Federal Court of Appeal  Cour d'appel fédérale

Date: 20180216

Docket: A-257-17

Citation: 2018 FCA 41

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
STRATAS J.A.

BETWEEN:

YAHAAN, also known as DONALD WESLEY on his own behalf and on behalf of all the members of the GITWILGYOOTS TRIBE

Appellant

and

HER MAJESTY THE QUEEN, ATTORNEY GENERAL OF CANADA, MINISTER OF ENVIRONMENT AND CLIMATE CHANGE, CANADIAN ENVIRONMENTAL ASSESSMENT AGENCY, PACIFIC NORTHWEST LNG LIMITED PARTNERSHIP, LAX KW'ALAAMS INDIAN BAND represented by its mayor, JOHN HELIN, and JOHN HELIN on his own behalf and on behalf of all other members of the NINE TRIBES OF LAX KW'ALAAMS, IYOO'NS, also known as CARL SAMPSON ST., on his own behalf and on behalf of all the members of the GITWILGYOOTS TRIBE, and METLAKATLA BAND

Respondents

Dealt with in writing without appearance of parties.

Judgment delivered at Ottawa, Ontario, on February 16, 2018.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: GAUTHIER J.A.
STRATAS J.A.

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Respondents

REASONS FOR JUDGMENT

PELLETIER J.A.

[1] The Court has before it two motions, one seeking the dismissal of an appeal from a judgment of the Federal Court reported as *Wesley v. Canada*, 2017 FC-725, [2017] F.C.J. No

839 (Reasons), the other seeking a stay of the appeal. The Federal Court dismissed an application for judicial review of the decisions permitting the Pacific NorthWest LNG [liquid natural gas] Project (the Project) to proceed on the basis that the person who brought the application in a representative capacity, Yahaan (also known as Donald Wesley) did not meet the requirements of Rule 114(1) of the *Federal Courts Rules*, SOR/98-106 (the *Rules*)that sets out the conditions to be met by a person seeking to act in a representative capacity. Yahaan has appealed the Federal Court's order.

[2] These motions arise because Pacific NorthWest LNG Limited Partnership (PNW), the proponent, announced that it would not proceed with the Project and wound up its Project operations. In light of this development, the Lax Kw'Alaams Indian Band, represented by its mayor John Helin, and John Helin, on his own behalf and on behalf of all other members of the nine tribes of the Lax Kw'Alaams, have moved to have the appeal dismissed for mootness since there is no longer a live dispute between the parties, given that the Project is at an end. The Attorney General of Canada on her own behalf and on behalf of Her Majesty the Queen, the Minister of the Environment and Climate Change and the Canadian Environmental Assessment Agency (the Federal Respondents), has moved for an order staying the appeal on the basis that since British Columbia's environmental approval does not expire until November 2019, there is a slight possibility that the Project could be revived before that date. In the Attorney General's view, this militates for a stay rather than a dismissal of the appeal until such time as the British Columbia environmental approval expires, at which time a decision can be made as to whether the Court should exercise its discretion to proceed with an appeal that is moot.

[3] These reasons deal with both motions although separate orders will be issued with respect to each of the motions.

[4] Yahaan opposes both motions on the basis that, because the environmental approvals remain in force, the Project could be revived which means that there continues to be a live issue between the parties. Furthermore, even if the Court is of the view that the Project will not proceed, Yahaan argues that the application should proceed because the subject matter of the application is the Gitwilgyoot's right to be consulted as opposed to the decisions authorizing the Project. In any event, the appeal should proceed because the Federal Court's decision, unless set aside, will remain as authority for a principle which he says will adversely affect the rights of Indigenous groups who claim an independent right of consultation. Finally, Yahaan argues that the Court should exercise its discretion to hear the appeal even if it finds that it is moot.

[5] For the reasons which follow, the motion seeking the dismissal of the appeal for mootness will be allowed and the appeal will be dismissed. The motion seeking a stay will be dismissed.

I. FACTS

[6] In 2013, PNW commenced proceedings under the *Canadian Environmental Assessment Act, 2012,* S.C. 2012, c. 19, s. 52 seeking approval of its proposed natural gas liquefaction and export facility (the Project) which was to be located in the District of Port Edward on lands and waters administered by the Prince Rupert Port Authority. As an environmental assessment was also required pursuant to British Columbia's *Environmental Assessment Act,* S.B.C. 2002, c. 43,

the Canadian Environmental Agency (the Agency) and the B.C. Environmental Assessment Office (the B.C. Office) cooperated in their respective environmental assessments until the issuance of the B.C. Environmental Assessment Certificate on November 25, 2014. Thereafter, the Agency continued with its assessment. By September 27, 2016, the federal approval process was completed as follows:

- the Agency's environmental assessment report was completed and forwarded to the Minister of the Environment and Climate Change (the Minister);
- the Minister determined that the Project was likely to cause significant adverse environmental effects (the Effects) and referred the question of whether the Effects were justified in the circumstances to the Governor in Council;
- the Governor in Council decided that the Effects were justified in the circumstances and established the conditions with which the Proponent must comply in order to proceed (the Decision Statement).

[7] After the issuance of the Decision Statement, further design work was undertaken with a view to reducing costs and minimizing certain environmental concerns in relations to Flora Bank, an issue of concern to Indigenous groups and the Agency. This work was undertaken against the backdrop of a decline in gas prices. As late as June 2017, the Agency wrote to PNW to propose a joint review process for consideration of the potential design changes to the Project.

[8] In the meantime, on October 27, 2016, Yahaan commenced an application for judicial review of the Federal Respondents'decisions authorizing the Project. The relief sought in that application included an order quashing: a) the environmental assessment; b) the decision of the

Minister of the Environment and Climate Change referring the matter to the Governor in Council, and; c) the Order in Council concluding that the Effects were justified in the circumstances.

[9] Yahaan commenced the application for judicial review in a representative capacity, pursuant to Rule 114 of the *Rules,* on his own behalf and on behalf of all members of the Gitwilgyoots Tribe, which is one of nine tribes that make up the Coast Tsimshian Nation. The notice of application alleges that the Crown failed in its duty of consultation prior to approving the Project because it did not consult Yahaan on behalf of the Gitwilgyoots and that the Gitwilgyoots have an independent right of consultation. The Lax Kw'alaams Band and Iyoo'ns (also known as Carl Sampson Sr) on behalf of the Gitwilgyoots Tribe and the Metlakatla Band were added as respondents at their request. These respondents challenge Yahaan's claim to represent the Gitwilgyoots as well as his claim that the Gitwilgyoots have a right to be independently consulted outside the usual structure of consultations between the Federal Crown with the Tsimshian Nation.

[10] The events giving rise to the motions before the Court began on July 25, 2017, when PNW announced that it would not be proceeding with the Project. On the same day, PNW wrote to the B.C. Oil and Gas Commission and surrendered its liquid natural gas export facility permit. On September 26, 2017, PNW informed the B.C. Office that the Project would not be proceeding and that it intended to let its Assessment Certificate lapse upon its expiry on November 25, 2019. On July 27 and 28, 2017, PNW gave notice to the Prince Rupert Port Authority that it was terminating its Project Development Agreement with the latter. On July 28, 2017, PNW, through

its counsel, advised the Agency that the Project was terminated and that PNW was not transferring ownership, care control or management of the Project, in whole or in part, to any party. At the same time, PNW advised that it would release all of its employees on September 29, 2017.

[11] On September 27, 2017, as part of an agreement to settle a related application for judicial review brought by a different First Nation, PNW agreed that it would not proceed with the Project and that it would not transfer, sell or assign any of its rights under or interest in the Minister of the Environment's Decision Statement or in any other authority which was referred to at page 2 of the Decision Statement.

[12] Yahaan does not dispute this sequence of events but takes the position that because both the B.C. Environmental Assessment Certificate and the Decision Statement remain effective, there is still a live controversy between the parties.

II. THE DECISION UNDER APPEAL

[13] The Federal Court had before it two motions seeking the same relief. PNW and Kw'Alaams both moved to have Yahaan's application dismissed because, while he had claimed to have commenced it in a representative capacity, he did not satisfy the conditions set out in Rule 114(1) of the *Rules*.

[14] Before addressing that issue, the Federal Court Judge set out some of the context of the issue before him, context which is helpful in understanding the background of this dispute:

> At the outset, it is important to note that these proceedings are an unfortunate consequence of an internal governance dispute among certain groups within the larger collective of the Coast Tsimshian Nation. It is apparent that the current leadership of the two interested Bands, Lax Kw'Alaams and Metlakatla, and a clear majority of Coast Tsimshian people support the Project on certain agreed conditions. Yahaan and his supporters, on the other hand, are opposed to the Project on any basis and have, over the objections of the Bands, occupied Lelu Island.
>
> […]
>
> Lax Kw'Alaams and Metlakatla maintain […] with considerable evidentiary support, that Yahaan, among others, was actively engaged in an internal dialogue with the Band leaders about the content of their ongoing consultation with the Crown. Yahaan only broke ranks when the Project began to be viewed more favourably within the Coast Tsimshian Nation.
>
> Reasons at paras 6 and 8

[15] The Court declined the invitation to confirm the exclusive right of the Lax Kw'Alaams and the Metlakatlka to consult with the Crown on behalf of the Coast Tsimshian people because it found that the record before it was wholly inadequate for that purpose and, in places, contradictory: Reasons at para 9. Similarly, the Court declined to address the controversy surrounding Yahaan's position as sm'oogit (or Head Chief) of the Gitwilgyoots. His position is contested by Iyoo'ns, a respondent in these proceedings. The Court was of the view that this question was one which should be resolved internally by the Gitwilgyoots according to their customs and, in any event, it was doubtful whether the Court had jurisdiction. As a result, the only question before the Federal Court was whether Yahaan was entitled to bring an application for judicial review in a representative capacity on behalf of the Gitwilgyoots.

[16] The Court began by reproducing Rule 114, the material parts of which appear below:

114 (1) Despite rule 302, a proceeding, other than a proceeding	114 (1) Malgré la règle 302, une instance — autre qu'une instance

referred to in section 27 or 28 of the Act, may be brought by or against a person acting as a representative on behalf of one or more other persons on the condition that	visée aux articles 27 ou 28 de la Loi — peut être introduite par ou contre une personne agissant à titre de représentant d'une ou plusieurs autres personnes, si les conditions suivantes sont réunies :
[…]	[…]
(b) the representative is authorized to act on behalf of the represented persons;	b) le représentant est autorisé à agir au nom des personnes représentées;
(c) the representative can fairly and adequately represent the interests of the represented persons; and […]	c) il peut représenter leurs intérêts de façon équitable et adéquate; […]
184 (1) All allegations of fact in a pleading that are not admitted are deemed to be denied.	184 (1) Les allégations de fait contenues dans un acte de procédure qui ne sont pas admises sont réputées être niées.
(2) Unless denied by an adverse party, it is not necessary that a party prove	(2) À moins qu'une partie adverse ne les nie, une partie n'est pas tenue de prouver les allégations suivantes :
(a) its right to claim in a representative capacity; or […]	a) son droit d'agir à titre de représentant; […]

[17] The Court relied on Rule 184(2) reproduced above to conclude that once Iyoo'ns put Yahaan's claim to act in a representative capacity in issue, the latter had the burden of establishing that the conditions of Rule 144(1) were met. The Court then held that, in the face of Iyoo'ns' challenge to Yahaan's leadership claim, it was not satisfied that Yahaan was the sm'oogit of the Gitwilgyoots. This was not to say that Yahaan was not the sm'oogit but only that he had failed to prove it. The Court's view was that until the question of the Gitwilgyoots

leadership was resolved, neither Yahaan nor Iyoo'ns was an appropriate person to act in a representative capacity.

[18] The Court also found that there was an absence of evidence that Yahaan had been authorized by the Gitwilgyoots to bring the notice of application on their behalf, a requirement found at Rule 114(1)(*b*). The Court noted that not only was there no evidence of community support but there was evidence which suggested that Yahaan's position was opposed by a substantial number of Gitwilgyoots members. The Court quoted from Yahaan's cross-examination to show that Yahaan acted unilaterally and without consulting Gitwilgyoots members. The Court found that Yahaan was in a clear conflict with the majority of the members of the Lax Kw'Alaams and with many members of the Gitwilgyoots who support the Project. His failure to consult so as to ascertain the level of support among the Gitwilgyoots for his position disqualified him, in the Court's view, from purporting to act on their behalf. The Court went on to find that Yahaan had not explained how he could meet the requirement of Rule 114(1)(*c*) to fairly and adequately represent the interests of those community members who opposed his position and with whom he had not consulted.

[19] Finally, the Court found that Yahaan had not demonstrated that he had the capacity to carry the judicial review proceedings forward or to engage in any meaningful consultation with the Crown in the event that his application succeeded.

[20] In the result, the Court allowed both motions and dismissed the underlying notice of application.

III. STATEMENT OF ISSUES:

[21] The relief sought in the notice of appeal is the dismissal of the respondents' motions seeking to have the notice of application struck and the reinstatement of the notice of application. The issue of mootness arises in relation to the striking of the notice of application that, in turn, arises as a result of the termination of the Project. The question is not whether the circumstances within the Gitwilgyoots tribe have changed so as to render the question of Yahaan's standing moot; instead, the argument is that Yahaan's status makes no difference because, in any case, there is no longer a live issue with respect to the Project.

[22] With that in mind, the issues in these motions are:

1- Is the notice of application seeking to set aside the decisions authorizing the Project moot?
2- If it is, should the Court exercise its discretion to hear the appeal notwithstanding its mootness?
3- If the notice of application is not moot, should it be stayed?

IV. ANALYSIS

A. *Is the notice of application seeking to set aside various approvals for the Project moot?*

[23] The evidence that the Project is at an end is compelling. It is not necessary to repeat here all the steps taken by PNW pursuant to its stated intention to terminate the Project. There is no dispute that those steps have been taken. I have no difficulty finding, on a balance of probability, that PNW has terminated the Project. Furthermore, PNW's agreement with another litigant in related proceedings that it will not proceed with the Project and that it will not transfer, sell or

assign any of its rights under or interest in the Minister of the Environment's Decision Statement or in any other authority referred to in the Decision Statement is credible evidence of PNW's intention to permanently terminate the Project.

[24] The only fact put forward to suggest that the Project is not effectively at an end is the fact that the B.C. Environmental Assessment Certificate does not expire until November 25, 2019. One might also point to the fact that the federal approvals (the Order in Council and the Decision Statement) have no expiry date. As a result, it is conceivable that another entity seek to take advantage of those approvals and the Project.

[25] No one has shown that a party proposing to revive the Project could do so by assuming the benefit of the various authorizations granted to PNW and could do so without the participation of PNW. Furthermore, some of the approvals obtained by PNW from other entities, such as the B.C. Oil and Gas Commission and Prince Rupert Port Authority, have been surrendered or terminated.

[26] In short, the argument that the Project could be revived because some authorizations remain in effect is speculative. This Court has held that speculative possibilities are insufficient to avoid a finding of mootness: *Aventis Pharma Inc. v. Apotex* Inc., 2006 FCA 328 at para. 18, 354 N.R. 316; *N.O. v. Canada (Minister of Citizenship and Immigration)*, 2016 FCA 214 at para. 4, [2016] F.C.J. No. 963 (QL); *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 358 at para. 4, 65 Imm. L.R. (3d) 155.

[27] In my view, the notice of application seeking to set aside the Project approvals is now moot.

B. *Should the Court exercise its discretion to hear the appeal notwithstanding the mootness of the application for judicial review?*

[28] Yahaan argues that even if the Project is a dead letter, there are still live issues between the parties, notably the right of the Gitwilgyoots to be separately consulted by the Crown rather than under the aegis of the Lax Kw'Alaams and the Metlakatla as has apparently been the case in the past. The Federal Court judge declined the invitation to address those issues because the material before him was deficient. Allowing the application for judicial review to proceed on that issue in the absence of a live controversy would amount to a reference on the internal management of the Coast Tsimshian Nation. This not a role that this Court is prepared to assume even if it has the jurisdiction to do so, a question which is not free from doubt.

[29] Yahann argues that the Court should hear this appeal because the Federal Court's decision will stand as a precedent which will have consequences for the future rights of the parties amongst themselves and vis-à-vis the Crown. This argument has no merit. As the detailed review of the Federal Court's decision which I undertook earlier in these reasons shows, the Federal Court dealt only with the question of whether Yahaan was entitled to bring his notice of application in a representative capacity. The Court made no findings with respect to the right of the various parties to be consulted by the Crown. As a result, there is no need for the Court to disturb the authority of the Federal Court's decision.

[30] Yahaan raises a related question which is whether these questions should be decided on a written record rather than after a hearing by a panel of the Court. Yahaan relies on the decision of this Court in *Amgen Inc. v. Apotex Inc.*, 2016 FCA 196, 487 N.R. 202 (*Amgen*) as authority for the proposition that motions for dismissal of an appeal should be left to the panel hearing the appeal if reasonable minds could differ on the outcome of the motion.

[31] In my view, reasonable minds would agree with the conclusion that Yahaan's application for judicial review is now moot. There is no factual dispute as to PNW's termination of the Project and the steps which it took to give effect to that termination. The possibility of the Project being revived is, at best, speculative. Given that those points are settled, all that remains is the decision as to whether or not to exercise the Court's discretion to hear a moot appeal.

[32] The factors to be considered in deciding whether to hear a matter in spite of the fact that it is moot were discussed in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, 57 D.L.R. (4th) 231. These factors include the dangers of deciding a question where there is no real adversarial debate, the judicial economy achieved by having courts decide only those cases which need to be decided, and the Court's obligation not to intrude upon the legislature's role. The court's role is adjudicative not legislative; it decides live disputes between contending parties who are before the Court.

[33] While there might be a real adversarial debate between Yahaan and the Lax Kw'Alaans and the Metlakatla as to their mutual rights and obligations in consultation with the Crown, the duty of consultation is fact specific: *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010

SCC 43 at para. 36, [2010] 2 S.C.R. 650; *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 173, 485 N.R. 258. In this case, the factual matrix underlying the claimed duty of consultation has shifted so that any adversarial debate would amount to a reference on the respective rights and obligations of the Kw'Alaams and the Metlakatla Band. This is not the role of this Court.

[34] As for judicial economy, this is not a case which is recurring, but of brief duration. Environmental cases in which the adequacy of consultation with Canada's First Nations has arisen have shown themselves to be anything but brief. If the question of the respective roles of the protagonists in this case vis à vis the Crown should arise again, there will be time to deal with that issue then.

[35] Finally, if this Court were to venture into a reference on the respective rights and obligations of the Gitwilgyoots, the Lax Kw'Alaams and the Metlakalta in the abstract and not for the purpose of deciding how those rights and obligations affected the resolution of a particular dispute, it would be straying into the legislature's area.

[36] For all of these reasons, I would therefore exercise my discretion against hearing this appeal. I would allow the motion for dismissal of the appeal on the ground that it is moot and I would dismiss the appeal.

[37] As for the motion to stay the hearing of the appeal, I believe that the interests of justice are best served by dealing with this matter now rather than leaving them in limbo for a period of

time only to have the parties bring a motion to dismiss again at a later date. As a result, the motion for a stay of proceedings is dismissed, by way of separate order.

[38] Given that this decision will save all the parties the costs of perfecting and arguing the appeal, each of them should bear their own costs of these motions. The costs of the appeal will follow the event.

V. CONCLUSION

[39] The motion brought by Lax Kw'Alaams Indian Band represented by its Mayor John Helin and John Helin on his own behalf and on behalf of all other members of the nine tribes of the Lax Kw'Alaams for an order dismissing the appeal will be allowed and the appeal will be dismissed with costs.

"J.D. Denis Pelletier"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-257-17
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MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	GAUTHIER J.A. STRATAS J.A.
DATED	FEBRUARY 16, 2018

WRITTEN REPRESENTATIONS BY:

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