based on written argument. Ecojustice filed a brief and a supplemental brief as did Mr. Allan, while a single brief was filed by Alberta, the Lieutenant Governor in Council, and the Minister.

II. Analysis: The Test for Injunctive Relief

[8] The parties agree that the tripartite test for injunctive relief is set out in the seminal case ***RJR-MacDonald Inc v Canada (Attorney General)***, 1994 SCC 117 at 22 [***RJR-MacDonald***]. Specifically, the onus is on the applicant to demonstrate that:

(a) There is a serious issue to be tried;

(b) The applicant will suffer irreparable harm if the injunction is denied; and

(c) The balance of convenience between the parties favours granting the injunction.

A. Serious issue

[9] The Respondents contend that Ecojustice's argument contains circular reasoning and lacks substance. They submit that with the further clarification of the mandate of the Inquiry and the required threshold of procedural fairness, there is no identifiable cause of action or serious question to be tried.

[10] The Applicant, on the other hand, argues that the current matter raises issues of bias, improper purpose, and lack of jurisdiction, all of which are serious issues that are neither

vexatious nor frivolous. As such, the Applicant submits that it has met the burden under the first part of the test.

[11] There are no specific requirements that must be met to satisfy the first prong of the tripartite test. However, the threshold is a low one, as pointed out by the Applicant and as conceded by the Crown. The Court must make a preliminary assessment of the merits of the case, and in most circumstances, if the underlying application is neither vexatious nor frivolous, the Court should proceed to the next step of the test: ***RJR-MacDonald*** at 26.

[12] I find that the Applicant's allegations are of serious nature and are neither vexatious nor frivolous. Therefore, the first part of the test is satisfied.

B. Irreparable harm

[13] The Applicant relies on ***Canada (Royal Canadian Mounted Police) v Malmo-Levine***, 1998 CanLII 8809 (FCTD) [***Malmo-Levine***], ***Bennett v British Columbia (Superintendent of Brokers)***, 1993 CanLII 2057 (BCCA) [***Bennett***], and ***Yukon Medical Council v Yukon (Information and Privacy Commissioner)***, 2001 YKCA 8 [***Yukon***] to argue that its reputation will suffer irreparable harm if the request for injunction is denied. In his Affidavit, Devon Page, the Executive Director of Ecojustice, deposes that his organization maintains a reputation as Canada's leading environmental law charity and that unfounded and untested allegations that maybe made in the Inquiry risk harm to such reputation.

[14] Upon careful reading of the cases mentioned above, I find that they are distinguishable from the present matter on a factual basis. In ***Malmo-Levine***, one of the RCMP officers under investigation by a complaints panel overheard the panel chairman's private conversation, in which the chairman insinuated that the RCMP would lie at the hearing to evade accountability. In ***Bennett***, the applicants were under investigation for insider trading. One of the investigatory panel members was a director of a company that was a market rival to the applicants' company. Unlike the present case, both ***Malmo-Levine*** and ***Bennett*** centred around the reasonable apprehension of bias of specific individuals, with concrete and substantial context and evidence.

[15] In ***Yukon***, before the Court of Appeal of Yukon had a chance to decide whether the Yukon Medical Council was subject to the Access to *Information and Protection of Privacy Act* and thus required to disclose certain disciplinary documents, the Privacy Commissioner sought to hold an inquiry to compel the Council's disclosure. The Council's stake in the matter and the nature of the materials that the Council may be forced to divulge were neither speculative nor abstract. Accordingly, denying the Council's application amidst uncertainty as to the purview of the Act would have caused irreparable harm to the Council. In contrast, in the case at hand, it is unclear at the moment whether the Inquiry will even implicate Ecojustice in any concrete way.

[16] In fact, the crux of the Respondents' argument is that Ecojustice's claim of harm is speculative at this juncture. They submit, inter alia, that there is no evidence of an impending public release of information that will negatively impact Ecojustice's reputation. I agree with the Respondents.

[17] In ***RJR-MacDonald***, the Supreme Court of Canada described irreparable harm, at 31:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. ...

[18] Significantly, the applicant must demonstrate that evidence of irreparable harm is clear and not speculative. In other words, a claim of loss of reputation must go beyond simple speculation: ***Modry v Alberta Health Services***, 2015 ABCA 265 at para 82.

[19] The Inquiry is in its second phase, which entails contacting organizations of interest in order to solicit their response. Currently, there has been no published finding of misconduct on the part of Ecojustice. There is no evidence that the Inquiry contains unfounded and untested allegations against Ecojustice that would harm the organization's reputation. Mr. Page suggests that a risk of harm exists in the "possibility" of being called to respond to the Inquiry that may have no legal foundation. However, I am not convinced that a mere "possibility" amounts to evidence of irreparable harm that is both clear and not speculative.

[20] Further, Ecojustice asks this Court to consider the impact on public confidence if the Court permits the Inquiry to proceed when there are allegations of improper purpose, bias, and lack of jurisdiction. With respect, this argument is not germane in establishing whether denying Ecojustice's application would cause irreparable harm to its reputation, nor does it serve as evidence in such determination. The allegations of improper purpose, bias, and lack of jurisdiction are issues to be examined and resolved in the upcoming judicial review.

[21] Given the foregoing discussion, I find that Ecojustice's alleged irreparable harm to reputation is purely speculative at this juncture, and as such, the Applicant fails to satisfy the second part of the tripartite test.

C. Balance of convenience

[22] Notwithstanding the above finding, which obliges me to deny Ecojustice's application, I will briefly discuss the final step of the tripartite test for the sake of completeness.

[23] Assessing which of the parties will suffer the greater harm from the granting or refusal of an interlocutory injunction involves various factors, dependent on the circumstances of each case: ***RJR-MacDonald*** at 33.

[24] Ecojustice claims that the balance of convenience weighs in favour of granting this application as it faces the possibility of public scrutiny in an ongoing Inquiry that may ultimately be found to be void *ab initio* for improper purpose, a reasonable apprehension of bias, and being outside of the jurisdiction of the Province of Alberta.

[25] On the other hand, the Respondents contend that there is a strong public interest in ensuring the orderly, uninterrupted, and timely progression of the Inquiry. They submit that the preamble to Order in Council 125/2019 expressly states its purpose to be in the "public interest" and that this Court should give deference to the legislation's declared purpose. In support of this proposition, the Respondents point to the Supreme Court of Canada's comment in ***RJR-MacDonald*** at 41:

> When the nature and declared purpose of legislation is to promote the public interest, **a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so**. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> [Emphasis added]

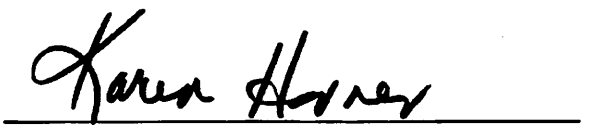
[26] Considering the declared purpose of the Inquiry and the deference it warrants, as well as the Applicant's failure to demonstrate the existence of irreparable harm that is beyond mere speculation, I conclude that the balance of convenience weighs in favour of the Respondents.

III. Conclusion

[27] The Application for an Injunction by Ecojustice is therefore dismissed with costs on Column one of Schedule C of the Rules of Court with a multiplier factor of 2 to account for inflation.

Heard in writing by agreement of the parties.

Dated at the City of Calgary, Alberta this 26th day of November, 2020.



K.M. Horner
J.C.Q.B.A.

Appearances:

Barry Robinson
for Ecojustice Canada Society

Doreen Mueller, Q.C. and Peter Bujis
for the Attorney General of Alberta

David Wachowich, Q.C.
Rose LLP
for J. Stephens Allan