Federal Court of Appeal | Cour d'appel fédérale

Date: 20180531

**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-74-17; A-75-17;
A-76-17; A-77-17; A-84-17; A-86-17**

Citation: 2018 FCA 104

CORAM: **DAWSON J.A.**
DE MONTIGNY J.A.
WOODS 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, 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 May 31, 2018.

REASONS FOR ORDER BY: THE COURT

Federal Court of Appeal | Cour d'appel fédérale

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Applicants

and

**ATTORNEY GENERAL OF CANADA,
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Respondents

and

**ATTORNEY GENERAL OF ALBERTA and
ATTORNEY GENERAL OF BRITISH
COLUMBIA**

Interveners

REASONS FOR ORDER

THE COURT

[1] Tsleil-Waututh Nation moves for an order:

i. reopening the evidentiary record to include as fresh evidence 15 documents that Tsleil-Waututh has obtained in redacted form from the National Observer; and,

ii. requiring Canada, pursuant to Rule 41, to produce unredacted copies of the 15 documents and to produce an e-mail and other documents listed in Schedule "A" to Tsleil-Waututh's motion.

[2] Tsleil-Waututh asserts that the documents establish that Canada did not consult honourably in connection with the Trans Mountain Expansion Project (Project). Specifically, the documents are said to establish that:

i. Canada's representatives were not mandated to consult. Instead, they were given a truncated mandate, limited to listening to, and recording, the concerns expressed

by Indigenous groups for transmission to the Cabinet in the Crown Consultation and Accommodation Report.

ii. Canada participated in the consultation process with an impermissibly "closed mind" or a "mind made up".

[3] Tsleil-Waututh's motion is supported by the applicants Squamish Nation, Coldwater Indian Band, Stk'emlupsemc te Secwepemc, Stó:lō Applicants and Upper Nicola Band. The motion is opposed by the respondents Attorney General of Canada and Trans Mountain Pipeline ULC.

[4] For the reasons that follow, we have concluded that the evidentiary record should not be reopened and that Tsleil-Waututh's motion should be dismissed with costs payable to the Attorney General and Trans Mountain in any event of the cause.

I. The facts

[5] The facts giving rise to the motion may be briefly stated.

[6] On April 18, 24 and 27, 2018, three articles were published online by the National Observer. The articles dealt with the timing of Canada's decision to approve the Project and Canada's consultation with Indigenous groups, including Tsleil-Waututh. At the time the articles were published the hearing of the underlying consolidated applications for judicial review had been concluded and the applications were under reserve, awaiting the Court's judgment.

[7] On April 27, 2018, the author of the three articles provided Tsleil-Waututh with access to 15 documents that the National Observer had obtained through requests made under the *Access to Information Act*, R.S.C. 1985, c. A-1 (Act). The documents, many of which are redacted or heavily redacted, are appended to the affidavit of Miriam Bird filed in support of Tsleil-Waututh's motion. The affidavit also appends the three articles published online by the National Observer.

II. Applicable legal principles

[8] Counsel have not referred the Court to any binding authority on the test to be applied by this Court when asked to reopen a concluded judicial review hearing for the purpose of reopening the evidentiary record. Nor have they made detailed submissions on the test to be applied to Tsleil-Waututh's request that Canada be required to produce unredacted copies of the 15 documents produced under the Act and the additional documents listed in Schedule "A" to Tsleil-Waututh's motion.

[9] On the motion to reopen the evidentiary record, Tsleil-Waututh argues that the primary concern should be to uphold the integrity of the consolidated applications so that justice may be seen to be done. Tsleil-Waututh relies upon the decision of the Federal Court in *Varco Canada Limited v. Pason Systems Corp.*, 2011 FC 467, 92 C.P.R. (4th) 399, (*Varco #1*).

[10] In *Varco #1* the Federal Court reopened a patent action after the trial had been concluded and while the Court's judgment was under reserve. Tsleil-Waututh submits that the Federal Court applied a two-part test asking:

i. Could the evidence, if it had been presented, have had any influence on the result?
ii. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[11] Canada points to three authorities that have considered requests to reopen actions after the trial has concluded: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, *Varco #1*, and *Mehedi v. 2057161 Ontario Inc.*, 2015 ONCA 670, 391 D.L.R. (4th) 374. Canada also points to a second request to reopen made in the Varco action, discussed in *Varco Canada Limited v. Pason Systems Corp.*, 2011 FC 1140, [2011] F.C.J. No. 1424 (*Varco #2*).

[12] Trans Mountain adopts Canada's submissions with respect to the test to reopen and adds more detailed submissions on the need to approach the jurisprudence cited above with caution because these cases all arose in the context of civil trials for damages. Trans Mountain submits that in the present case, this Court must consider how the evidentiary principles governing judicial review applications differ from those governing trials. In this connection Trans Mountain refers to, among other things: subsection 18.4(1) of the *Federal Courts Act* which requires judicial review applications to be heard and determined "without delay and in a summary way"; Rule 3 of the *Federal Courts Rules* which requires the Rules to be "interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits"; and this Court's order of March 9, 2017, issued near the outset of the consolidated applications which directed, among other things, that "the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized".

[13] We begin our analysis with the decision of the Supreme Court in *Sagaz* and the Court's admonition, at paragraph 61 of the reasons, that the discretion to reopen a trial is to be used "sparingly and with the greatest care" so that "abuse of the Court's processes" does not result.

[14] As to the test for reopening a trial, the Supreme Court endorsed the trial judge's use of the two-part test articulated in *Scott v. Cook*, [1970] 2 O.R. 769 (H.C.). This test requires a court to consider:

i. Would the evidence, if presented at trial, probably have changed the result?
ii. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[15] The first step of the test articulated in *Scott* is a more rigorous test than that urged by Tsleil-Waututh: could the evidence have any influence on the result.

[16] We agree that in *Varco #1* at paragraph 17 the Federal Court articulated the first step of the two-part test to be "could the evidence, if it had been presented, have had any influence on the result?" (see also the reasons of the Federal Court at paragraph 23). However, when applying the test the Court characterized the proposed new evidence to "go directly to critical matters at issue". The evidence was said to be "necessary for completeness of the trial testimony." Thus, the evidence went well beyond the threshold of evidence that "could" have influenced the result.

[17] Any uncertainty in the test applied by the Federal Court was, in our view, clarified in *Varco #2*. *Varco #2* dealt with a second request to reopen the trial. At paragraph 7 of its reasons, the Federal Court stated the applicable legal test to be:

1. Would the evidence, if presented at trial, have changed the result?

2. Could the evidence have been obtained before trial by the exercise of reasonable diligence?

[18] In applying the test, and rejecting the second request to reopen the trial, the Federal Court noted, at paragraph 21, that to "have an influence on the result the evidence must be such that it could likely change the result." The proposed new evidence did not reach that benchmark.

[19] What we take from the Federal Court's application of the two-step test in *Varco #1*, and from the Federal Court's restatement of that test in *Varco #2*, is that the jurisprudence of the Federal Court is to the effect that at the first step the question to be asked is would the evidence, if presented at trial, probably have changed the result? This is consistent with the test articulated in *Scott* and endorsed by the Supreme Court in *Sagaz*.

[20] We have also considered, and accepted, the submission that jurisprudence arising in the context of the conduct of trials should not be applied blindly in the context of judicial review. There is ample jurisprudence to the effect that, consistent with subsection 18.4(1) of the *Federal Courts Act*, judicial review applications are to be heard and determined without delay. It is for this reason, for example, that the Court is reluctant to entertain preliminary motions in judicial review applications.

[21] The imperative to hear and determine judicial review applications without delay and in a summary way means that the discretion to reopen a concluded application for judicial review should be exercised with great caution, mindful of the need not to unduly delay the adjudication

of important issues, often issues of significant public interest. The parties acknowledge that the consolidated applications raise issues of significant public interest. Thus, we would add a third criterion to the test to reopen: would reopening the evidentiary record be in the public interest?

[22] As for the subpoena requested under Rule 41, in order for a party to a judicial review proceeding to obtain a subpoena requiring the production of a document the party must establish that the evidence sought to be produced is necessary, there is no other way of obtaining the evidence, the party is not engaged in a fishing expedition, and the document being subpoenaed is likely to contain relevant evidence on the matter: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128, [2017] F.C.J. No. 601, at paragraph 103.

III. Application of the test to reopen to the facts of this case

[23] We begin our analysis by considering what the 15 documents obtained under the Act establish.

[24] Tsleil-Waututh asserts that the documents:

i. Establish that the Deputy Minister of Natural Resources Canada had a telephone call with Kinder Morgan Canada's Chief Executive Officer in January 2016 to discuss the timelines of the regulatory review of the Project.

ii. Confirm that the then Assistant Deputy Minister convened a meeting on October 27, 2016 with senior federal officials to discuss the Project. A copy of handwritten notes from that October 27, 2016 meeting indicate that Canada had made its decision to approve the Project and that federal officials should "convey with fidelity what they [federal government] have chosen to do". In an engagement meeting earlier in the day with Tsleil-Waututh the then Assistant

Deputy Minister told Tsleil-Waututh that a decision to approve the Project had not yet been made.

iii. Confirm that following the October 27, 2016 meeting the then Assistant Deputy Minister "started circulating a number of Memoranda to the Deputy Minister to senior officials, and those officials subsequently held many conference calls, all in connection with Canada's decision to approve the Project under the pretense of the topic '*Critical Path for Pipelines and Related Announcements*'."

[25] We disagree.

[26] We have carefully read each of the 15 documents produced pursuant to the Act and have concluded that they fall far short of establishing any of the three assertions put forward by Tsleil-Waututh.

[27] To illustrate, the only document which deals with the January 2016 telephone call with Kinder Morgan Canada's Chief Executive Officer is Exhibit F to the Bird affidavit, a memorandum to the Deputy Minister of Natural Resources Canada. The memorandum explains that the Chief Executive Officer had requested a call with the Deputy Minister and stated that the Chief Executive Officer:

> … may wish to discuss: the current status of the National Energy Board's (NEB) review of the project; the Government's approach to reviewing the environmental assessment process and potential transition measures that could apply to [the Trans Mountain Expansion project]; the Government's commitment to renew its relationship with Indigenous people; and, potential developments in the company's plans related to the project.

[28] The memorandum then provided an update on the status of the Project review process. The document is silent about the timing of the Project review process and there is no reference to

Canada expediting the review process. We accept Trans Mountain's submission that the content of this memorandum sheds no light on whether Canada fulfilled its duty to consult with Tsleil-Waututh or any other Indigenous group.

[29] The documents do establish that the then Deputy Minister convened a meeting on October 27, 2016, with senior federal officials to discuss the Project. However, contrary to the submission of Tsleil-Waututh, the handwritten notes (Exhibit J to the Bird affidavit) do not establish that Canada had already made its decision to approve the Project. Tsleil-Waututh puts particular reliance on the following passage from the handwritten notes:

> Risks: Gov't has indicated Decision on the process as is
> Not changing the process
> All legally sound from Gitxaala
> Convey with fidelity what they have chosen to do

[30] In our view, as submitted by Stk'emlupsemc te Secwepemc, this passage demonstrates that Canada had decided that there would be no change to the framework of the project review process. Canada would continue to rely, to the extent possible, on the National Energy Board process and would continue to operate within the four-phase consultation process. A similar multi-phase consultation process had been followed with respect to the Northern Gateway project and in *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 this Court found the consultation framework to be reasonable. Thus, the passage refers to the process as being "legally sound" following the *Gitxaala* decision.

[31] Nothing in this passage or in the balance of the handwritten note demonstrates that Canada had already made the decision to approve the Project.

[32] The documents that post-date the October 27, 2016 meeting do not support Tsleil-Waututh's assertion that by that date Canada had decided to approve the Project and that thereafter senior officials held conference calls "all in connection with Canada's decision to approve the Project under the pretense of the topic '*Critical Path for Pipelines and Related Announcements*'".

[33] Thus, a memorandum to the Deputy Minister in advance of a November 3, 2016, conference call dealing with the rollout and implementation of the Oceans Protection Plan, Exhibit M to the Bird affidavit, sets out a communication strategy for the Oceans Protection Plan "if the [Trans Mountain Expansion project] is approved, to re-announce and provide additional details on initiatives that strengthen the overall marine safety system in the project area. NRCan officials will work with Transport Canada to prepare for such an approach in the event the project is approved" (underlining added).

[34] To similar effect, a memorandum prepared for the Minister entitled "Update on Indigenous Consultations for the Trans Mountain Expansion Project" (for information by November 4, 2016) advises the Minister:

> Prior to a Government decision, Crown officials will prepare a Consultation and Accommodation Report (CAR) to inform the Government on the adequacy of Aboriginal consultation based on the examination of potential impacts on asserted Aboriginal rights and establish treaty rights and measures proposed to address these impacts, on every potentially impacted Indigenous group. The Major Projects Management Office (MPMO) and British Columbia's Environmental Assessment Office (EAO) have jointly been developing this report for decision-makers.
>
> (underlining added)

[35] Tsleil-Waututh has failed to demonstrate that the 15 documents establish the facts asserted by Tsleil-Waututh and has failed to demonstrate that the documents would probably have an influence on the result of these consolidated applications. Tsleil-Waututh has also failed to demonstrate that unredacted copies of the documents would probably have an influence on the result of these proceedings.

[36] On this point, many of the redactions relate to matters that are plainly irrelevant to Tsleil-Waututh's assertions (for example, redactions of the names of individual public servants and Conference ID Numbers used for conference calls). Other redactions were made on the basis of claims to solicitor client privilege or confidences of the Queen's Privy Council for Canada. Information falling within these claims would not be subject to production in these consolidated applications.

[37] As for the additional documents listed in Schedule "A" to Tsleil-Waututh's motion, there is no evidence on which we could conclude that these documents would probably, if produced, have an influence on the result of these consolidated applications.

[38] The findings that Tsleil-Waututh has failed to show that any of the documents at issue would, if produced, probably change the result of the hearing are wholly dispositive of Tsleil-Waututh's motion. It is therefore not necessary to consider the issues of reasonable diligence and whether reopening the evidentiary record at this time would be in the public interest, and we do not address these issues.

[39] There is, however, one final point. In addition to relying on the content of the 15 documents provided to it by the National Observer, Tsleil-Waututh relies upon the content of the articles published in the National Observer and statements attributed to unknown persons described in the articles to be whistleblowers. These statements reported in news articles are hearsay, and there is no evidence that would permit us to conclude that the statements are sufficiently reliable so as to be given any weight. Accordingly, we have given no weight to the statements.

[40] For these reasons Tsleil-Waututh's motion will be dismissed with costs payable in any event of the cause to the Attorney General and to Trans Mountain.

"Eleanor R. Dawson"
J.A.

"Yves de Montigny"
J.A.

"J. Woods"
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-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 THE COURT:	DAWSON, DE MONTIGNY, WOODS JJ.A.
DATED:	MAY 31, 2018

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