

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140724

Docket: 14-A-38

Citation: 2014 FCA 182

Present: STRATAS J.A.

BETWEEN:

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

Applicants

and

**ATTORNEY GENERAL OF CANADA,
NATIONAL ENERGY BOARD and
NORTHERN GATEWAY PIPELINES INC.**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on July 24, 2014.

REASONS FOR ORDER BY:

STRATAS J.A.

Federal Court of Appeal



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Respondents

REASONS FOR ORDER

STRATAS J.A.

[1] There are ten related applications for leave currently before this Court. Those applications are governed by a direction of this Court. Among other things, the direction sets out certain procedures to be followed and filing deadlines.

[2] Northern Gateway Pipelines Limited Partnership, a respondent in many of the ten applications, seeks changes to the direction. In particular, it seeks an order permitting the respondents to file one motion record in response to all of the applications – in effect, a request for consolidation of the ten applications – and also an adjustment to the filing deadlines for the responding and reply materials.

[3] To illustrate the changes it seeks, Northern Gateway helpfully sets out how the relevant paragraph of the direction would look if its requests were to be accepted. In that paragraph, it provides for the respondents to be able to file memoranda of fact and law of up to 85 pages, almost three times the page limit set by Rule 70 of the *Federal Courts Rules*, SOR/98-106, as amended. I have taken this as a request to increase the page limit.

[4] For the reasons that follow, I will consolidate the applications and adjust the filing deadlines. However, I reject the request for an increase in the page limit.

A. Background to the applications for leave

[5] The ten applications for leave arose after the enactment of Order in Council, P.C. 2014-809 (*Canada Gazette*, vol. 148, no. 26, p. 1645) made by the Governor in Council under subsection 54(1) of the *National Energy Board Act*, R.S.C. 1985, c. N-7. The Governor in Council directed the National Energy Board to issue certificates of public convenience and necessity concerning Northern Gateway's pipeline project. The National Energy Board has issued those certificates (nos. OC-060 and OC-061).

[6] Nine of the ten applications have been brought under subsection 55(1) of the *National Energy Board Act*, *supra*. In them, the applicants seek leave to apply for judicial review of the Order in Council. The nine applications are as follows:

- 14-A-39 (*Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*)
- 14-A-41 (*Gitxaala Nation v. Attorney General of Canada, Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership*)
- 14-A-42 (*Kitasoo Xai'Xais Band Council on behalf of all members of the Kitasoo Xai'Xais Nation and Heiltsuk Tribal Council on behalf of all members of the Heiltsuk Nation v. Her Majesty the Queen and Northern Gateway Pipelines Limited Partnership*)
- 14-A-43 (*Federation of British Columbia Naturalists carrying on business as B.C. Nature v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*)
- 14-A-44 (*Unifor v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*)

- 14-A-45 (*Haisla Nation v. Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc.*)
- 14-A-46 (*Gitga'at First Nation v. Attorney General of Canada and Northern Gateway Pipelines Limited Partnership*)
- 14-A-47 (*The Council of the Haida Nation and Peter Lantin, suing on his own behalf and on behalf of all citizens of the Haida Nation v. Attorney General of Canada, Northern Gateway Pipelines Limited Partnership and Northern Gateway Pipelines Inc.*)
- 14-A-48 (*Martin Louie, on his own behalf and on behalf of all Nadleh Whut'en, and Fred Sam, on his own behalf, on behalf of all Nak'Azdli Whut'en, and on behalf of the Nak'Azdli Band v. Attorney General of Canada and Northern Gateway Pipelines Inc. on behalf of Northern Gateway Pipelines Limited Partnership*)

[7] The tenth application has been brought under subsection 22(1) of the *National Energy Board Act, supra*. It seeks leave to appeal the certificates of convenience and necessity issued by the National Energy Board. The file is 14-A-38 (*Forestethics Advocacy Association, Living Oceans Society and Raincoast Conservation Foundation v. Attorney General of Canada, National Energy Board and Northern Gateway Pipelines Inc.*).

B. Background to this motion

[8] Northern Gateway brought this motion informally by way of letter dated July 15, 2014.

The following letters have been filed in response:

- Letter dated July 15, 2014 of counsel for the Attorney General of Canada and Her Majesty the Queen, a respondent in all ten applications;
- Letter dated July 15, 2014 of counsel for the Gitxaala Nation, the applicant in 14-A-41;
- Letter dated July 16, 2014 of counsel for the Kitsoo Xai'Xais Band Council and the Heiltsuk Tribal Council, applicants in 14-A-42;
- Letter dated July 17, 2014 of counsel for the Haida Nation, an applicant in 14-A-47.

All counsel involved in all applications have been copied on all letters.

[9] As is apparent, the parties have proceeded by way of exchange of informal letters, rather than a formal motion record. In this instance, this is acceptable to the Court. The facts underlying their positions – largely evident from the Court files – are straightforward and not in dispute, the relief sought is relatively simple, there is a large degree of agreement among the parties, and speed is of the essence.

[10] This Court issued a direction on July 3, 2014 and amended it on July 8, 2014. That direction specified, among other things, certain procedures and deadlines. As mentioned at the outset of these reasons, Northern Gateway seeks to adjust this direction somewhat, asking for consolidation, revised filing deadlines and an increase in the page limit for the respondents' memoranda.

C. The parties' positions on the motion

[11] The respondent Attorney General supports Northern Gateway's motion.

[12] The Gitxaala Nation, Kitsoo Xai'Xais Band Council, Heiltsuk Tribal Council and Haida Nation do not oppose Northern Gateway's consolidation request or the deadline for the respondents to file their response. However, they seek slightly more time for their replies. The letter from counsel for the Gitxaala Nation advises that the applicants in all files except for 14-A-44 and 14-A-48 agree with this position. The position of the applicants in those files is unknown.

D. Consolidation

[13] An order will issue consolidating all ten applications before the Court. They all arise from the same matter and they have similar facts and law. Consolidating the files will allow the respondents to prepare one record, rather than ten separate records. This achieves significant cost savings and is convenient for the parties and the Court.

[14] The Haida Nation, although not objecting to consolidation, expresses concern that the plethora of issues raised by others might drown out its more narrow submission or result in confusion.

[15] That concern can be quickly dismissed. The respondents are expected to respond to all the parties' submissions that have some force. If not, they do so at their own peril. And the Court will carefully study and consider the submissions of the Haida Nation, as it will for all parties.

E. Filing deadlines

[16] Northern Gateway asks that the respondents be given until July 28, 2014 to respond to the applications.

[17] This is a modest extension of the time set out in the Court's earlier direction, an extension made necessary by the large volume of materials – several thousands of pages – to which it must respond.

[18] July 28, 2014 is very soon upon us and the parties' submissions were sent to me only a couple of days ago. The respondents may have to adjust as a result of this Court's decision on the motion. Therefore, the Court is prepared to give the respondents a little more time after July 28 to file their records. The Court will set August 1, 2014 as the deadline.

[19] In its submissions in support of its motion, Northern Gateway proposes that the applicants have only one week after receiving the respondents' records to reply. In response, various applicants seek two weeks to file their replies. For the same reasons that justify extra time for the respondents, some extra time is justified for the replies. This Court shall set August 12, 2014 as the deadline for the replies.

F. Increasing the page limit for the respondents' memoranda

[20] Northern Gateway requests that the respondents be able to file 85 page memoranda. As mentioned at the outset of these reasons, I reject this.

[21] Rule 70 of the *Federal Courts Rules*, *supra* specifies that the page limit is 30 pages. It repeats the word "concise" three times. The 30 page limit and the thrice-repeated requirement of conciseness apply to even the most complex, high-stakes appeals on the merits. Accordingly, the presence of "important and complicated questions," by itself, does not justify an increase in the page limit: *Canada v. General Electric Capital Canada Inc.*, 2010 FCA 92 at paragraph 5.

[22] Rule 70 also uses the word "memorandum," not "encyclopaedia." The aim of Rule 70 is to have counsel advance only central and important points, not everything that can possibly be imagined. The best memoranda target the controlling idea of the case – the particular part of the legal test upon which the case will turn. Then, after a smattering of orienting information, they deploy only the facts and authorities relevant to their position on the controlling idea. And

throughout, they supply accurate citations so we can verify what we have been told and investigate the finer details.

[23] Sadly, that is not the norm. All too often, we are dragged through blizzards of trivia, ponderous explanations of the elementary or inconsequential, bald assertions without demonstration or citation, repetitive submissions, block quotes of boggling length, and summary after summary of case law with no selection, distillation or synthesis. These bloat the page count and dissipate the force of the argument, sometimes to the vanishing point. My former colleague, Justice John Evans, who read thousands of memoranda during his exemplary career, put it well:

Conciseness is a virtue which is always in demand but, in my experience, often conspicuous by its absence from memoranda of fact and law filed in this Court. I do not recall an occasion when I thought that the expansion of a memorandum by another 10 pages would have improved things. Quite the contrary, in fact.

(*Sawridge Band v. Canada*, 2006 FCA 52 at paragraph 20; see also Justice John I. Laskin, “Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums” (1999) 18 Adv. Soc. J. No. 2, at pages 3-12 and Justice Marvin A. Catzman, “The Wrong Stuff: How to Lose Appeals in the Court of Appeal” (2000) 19 Adv. Soc. J. No. 1 at pages 1-5.)

[24] For these reasons, requests to increase the 30 page limit in this Court are “granted sparingly” and are exceptional: *General Electric*, *supra* at paragraph 5.

[25] In this case, the threshold of exceptionality has not been not met. I have reviewed the applicants’ memoranda and the originating documents in the ten applications to investigate whether longer responding memoranda are justified. I conclude they are not. Almost none of the

relevant factors supporting an increase in the page limit are present here: *General Electric, supra* at paragraph 5.

[26] The only factor that might justify an increase is the large number of submissions to which the respondents must respond. However, several considerations offset this. First, while the various applicants do have different perspectives and circumstances, many of the issues and submissions they raise are similar if not identical. Second, the respondents' focus should not be the broad, overall, definitive merits of the matter. Rather, their focus should be narrower: the absence of any issues that are reasonably arguable and the presence of any other factors demonstrating that leave is contrary to the interests of justice. Finally, there are two sets of respondents: the Northern Gateway respondents and the government respondents. If they work together, each respondent might be able to adopt whole sections of submissions advanced by the other in just a single sentence.

[27] For the foregoing reasons, I deny the request for an increase in the page limit.

[28] An order shall issue in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: 14-A-38

STYLE OF CAUSE: FORESTETHICS ADVOCACY
ASSOCIATION, LIVING OCEANS
SOCIETY AND RAINCOAST
CONSERVATION FOUNDATION
V. ATTORNEY GENERAL OF
CANADA, NATIONAL ENERGY
BOARD AND NORTHERN
GATEWAY PIPELINES INC.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY: STRATAS J.A.

DATED: JULY 24, 2014

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NORTHERN GATEWAY
PIPELINES LIMITED
PARTNERSHIP

AND FOR THE RESPONDENT IN
FILES 14-A-38, 14-A-41, 14-A-45,
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NORTHERN GATEWAY
PIPELINES LIMITED
PARTNERSHIP

AND FOR THE RESPONDENT
IN FILES 14-A-38, 14-A-41,
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