Federal Court of Appeal  Cour d'appel fédérale

Date: 20191023

Dockets: A-321-19 (lead file),
A-323-19, A-324-19, A-325-19,
A-326-19, A-327-19

Citation: 2019 FCA 266

Present: **STRATAS J.A.**

BETWEEN:

CHIEF RON IGNACE and CHIEF ROSANNE CASIMIR, on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, UPPER NICOLA BAND, COLDWATER INDIAN BAND, SQUAMISH NATION, TSLEIL-WAUTUTH NATION, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE

Applicants

and

ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN PIPELINE ULC and TRANS MOUNTAIN CORPORATION

Respondents

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN AND CANADIAN ENERGY REGULATOR

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on October 23, 2019.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

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REASONS FOR ORDER

STRATAS J.A.

[1] The Attorney General of Saskatchewan moves under Rule 110 of the *Federal Courts Rules* S.O.R. 98-106 to intervene in the consolidated proceeding. The Stk'emlupsemc te Secwepemc Nation, the Squamish Nation, the Coldwater Indian Band and the Upper Nicola Band all oppose.

[2] For the reasons that follow, I will grant the Attorney General of Saskatchewan's motion, but on strict terms.

A. Rule 110: relevant principles

[3] Rule 109 is the main provision in the Rules governing interventions. Rule 110 is a special provision governing interventions by Attorneys General.

[4] Rule 110 "contemplates a special role for attorneys-general": *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 ("*TWN No. 1*") at para. 11; *Copps v. Mikisew Cree First Nation*, 2002 FCA 306, 293 N.R. 182 at para. 8. The "special role" recognizes that "in legal proceedings, Attorneys General represent the Crown and protect and advance the public interest": *TWN No. 1* para. 14; see also *Tsleil-Waututh National v. Canada (Attorney General)*, 2017 FCA 174, 414 D.L.R. (4th) 373 at para. 22 ("*TWN No. 2*"). Thus, Attorneys General have a

"broader right [than others] to …intervene in order to advance the public interest": *TWN No. 1* at para. 15.

[5] Under Rule 110, the Court must first look for "a question of general importance raised in the proceeding". A question of general importance in the proceeding can either be a question raised by the proceeding as a whole or one or more questions raised within the proceeding: *TWN No. 1* at para. 18; *TWN No. 2* at para. 25.

[6] From there, the Court must assess whether there is a "nexus between the issues raised in the proceeding on the one hand and the interests of the Government [of the Province] and the population it serves on the other": *TWN No. 1* at para. 22.

[7] Even where these two elements are satisfied, Attorneys General are not automatically entitled to enter proceedings. Rule 110 must be interpreted and applied in accordance with the objectives set out in Rule 3, namely the securing of "the just, most expeditious and least expensive determination of every proceeding on its merits": *TWN No. 2* at para. 26.

[8] For example, in *TWN No. 2*, the Attorney General of British Columbia moved for leave to appeal. The Attorney General showed that the proceeding involved a question of general importance. The Attorney General also showed a connection between the issues in the proceeding and the province's interests. Even so, the Court had to consider whether the motion should be denied because of the lateness of the Attorney General's motion and the Attorney General's failure to set out exactly what submissions it intended to make.

[9] Even if a motion to intervene is granted, this Court has the power to impose conditions on the intervention under Rule 53. Foremost of these is the requirement that the intervener not add to the evidentiary record or make submissions that, in reality, are unsworn statements of evidence. See *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686.

[10] To perform this methodology, the Court must have a thorough understanding of the issues raised in the proceeding. Only then can the Court be sure that the party seeking to intervene will have something useful to contribute and will not go beyond that useful contribution.

B. Applying the principles to this motion

[11] The consolidated proceeding is limited to the following issues:

> 1. From August 30, 2018 (the date of the decision in *Tsleil-Waututh Nation*) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of *Tsleil-Waututh Nation*, 2018 FCA 153? The answer to this question should include submissions on the standard of review, margin of appreciation or leeway that applies in law.
>
> 2. Do any defences or bars to the application apply?
>
> 3. If the answers to the questions 1 and 2 are negative, should a remedy be granted and, if so, what remedy and on what terms?

(Orders dated September 4, 2019 in files 19-A-36, 19-A-37, 19-A-38, 19-A-40, 19-A-42 and19-A-47; *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 224.)

[12] Significant portions of the law underlying these questions are settled. Two decisions of the Court, based on multiple decisions of the Supreme Court, express the law on the duty to consult: *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 119-127, leave to appeal to SCC refused, 37201 (9 February 2017); *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2018] 3 C.N.L.R. 205 at paras. 173-203, leave to appeal to SCC refused, 38379 (2 May 2019). The panel determining the consolidated proceeding is bound by those decisions. The Court does not need assistance on these questions from the Attorney General of Saskatchewan.

[13] Without in any way constraining the parties or the panel that will hear the consolidated application, and without minimizing the importance of any of the three questions set out in the September 4, 2019 Order, for the purposes of this motion it is helpful to look at some of the questions that might usefully be explored in the area of the standard of review, margin of appreciation or leeway that might be applied by this Court when it answers the first of the three questions.

[14] Given the scope of the Trans Mountain expansion project, many issues, perhaps thousands, are potentially subject to the duty to consult. It may be unrealistic to expect absolutely perfect compliance. This Court has put it this way:

> Compliance with the duty to consult is not measured by a standard of perfection: *Gitxaala Nation* at paras. 182-184; *Tsleil-Waututh Nation* at paras. 226, 508-509 and 762. Some leeway must be afforded because of the inevitability of "omissions, misunderstanding, accidents and mistakes" and "difficult judgment calls" in "numerous, complex and dynamic" issues involving many parties: *Gitxaala Nation* at para. 182.

(*Raincoast* at para. 21.) The open question is just how must leeway must be afforded.

[15] As well, in its Order in Council, the Governor in Council stated that it had considered the issue of consultation and had concluded that Canada fulfilled its duty to consult. This is a decision by an administrative decision-maker. Normally, such decisions are reviewed using the administrative law standard of review set out in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 and associated cases.

[16] The Governor in Council's decision needs to be interpreted. Is the Governor in Council saying that Canada perfectly met the duty to consult or is it saying that, bearing in mind the leeway the law must allow, it thinks that Canada imperfectly but adequately met the duty to consult? Are there other issues relevant to the interpretation of the Governor in Council's decision?

[17] Assuming the *Dunsmuir* framework applies, what is the standard of review to be applied to the decision as interpreted? How deferential, if at all, should the Court be? What factors, if any, might affect the Court's assessment of the level of deference? Is the legislative purpose behind section 54 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 a factor? The

legislative purpose has been discussed on several occasions but most recently in *Raincoast Conservation Foundation v. Canada (Attorney General)*, 2019 FCA 259 at para. 15.

[18] Is the foregoing irrelevant because compliance with the duty to consult, subject to leeway, is mandatory regardless of whether the Governor in Council thinks it has been complied with or not?

[19] Do *Gitxaala Nation*, *Tsleil-Waututh Nation* or other cases shed light on these questions? Were the decisions under review in those cases analogous to the Governor in Council's decision in this case, or did the Governor in Council do something different here?

[20] Are there any other approaches that the Court should follow when answering the questions set out in the September 4, 2019 Order?

[21] The questions set out in the September 4, 2019 Order and related questions, some of which have been posed in these reasons, are of general importance for the purposes of Rule 110. After all, the Attorney General of Alberta has already been permitted to intervene on the basis of these.

[22] But is there a nexus between these questions and the interests of the Attorney General of Saskatchewan and the public it serves?

[23] The Stk'emlupsemc te Secwepemc Nation, the Squamish Nation, the Coldwater Indian Band and the Upper Nicola Band say there is no nexus or an insufficient nexus. They point out that the pipeline in question is entirely outside the borders of Saskatchewan. They note that the law on Canada's constitutional duty to consult is largely settled and that certain arguments about the economic impacts of the project were excluded by the September 4, 2019 Order. They forcefully submit that many of Saskatchewan's proposed submissions would be duplicative or beyond the scope of these proceedings.

[24] To some extent, they are correct. Among other things, the Attorney General of Saskatchewan offers to assist this Court with constitutional principles governing interprovincial works and undertakings and issues relating to the *Canadian Environmental Protection Act* and the *Species at Risk Act*. The Attorney General acknowledges that the consolidated proceedings do not "directly" raise these issues but suggests that this Court could benefit from more "context". The Court agrees that these issues are irrelevant to this consolidated proceeding.

[25] Interveners often advertise that they can offer context or perspective. But context is useful only if it is relevant and useful to the proceeding. Too often, under assurances of "context", interveners stand up and make a Parliamentary speech that does not advance the determination of the case at all: *Atlas Tube Canada ULC v. Canada (National Revenue)*, 2019 FCA 120 at para. 8. In this area, we do not need the "context" the Attorney General offers.

[26] Nevertheless, the Court finds there is a nexus between the questions at issue in the consolidated proceeding and the interests of the Attorney General and the population of Saskatchewan.

[27] The Saskatchewan economy does stand to benefit directly from the approval of the Trans Mountain project. This project is designed to address a serious lack of capacity in the western Canadian pipeline system that has depressed prices in Saskatchewan and forced greater reliance on more expensive shipping methods, such as rail. The answers to the questions in this consolidated proceeding affect the likelihood that the Governor in Council's approval, and future approvals like it, will be upheld or overturned.

[28] The Court anticipates that in this case the Attorney General will advocate for stricter standards of review so that projects, important to Saskatchewan's economy, are more likely to be approved. This, the Attorney General says, would be in its interests. Saskatchewan has a significant petro-chemical sector and has no direct access to overseas international markets. Oil and gas production is Saskatchewan's biggest economic sector, accounting for $9.8 billion in 2018 and 15.5% of the province's gross domestic product. Saskatchewan depends on inter-provincial transportation facilities, such as pipelines, to ensure its products can reach international markets.

[29] Saskatchewan has a constitutional duty to consult with First Nations and other Indigenous groups on similar projects within its own borders. Like the Federal government, it regulates pipelines and is subject to a duty to consult. In fact, in terms of distance, Saskatchewan has more

pipelines within its borders than there are federally regulated pipelines in the whole country. The Court's answers to the questions in the consolidated proceeding could be jurisprudentially significant to it.

[30] The consolidated proceedings also have implications for future interprovincial pipeline projects and energy resource development. If Courts can too readily interfere and quash project approvals, fewer projects may be proposed and those that are proposed may not always be pursued to completion. This would have direct consequences for Saskatchewan.

[31] The Attorney General of Saskatchewan has committed to remaining within the scope of the September 4, 2019 Order: "[t]he AG Saskatchewan will make submissions on the three issues directed by this Court in the Leave Order, relating to the implementation of the duty to consult within that specific context." The Attorney General adds that in previous cases on the duty to consult he has "emphasized the practical nature of the duty to consult process".

[32] The Attorney General of Saskatchewan suggests the level of deference for decisions regarding project approvals should be high. He offers factors that affect the level of deference.

[33] The Attorney General emphasizes that this is the second round of consultations for the same project. He adds that the regulatory process cannot be so lengthy and onerous that project proponents are discouraged from continuing with a project, as has happened once already. He urges that the attenuated and expeditious approval process set out in legislation, discussed in the cases summarized by this Court in *Raincoast Conservation Foundation v. Canada (Attorney*

General), 2019 FCA 259 at para. 15, influence the degree of enforcement of the duty to consult and the intensity of review that reviewing courts should adopt when reviewing project approvals. Finally, he notes that the provinces beneficially own natural resources within their boundaries (see, *e.g.*, the *Constitution Act, 1930*, R.S.C. 1985, App. II, No. 26, Schedule (3): *Canadian-Saskatchewan Natural Resources Transfer Agreement*, para. 1; *Constitution Act, 1867*, s. 92A). This ownership is valuable only if interprovincial transportation of these resources, such as by pipelines, is possible.

[34] The Court does not comment on these factors, or even their relevance, except to say that the parties' discussion and debate concerning them, and perhaps others, will be of assistance to the Court when determining the consolidated applications.

[35] The parties are agreed that if intervention is permitted, the Attorney General of Saskatchewan should enter on the same terms as the Attorney General of Alberta. The Court agrees.

C. Disposition

[36] The motion will be granted. The Attorney General of Saskatchewan will be added to these consolidated proceedings as an intervener. The style of cause will be amended to reflect this fact. The order will provide that the Attorney General of Saskatchewan:

(a) shall take the issues in these consolidated proceedings as they are and shall not add to them, nor shall it add to the evidentiary record; it shall not make submissions on issues specifically rejected in these reasons;

(b) shall not be liable for costs nor be entitled to costs;

(c) shall endeavour not to duplicate the submissions of the parties; and

(d) may file a memorandum of fact and law of no more than 15 pages no later than the time set for the respondents to file their memoranda (see this Court's procedural and scheduling order of September 20, 2019).

There shall be no costs of the motion.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-321-19
STYLE OF CAUSE:	CHIEF RON IGNACE *et al.* v. ATTORNEY GENERAL *et al.*

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	OCTOBER 22, 2019

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