

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: James Lansing Affleck et al. (Applicants) v. The Attorney General of Ontario and the Attorney General of Canada (Respondents)

BEFORE: Master Graham **HEARD:** October 24, 2018

COUNSEL: Ian Blue and Daria Peregoudova for the applicants

David Wilson and David Taylor for Dairy Farmers of Ontario (“DFO”) and Dairy Farmers of Canada (“DFC”), moving parties

Padraic Ryan for the Attorney General of Ontario

Melanie Toolsie for the Attorney General of Canada

ENDORSEMENT

(Motion by DFO and DFC for leave to intervene)

- [1] The moving parties DFO and DFC seek leave to intervene in this application under rule 13.01. As the current deadline for the filing of responding materials in the application is November 30, 2018, the parties require a prompt decision and accordingly, this endorsement is of necessity brief.
- [2] The applicants (responding parties on this motion) raise the preliminary legal issue that the proposed intervener DFO, as an administrative authority, should not be permitted to intervene in an application that questions the constitutional validity of the *Milk Act* and associated regulations which it administers and enforces because to do so would compromise its impartiality. DFO has administrative enforcement power conferred upon it by ss. 2.5 and 7(8) of the *Milk Act* and is the designated authority responsible for administering and enforcing regulations under Regulation 354/95, *Milk and Farm-Separated Cream-Marketing* under the *Milk Act*. It has statutory powers and makes decisions under those statutory powers under ss. 4, 5 and 6 of this regulation and Regulation 761, *Milk and Milk Products*.
- [3] The applicants rely on *Northwestern Utilities et al. v. Edmonton*, [1979] 1 S.C.R. 684, in which the court stated (at p. 709):

This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself [i.e. the Alberta Public Utilities Board], which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, **or in future proceedings involving**

similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance. [emphasis added]

- [4] The applicants submit that in the same way that an administrative body may not argue the merits of an appeal from one of its decisions, the DFO, as an administrative authority, should not be permitted to intervene as a party in a case impugning the constitutional validity of statutory and regulatory provisions that it administers and enforces.
- [5] The proposed interveners refer me to *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. 1426 (C.A.), although without making any specific submissions as to which portion of the decision they are relying on. That case and the cases reviewed by the court making the decision all address the issue of the extent of a tribunal's participation in an appeal from one of its decisions. Generally, as in *Northwestern Utilities, supra*, the tribunal is a party to the appeal as of right. The tension in the decisions is between ensuring that the appeal court is as fully informed as possible with respect to the issue before the tribunal and maintaining the impartiality of the tribunal as a quasi-judicial decision making body.
- [6] In the case before me, rather than being parties to the application as of right, the proposed interveners are seeking to be added as parties, but the issue is still whether their participation should be limited on the basis that adding them as parties would compromise their neutrality, particularly "in future proceedings involving similar interests and issues or the same parties" (see *Northwestern Utilities, supra*).
- [7] Two of the applicants, Elisa Vander Hout and Paul Noble, are producers of milk who would plausibly be subject to regulation by the DFO. I accept that the DFO, as an administrative authority that has the ability to affect the rights of at least two of the applicants, and which must make decisions in that regard impartially, should not be permitted to take an adversarial position against the applicants. To grant the DFO and DFC the status of interveners in a proceeding in which they would be opposing the applicants' position would violate their impartiality in respect of the applicants. Accordingly, their motion is dismissed.
- [8] The applicants filed a costs outline at the conclusion of the hearing. If the applicants and the proposed interveners cannot agree on the disposition of the costs of the motion, they may arrange to make written submissions.



MASTER GRAHAM

October 26, 2018