Federal Court of Appeal | Cour d'appel fédérale

Date: 20170829

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 174

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 and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 29, 2017.

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 British Columbia moves under Rule 110 of the *Federal Courts Rules*, SOR/98-106 to intervene in these consolidated proceedings.

A. Background

[2] In these 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.

[3] 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.

[4] 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.

[5] By Order dated March 9, 2017, after submissions were received, this Court consolidated 16 separate applications involving 31 parties and received one of the largest evidentiary records this Court has ever seen. The March 9, 2017 Order streamlined the process for getting the applications ready for hearing and set an expedited schedule.

[6] During these proceedings, tens of motions have been brought. All were prosecuted under attenuated timelines.

[7] The public interest in expediting this matter is strong. A couple of preambles in the March 9, 2017 Order put it this way:

> [W]ithout expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;

> [T]herefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

[8] The parties are to be commended for their conduct in these proceedings. They have worked hard to ensure the fastest possible hearing of this matter. They have complied fully with the letter and the spirit of the March 9, 2017 Order and the forest of orders and directions the Court has issued since that time.

B. Earlier motions to intervene

[9] The March 9, 2017 Order allowed for motions to intervene to be brought within thirty-five days of the Order, namely by April 13, 2017. Two parties moved to intervene. One was successful: the Attorney General of Alberta (hereafter "Alberta"). See *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102.

[10] The Attorney General of British Columbia did not move to intervene.

C. Later circumstances in British Columbia

[11] On April 11, 2017, just two days before the expiry of the time to intervene in these proceedings, writs of election were issued in British Columbia.

[12] The election was held on May 9, 2017. No one party achieved a majority of seats. The incumbent party won a plurality of seats and formed the government. At the end of June, it lost a

vote of confidence in the Legislature. Soon afterward, the Lieutenant Governor invited the leading opposition party to form the government. It did so and assumed office on July 18, 2017.

D. British Columbia's motion to intervene

[13] Five weeks later, on August 22, 2017, the Attorney General of British Columbia (hereafter "British Columbia") brought this motion. By direction, this Court required representations on the motion to be filed on an expedited basis. The last representations were filed two business days immediately preceding today.

[14] A number of aspects of British Columbia's motion are unsatisfactory.

[15] For one thing, it took five weeks for British Columbia to bring this motion, a very long time in a closely-managed, expedited proceeding such as this. The seven-paragraph affidavit offered in support of the motion does not offer a single word of explanation for the five-week delay.

[16] The respondents, Trans Mountain and Canada, and the intervener, Alberta, found it difficult to respond to British Columbia's motion because it said little on the scope of its intervention. British Columbia's written representations contain only four very general paragraphs regarding why it meets the test for intervention under Rule 110. None of them address the issue of the scope of the intervention.

[17] In this Court, an intervener—even an Attorney General intervening under Rule 110—is not given an open microphone to say anything it wishes. Instead, in order to ensure that new issues and matters requiring evidence are not raised, this Court defines the scope of the intervention. It is true that Attorneys General intervening under Rule 110 make submissions based on the public interest in their respective jurisdictions. In appropriate cases, this can be broad. But this Court must still take care to ensure that procedural and substantive unfairness is not caused to the parties directly affected by the proceedings: the existing applicants and respondents.

[18] In its representations in chief, British Columbia submits that the Project has a "disproportionate impact…on British Columbians" including "impact[s] on British Columbia's land and coast" and effects upon the "health and welfare of British Columbians," the environment and "provincial infrastructure." It adds that there are "constitutional limitations on British Columbia's ability to regulate the Project," British Columbia has a "strong interest in the regulatory regime that governs interprovincial pipelines," and these proceedings "raise profound questions about cooperative federalism in Canada." British Columbia also notes that it raised certain concerns in this matter before the National Energy Board.

[19] In its representations in reply, British Columbia adds that marine spill risks were unreasonably assessed, resulting in risk to British Columbians and a breach of the duty to accommodate Indigenous peoples and First Nations.

[20] Missing overall is any mention of the precise submissions British Columbia intends to make as an intervener in these proceedings. In these circumstances, all that this Court can do is assume that British Columbia intends to speak to the concerns described above and no other concerns.

E. The criteria for intervention

[21] The criteria for intervention under Rule 110 are set out in this Court's earlier decision in *Tsleil-Waututh Nation*, above.

[22] Motions to intervene under Rule 110 are different from motions to intervene under Rule 109. As explained in *Tsleil-Waututh Nation*, Rule 110 is a special rule allowing the Attorneys General of Canada and the provinces to move to intervene. Rule 110 recognizes that Attorneys General who represent broader interests—in many cases the interests of millions of members of the public—are responsible on behalf of the Crown for advancing and protecting the public interest.

[23] In contrast, Rule 109 requires others moving to intervene, such as special interest groups, to show how their participation in the proceeding as an intervener "will assist in the determination of a factual or legal issue related to the proceeding." As *Tsleil-Waututh Nation*, above explains, Attorneys General are under no such requirement.

[24] Under the terms of Rule 110, Attorneys General are not automatically allowed to intervene.

[25] First, 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 v. Mikisew Cree First Nation*, 2002 FCA 306, 293 N.R. 182 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. The "question of general importance" requirement can also be met where "serious questions are raised in proceedings that themselves are of general importance": *Tsleil-Waututh Nation* at para. 18.

[26] Second, Rule 110 does not stand alone in the *Federal Courts Rules*. In making an intervention order under Rule 110, this Court can impose conditions: Rule 53. More broadly, 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." In some special circumstances, those considerations can empower the Court to dismiss an Attorney General's motion to intervene, even where the "question of general importance" requirement is met.

F. Should British Columbia be allowed to intervene?

[27] In my view, British Columbia has met the "question of general importance" requirement. This Court so found in the context of Alberta's motion to intervene in these proceedings (*Tsleil-Waututh Nation*, above at paras. 19 and 21-22):

> 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.
>
> …
>
> 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.
>
> 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.

[28] Equally, there is a strong nexus between the issues raised in this proceeding on the one hand and the interests of the Government of British Columbia and the population it serves on the other.

[29] Both the respondent, Trans Mountain, and the intervener, Alberta, submit that this Court should exercise its discretion against allowing British Columbia to intervene. Both invoke British Columbia's delay in moving to intervene.

[30] Trans Mountain goes further and opposes on the basis of the unsatisfactory features of British Columbia's motion, some of which I have described above. It raises the specter of British Columbia advancing new, complex issues on the eve of the hearing, resulting in substantive and procedural unfairness.

[31] I share many of these concerns. The public interest in this hearing going ahead as scheduled on October 2-13, 2017 outweighs any public interest served by British Columbia's intervention. British Columbia could have moved to intervene far sooner. The five-week delay in bringing this motion—in the end a motion offering just a handful of meaningful paragraphs supported by general documents already known to the Court—is unexplained. Finally, British Columbia says that it considers its participation in the proceedings important, yet after five weeks it cannot yet say with much specificity how it intends to participate.

[32] British Columbia does not appear to understand the basic ground rules of the complex proceeding it is seeking to enter. Its representations in chief show no understanding of the March 9, 2017 Order and the strong public interest in the hearing going ahead as scheduled; rather than seeking a variation of the March 9 Order to allow its intervention motion to be considered, it sought an extension of time under the Rules to intervene but the Rules do not set a time period for interventions. It was unaware of other important orders made in the proceedings relating to the manner of service and the style of cause. To enter complex proceedings—especially at a very late date—a party must intimately understand the proceedings and to the extent possible work within existing strictures, doing its best to minimize any prejudice. Here, this did not happen.

[33] Although this motion is a close call, this Court has decided to allow British Columbia to intervene on terms. The style of cause is hereby amended to reflect this. The style of cause is now as set out at the beginning of this document.

[34] There are certain circumstances that prompt this Court to grant British Columbia's motion to intervene.

[35] Two provinces are most directly affected by these proceedings, Alberta and British Columbia. The public interest of Alberta has been given a voice in these proceedings. The public interest of British Columbia deserves a voice too.

[36] Alberta appears to be mainly on the side of the respondents. British Columbia appears to be mainly on the side of the applicants. The former is in the proceedings; the latter should also be in the proceedings. One factor in intervention proceedings is the concept of "equality of arms" and fair treatment to both sides: *Gitxaala Nation v. Canada*, 2015 FCA 73 at para. 23; *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 12.

[37] British Columbia did participate in the administrative proceedings before the National Energy Board. It advanced a position there. It should be free to advance a position in the judicial review of those administrative proceedings.

[38] Trans Mountain characterizes British Columbia as reversing its position on the issue of intervention. Even accepting that characterization, the intervening election, the confidence vote and the resulting change of government are justifying circumstances.

[39] Trans Mountain submits that British Columbia is estopped or foreclosed from advancing certain arguments. I do not accept this, except to the extent discussed below.

[40] The concerns that Trans Mountain and Alberta raise are serious. But they can be regulated by conditions imposed on the granting of intervention status.

[41] While British Columbia may have been blasé in approaching this motion to intervene, it must be vigilant in complying with these conditions: if any are breached, the panel hearing the appeal may revoke British Columbia's status as an intervener.

G. The intervention order and conditions attached to it

[42] British Columbia may file a memorandum of fact and law of no more than fifteen pages, the same page length given to Alberta. It may also make oral submissions at the hearing for a duration to be set by the hearing panel.

[43] British Columbia will have to file its memorandum of fact and law on a highly expedited basis. This timing is dictated by present circumstances.

[44] Under the March 9, 2017 Order as amended, the respondents and Alberta file their memoranda of fact and law this Friday, September 1, 2017. Mindful of the public importance of the hearing in this matter proceeding as scheduled, almost all of the existing parties—both applicants and respondents—insist that this filing date be maintained. I agree. The deadline of September 1, 2017 for the respondents and Alberta to file their memoranda is confirmed.

[45] As already noted, British Columbia appears to be adverse in interest to the respondents and Alberta and supportive of some of the applicants' positions. Under our Rules concerning the filing of memoranda, absent special circumstances, applicants and those supporting them do not have a right of reply.

[46] Accordingly, the latest that British Columbia can file its memorandum of fact and law is Friday, September 1, 2017. In its reply representations on this motion, British Columbia accepts this as the deadline. Therefore, September 1, 2017 shall be the deadline for British Columbia's memorandum.

[47] Two respondents, Trans Mountain and Canada, have asked for an opportunity to respond to British Columbia by way of a reply memorandum. Fairness requires this. Therefore, these respondents shall be permitted to file memoranda of fact and law replying to British Columbia, restricted to the matters raised by British Columbia in its memorandum. The reply memoranda shall be limited to ten pages.

[48] Given the closeness of the hearing date, the deadline for the filing of the respondents' reply memoranda will be September 8, 2017.

[49] Alberta also asked to file a reply memorandum. But it only has the status as an intervener. Thus, I exercise my discretion against allowing it to file a reply memorandum. If necessary, it can reply to British Columbia as part of its oral submissions at the hearing. This places Alberta and British Columbia in the same situation: neither will be able to respond in writing to the other.

[50] Many of the applicants ask for an opportunity to file a second memorandum replying to British Columbia's memorandum. I am not persuaded at this time that this will be necessary. British Columbia's memorandum, expected to be supportive of some of the applicants' positions, will be brief and any necessary reply can be made orally at the hearing.

[51] The applicants also request a further half day of hearing time on the basis that British Columbia's time for oral submissions will come out of the applicants' overall time.

[52] I deny the request. Here I note that there is equal treatment of both sides: Alberta's time for oral submissions will come out of the respondents' overall time and British Columbia's time for oral submissions will come out of the applicants' overall time. While the interveners are cutting into the parties' time for oral submissions, still much time remains. As is the case for Alberta, the duration of British Columbia's oral submissions shall be set by the chair of the panel hearing this matter. I expect that the duration of argument devoted to each intervener will be relatively small, probably in the ten-to-thirty minute range. Further, the overall time set for

argument—seven days—is longer than any other modern proceeding in this Court. Therefore, I am not persuaded that the overall time for argument should be extended.

[53] I now turn to the permissible scope of British Columbia's intervention.

[54] In this Court, an intervener is not an applicant: *Tsleil-Waututh Nation*, above. An intervener cannot introduce new issues or claim relief that an applicant has not sought. Instead, an intervener is limited to addressing the issues already raised in the proceedings, *i.e.*, within the scope of the notices of application. As well, an intervener cannot introduce new evidence. See generally *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151, [2016] 1 F.C.R. 686.

[55] In this Court, interveners are guests at a table already set with the food already out on the table. Interveners can comment from their perspective on what they see, smell and taste. They cannot otherwise add food to the table in any way.

[56] To allow them to do more is to alter the proceedings that those directly affected—the applicants and the respondents—have cast and litigated under for months, with every potential for procedural and substantive unfairness.

[57] Against this, British Columbia cites certain decisions of the Supreme Court of Canada that take a looser approach to intervention. These decisions are distinguishable. They concern the intervention practice of that Court as a final general court of appeal acting under its own

intervention rule. They do not concern the intervention practice of this Court acting as a first-instance reviewing court operating under its own intervention rule.

[58] These principles affect the permissible scope of British Columbia's intervention. Some of the concerns British Columbia raises, described at para. 18 above, are new issues in these proceedings. For example, the "constitutional limitations on British Columbia's ability to regulate the Project" are not in issue, nor is the "regulatory regime that governs interprovincial pipelines" except to the extent that the meaning of certain regulatory provisions has been put in issue by the parties. Further, "profound questions about cooperative federalism in Canada" have not been raised. These issues are off the table.

[59] They are also irrelevant to the issues this Court must decide. Before this Court are judicial reviews of decisions of the National Energy Board and the Governor in Council. The question is whether the decisions should stand in light of the administrative law principles raised by the parties and the principles associated with the duty to consult and accommodate Indigenous peoples and First Nations—nothing more. I am not persuaded that cooperative federalism or constitutional limitations on British Columbia's ability to regulate the Project have anything to do with these principles or how they are applied.

[60] This Court is a court of law that grapples with legal arguments; larger political issues that do not bear on the legal issues are irrelevant and distracting, and, thus, inadmissible. See *Ishaq*, above at paras. 26-27; see also D. Stratas, "The Canadian Law of Judicial Review: A Plea for

Doctrinal Coherence and Consistency" (2016), 42 Queen's L.J. 17 at 59-61 and authorities cited therein.

[61] British Columbia shall not advance new issues.

[62] British Columbia shall also take care not to advance new arguments that in effect are new issues. For example, submissions that extend the scope of the duty to consult and accommodate beyond those advanced by the applicants are not permissible.

[63] British Columbia shall be limited to submissions commenting on the submissions advanced by other parties from its perspective as guardian of the public interest of British Columbia and as a government with responsibilities to discharge under provincial legislation. This is to be done with one goal front of mind: to assist the Court in deciding whether the administrative decisions before it should be quashed on account of administrative law and duty to consult principles.

[64] For example, British Columbia may make submissions on the issue it raised in its reply representations on this motion: namely, whether marine spill risks were unreasonably assessed, resulting in risk to British Columbians and a breach of the duty to accommodate Indigenous peoples and First Nations. The applicants have placed this issue on the table.

[65] British Columbia's submissions shall not unnecessarily duplicate the submissions of other parties.

[66] British Columbia may also make submissions concerning its involvement in the administrative proceedings below and whether the concerns it advanced, similar to those raised by the applicants, have been addressed.

[67] British Columbia shall be limited to the evidentiary record. For example, in commenting on what it calls "disproportionate impact[s]…on British Columbians," including "impact[s] on British Columbia's land and coast" and effects upon the "health and welfare of British Columbians," the environment, and "provincial infrastructure," British Columbia shall be restricted to the evidence in the Electronic Record in these proceedings.

[68] Trans Mountain submits that as a condition of intervening, British Columbia should be liable for its solicitor and client costs occasioned by the need to file a memorandum in reply to British Columbia. Trans Mountain is the only party asking for costs.

[69] Trans Mountain is entitled to costs owing to British Columbia's lateness in moving to intervene. Had British Columbia moved sooner, it would have been required to file its memorandum at the same time as the applicants. In that case, Trans Mountain would have been able to respond to British Columbia in its responding memorandum. Trans Mountain must now prepare a second memorandum. In my discretion, I award it $7,500 in costs from British Columbia in any event of the cause.

[70] Except as provided in these reasons, the schedule set by this Court remains in place. In particular, the hearing is set for a duration of seven days during the period of October 2-13, 2017.

[71] Nothing in these reasons should be taken to affect the hearing panel's discretion over the conduct of the hearing.

[72] I thank all parties for their prompt and helpful submissions. An order shall issue in accordance with these reasons.

"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.***

MOTIONS DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	AUGUST 29, 2017

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