In the Court of Appeal of Alberta

Citation: Town of Canmore v Three Sisters Mountain Village Properties Ltd, 2022 ABCA 274

Date: 20220822
Docket: 2201-0148AC;
2201-0151AC
Registry: Calgary

Between:

Town of Canmore

Respondent (Appellant)

- and -

Three Sisters Mountain Village Properties Ltd. and Land & Property Rights Tribunal

Respondent (Respondent)

- and -

Natural Resources Conservation Board

Applicant

- and -

Stoney Nakoda Nations

Applicant

- and -

Bow Valley Engage Society

Applicant

Reasons for Decision of
The Honourable Justice Bernette Ho

Application for Party Status
Application for Leave to Intervene

Reasons for Decision of
The Honourable Justice Bernette Ho

Introduction

[1] In October 1991, Three Sisters Golf Resorts Inc. filed with the Natural Resources Conservation Board (NRCB) Application # 9103 respecting the development of a golf resort and recreation area within the boundaries of the Town of Canmore. In November 1992, the NRCB determined that the proposed project outlined in Application #9103 was in the public interest, and following authorization by the Lieutenant Governor in Council, the NRCB issued an approval respecting the project (Prior NRCB Approval).

[2] In the spring of 2021, Canmore's Town Council considered and refused to adopt two Area Structure Plans, the Three Sisters Village Area Structure Plan and the Smith Creek Structure Plan (collectively, the ASPs), submitted by Three Sisters Mountain Village Properties Ltd. (Three Sisters). Three Sisters had submitted the ASPs on the basis that they were consistent with the Prior NRCB Approval and, accordingly, section 619 of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*) required the Town of Canmore to adopt them.

[3] Three Sisters appealed the Town of Canmore's refusal to the Land & Property Rights Tribunal (Tribunal). After receiving submissions and conducting a hearing in March 2022, the Tribunal issued two decisions that concluded the ASPs were consistent with the Prior NRCB Approval (the Decisions): *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2022 ABLPRT 671; *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2022 ABLPRT 673. The Tribunal directed the Town of Canmore to adopt the ASPs in the form of by-laws, which the Town had previously refused to adopt.

[4] The Town of Canmore seeks permission to appeal the Tribunal's Decisions. The applications for permission to appeal are currently scheduled to be heard in late September 2022.

[5] The Stoney Nakoda Nations (Nations) now seek leave to be added as a party, and in the alternative, as an intervenor, to the Town of Canmore's applications for permission to appeal filed under Court of Appeal File Nos. 2201-0148AC and 2201-0151AC. The NRCB and Bow Valley Engage Society (BVE) seek leave to be added as intervenors for the purposes of both applications for permission to appeal as well.

The Applicants

[6] The Nations are comprised of the Bearspaw First Nation, the Chiniki First Nation and the Wesley (Goodstoney) First Nation. Each were signatories to Treaty No. 7.

[7] The Nations consider the area in and around Canmore to be their traditional lands, including lands that are the subject matter of the ASPs. The ASPs involve lands that are covered by Treaty No. 7. At present, the Nations maintain their traditions and customs throughout their traditional lands.

[8] The Nations participated as intervenors in the Tribunal's process leading to the Decisions.

[9] The NRCB is a corporation established under section 12 of the *Natural Resources Conservation Board Act*, RSA 2000, c N-3. The NRCB describes itself as an arms-length agency of the Government of Alberta responsible for determining the public interest of proposed major natural resource projects.

[10] The NRCB participated as an intervenor in the Tribunal's process leading to the Decisions.

[11] The BVE is a not-for-profit society incorporated under the *Societies Act*, RSA 2000, c S-14 and is funded entirely by donors. Its mandate is to promote civic awareness, engagement and actions on issues threatening the environmental sustainability, affordability and community character of the Town of Canmore and the surrounding Bow Valley area. It describes its goal as ensuring the long-term livability of the Bow Valley for both humans and wildlife.

[12] The BVE did not participate as an intervenor in the Tribunal's process leading to the Decisions. The BVE was not formally incorporated as a society until after the release of the Decisions, though individual members of the BVE participated in hearings conducted before Canmore's Town Council. There is also some evidence suggesting that the BVE operated informally as a group prior to being registered as a society.

Test for Party and Intervenor Status

[13] There is little controversy regarding the legal test to be met, though for the Nations, it must be considered in view of the Nations' application for full party status, and in the alternative, intervenor status. The threshold for party status is necessarily greater than that for intervenor status: *Carbon Development Partnership v Alberta (Energy and Utilities Board),* 2007 ABCA 231 at para 8.

[14] As a starting point, section 688(3) of the *MGA* contemplates that a judge will hear from "those persons who are, in the opinion of the judge, affected by the application" at the permission to appeal stage.

[15] The Court may add a party to an appeal pursuant to Rule 14.57 of the *Alberta Rules of Court,* Alta Reg 124/2010 or pursuant to the court's inherent power. The guiding principles were summarized in *Balancing Pool v ENMAX Energy Corporation*, 2018 ABCA 143 at paras 20 to 22 [*Balancing Pool*]. At paragraph 20 of the *Balancing Pool* decision, the Court wrote:

> This Court has an inherent power to add parties to an appeal should it find that it is in the interests of justice to do so: *Hayes v Mayhood et al*, [1959] SCR 568, 18 DLR (2d) 497. The guiding principles have been set forth in *Carbon Development Partnership v Alberta (Energy and Utilities Board)*, 2007 ABCA 231, [2007] AJ No 727 (QL) at para 9:
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> > The court has inherent power to add parties to an appeal, especially if an applicant's interests are not represented: ... The joinder test is whether or not the applicant has a legal interest in the outcome of the proceeding. If so, there are two different sub-tests. The first is whether it is just and convenient to add the applicant. The second is whether or not the applicant's interest would only be adequately protected if it were granted party status.

[16] A party may be granted intervenor status pursuant to Rule 14.58. The test for adding intervenors to an appeal was summarized in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2020 ABCA 254 at para 20:

> on an application to intervene, the test in Alberta is found in *Grant Thornton Ltd v Alberta Energy Regulator*, 2016 ABCA 238 at paras 7-13, [2016] AJ no 790 (QL). The factors to be considered are whether the intervenor: (1) is directly affected; (2) is necessary to properly decide the matter; (3) has interests in the proceedings that will not be fully protected; (4) can contribute useful and different submission expertise; (5) will not unduly delay the proceedings; (6) will suffer any possible prejudice; (7) will widen the dispute between the parties; (8) will transform the court into a political arena. Ultimately these factors assist in determining whether an applicant will be affected by the outcome of the appeal, *and* whether they can offer any expertise or fresh perspective on the subject matter that will be helpful in resolving the appeal. [emphasis in original]

[17] One further factor to consider in an application for intervenor status is whether the party was granted intervenor status in the proceedings below: *Suncor Energy Inc v Unifor Local* 707A, 2016 ABCA 265 at para 20.

[18] This Court generally discourages the addition of parties or intervenors at the permission to appeal stage for the reasons outlined in *Balancing Pool* at paras 21-22:

> However, this Court strongly discourages adding parties or allowing intervenors at this earlier stage, for the purpose of an application for permission to appeal. The reason for this is clear: in the absence of permission to appeal being granted, there is no appeal and as such no interest, legal or economic, that can be directly affected by the application (at least immediately). If the application to appeal is granted, parties are at liberty to apply for status at the hearing of the appeal. If the application

> is dismissed, there is no appeal. Unless and until permission is granted, proposed parties are not generally at risk. Usually the issues on a permission application are narrow and are focused on the statutory requirements. In other words, the inquiry at that stage is usually a narrow one and rarely assisted by representations from multiple parties.
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> For these reasons, this Court has held that adding parties or intervenors should be discouraged at this stage of the proceedings absent extraordinary circumstances. [emphasis in original]

The Town of Canmore's Applications for Permission to Appeal

[19] It is important to understand the nature of the Town of Canmore's applications for permission to appeal as context for the applicants' submissions.

[20] The Town of Canmore seeks permission to appeal pursuant to section 688(1) of the *MGA* which provides that an appeal lies to this Court from the Tribunal on a question of law or jurisdiction only. At paragraph 5 of the application for permission to appeal filed in 2201-0148AC, the Town of Canmore proposes nine grounds of appeal:

> a. The LPRT erred in concluding it had jurisdiction to hear the appeal filed by the Respondent Three Sister Mountain Village Properties Ltd. by misinterpreting s. 619 of the MGA and failing to ascertain that s. 619(1) of the MGA is retrospective in nature and the presumption against its retrospective application had not been rebutted;
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> b. The LPRT erred in concluding it had jurisdiction to hear the appeal filed by the Respondent Three Sister Mountain Village Properties Ltd. by misinterpreting s. 619 of the MGA and concluding that the Smith Creek Area Structure Plan (the "Smith Creek ASP") was a statutory plan amendment;
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> c. The LPRT erred in concluding it had jurisdiction to hear the appeal filed by the Respondent Three Sister Mountain Village Properties Ltd. by misinterpreting s. 619 of the MGA and interpreting s. 619(5) of the MGA as granting jurisdiction to hear an appeal concerning a new statutory plan;
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> d. The LPRT misinterpreted or failed to interpret s. 619(2) of the MGA in concluding the National Resources Conservation Board Approval for Application #9103 – Three Sisters Golf Resorts Inc. (the "NRCB Approval") [sic] and the Smith Creek ASP are consistent;
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> e. In concluding the NRCB Approval and the Smith Creek ASP are consistent, the LPRT failed to articulate or enunciate any legal test, principle or rationale it

applied in determining the critical issue, consistency, as set out in s. 619(2) of the MGA;

f. In concluding the NRCB Approval and the Smith Creek ASP are consistent, the LPRT failed to take into consideration relevant evidence or took into consideration irrelevant evidence;

g. The LPRT exceeded its jurisdiction under s. 619 of the MGA by ordering the Applicant Town of Canmore to adopt the Smith Creek ASP even though s. 619(8) of the MGA limits its authority to ordering a municipality to amend a statutory plan;

h. By ordering the Applicant Town of Canmore to adopt the Smith Creek ASP as originally submitted by the Respondent Three Sister Mountain Village Properties Ltd. without incorporating any subsequent amendments, the LPRT failed to take into consideration relevant evidence or took into consideration irrelevant evidence; and

i. The LPRT failed to provide any or adequate reasons for the LPRT Decision.

[21] The Town of Canmore's application filed in 2201-0151AC proposes the same grounds of appeal but refers to the Three Sisters Village ASP rather than the Smith Creek ASP.

[22] In determining whether to grant permission to appeal, this Court will consider whether each proposed ground of appeal presents: (i) a question of law or jurisdiction; (ii) of sufficient importance to merit a further appeal; and (iii) with a reasonable prospect of success: *MGA*, s 688(3); *Augustana Neighbourhood Association v Camrose (Subdivision and Development Appeal Board)*, 2021 ABCA 427 at para 16; *Biernacki v Alberta (Land and Property Rights Tribunal)*, 2022 ABCA 56 at para 10.

The Parties' Positions

The Town of Canmore

[23] The Town of Canmore consents to the applications before the Court.

Tribunal

[24] The Tribunal takes no position with respect to the applications before the Court.

Three Sisters

[25] Three Sisters consents to the application filed by the NRCB and opposes the applications filed by the Nations and the BVE.

[26] Three Sisters submits that if the Nations were granted intervenor status, the Nations should be limited to addressing the grounds advanced by the Town of Canmore rather than broadening the dispute to address issues that were not before the Tribunal.

Analysis

NRCB

[27] I am satisfied that the NRCB meets the test for intervenor status for several reasons.

[28] First, a review of the Decisions makes clear that the Prior NRCB Approval was of central importance to the proceedings before the Tribunal. The Prior NRCB Approval was and continues to be the subject of the dispute between the parties.

[29] Second, while the fact that the NRCB was an intervenor in the proceedings below is not determinative of the outcome of this application, it is a factor to consider and, in my view, weighs in favour of the NRCB's continued participation.

[30] In the fall of 2021, the Tribunal granted the NRCB leave to intervene on three issues:

(a) whether the NRCB decisions rendered prior to section 619 of the *MGA* coming into force are a "licence, permit, approval or other authorization granted by" the NRCB for the purposes of section 619;
(b) the interpretation of the *Natural Resources Conservation Board Act*; and
(c) a remedy that might direct the NRCB to do, or not to do, something.

See *Three Sisters Mountain Village Properties Ltd v Town of Canmore*, 2021 ABLPRT 662 at paras 8 and 29.

[31] The nature of the NRCB's intervention in the proceedings below demonstrates its unique role and interest in the Decisions and outcome of the applications for permission to appeal. The NRCB's submissions before the Tribunal were helpful in informing the Decisions as the NRCB addressed its statutory framework, the application of section 619 of the *MGA*, and the Nations' submissions respecting jurisdiction of the Tribunal.

[32] Third, the NRCB has further indicated that if granted intervenor status, it will not seek to adduce any fresh evidence and would not broaden the dispute between the parties. At this juncture, the NRCB anticipates addressing only the proposed ground of appeal set out in subparagraph 5(a) of the permission to appeal applications, though the NRCB would seek to address any issue that may impact the NRCB and its operational validity and authority on a go forward basis. Thus, the intervention would not unduly delay the proceedings and would not cause prejudice to the parties. Notably, both the Town of Canmore and Three Sisters consent to the NRCB's application for intervenor status which suggests that the parties agree no prejudice will arise as a result of the NRCB's participation.

[33] Fourth, the NRCB is uniquely positioned to address its interests, which cannot be adequately protected by the other parties.

[34] Finally, I am satisfied that extraordinary circumstances exist such that the NRCB should be granted intervenor status even at this early juncture of the proceedings. As already noted, the Prior NRCB Approval was and continues to be central to the dispute between the parties. In my view, submissions from the NRCB may assist the Court when considering whether to grant leave and on what questions.

[35] To conclude, I am satisfied that the NRCB, as the regulatory authority that issued the Prior NRCB Approval, will be affected by the outcome of the appeal and it can offer special expertise, perspective or information that will assist the Court in deciding whether to grant permission to appeal. The NRCB is granted intervenor status for the purposes of both applications for permission to appeal.

The Nations

[36] The Nations seek to be added as a party, and in the alternative, an intervenor in the applications for permission to appeal. The distinction is important because if the Nations are granted full party status, they are entitled to participate in any potential appeal in a more fulsome manner under the *Alberta Rules of Court*, as opposed to the role that may be undertaken by an intervenor: see for example *1985 Sawridge Trust v Alberta (Public Trustee)*, 2017 ABCA 418 at paras 38-39. Thus, the Nations must meet a higher threshold to be added as a party, a point which was acknowledged by the Nations in their written materials.

[37] If granted status, the Nations intend to address the proposed grounds of appeal at subparagraphs 5(d), (e), (f), and (i) of the applications for permission to appeal in order to assert that the Tribunal erred in failing to consider the honour of the Crown and reconciliation in the Tribunal's discussion of consistency and its interpretation of section 619 of the *MGA*. The Nations confirmed they do not seek to overturn the Prior NRCB Approval or challenge the Tribunal's constitutional jurisdiction, nor do they wish to raise new constitutional issues relating to the duty to consult. Counsel submitted that full party status is only required if a narrow interpretation of subparagraphs 5(d), (e), and (f) is adopted, in the sense that the words "honour of the Crown" and "reconciliation" are not expressly referred to. The Nations submit that if granted status they will not broaden the dispute between the parties, noting that they addressed consistency and the public interest before the Tribunal.

[38] Three Sisters opposes the Nations' application. Three Sisters submits that the Nations seek to add issues respecting reconciliation and the honour of the Crown to matters before this Court. It argues this would both widen the dispute between the parties and prejudice Three Sisters because these are issues that otherwise are not referenced in the applications for permission to appeal.

[39] The Nations indicate that their traditional lands encompass the ASPs and are presently still used for traditional and cultural practices. Further, the individual member Bands of the Nations are each signatories to Treaty No. 7. I am satisfied that the Nations have a legal interest in whether permission to appeal is granted.

[40] I would, however, dismiss the Nations' application for party status but grant the Nations status as intervenors. Even though intervenor status should only be granted in limited circumstances at this early stage of the proceedings, I am satisfied that it should be granted in the circumstances of this case. The Nations were intervenors before the Tribunal for a limited purpose and provided submissions respecting the Prior NRCB Approval and consistency. They are uniquely positioned to address their interests, which will not be advanced by the other parties and, therefore, the Nations' interests may not be fully protected by the other parties.

[41] While intervenors are usually permitted to raise additional legal arguments, and sometimes additional policy arguments, they are not usually permitted to raise fresh issues or adduce additional evidence, including constitutional issues, that are not grounded in the record below: *Johnston v Alberta (Vital Statistics)*, 2008 ABCA 2 at para 7; *Lameman v Canada (AG)*, 2006 ABCA 43 at para 5. Therefore, if the Nations raised new issues, and in particular, constitutional issues, that would be of concern to this Court.

[42] While I understand Three Sisters' position that the Nations involvement will broaden the scope of the dispute, the submissions the Nations intend to make were advanced before the Tribunal. That said, I reiterate that it would not be appropriate for the Nations to raise additional proposed grounds of appeal or otherwise expand the scope of the current proceedings to include constitutional issues. The Nations are granted intervenor status to address the proposed grounds of appeal outlined at subparagraphs 5(d), (e), (f), and (i) of both applications for permission to appeal.

The BVE

Issues respecting the Downing Affidavit

[43] As a preliminary matter, Three Sisters takes issue with the content of paragraphs 18 and 20 to 25 of the Affidavit of Lisa Downing sworn August 5, 2022. Three Sisters submits those paragraphs contain legal opinion and argument that are inappropriate for an affidavit sworn by a lay person and asks that those paragraphs be struck or be ascribed no weight for the purposes of the BVE's application.

[44] Counsel for the BVE submits that the Court should consider the purpose of the affidavit and nature of the application. The impugned paragraphs are included to provide the Court with context and explain what arguments may be advanced if the BVE is granted intervenor status. The paragraphs are also intended to provide the Court with an understanding as to why the BVE has an interest in the outcome of the applications for permission to appeal and any subsequent appeals.

[45] While I agree that the impugned paragraphs include content that is inappropriate for an affidavit from a lay person, I understand the purpose for which the information was included by the BVE. I do not consider it necessary to strike the challenged paragraphs, but I do not ascribe evidentiary weight to statements that contain legal opinion or argument. I take them as providing context and information respecting the BVE's interests, as submitted by its counsel.

The Intervenor Application

[46] The BVE submits that its members will be directly and significantly affected by the outcome of the appeals and the Three Sisters' developments outlined in the ASPs, if ultimately allowed to proceed. Further, the BVE submits it will offer a fresh perspective of residents and landowners, separate from that of the Town of Canmore as a municipality, and will not delay the proceedings or cause prejudice to any parties. The BVE argues that its interests will not be adequately represented by the Town of Canmore. During oral argument, counsel to the BVE explained that it seeks to intervene to address subparagraphs 5(d), (e), and (f) of the applications for permission to appeal.

[47] As noted above, Three Sisters opposes the BVE's application. Three Sisters submits that being residents and landowners is not a sufficient interest to merit intervenor status, nor does exercising rights as concerned citizens translate into intervenor status. The BVE also has not identified any unique perspective or expertise different from that of the Town of Canmore. Further, Three Sisters would be prejudiced by a widening of the dispute because the BVE seeks to raise issues that were not before the Tribunal, including undermining, transportation, and wildlife corridors. Finally, adding the BVE would transform this Court into a political arena given BVE's mandate in the realm of political advocacy.

[48] When asked to address extraordinary circumstances warranting being granted intervenor status before the permission to appeal stage, the BVE stressed the importance of this matter to resident and stakeholder members of the BVE. They are affected within the language of section 688(3) of the *MGA* and consider it necessary to make submissions on whether questions of law of sufficient importance to merit an appeal exist. Counsel submitted that it would add a valuable perspective and are content to operate under strict page and time limits for their submissions.

[49] Even if I were to accept that the BVE will be affected by the outcome of the applications for permission to appeal, I am not satisfied that extraordinary circumstances exist to add the BVE as an intervenor at this juncture.

[50] The BVE was not, as a society, an intervenor before the Tribunal, nor do they offer a special expertise that would assist the Court in deciding whether to grant permission to appeal. While its perspective on issues may be slightly different, and perhaps broader, than those of the Town of Canmore, as confirmed during oral submissions, the legal positions being advocated by the BVE will essentially be the same as those that will be advanced by the Town of Canmore. I am not convinced that the Court will require the BVE's perspective to determine if permission to appeal

should be granted or on what questions. Offering a different perspective is not in any event determinative of whether the test for status has been met: *Saskatchewan Power v Morgan Stanley Capital Group Inc.*, 2013 ABCA 341 at para 19.

[51] I further agree with the proposition that exercising one's rights as an engaged citizen at first instance does not translate to any legal expectation of intervenor status as of right: *Benga Mining Limited v Alberta Energy Regulator*, 2021 ABCA 363 at para 37. I fully appreciate how important the possibility of a continuing appeal is to the BVE and its membership, but I am not satisfied that extraordinary circumstances exist to warrant being granted intervenor status at this juncture. Therefore, the BVE's application for intervenor status is dismissed. I make no comment and offer no determination on the possibility or merits of the BVE applying to become involved at a later stage, in the event permission to appeal is granted.

Disposition

[52] The NRCB and the Nations are granted intervenor status for both applications for permission to appeal, as outlined herein. Subject to further order of this Court or of the Case Management Officer, the NRCB and the Nations are each permitted to file a single written submission pertaining to both applications. The submissions are to be no longer than 10 pages, formatted in accordance with the stipulations outlined in the *Alberta Rules of Court*.

[53] Unless otherwise directed by the Justice hearing the applications for permission to appeal, the NRCB and the Nations shall each be permitted 15 minutes for oral argument and reply.

[54] At the hearing, all parties should be prepared to address the degree to which the NRCB and the Nations should participate in the ongoing appeal, in the event permission to appeal is granted. In my view, the Justice hearing the applications will be in a better position to impose any conditions on the NRCB and Nations continued involvement if these matters proceed past the permission to appeal stage.

Application heard on August 16, 2022

Reasons filed at Calgary, Alberta
this 22nd day of August, 2022

Ho J.A.

Appearances:

K.L. Becker Brookes
for the Town of Canmore

G.J. Stewart-Palmer, QC
for Three Sisters Mountain Village Properties Ltd.

M.J. d'Alquen
for the Land & Property Rights Tribunal

W.Y. Kennedy
for the Natural Resources Conservation Board

B.A. Barrett
for the Stoney Nakoda Nations

A.F. Sunter
M. Deyholos
for the Bow Valley Engage Society