Federal Court of Appeal | Cour d'appel fédérale

Date: 20170515

Dockets: A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17

Citation: 2017 FCA 102

Present: STRATAS J.A.

BETWEEN:

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY

Applicants

and

ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC

Respondents

and

ATTORNEY GENERAL OF ALBERTA

Intervener

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 15, 2017.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal  Cour d'appel fédérale

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Dockets: A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17

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Intervener

REASONS FOR ORDER

STRATAS J.A.

[1] Before the Court are two motions for leave to intervene in these consolidated proceedings. The Attorney General of Alberta has brought one of them. The Tsartlip First Nation and Chief Dom Tom on his own behalf and on behalf of the members of the Tsartlip First Nation (collectively, "the Tsartlip") have brought the other. Both motions are opposed.

[2] For the reasons that follow, the motion brought by the Attorney General of Alberta shall be granted. The motion brought by the Tsartlip shall be dismissed.

A. The consolidated proceedings

[3] In the consolidated proceedings, the applicants seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and Order in Council PC 2016-1069 dated November 29, 2016 and published in a supplement to the *Canada Gazette*, Part I, vol. 150, no. 50 on December 10, 2016.

[4] In brief, the Project—the capital cost of which is $7.4 billion—adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the

construction of new works such as pump stations and tanks and the expansion of an existing marine terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

[5] The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law, relevant statutory law, and section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to First Nations and Indigenous peoples and their rights. They also raise many issues concerning the Project's "environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

[6] By Order dated March 9, 2017, after submissions were received, this Court consolidated 16 separate applications involving 31 parties, streamlined the process for getting the applications ready for hearing, and set an expedited schedule.

B. The Attorney General of Alberta's motion for leave to intervene under Rule 110

[7] The Attorney General of Alberta moves for leave to intervene under Rule 110 of the *Federal Courts Rules*, SOR/98-106. The applicants, the Tsleil-Waututh Nation and the Stól:ō applicants, oppose Alberta's motion for leave to intervene. They say that Alberta has failed to satisfy certain prerequisites in Rules 109 and 110.

[8] This Court has not discussed Rule 110 to any significant extent. Rule 110 provides as follows:

110. Where a question of general importance is raised in a proceeding, other than a question referred to in section 57 of the Act,	**110.** Lorsqu'une question d'importance générale, autre qu'une question visée à l'article 57 de la Loi, est soulevée dans une instance :
(*a*) any party may serve notice of the question on the Attorney General of Canada and any attorney general of a province who may be interested;	*a*) toute partie peut signifier un avis de la question au procureur général du Canada et au procureur général de toute province qui peut être intéressé;
(*b*) the Court may direct the Administrator to bring the proceeding to the attention of the Attorney General of Canada and any attorney general of a province who may be interested; and	*b*) la Cour peut ordonner à l'administrateur de porter l'instance à l'attention du procureur général du Canada et du procureur général de toute province qui peut être intéressé;
(*c*) the Attorney General of Canada and the attorney general of a province may apply for leave to intervene.	*c*) le procureur général du Canada et le procureur général de toute province peuvent demander l'autorisation d'intervenir.

[9] Rule 110(*c*) authorizes an Attorney General of a province to move for leave to intervene. The Attorney General of Alberta moves under this provision.

[10] The Tsleil-Waututh Nation and the Stól:ō applicants say that the Attorney General for Alberta can only move for leave to intervene if it satisfies the prerogatives for intervention under Rule 109, if it has received notice under Rule 110(*a*) or the Court has asked the Administrator to bring the proceeding to the attention of the Attorney General under Rule 110(*b*) and if there is a "question of general importance" within the meaning of the opening words of Rule 110.

[11] I disagree. As this Court said in *Copps v. Mikisew Cree First Nation*, 2002 FCA 306, 293 N.R. 182 at para. 8, "Rule 110 contemplates a special role for attorneys-general in addition to those contemplated under section 57 of the *Federal Courts Act* [R.S.C. 1985, c. F-7] and Rule 109." If this Court were to adopt the interpretation of Rule 110 urged upon it by the Tsleil-Waututh Nation, the Rule would fail to recognize the special role of Attorneys General. Rather, it would place them in a worse position than private parties wishing to intervene.

[12] The Attorneys General would have to satisfy all the prerequisites under Rules 109 and 110 while private parties wishing to intervene would have to satisfy only the prerequisites under Rule 109. Much clearer legislative language would be necessary to persuade me that the legislative drafter intended that Attorneys General—who represent broader interests, potentially the interests of millions of members of the public—should face more impediments to intervention than private parties.

[13] This can be put another way. Suppose this Court were holding a hearing on a question of general importance affecting the interests of the government or the population in a jurisdiction. If the Tsleil-Waututh Nation's submission were accepted, the relevant Attorney General would have to stand outside the courtroom waiting for a formal invitation under Rule 110(*a*) or a notice from the Administrator under Rule 110(*b*) before he or she could come inside. And even then, she or he would have to persuade the Court that the requirements of Rule 109 and the opening words of Rule 110 are satisfied. All that before they can begin to make submissions on behalf of their governments and the people they serve.

[14] Rule 110 should be interpreted against the backdrop of our foundational principles and longstanding constitutional arrangements pertaining to Attorneys General. In Westminster constitutions such as ours, the starting point is that, subject to legislative override, the rights of the public are vested in the Crown and the Attorney General, an officer of the Crown, enforces the rights: *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 at 477. Broadly writ, in legal proceedings Attorneys General represent the Crown and protect and advance the public interest.

[15] Giving Attorneys General a broader right to apply to intervene in order to advance the public interest—as Rule 110(*c*) does—is consistent with these foundational principles and constitutional arrangements. There must be clear language in the legislative text to displace them.

[16] Nothing in the legislative text of Rule 110 suggests that Rules 110(*a*) and 110(*b*) are prerequisites to an application for leave to intervene under Rule 110(*c*). Similarly, nothing in the legislative text of Rule 110 suggests that Attorneys General must also satisfy the prerequisites for intervention in Rule 109.

[17] The Attorney General of Alberta points to other proceedings in this Court in which she was permitted to intervene under Rule 110(*c*) even though she had not satisfied the prerequisites in Rules 109, 110(*a*) and 110(*b*): *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2004 FCA 66, [2004] 3 F.C.R. 436; *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308, [2010] 4 F.C.R. 500; *Canada (Minister of Indian and Northern*

Affairs) v. Daniels, 2014 FCA 101, [2014] 4 F.C.R. 97. I am bound to follow these cases unless they are manifestly wrong: *Miller v. Canada (Attorney General)*, 2002 FCA 370, 220 D.L.R. (4th) 149. The Tsleil-Waututh Nation does not make that submission.

[18] Under the terms of Rule 110(*c*), an Attorney General is not automatically admitted into the proceeding. The opening words of Rule 110 require that there be "a question of general importance raised in the proceeding." The question must be one that affects the interests of the government or the population in the relevant jurisdiction in a general way: *Copps*, above at para. 8; *Vancouver Wharves Ltd. v. Canada (Labour, Regional Safety Officer)* (1996), 107 F.T.R. 306, 41 Admin. L.R. (2d) 137 at paras. 36, 37, 41 and 42. Further, the requirement can also be met where serious questions are raised in proceedings that themselves are of general importance.

[19] There is no doubting the importance of these consolidated proceedings. They consist of 16 separate proceedings brought by many applicants, including First Nations, Indigenous peoples and environmental groups. The Project concerns a pipeline that crosses much of Alberta. The Project is intended to facilitate the access of Alberta's natural resources to new markets for the benefit of the economy.

[20] The Attorney General of Alberta submits that the consolidated proceedings have implications for future interprovincial pipeline projects and energy resource development. It says that the Government of Alberta is interested in the assessment of upstream greenhouse gas emissions. The Attorney General intends to encourage this Court to adopt "clear, consistent and

predictable rules and processes to facilitate the consideration of resource development projects in the public interest in a manner that respects section 35 of the *Constitution Act, 1982*."

[21] Further, the legal issues the applicants raise are of general importance. These include issues concerning the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, the *Species at Risk Act*, S.C. 2002, c. 29, and issues relating to the rights and interests of Indigenous peoples.

[22] Taken together, all these considerations suggest a strong nexus between the issues raised in the proceeding on the one hand and the interests of the Government of Alberta and the population it serves on the other.

[23] Thus, the Attorney General of Alberta easily meets the test for intervention under Rule 110. An order shall issue granting leave to the Attorney General of Alberta to intervene. The style of cause for the consolidated proceedings shall be amended accordingly.

[24] Under Rule 53(1), the Court may "impose such conditions and give such directions as it considers just" concerning the order granting leave to intervene.

[25] The Attorney General of Alberta shall be entitled to file a memorandum of fact and law; the Attorney General's intended position in the consolidated proceedings suggests that its memorandum of fact and law should be filed with the respondents' memoranda.

[26] In accordance with paragraph 8(8) of the Court's scheduling order of March 9, 2017, the page limit, the deadline for filing and other procedural matters shall be set at a later date.

[27] The Attorney General of Alberta shall also be entitled to make oral submissions at the hearing of the consolidated proceedings for a duration to be set by the panel. The Attorney General shall not add to or modify the evidentiary record, nor shall she be entitled to or be liable for costs.

C. The Tsartlip's motion for leave to intervene under Rule 109

[28] The Tsartlip move to intervene under Rule 109. The respondent, Trans Mountain Pipeline ULC, opposes.

[29] The factors to be considered on an intervention motion under Rule 109 are set out in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)*, [1990] 1 F.C. 84 (T.D.), affirmed [1990] 1 F.C. 90, 103 N.R. 391 (C.A.), recently reaffirmed in *Sport Maska Inc. v. Bauer Hockey Corp.*, 2016 FCA 44, 480 N.R. 387.

[30] In support of its motion, the Tsartlip cite *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, [2015] 2 F.C.R. 253, a decision that pre-dates *Sport Maska*.

[31] *Pictou Landing* proposed a tweaking and reformulating of the *Rothmans* factors, in part to better define and limit the "interests of justice" factor in *Rothmans*. *Pictou Landing* considered

the "interests of justice" factor, left undefined and unlimited, to be undesirable. *Pictou Landing* also showed that some of the *Rothmans* factors are illogical and do not adequately reflect contemporary legal principles such as those in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87. Finally, *Pictou Landing* pointed out that certain requirements in Rule 109—a provision in a regulation that is part of the binding law of Canada—are mandatory and cannot be reduced to mere factors that can be overridden.

[32] But I am bound by *Sport Maska*. Its *ratio*, which I must accept at this time, is that *Rothmans* and *Pictou Landing* are sufficiently similar so no departure from *Rothmans* is warranted (at para. 41). The Court added that the *Pictou Landing* factors can be considered under the flexible "interests of justice" factor in *Rothmans* (at para. 42).

[33] I followed *Sport Maska* in this way in *Prophet River First Nation v. Canada (Attorney General)*, 2016 FCA 120 at paras. 2-4. There, four of the six *Rothmans* factors were utterly irrelevant to the intervention motion, as they almost always are. The *Pictou Landing* factors fell under "the interests of justice" factor and dictated the outcome of the motion. This is how I shall proceed here, with the qualification that the *Federal Courts Rules*, being law, also bind me.

[34] In exercising my discretion, I have carefully considered and weighed the relevant factors in the way *Sport Maska* instructs me to do. I have also considered the provisions of the *Federal Courts Rules* that bind me. In the interests of brevity and expedition, I need to offer only brief reasons on the factors most salient to my exercise of discretion.

[35] Trans Mountain submits that the moving parties' motion "is an improper attempt to obtain full party status in the [application for judicial review] without filing its own judicial review application." I agree.

[36] In substance, the Tsartlip have not brought a motion for leave to intervene. Rather, they have brought an application for judicial review in the guise of a motion to intervene. The Tsartlip decided not to apply for judicial review under Rule 301. They cannot do so now through the mechanism of an intervention under Rule 109 in these expedited proceedings.

[37] Even if somehow I could take the motion to be a late application for judicial review, I would not grant an extension of time in these expedited proceedings. On the material before me, the test is not met: see, *e.g.*, *Canada (Attorney General) v. Larkman*, 2012 FCA 204, 433 N.R. 184.

[38] The Tsartlip intend to argue that the National Energy Board pursued a methodology that is unreasonable in the administrative law sense or failed to consider matters pertaining to them and, thus, made a decision that is not "lawful." Specifically, in its notice of motion, the Tsartlip say that they intend to raise the issue "whether the environmental assessment done by the under the [*sic*] *Canadian Environmental Assessment Act, 2012*…and section 52(3) of the *National Energy Board Act*…was lawful" as well as "the issue of the assessment of significant environmental impacts under [the *Canadian Environmental Assessment Act, 2012*]."

[39] The Tsartlip state that if they are allowed to intervene, they will address the faulty nature of the environmental assessment by "providing their own indigenous perspective on how the [National Energy Board] ought to have viewed the question of assessment of significant environmental impacts of the project on [the Southern Resident Killer Whale] and whether the environmental impacts can be justified." In their written representations, the Tsartlip add that they intend to make submissions on the effects which would occur to them as a result of the adverse effects to the Southern Resident Killer Whale caused by increased tanker traffic.

[40] In effect, the Tsartlip suggest that the decision must be quashed because it unreasonably affects their *own* rights and interests. This is what applicants do in their notices of application for judicial review, not interveners.

[41] In their supporting affidavit, the Tsartlip say that they did not bring their own judicial review because it was "prohibitively expensive." They do not explain this further. Nevertheless, this requires closer examination.

[42] In a case like this one where others are preparing the evidentiary record, the expense of an applicant's counsel is roughly equivalent to the expense of an intervener's counsel. The cost of filing a notice of application and an applicant's memorandum of fact and law on the merits is roughly the same as filing a motion record for leave to intervene and filing an intervener's memorandum of fact and law on the merits. So what makes it "prohibitively expensive" to be an applicant as compared to an intervener? An applicant is potentially liable to the respondents for their costs, while an intervener is not.

[43] Rule 109 cannot be used, intentionally or unintentionally, as an end-run around the potential liability for costs that applicants face. Put another way, intervention is not a mechanism by which, intentionally or unintentionally, a party can challenge a decision exactly as an applicant can, but be immunized from a potential costs award.

[44] Rule 109 can be an end-run in another sense. All applicants, no matter how important their interests might be, face a limitation period: *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 18.1(2). Important public policy interests are served by it: *Canada (Attorney General) v. Larkman*, above at paras. 86-88. If someone has already applied for judicial review within the limitation period, can another party use Rule 109 to join the proceedings, in substance as a co-applicant, well after the limitation period for applying has passed? I think not. That would be an impermissible end-run.

[45] There may be explanations or special circumstances that might excuse a delay in bringing an application for judicial review, but these should be advanced by way of a motion for an extension of time based on this Court's jurisprudence: see, *e.g.*, *Grewal v. Canada (Minister of Employment & Immigration)*, [1985] 2 F.C. 263 (C.A.); *Larkman*, above.

[46] Therefore, in the circumstances of this case I conclude that if the Tsartlip had a direct interest in quashing the decision below, they should have asserted it by bringing their own application for judicial review on a timely basis. They cannot now use Rule 109 to achieve that outcome.

[47] A further objection to the Tsartlip's intervention is that their submissions will not, in the words of Rule 109(2), "assist the determination of a factual or legal issue related to the proceeding," *i.e.*, the issues raised in the existing applications before the Court.

[48] In considering this, it must be recalled that acting under the guise of having a different perspective, an intervener cannot adduce fresh evidence or make submissions that are in reality fresh evidence: *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, 474 N.R. 268 at paras. 14-27; *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 14. An intervener cannot transform the proceedings into something different by, for example, raising issues foreign to the applications before the Court: *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167. A proposed intervener must rely on the same evidence in the record that others are relying upon and focus on how they can assist the Court's determination of the existing proceedings.

[49] Thus, successful moving parties for intervention often propose to work within the ambit of the existing proceedings and the existing evidentiary record but propose to do something different than the existing parties. For example, they propose to invoke a body of jurisprudence that existing parties have not invoked, ask us to interpret certain jurisprudence differently, or acquaint the Court with the larger implications associated with its ruling. Some other examples where interveners typically can assist the Court are set out in *Ishaq* at paragraph 12 and *Zaric* at para. 18.

[50] The Tsartlip do not propose to do any of these things. Rather, they intend to make the same legal submissions that others, particularly the applicant, Tsleil-Waututh Nation, will make, relying upon the same factual record.

[51] For example, in its notice of application, the applicant, Tsleil-Waututh Nation, submits that the National Energy Board unlawfully assessed the significance of environmental effects and the justification thereof by failing to consider adequately the effects on the Southern Resident Killer Whale, a species of great significance to Indigenous peoples in the area, including the Tsartlip. A fair construction of the Tsleil-Waututh Nation's notice of application is that it intends to refer to all available evidence in the record on this point, including the evidence that the Tsartlip placed before the Board on this issue. On the material before me, I see little or no daylight between the submissions the Tsleil-Waututh Nation will make and the submissions the Tsartlip propose to make.

[52] There are cases where the assistance of an intervener is needed to help advance the position of an applicant because the Court is not satisfied the applicant will be able to canvass the matter adequately: see, *e.g.*, *Zaric*, above at para. 18. But that is not the case here. The Tsartlip have not explained why the presence of the Tsleil-Waututh Nation before this Court is somehow inadequate and so it needs to step in. The Tsartlip do not call into question the capability or willingness of the Tsleil-Waututh Nation to advance all of the evidence in the record relevant to the assessment of the effect of the Project on the Southern Resident Killer Whale, including the evidence offered by the Tsartlip concerning the importance of this species to them.

[53] Although intervention is not open to them, the Tsartlip can participate in other valuable, less expensive ways, such as offering the services of their counsel to assist the Tsleil-Waututh Nation and other applicants to ensure that their submissions are the best they can be and advance the Tsartlip's interests.

[54] Thus, for the foregoing reasons, I am not persuaded that leave to intervene should be granted. I will dismiss the Tsartlip's motion with costs.

[55] For certainty, these reasons should not be taken to be deciding any issues concerning the relevance, weight and significance of the evidence concerning any legal issue. This task is for the panel hearing the appeal.

D. A miscellaneous matter

[56] On April 28, 2017, the Kwantlen First Nation, Cheam First Nation and Chawathil First Nation discontinued their application for judicial review in file A-230-16. This was one of the applications forming part of the consolidated proceedings. In my order concerning the intervention motions, I shall also amend the style of cause to remove these parties. The style of cause shall be as reflected on this document.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	**A-78-17 (lead file); A-217-16; A-218-16; A-223-16; A-224-16; A-225-16; A-232-16; A-68-17; A-73-17; A-74-17; A-75-17; A-76-17; A-77-17; A-84-17; A-86-17**
STYLE OF CAUSE:	**TSLEIL-WAUTUTH NATION *et al.* v. ATTORNEY GENERAL OF CANADA *et al.***

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	MAY 15, 2017

WRITTEN REPRESENTATIONS BY:

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Scott Smith	FOR THE RESPONDENT TO THE MOTION, TSLEIL-WAUTUTH NATION
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