Federal Court Cour fédérale

Date: 20230824

Docket: 23-T-37

Citation: 2023 FC 1133

Ottawa, Ontario, August 24, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

LUUTKUDZIIWUS, ALSO KNOWN AS CHARLES WRIGHT, AND GWININITXW, ALSO KNOWN AS YVONNE LATTIE, ON BEHALF OF THEMSELVES AND IN THEIR CAPACITY AS GITXSAN HEREDITARY CHIEFS AS REPRESENTATIVES OF THEIR WILPS

Applicants

and

ATTORNEY GENERAL OF CANADA, PRINCE RUPERT PORT AUTHORITY, AND VOPAK DEVELOPMENT CANADA INC.

Respondents

ORDER AND REASONS

I. OVERVIEW

[1] Luutkudziiwus (also known as Charles Wright) and Gwininitxw (also known as Yvonne Lattie) are Gitxsan Hereditary Chiefs. They seek an extension of time to commence an application for judicial review of a decision by federal authorities approving the development of a bulk liquid storage and export terminal in Prince Rupert, British Columbia. The extension of time is opposed by Vopak Development Canada Inc. (Vopak), the original proponent of the project, and by the Prince Rupert Port Authority (PRPA), the agency responsible for the land and water on which the project is to be developed. The Attorney General of Canada (AGC) takes no position on the applicants' request.

[2] As I explain in the reasons that follow, I am not satisfied that it is in the interests of justice to grant an extension of time to commence the application for judicial review. This motion will, therefore, be dismissed.

II. BACKGROUND

[3] Vopak has proposed the development of a marine berthing, storage, and loading facility for bulk liquids including liquified petroleum gas, light diesel, gasoline, and methanol. The facility is to be located on Ridley Island at the Port of Prince Rupert. The lands and waters on which the facility will be built and operate are under the jurisdiction of the PRPA. Products will be transported to the facility from various locations across Western Canada by rail. The products will then be shipped from a jetty to international markets.

[4] The project was subject to an assessment by the British Columbia Environmental Assessment Office. It was also subject to review by Transport Canada and the PRPA under the *Canadian Environmental Assessment Act, 2012* (now repealed) as well as by Environment and Climate Change Canada under the *Impact Assessment Act*, SC 2019, c 28, s 1.

[5] The provincial and federal assessments of the project began in July 2018.

[6] Provincial approval of the project (subject to eleven conditions) was granted on April 20, 2022.

[7] On November 10, 2022, Transport Canada, Environment and Climate Change Canada, and the PRPA issued a Notice of Determination that the project is not likely to cause significant adverse environmental effects. The process followed by these federal authorities and the grounds for the decision are set out in a 180-page Determination Rationale dated November 9, 2022. This is the decision the applicants seek to challenge by way of judicial review.

III. THE TEST FOR AN EXTENSION OF TIME

[8] Subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7, provides:

Time limitation	**Délai de présentation**
18.1(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made	**18.1(2)** Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l’office

within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.	fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

[9] The 30-day time limit for commencing an application for judicial review may be extended by the Court under Rule 8 of the *Federal Courts Rules*, SOR/98-106. The burden is on the applicants to establish that an extension of time is warranted.

[10] In determining whether to grant an extension of time, "the overriding consideration or the real test is ultimately that justice be done between the parties" (*Alberta v Canada*, 2018 FCA 83 at para 45). Four questions are particularly salient to this determination: (a) Have the applicants established a continuing intention to pursue the application? (b) Have the applicants provided a reasonable explanation for their delay in pursuing the application? (c) Does the application have some potential merit? and (d) Would the respondents be prejudiced if an extension of time were granted? See *Canada (Attorney General) v Hennelly*, 1999 CanLII 8190, 167 FTR 158 (CA), at para 3.

[11] This is not a checklist. The importance of each question depends on the circumstances of the case (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 62). It is not necessary for every factor to favour an extension of time for the extension to be warranted, nor is any one

factor necessarily determinative (*Alberta v Canada* at para 45; *Larkman* at para 62). Rather, the factors "are intended to assist the Court in determining whether an extension of time is in the interests of justice between the parties" (*Oleynik v Canada (Attorney General)*, 2023 FCA 162 at para 36; *Whitefish Lake First Nation v Grey*, 2019 FCA 275 at para 3).

IV. THE TEST APPLIED

A. *Have the applicants established a continuing intention to pursue the application?*

[12] The first matter to be determined is the period of delay to be assessed. The end of this period is not in dispute. The applicants provided their draft motion materials to the respondents on April 20, 2023. They then filed their Motion Record on May 15, 2023. The beginning of the period of delay is in dispute, however.

[13] Both applicants state in their respective affidavits that they learned of the decision in question on or about January 3, 2023. The respondents PRPA and Vopak submit, on the other hand, that the period of delay begins earlier than this. They contend that there is evidence suggesting that the applicants were in a position to know about the decision at least as of November 30, 2022, and the applicants have failed to explain why, despite this, they only learned of the decision on or about January 3, 2023.

[14] For several reasons, the applicants' account of when they first learned of the decision is difficult to accept. Neither applicant says how they learned of the decision on or about January 3, 2023. As well, the applicants had been informed in early November 2022 that a

decision was imminent and that it could well be made that month (see below). The applicants have not explained why, despite their demonstrated interest in the project, they failed to monitor the matter more closely. Finally, and most significantly, their account is difficult to reconcile with the evidence that, on November 30, 2022, a representative of Transport Canada sent an email addressed to the applicants via Ms. Lattie's daughter, Jennifer Loring, informing the applicants that the federal reviews had been completed and providing a link to the Notice of Determination.

[15] The applicants deny knowing about this email until April 28, 2023, when their counsel brought it to their attention after a copy was provided by the Department of Justice in connection with the present motion.

[16] The November 30, 2022, email was sent further to an earlier one from Transport Canada dated November 2, 2022. The earlier email, which had also been sent to the applicants via Ms. Loring's email address, stated that the federal reviews of the project were "approaching conclusion" and the determination was expected "as early as November 2022." The applicants do not dispute that they knew about this earlier email. As well, previously they had sent and received communications with federal officials via Ms. Loring's email address, the one to which the November 30, 2022, email was sent.

[17] The applicants have not provided any evidence from Ms. Loring that she did not receive the November 30, 2022, email, that she received it but did not notice it at the time, or that she noticed it but did not share it with the applicants. Nor have the applicants provided any

explanation for the absence of such evidence. This leaves a significant gap in the record. The applicants assert in their reply submissions (at para 30) that Ms. Loring's "failure to access the November 30, 2022 email on a timely basis is the result of inadvertent human error" but they have not provided any evidence that this is in fact what happened.

[18] All this being said, I am prepared to view the record in the light most favourable to the applicants and accept that they did not learn of the decision in question until January 3, 2023.

[19] As noted above, the applicants provided their draft motion materials to the respondents on April 20, 2023. While there was a delay of almost a month before the motion for an extension of time was filed, I accept that the applicants had a continuing intention to proceed with the application for judicial review during that time. The question, then, is whether they have established a continuing intention to proceed with the application between January 3, 2023, and April 20, 2023.

[20] The evidence to support such an intention is far from compelling. Neither applicant states expressly in their affidavit that, since learning of the decision, they have had a continuing intention to challenge it by way of judicial review. At best, this is implied by their account of the steps they took to prepare to proceed with an application for judicial review as well as the present motion. That account, which I set out in the next section, consists only of broad and unsubstantiated assertions. Nevertheless, there is nothing to suggest that the applicants ever stopped intending to challenge the project once they learned of its approval. I find that this factor favours granting an extension of time.

B. *Have the applicants provided a reasonable explanation for their delay in pursuing the application?*

[21] As noted in the previous section, there was a delay of approximately one month from when the applicants provided their draft motion material to the other parties and when they filed their Motion Record. I find that the need to wait for informal responses from the other parties as well as the need to revise the motion materials to incorporate information provided by the Department of Justice regarding the November 30, 2022, email reasonably explains the delay between April 20, 2023, and May 15, 2023. The question, then, is whether the applicants have provided a reasonable explanation for their delay in pursuing the application between January 3, 2023, and April 20, 2023.

[22] Mr. Wright states that, since he and Ms. Lattie became aware of the decision approving the project, they have worked to prepare the Notice of Application for judicial review and the present motion "as expeditiously as possible" (*Affidavit of Charlie Wright sworn May 10, 2023, para 42*). Likewise, Ms. Lattie states that they prepared the application and the present motion "as quickly as possible" (*Affidavit of Yvonne Lattie sworn May 5, 2023, para 57*). She adds that, since their Wilps (the houses of which they are the hereditary chiefs) are not bands under the *Indian Act*, they do not have paid staff or access to core funding from the federal government. She also states that they applied for and obtained funding and appointed "appropriate personnel" to coordinate the litigation (*Affidavit of Yvonne Lattie sworn May 5, 2023, paras 58-59*). Ms. Lattie does not say when any of these things occurred.

[23] The respondents PRPA and Vopak submit that the applicants have failed to provide a reasonable explanation for their delay in bringing this matter forward. I agree.

[24] A not insignificant amount of time needs to be accounted for – on the view most favourable to the applicants, nearly four months – yet the applicants have offered little in the way of explanation for their delay in pursuing the application for judicial review. The bare assertions that they moved as "quickly" or "expeditiously" as possible do not constitute a reasonable explanation for the delay. I accept that preparing for litigation takes time. However, in the absence of any details about what steps the applicants took and when, I am unable to find that the delay in bringing this matter forward is reasonably explained. Similarly, the applicants submit in their reply submissions (at para 56) that Indigenous communities, including the Wilps, "often face complex issues in determining whether to proceed with litigation" yet there is no evidence of what, if any, issues were at play in this case. Consequently, this factor does not favour granting an extension of time.

C. *Does the application have some potential merit?*

[25] The question at this stage is whether the proposed application for judicial review has some potential merit. If it is clearly without merit, it would not be in the interests of justice to allow it to proceed. On the other hand, it can be in the interests of justice to permit a clearly meritorious application to proceed despite, for example, a lack of diligence in bringing the matter forward. This being said, it is not a motion judge's responsibility to decide whether the application will ultimately succeed or fail (*Kemp v Canada (Finance)*, 2022 FCA 198 at para 17).

[26] As set out in their draft Notice of Application, the applicants challenge the decision in question on two grounds:

a) The federal authorities, acting on behalf of the Crown, breached the Crown's constitutional obligations by failing to justify the infringement of the applicants' fishing rights prior to the issuance of the decision; and

b) The federal authorities, acting on behalf of the Crown, breached the Crown's constitutional obligations by failing to consult and accommodate the applicants in respect of potential impacts of the project on the applicants' Aboriginal rights prior to the issuance of the decision.

[27] These grounds do not appear to be strong.

[28] First, the respondents PRPA and Vopak submit that there is a serious issue as to whether the applicants even have standing to bring this application. I agree.

[29] Not every administrative action will trigger a right to bring an application for judicial review (*Dow v Canadian Nuclear Safety Commission*, 2021 FCA 117 at para 34). A party must be "directly affected by the matter in respect of which relief is sought" to bring an application for judicial review under subsection 18.1(1) of the *Federal Courts Act*. No right of review arises where the conduct in question does not affect legal rights, impose legal obligations, or cause prejudicial effects (*Dow* at para 34; *Laurentian Pilotage Authority v Corporation des Pilotes de Saint-Laurent Central Inc*, 2019 FCA 83 at para 31).

[30] In the present case, the project approved by federal authorities is not on or even close to the traditional territories of the Gitxsan. Those territories, known as the Lax Yip, are hundreds of kilometers inland from the proposed site.

[31] No one in this proceeding disputes that the applicants hold and exercise constitutionally protected Aboriginal rights, including fishing rights, in their respective territories within the Lax Yip. However, the sole nexus the applicants allege between the decision approving the project and their rights and interests is the potential deleterious impact of the project on salmon populations in the Lax Yip. The only evidence supporting this alleged nexus is the opinion of the applicants themselves that the project will harm the salmon populations on which they and their communities rely for several important purposes. Ms. Lattie states: "If the Project proceeds it will definitely threaten these fragile populations and make it even harder for us to exercise our rights and sustain our culture, health and way of life" (*Affidavit of Yvonne Lattie sworn May 5, 2023, para 30*). Mr. Wright states: "I am very concerned that [*sic*] about the impacts of the Project on fish and fish habitat in the Skeena River Estuary. The effects of the Project on coastal marine waters will have direct implications for our ability to exercise our rights to fish in our own territories" (*Affidavit of Charlie Wright sworn May 10, 2023, para 37*).

[32] On the other hand, the federal review of the project included extensive study of the potential impacts of the project on local fish populations, including salmon. Federal authorities concluded that the project is not likely to result in significant adverse environmental effects in relation to marine fish: see Determination Rationale at 75-77.

[33] I have no doubt that the applicants' concerns about the potential impacts of the project on salmon populations are genuine. However, a serious argument can be made that, standing on their own, these concerns are insufficient to establish that the decision to approve the project affects the applicants' rights or imposes prejudicial effects on them, especially when viewed against the backdrop of the extensive study of the potential impacts of the project on fish populations conducted by federal authorities as well as the significant distance between the applicants' traditional territories and the site of the project.

[34] Second, the applicants' concerns about the potential impact of the project on salmon populations are also the sole basis for their contention that they had a right to be consulted during the project approval process. Here as well, a serious argument can be made that these concerns are insufficient to establish that the applicants had a right to be consulted to a greater extent than appears to have occurred.

[35] The record demonstrates that a robust consultation process with Indigenous groups potentially affected by the project was undertaken by provincial and federal authorities as well as by Vopak. Specifically, in connection with the provincial review, six First Nations on whose traditional territory the project is to be located were formally identified for consultation. The Gitxsan First Nation was not so identified, a determination that the applicants did not challenge at the time. Federal authorities appear to have been guided by the provincial determination regarding which First Nations were entitled to be included in the formal consultation process. Despite the fact that the applicants do not belong to any of the groups formally included in the consultation process, on the record before me (including documents filed by the applicants), it

appears that their representations concerning the potential impacts of the project were welcomed and considered by federal decision makers. The applicants contend that they were entitled to a greater level of consultation than took place but their argument in support of this position does not appear strong.

[36] In sum, the application for judicial review appears to be of doubtful merit at best. Consequently, this factor does not weigh heavily, if at all, in favour of an extension of time.

D. *Would the respondents be prejudiced if an extension of time were granted?*

[37] The respondents PRPA and Vopak submit that they would be prejudiced if the application for judicial review were permitted to proceed at this time. While, in my view, they have cast the issue of prejudice too broadly, I nevertheless agree that they would be prejudiced if an extension of time were granted.

[38] Approval of the project is not subject to any other legal challenge. The Metlakatla First Nation (one of the Aboriginal communities formally included in the consultation process) filed an application for judicial review of the decision in question on December 9, 2022, but the application was withdrawn on March 27, 2023.

[39] Since the project received federal approval, PRPA and Vopak have taken significant steps to move it forward. These steps have included:

- Executing a Ground and Water Lot Lease between PRPA and Vopak on December 31, 2022. The lease establishes certain milestones for the development of the

project, including a deadline of December 31, 2023, by which construction activities must be commenced.

- Making significant investments in design engineering and other preparatory steps necessary for construction to begin.

- Obtaining permits and authorizations based on construction beginning in the fall of 2023.

- Forming a joint venture between Vopak and AltaGas Ltd. on April 26, 2023, for the development of the project.

- Entering a benefits agreement between Vopak and Metlakatla First Nation on April 21, 2023. The negotiation of benefits agreements with four other First Nations on whose traditional territory the project is located is continuing. (A benefits agreement between Vopak and Lax Kw'alaams Band was entered into on October 28, 2022.).

- Preparing to contract for the purchase and delivery of "long lead" items such as marine pilings for the jetty as well as essential large equipment such as compressors.

[40] On this basis, as well as on the basis of ongoing work that must be completed in a timely way to keep the project on schedule, PRPA and Vopak submit that they would suffer significant prejudice if the project were to cease or be delayed due to the applicants' application for judicial review. There is substantial evidence to support this submission. In my view, however, the question at this stage is a narrower one. It is whether PRPA and Vopak would be prejudiced by an extension of time, not whether they would be prejudiced by the application for judicial review itself. The two are obviously connected; however, for present purposes, the only question is

whether PRPA and Vopak would be prejudiced by the judicial review starting now, well after the period provided for in section 18.1 of the *Federal Courts Act* has lapsed. Certainty and finality are important considerations in the assessment of whether an extension of time is in the interests of justice. As the Federal Court of Appeal held in *Larkman*, “When the thirty day deadline expires and no judicial review has been launched against a decision or order, parties ought to be able to proceed on the basis that the decision or order will stand” (at para 87).

[41] Having narrowed the issue in this way, I am satisfied that PRPA and Vopak would be prejudiced by an extension of time. This is because permitting the application for judicial review to proceed now would constitute a material change in the circumstances in which PRPA and Vopak took and must continue to take steps towards the timely completion of the project. At the very least, it would create doubt about whether the project can proceed on its current schedule. Allowing the application for judicial review to proceed at this late stage (especially now that the application for judicial review by the Metlakatla First Nation has been withdrawn) would subvert the principles of certainty and finality the 30-day period is meant to protect, principles on which PRPA and Vopak reasonably relied in proceeding with the development of the project. Consequently, this factor weighs against an extension of time.

[42] Vopak also submits that it is not the only interested party that would be prejudiced if an extension of time were granted. It submits that several First Nations and their members who stand to reap significant benefits from the project would also be prejudiced: see *Written Representations of the Respondent, Vopak Development Canada Inc., paras 111-112 and 120.*

[43] Included in Vopak's Motion Record is a letter dated May 31, 2023, from Garry Reese, Elected Mayor, Lax Kw'alaams Band, and Harold Leighton, Chief Councillor, Metlakatla First Nation. The letter states in part:

> The Project is proposed to be located within the core of the territories of Metlakatla and Lax Kw'alaams. This is an area of great significance to the Coast Tsimshian (Metlakatla and Lax Kw'alaams) peoples. We hold unextinguished Aboriginal rights and title over the lands and waters impacted by the Project. As such, Metlakatla and Lax Kw'alaams have had a deep interest in the potential impacts of the Project since it was first proposed some years ago.
>
> [. . .]
>
> Over the past several months, Metlakatla and Lax Kw'alaams have each finalized an agreement with Vopak by which we each agreed to provide our respective consent to the Project. Under the terms of these agreements, Vopak has agreed to provide significant economic and other benefits to both Metlakatla and Lax Kw'alaams, and our respective members, relating to the Project. These benefits will accrue to our communities both now and in the future.
>
> These benefits will be undermined if the Wilps are permitted to pursue a judicial review of the Project. The deadline for them to do so has long passed. We are very concerned by the prospect of a judicial review being commenced by the Wilps at this late stage.
>
> The Wilps' proposed judicial review is also troubling because the Project is not located within the Wilps' territory. Their territory is hundreds of kilometers away from the Project. We have great respect for the Wilps' rights within their territories, and we expect the Wilps to reciprocate by respecting our Aboriginal rights and title within our territories, which centre on Ridley Island.

[44] Arguably, Mayor Reece and Councillor Leighton bring an important perspective to the question of the impact of any delay to the project that would result from permitting the applicants' application for judicial review to proceed at this stage. However, Vopak does not cite any authority for the proposition that it may rely on the interests of third parties to the

litigation in opposing an extension of time. Since I have determined that an extension of time is not warranted without considering third-party interests, it is not necessary to determine whether it is appropriate to take such interests into account in this case.

E. *Overall Assessment*

[45] Weighing and balancing the foregoing factors, I am not persuaded that it would be in the interests of justice to grant an extension of time to commence the application for judicial review. I accept that the applicants had a continuing intention to challenge the decision since learning of it. However, they have not provided a reasonable explanation for their delay in moving forward with the application, the application is of doubtful merit, and two of the three respondents would suffer significant prejudice if the application were permitted to proceed now. The motion will, therefore, be dismissed.

V. COSTS

[46] The applicants did not seek costs in the event that an extension of time is granted and they asked that a costs order not be made against them if the motion is dismissed.

[47] Only PRPA and Vopak opposed the motion for an extension of time; the AGC took no position. Vopak seeks costs in the event that the motion is dismissed but did not make any submissions in this regard. PRPA does not seek costs.

[48] In my view, this is not an appropriate case for costs.

VI. CONCLUSION

[49] For these reasons, the motion will be dismissed.

ORDER IN 23-T-37

THIS COURT ORDERS that

1. The motion is dismissed.

2. The parties shall bear their own costs.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	23-T-37
STYLE OF CAUSE:	LUUTKUDZIIWUS, ALSO KNOWN AS CHARLES WRIGHT ET AL v ATTORNEY GENERAL OF CANADA ET AL

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

ORDER AND REASONS:	NORRIS J.
DATED:	AUGUST 24, 2023

WRITTEN REPRESENTATIONS BY:

Kate Gunn Melissa Rumbles	FOR THE APPLICANTS
Thomas Isaac Jeremy Barretto Emilie Cox	FOR THE RESPONDENT, PRINCE RUPERT PORT AUTHORITY
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