Federal Court | Cour fédérale

Date: 20101216

Docket: T-923-09

Citation: 2010 FC 1295

Montreal, Quebec, December 16, 2010

Present: Mr. Richard Morneau, Prothonotary

[ENGLISH TRANSLATION]

BETWEEN:

THE UASHAUNNUAT (THE INNU OF UASHAT AND MANI-UTENAM)
and
CHIEF GEORGES-ERNEST GRÉGOIRE
and
THE HEADS OF TRADITIONAL UASHAUNNUAT FAMILIES AND THE TRADITIONAL UASHAUNNUAT FAMILIES AND THEIR MEMBERS
and
THE INNU BAND TAKUAIKAN UASHAT MAK MANI-UTENAM
and
MIKE McKENZIE, RONALD FONTAINE, RAYMOND JOURDAIN, JONATHAN McKENZIE, TOMMY VOLLANT, JEAN-GUY PINETTE, MARIE-MARTHE FONTAINE, MARCELLE ST-ONGE AND RÉJEAN AMBROISE

Plaintiffs

and

GAIL SHEA, IN HER CAPACITY AS MINISTER OF FISHERIES AND OCEANS
and
JIM PRENTICE, IN HIS CAPACITY AS MINISTER OF THE ENVIRONMENT

Defendants

and
HYDRO-QUÉBEC
and
THE ATTORNEY GENERAL OF QUEBEC

Interveners

AND

Docket: T-957-09

THE UASHAUNNUAT (THE INNU OF UASHAT AND MANI-UTENAM)
and
CHIEF GEORGES-ERNEST GRÉGOIRE
and
THE HEADS OF TRADITIONAL UASHAUNNUAT FAMILIES AND THE TRADITIONAL UASHAUNNUAT FAMILIES AND THEIR MEMBERS
and
THE INNU BAND TAKUAIKAN UASHAT MAK MANI-UTENAM
and
MIKE McKENZIE, RONALD FONTAINE, RAYMOND JOURDAIN, JONATHAN McKENZIE, TOMMY VOLLANT, JEAN-GUY PINETTE, MARIE-MARTHE FONTAINE, MARCELLE ST-ONGE AND RÉJEAN AMBROISE

Plaintiffs

and

JOHN BAIRD, IN HIS CAPACITY AS MINISTER OF TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

Defendant

and
HYDRO-QUÉBEC

Intervener

REASONS FOR ORDER AND ORDER

[1] This is a case in dockets T-923-09 and T-957-09 (that are combined through an order dated September 2, 2009) involving a motion by the Defendants for partial striking of allegations that appear in the notices of application for judicial review filed by the Plaintiffs in June 2009 in each docket (the Applications).

[2] The Defendants happen to be the Minister of Fisheries and Oceans (the Minister of Fisheries) and the Minister of the Environment in docket T-923-09 and, in docket T-957-09, the Minister of Transport, Infrastructure and Communities (the Minister of Transport).

[3] For the purposes hereof, the two interveners, Hydro-Québec and the Attorney General of Quebec, share the Defendants' views.

[4] According to the Defendants, the Defendants' attack in the Applications against decisions of May 2009 to approve under various federal statutes the La Romaine Hydroelectric Project (the La Romaine Project) also contains an indirect attack, even somewhat more direct in the case of docket T-923-09, against a decision of August 2005 (the August 2005 decision).

[5] Through that decision, it was decided under section 15 of the *Canadian Environmental Assessment Act,* S.C. 1992, c. 37, as amended (the CEAA) that, for environmental assessment purposes, the scope of the La Romaine Project would not cover the power transmission lines.

[6] According to the Defendants' core argument, given that the August 2005 decision was not at all attacked by an application for judicial review made within the thirty (30)-day time limit in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. (1985), c. F-7, as amended, that decision must be considered final and valid. Therefore, the scope of the La Romaine Project cannot be called into question more than three (3) years later in the Applications. Thus, all allegations and conclusions in the Applications that go the opposite direction should, as of now, be stricken.

[7] Although the Defendants may ultimately be successful on this aspect during the merit hearing of the Applications, I still do not intend to allow the Defendants' current interlocutory motion and proceed with the striking-outs sought because, for the following reasons, I do not consider this to be an exceptional case, from the perspective of the relevant case law.

Background

[8] For the purposes hereof, I do not intend to dismiss the evidence submitted by the Defendants and Hydro-Québec in the context of the motion because the dynamic raised by the Defendants centres on compliance with the time limit in subsection 18.1(2) of the *Federal Courts Act* and not on an attack centrally involving an analysis, as such, of the worth, basis or nature of the allegations and reasons raised by the Defendants. Therefore, I do not intend to take up the following statement issued by the Court in *Amnesty International Canada v. Canada (Attorney General)*, 2007 FC 1147 (CanLII), at paragraph 30 [translation]:

> [30] By analogy with the process set out in the *Federal Courts Rules* regarding the striking out of claims, as a general rule, evidence cannot be adduced as part of a motion to strike a notice of

> application. Moreover, the facts alleged by the Plaintiff in the notice of application must be accepted as true: *Addison & Leyen Ltd. et al*, *supra*, at paragraph 6.

[9] Nor do I intend to dismiss any or all of that evidence for any other reason raised by the Plaintiffs.

[10] Regarding the factual background of the present case, it is known that around March 2004, the intervener Hydro-Québec, which happens to be the sponsor, informed that it intends to go ahead with building four hydroelectric power stations on the Romaine River in the province of Quebec.

[11] Carrying out that project required certain federal approvals to be issued in advance, namely, on one hand, authorization under subsection 35(2) of the *Fisheries Act*, R.S.C. 1985, c. F-14 and, on the other, approvals under subsection 5(2) of the *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22 (hereinafter, collectively, the federal approvals).

[12] In keeping with paragraph 5(1)(*d*) of the CEAA, an environmental assessment of said project had to be done under that statute before the granting of the federal approvals.

[13] In August 2005, further to various consultations, the Minister of the Environment made a decision under section 15 of the CEAA. Specifically, the Minister established the scope of the project for which the environmental assessment was to be done.

[14] It appears that this August 2005 decision was publicized on or around September 14, 2005 and indicated that the scope of the La Romaine Project did not include the connection project. In

other words, the environmental assessment of said project would not also cover the power transmission lines.

[15] Subsequently, the La Romaine Project, as delineated, underwent an impact study, and that study was then reviewed by a Joint Review Panel.

[16] On May 13, 2009, in keeping with paragraph 37(1)(*a*) of the CEAA, and as per the approval of the Governor in Council, the Minister of Transport and the Minister of Fisheries determined that they were able to exercise their attributions with respect to the La Romaine Project because they believed that said project being carried out was not likely to have significant adverse environmental impacts.

[17] The Minister of Fisheries and the Minister of Transport then issued the federal approvals (the Court's understanding is that the Plaintiffs partially question that chronology. However, that aspect does not really have relevance for the purposes of this debate and will not be further pursued here).

[18] In the Applications, the Plaintiffs argue that the federal approvals of May 2009 are not valid due to, among other reasons, the fact that such approvals could not have been given without an environmental assessment conducted in accordance with the CEAA.

[19] However, as the Plaintiffs argue, the environmental assessment conducted in this case was not in accordance with the CEAA because the split between energy generation and energy transmission is contrary to the requirements of the CEAA. According to the Plaintiffs, energy

generation and transmission are two inseparable components of one and the same project. They therefore argue that the Defendants did not do the environmental assessment of an integral, crucial component of the overall La Romaine Project.

Analysis

[20] Even though in paragraph [8] above a certain statement in the *Amnesty International* case was dismissed, the Court in that case still cites the decision of the Federal Court of Appeal in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.A. no. 1629, 176 N.R. 48, to reiterate the key principles governing motions to strike filed against applications for judicial review.

[21] At paragraphs [22] to [29] of *Amnesty International*, the Courts states the following [translation]:

> **The legal principles governing motions to strike**
>
> [22] Applications for judicial review are supposed to be summary dispositions, and motions for striking of a notice of application add considerably to the cost and time required for reviewing such matters.
>
> [23] Moreover, as the Federal Court of Appeal pointed out in *David Bull Laboratories (Canada) Inc. v. Pharmacia Inc.*, [1994] F.C.J. no. 1629, the process of striking out is much more feasible in the case of actions than an application for judicial review because there are numerous rules which require precise pleadings as to the nature of the claim or the defence and the facts upon which it is based. There are no comparable rules with respect to notices of application for judicial review.
>
> [24] Therefore, the Federal Court of Appeal pointed out that it is far more risky for a tribunal to strike a notice of application for judicial review than a standard pleading. Moreover, with an

> application for judicial review, as apposed to an action, different economic issues come into play. In other words, applications for judicial review do not involve examination and trial – matters that can be avoided in actions: *David Bull*, at paragraph 10.
>
> [25] By contrast, the full hearing for an application for judicial review largely proceeds in the same manner as a motion to strike the notice of application, in other words on the basis of the affidavit evidence submitted and the arguments advanced before a judge of the Court.
>
> [26] Hence the reason why the Federal Court of Appeal ruled that an application for judicial review ought not to be struck out before the hearing on the merits is held, unless the application is "so clearly improper as to be bereft of any possibility of success".
>
> [27] The Federal Court of Appeal also states that "such cases must be very exceptional and cannot include cases […] where there is simply a debatable issue as to the adequacy of the allegations in the notice of motion": *David Bull*, at paragraph 15.
>
> [28] Unless an applicant can meet that very strict standard, "the direct and proper way to contest an originating notice of motion which the respondent thinks to be without merit is to appear and argue at the hearing of the motion itself": *David Bull*, at paragraph 10. See also *Addison & Leyen Ltd. v. Canada*, 2006 FCA 107 (CanLII), [2006] F.C.A. no. 489, 2006 FCA 107, at paragraph 5, below for other reasons by 2007 CSC 33 (CanLII), [2007] S.C.C. no. 33, 2007 CSC 33.
>
> [29] The criterion is this strict because it is usually more effective for the Court to deal with a preliminary argument at the hearing of the application for judicial review itself, rather than in the form of a preliminary motion: see the comments by the Federal Court of Appeal in *Addison & Leyen*, at paragraph 5.
>
> [My underlining.]

[22] The same principles from *David Bull Laboratories* had also been reiterated in April 2000 by Justice Dawson, a member of our Court at the time, at the start of the analysis at paragraphs [33] to [37] of *The Regional Municipality of Hamilton-Wentworth v. The Minister of the Environment et al.* 187 F.T.R. 287, (*Hamilton-Wentworth*).

[23] That decision is very enlightening because it has a dynamic similar to the situation in the case at hand. In fact, that decision involves the CEAA as well as the potential interrelatedness among various decisions made under it, also in the context of a motion to strike filed by the defendants on the grounds that the application for judicial review in that case – just like here – brought up means and redresses pertaining to decisions that had not been attacked within the thirty (30)-day time limit in subsection 18.1(2) of the *Federal Courts Act*. At paragraph [38] of its decision, the Court states [translation]:

> [38] The defendants' motion to strike was based on the fact that the parties affected by the application raised means and was aiming to secure remedies pertaining to issues not addressed by the July 5, 1999 decision, but were addressed by earlier decisions made more than 30 days before the date when the application was submitted in the original proceeding.

[24] That passage is better understood when considering paragraphs [20] to [22] where Justice Dawson reiterates the decision reached by the prothonotary, a decision that she would reverse:

> [20] The result of the prothonotary's order was to limit the scope of the original proceeding in reviewing the decision by which the Minister of the Environment had appointed the members of the assessment panel and established the panel's mandate. In doing so, the prothonotary said that the Court has jurisdiction to dismiss in whole or in part in exceptional circumstances an application for judicial review in the context of a preliminary motion.
>
> [21] The prothonotary accepted the claim from the defendants, who were of the opinion that the decision by which the Minister of Fisheries and Oceans had asked the Minister of the Environment, on May 4, 1999, to submit the project to an assessment panel and the decision by which the Minister of the Environment had submitted the project to an assessment panel on May 6, 1999, were separate decisions from the one rendered on July 5, 1999 for appointing the members of the assessment panel and establishing that panel's

> mandate. He agreed that each decision could undergo a judicial review.
>
> [22] The prothonotary ruled that only the July 5, 1999 decision had been challenged within the 30-day time limit provided for in subsection 18.1(2) of the *Federal Courts Act*, R.S.C. (1985), c. F-7, as amended. In the absence of an order granting an extension of the deadline, judicial review of previous decisions was no longer possible.

[25] The core of the Court's analysis begins in paragraphs [39] and [40]. The Court then notes that an attack based on non-compliance with the deadline allotted, in this case the time limit from subsection 18.1(2) of the *Federal Courts Act,* would be accepted for striking only in exceptional circumstances. The Court stated the following [translation]:

> [39] I must point out that, even in actions where, as the Court of Appeal said in *David Bull Laboratories, supra*, it is much more feasible to strike out, a means of defence based on prescription, is not sufficient to allow the striking of a claim, but that this means should instead be brought up in a defence. Similarly, when a proceeding is initiated via an application, any matter involving the imposing of a limitation period should usually be debated at the hearing for the application rather than in the context of a motion to strike.
>
> [40] <u>This does not means that an application submitted outside the time limit allotted could never be stricken, but in my opinion, that striking would only be done in exceptional circumstances</u>.
>
> [My underlining.]

[26] Note that the passage that the latter excerpted from *Hamilton-Wentworth* would be later reiterated on at least two other occasions, namely in 2006 and 2007, when the Court was called upon to assess compliance with subsection 18.1(2) of the *Federal Courts Act* in the context of a motion to strike (see *John McKellar Charitable Foundation v. Canada (Canada Revenue Agency)*, 2006 FC 733 and *Jazz Air LP v. Toronto Port Authority*, 2007 FC 624).

[27] Returning to its analysis in *Hamilton-Wentworth*, the Court then summarizes the plaintiff's arguments and determines that the possibility of those arguments being substantiated means that the motion to strike must fail.

[28] Paragraphs [41] to [46] show the Court's approach [translation]:

> [41] In this case, to determine whether the parties affected by the application were brought up outside the time limit, the Court should reject the plaintiff's argument that the letter sent to it by the DFO on July 25, 1998, the letter that the Minister of Fisheries sent to the Minister of the Environment on May 4, 1999 and the May 6, 1999 press release (and I would add the decision referred to in the press release) are measures prior to the establishing of a panel and to the granting of the necessary jurisdiction via a mandate. The plaintiff asserts that such an argument is based on *Krause v. Canada, supra*, by the Federal Court of Appeal and applies the reasoning contained therein, specifically that, in circumstances like these, the measures for ensuring implementation of prior decisions can undergo a review. The plaintiff also relies on the decision made by the Federal Court of Appeal in *Alberta Wilderness Association et al. v. Canada (Minister of Fisheries and Oceans)* (1998), 238 N.R. 88 (F.C.A).
>
> [42] The Court should also reject the argument regarding the continuation of proceedings that the plaintiff is seeking to bring before the Court. The plaintiff argues that the letter in which the Minister of Fisheries recommended establishing an assessment panel, the Minister of the Environment's announcement that the project would be referred to a panel and the Minister's decision to establish a panel and grant it the necessary jurisdiction together form a continuing process, through which the CEAA is applied to the project. Given that the CEAA provides for a set of measures to take for a project, the measures taken by the various ministers are "more in nature of an ongoing process" impacting the plaintiff's legal rights. Therefore, the reasoning that this court followed in *Puccini v. Canada (Director General, Corporate Administrative Services, Agriculture Canada)*, 1993 CanLII 2973 (F.C.), [1993] 3 F.C. 557 (T.D.) applies. In other words, the plaintiff asserts that, until it knew what type of organization would review the project, who would be appointed and what would be reviewed, the referral to the panel was not legally complete.

> [43] For the purposes of this motion, it is not necessary, or not appropriate, to draw a conclusion about the ultimate merits of these arguments.
>
> [44] In exercising my discretion, I can only conclude that it is possible for the plaintiff to be successful, and that is what I conclude. This is not an exceptional instance justifying the striking of certain parts of the notice of application. I also note that striking certain parts of the application would not help the Court resolve the constitutional issues that would again arise, after striking certain parts of the application.
>
> [45] Since I have found that this is not an exceptional instance, I will allow the appeal against the order striking certain parts of the initial application and I will also dismiss the cross-appeal.
>
> [46] For greater certainty, I must also point out that this decision in no way limits or restricts the defendants' right to argue before the judge who will hear the application that certain parts of the application were submitted outside the time limit imposed and that they should be rejected for that reason alone, or to bring up the release and the delay, arguments that were brought up here during this hearing.
>
> [My underlining.]

[29] The matter that was before Justice Dawson ended up being heard on the merits jointly with other matters. However, it was also Justice Dawson who was made responsible for that review.

[30] So she actually has before her once again the Defendants' same arguments that she had rejected in 2000 and expresses the following principles:

> [62] What is essentially being challenged, as a preliminary matter, is whether the provisions in subsection 18.1(2) of the *Federal Courts Act* prevent challenges to the May 4 and 6, 1999 decisions and whether it is possible, in light of the delay, to raise the issues brought up by the Region about the applicability of the CEAA.
>
> […]

> [66] The fact that the legal requirements must be met and that failing to challenge a prior measure alters nothing about those requirements was acknowledged by the Court of Appeal in *Alberta Wilderness Association v. Canada (Minister of Fisheries and Oceans)*, [1999] 1 F.C. 483 (F.C.A.).
>
> [67] I further find that, as the Region maintains, the primary remedy sought is to prevent the panel from carrying out the review. The applications pertain to proceedings conducted and contemplated for giving effect to the previous decision to have the panel conduct a review. In keeping with the principle set out by the Court of Appeal in *Krause v. Canada*, [1999] 2 F.C. 476 (F.C.A.), enforcement actions are subject to review.
>
> (*Hamilton and District Chamber of Commerce v. Canada (Minister of the Environment)*, T-1400-99, April 24, 2001, 2001 FCT 381 (CanLII) (hereinafter *Hamilton*)
>
> [My underlining.]

[31] It is on the basis of what is expressed in *Hamilton-Wentworth* and *Hamilton* that the plaintiffs argue in their written submissions opposing the motion to strike from the review that:

> 107. Therefore, using this reasoning here, continuation of the Project's environmental assessment process and the other steps taken since the Project's illegal split did not remedy that illegality. Therefore, the Project's split, in contravention of the CEAA, cannot be assumed as valid.
>
> 108. Moreover, the plaintiffs can use the Project's illegal split as grounds for, among other things, challenging the federal decisions authorizing the Project since not all the requirements of the CEAA were met. The fact that the plaintiffs apparently did not previously challenge the Project's illegal split in no way changes the need to conduct an environmental assessment in accordance with the CEAA as a prerequisite for the defendants to issue authorizations.
>
> […]
>
> 114. Thus, in this case, the plaintiffs can bring up the Project's illegal split as grounds for challenging, in the context of their applications for judicial review of the federal decisions authorizing

> the Project since those authorizations bring about the Project's illegal split.
>
> [Plaintiffs' underlining.]

[32] Even if we acknowledge that the August 2005 decision is removed not just by several months but by more than three (3) years from the federal approvals of May 2009, that all players involved were therefore aware of that decision, either in August or September 2005, that a good many of the participants in favour of the La Romaine Project proceeded on the basis of the Project's scope as defined at that time and that it would not be until around November 2008 that the plaintiffs would express their disagreement about the scope of the La Romaine Project, I still cannot at this stage rule out the possibility that the plaintiffs' arguments can take precedence on the merits. Therefore, this is not an exceptional instance. In rejecting the plaintiffs' motion, I adopt *mutatis mutandis* the approach and the reserving of rights stated by Justice Dawson at paragraphs [43] to [46] of her decision in *Hamilton-Wentworth* (see *supra* at paragraph [28] for the text from those paragraphs).

[33] In my opinion, that finding remains unchanged despite this Court's decision in *Citizens' Mining Council of Newfoundland and Labrador Inc. v. Canada (Minister of the Environment),* 1999 CanLII 7759 in which the defendants referred to the motion's hearing. At that time, they specifically drew the Court's attention to paragraphs [46] to [50] of that decision.

[34] However, in my opinion, in those paragraphs, the Court simply ruled that a decision involving a project's scope can – not must – be subject to judicial review and that it is not premature if such an objection is lodged.

[35] It must also be noted that this finding was taken from the case's merit hearing – not during an interlocutory motion.

[36] All in all, that case definitely does not align with the approach and arguments raised by the plaintiffs here. Along that line and in order to give the *Citizens' Mining* case the place it deserves (but without wanting to get into rule 221 of the *Federal Courts Rules* (the Rules) which applies to actions), we can use an image recently held by Justice Hughes of our Court in *Apotex v. Pfizer Ireland Pharmaceuticals*, 2010 FC 968, at paragraph [18] :

[My underlining.]

[37] On the other hand, the fact that the existence of the August 2005 decision or how it is identified contravene, among other things, rules 301 or 302 are not, in this particular case, among the circumstances in favour of striking or taking several other interlocutory measures. Any non-compliance with those rules is necessarily concomitant to inclusion in the debate by the plaintiffs of the August 2005 decision. Once again, the situation will have to, if applicable, be brought to the attention of the judge who hears the merits.

[38] Likewise, the Court here cannot grant the defendants the subsidiary remedies that they are asking for in paragraphs a) to d) at the bottom page 4 and top of page 5 of their notice of motion because granting them would end up, to a very large extent, agreeing to the striking sought as the main remedy.

THUS, IT IS APPROPRIATE TO ISSUE THE FOLLOWING ORDER:

1. The plaintiffs' motion for partial striking and any subsidiary remedy included therein are rejected, costs to follow.

2. As for continuation of the case, the parties will see to it that they comply with what is set out in the order of May 28, 2010 in that regard unless, and this could very well be understandable, the parties by consensus decide to submit to the Court on or before January 15, 2011 a joint draft order containing, in terms of date(s) for all the next few steps, a less restrictive schedule.

"Richard Morneau"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**T-923-09**
STYLE OF CAUSE:	**THE UASHAUNNUAT (THE INNU OF UASHAT AND MANI-UTENAM) ET AL.** **and** **GAIL SHEA, IN HER CAPACITY AS MINISTER OF FISHERIES AND OCEANS ET AL.**
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PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	December 8, 2010
REASONS FOR ORDER AND ORDER:	PROTHONOTARY MORNEAU
DATE OF REASONS:	December 16, 2010

APPEARANCES:

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