

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140318

**Dockets: A-56-14
A-59-14
A-63-14
A-64-14
A-67-14**

Citation: 2014 FCA 71

Present: SHARLOW J.A.

BETWEEN:

**FORESTETHICS ADVOCACY,
LIVING OCEANS SOCIETY, and
RAINCOAST CONSERVATION FOUNDATION**

Applicants in A-56-14

**FEDERATION OF BRITISH COLUMBIA NATURALISTS
carrying on business as BC NATURE**

Applicant in A-59-14

H AISLA NATION

Applicant in A-63-14

GITXAALA NATION

Applicant in A-64-14

GITGA'AT FIRST NATION

Applicant in A-67-14

and

**ATTORNEY GENERAL OF CANADA, MINISTER OF THE ENVIRONMENT,
NATIONAL ENERGY BOARD, and
NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 18, 2014.

REASONS FOR ORDER BY:

SHARLOW J.A.

Federal Court of Appeal



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REASONS FOR ORDER

SHARLOW J.A.

[1] A preliminary issue has arisen in these consolidated applications for judicial review because it is not clear whether they are within the jurisdiction of the Federal Court of Appeal or the Federal

Court. The applicants have commenced parallel proceedings in both courts out of an abundance of caution, intending to discontinue the proceedings in the court that is found not to have the jurisdiction to determine their applications for judicial review.

[2] The parties have expressed the hope that the question of jurisdiction can be resolved expeditiously. Numerous motions and requests for directions have been filed to that end. All parties have provided helpful submissions (except the National Energy Board (the “Board”) which takes no position on the question of jurisdiction). I have now reviewed all of the submissions.

Background

[3] The decision sought to be judicially reviewed is the *Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Volume 1 and Volume 2* (the “Report”) published on December 19, 2013. It appears that the applications are intended to challenge the recommendations contained in the Report that would tend to favour the completion of the pipeline project known as the Enbridge Northern Gateway Project (the “Project”).

[4] The Joint Review Panel was established by an agreement between the Minister of the Environment and the Board. That agreement gives the Joint Review Panel the mandate to conduct the environmental assessment for the Project pursuant to the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“CEAA 2012”) and the *National Energy Board Act*, RSC 1985, c N-7 (the “NEB Act”). The key elements of that agreement are described in more detail below.

[5] All of the applicants take the position that the Report is based on one or more legal errors, and they seek declarations accordingly. For example, they allege that the Report does not comply with certain provisions of *CEAA 2012*, the *NEB Act*, the *Species at Risk Act*, SC 2002, c 29, Hearing Order OH-4-2011 for the Project, the *Terms of Reference* for the Project, and the agreement under which the Joint Review Panel was established. It is possible that if some or all of the allegations are made out, the Report could be found to be fundamentally flawed.

[6] Among the remedies sought by the applicants are an order that the Report be returned for reconsideration (I assume by a newly constituted Joint Review Panel), and an order that would preclude the Governor in Council from making any decision that would permit the Project to proceed as long as the Report is not corrected.

[7] It appears that the current deadline for a decision by the Governor in Council is in June of 2014. To date, no party has filed a motion for an order staying the proceedings of the Governor in Council in relation to the Report pending the disposition of these applications for judicial review.

Jurisdiction – applicable principles

[8] Pursuant to subsection 28(1) of the *Federal Courts Act*, RSC 1985, c. F-7, only the Federal Court of Appeal has the jurisdiction to hear and determine an application for judicial review made in respect of the federal boards, commissions and other tribunals listed in paragraphs 28(1)(a) to (r). An application for judicial review of a decision of any other federal decision maker is within the sole jurisdiction of the Federal Court.

[9] The list in subsection 28(1) of the *Federal Courts Act* includes the Board (paragraph 28(1)(f)) and the Governor in Council when making an order under subsection 54(1) of the *NEB Act* (paragraph 28(1)(g)). It does not expressly include a panel constituted like the Joint Review Panel or with an analogous mandate.

Issue

[10] The question of jurisdiction is whether (a) the Report is a decision of (or in respect of) the Board, or (b) a decision of or in respect of the Governor in Council when making an order under subsection 54(1) of the *NEB Act*. To determine that question, it is necessary to understand the statutory scheme that governs the proceedings of the Board when considering a proposal for a new pipeline project, particularly the part of the statutory scheme by which the Board provides the Governor in Council with the information it requires to decide whether to approve such a project. The process is complex and includes numerous opportunities for reconsideration of decisions made during the process. However, it is not necessary to describe the process completely. The following summary will suffice for present purposes.

[11] The process begins when the proponent of a pipeline project submits to the Board an application for a certificate of public convenience and necessity (sections 30, 31 and 32 of the *NEB Act*). The Board considers the application pursuant to numerous statutory requirements. The process requires public notices and hearings, and the Board may be required (and was required in this case) to conduct an environmental assessment under *CEAA 2012*.

[12] When the Board is satisfied that the application for a certificate is complete, it must prepare a report that includes, among other things, the Board's environmental assessment and the Board's recommendation as to whether or not a certificate should be issued. Pursuant to section 52 of the *NEB Act*, the Board submits its report to the Minister of Natural Resources, who may submit it to the Governor in Council. Pursuant to subsection 54(1) of the *NEB Act*, the Governor in Council may, by order, direct the Board either to issue a certificate or to reject the application.

[13] The Joint Review Panel was established in 2009 by an agreement between the Board and the Minister of the Environment to undertake, in a single process, the environmental assessment responsibilities of the Board and the Minister of the Environment with respect to the Project. The agreement required the Joint Review Panel to consist of three members, of which two were permanent members of the Board. The third member was required to be a person who satisfied the eligibility requirements for a temporary member of the Board.

[14] The work of the Joint Review Panel had not been completed when *CEAA 2012* came into force. Under a statutory transitional rule, the Joint Review Panel was continued as a panel established under section 38 of *CEAA 2012*. The original agreement was amended accordingly in August of 2012. Among the changes was a provision that required the chair of the Board to request that the Minister recommend to the Governor in Council that the third member be appointed as a temporary member of the Board.

Analysis

[15] For the reasons that follow, I have concluded that these applications for judicial review are within the sole jurisdiction of the Federal Court of Appeal pursuant to paragraph 28(1)(f) and (g) the *Federal Courts Act*.

[16] The work of the Joint Review Panel essentially is the work of the Board. That is so even if the Joint Review Panel also fulfils the environmental assessment obligations of another federal government authority under *CEAA 2012* with respect to the Project. According to the agreement under which the Joint Review Panel was established, it is intended to be comprised of Board members, and its report is intended to be the report of the Board that is required by section 52 of the *NEB Act* as described above. Section 9 of the amended agreement, entitled “Report and Decision Making”, reads as follows:

- 9.1 The Panel will prepare a report under section 52 of the *NEB Act* setting out its recommendation on whether a certificate of public convenience and necessity should be issued taking into account whether the project is and will be required by the present and future public convenience and necessity, the reasons for the recommendations, as well as the terms and conditions that the Panel considers necessary or desirable in the public interest to which the certificate will be subject if the Governor in Council were to direct the Board to issue the certificate. The report will also set out the Panel’s rationale, conclusions and recommendations relating to the environmental assessment of the project, including any mitigation measures and follow-up programs and a summary of any comments received from the public and Aboriginal peoples, as well as information referred to in Section 8 [Aboriginal Consultation]. The report will also identify:
 - those conclusions that relate to the environmental effects to be taken into account under section 5 of the *Canadian Environmental Assessment Act, 2012*; and

- recommended mitigation measures that relate to the environmental effects to be taken into account under section 5 of the *Canadian Environmental Assessment Act, 2012*.
- 9.2 Once completed, the report will be submitted to the Minister of Natural Resources who will make it available to the public and Aboriginal peoples.
- 9.3 The Governor in Council will make the decision on the environmental assessment (whether the project is likely to cause significant adverse environmental effects and if so, whether such effects are justified in the circumstances). The Governor in Council will also decide, by order, whether the Board should issue a certificate and will give reasons for the order.

[17] I conclude that by virtue of paragraph 28(1)(f) of the *Federal Courts Act*, the Federal Court of Appeal has the sole jurisdiction to consider these applications for judicial review insofar as the applicants seek remedies against the Board.

[18] The applicants also seek an order that essentially would stay the proceedings before the Governor in Council in respect of the Report. Under the statutory scheme, any decision of the Governor in Council in response to the report would be an order under subsection 54(1) of the *NEB Act*. I conclude that by virtue of paragraph 28(1)(g) of the *Federal Courts Act*, the Federal Court of Appeal has the sole jurisdiction to make an order aimed at preventing the Governor in Council from responding to the Report pursuant to subsection 54(1) of the *NEB Act*.

[19] Therefore, this matter may proceed only in the Federal Court of Appeal. There will be no costs in respect of any of the motions or requests for direction relating to the determination of the jurisdiction question.

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-56-14

STYLE OF CAUSE: FORESTETHICS ADVOCACY ET
AL v. ATTORNEY GENERAL OF
CANADA ET AL

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: SHARLOW J.A.

DATED: MARCH 18, 2014

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