Federal Court of Appeal  Cour d'appel fédérale

Date: 20150129

**Dockets: A-56-14, A-59-14, A-63-14, A-64-14; A-67-14;
A-437-14, A-439-14, A-440-14, A-442-14, A-443-14,
A-445-14, A-446-14, A-447-14, A-448-14, A-514-14,
A-517-14, A-520-14, A-522-14**

Citation: 2015 FCA 27

Present: STRATAS J.A.

BETWEEN:

**GITXAALA NATION, GITGA'AT FIRST NATION,
HAISLA NATION, THE COUNCIL OF THE HAIDA NATION
and PETER LANTIN suing on his own behalf and on
behalf of all citizens of the Haida Nation,
KITASOO XAI'XAIS BAND COUNCIL on behalf of
all members of the Kitasoo Xai'Xais Nation and
HEILTSUK TRIBAL COUNCIL on behalf of all
members of the Hailtsuk Nation, MARTIN LOUIE,
on his own behalf, and on behalf of Nadleh Whut'en and on
behalf of the Nadleh Whut'en Band, FRED SAM, on his
own behalf, on behalf of all Nak'azdli Whut'en, and on
behalf of the Nak'azdli Band, UNIFOR, FORESTETHICS
ADVOCACY ASSOCIATION, LIVING OCEANS SOCIETY,
RAINCOAST CONSERVATION FOUNDATION,
FEDERATION OF BRITISH COLUMBIA NATURALISTS
carrying on business as BC NATURE**

Applicants and Appellants

and

**HER MAJESTY THE QUEEN, ATTORNEY GENERAL
OF CANADA, MINISTER OF THE ENVIRONMENT,
NORTHERN GATEWAY PIPELINES INC.,
NORTHERN GATEWAY PIPELINES LIMITED PARTNERSHIP
and NATIONAL ENERGY BOARD**

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 29, 2015.

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] By way of applications for judicial review and administrative law statutory appeals, the applicants and appellants challenge decisions made by the National Energy Board, the Governor in Council and the Joint Review Panel concerning the Northern Gateway Pipeline Project. By Order dated December 17, 2014 of this Court, these applications and appeals were consolidated.

[2] That Order also scheduled the steps in these proceedings. The schedule is a tight one, reflecting that fact that, until set aside, administrative decisions reflect the public interest: *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385. Unless the decisions are stayed, review proceedings should be determined one way or the other as soon as possible.

[3] That Order also defined the content of the record to be placed before this Court – basically the materials before the National Energy Board, the Governor in Council and the Joint Review Panel – and allowed for a substantial measure of electronic service and filing. To narrow the issues in dispute and allow the memoranda of fact and law to deal only with contentious matters, the parties were ordered to prepare an agreed statement of facts. Considerable progress has apparently been made on that, for which the parties are to be commended.

[4] During the fall of 2014, many parties signalled their intent to file affidavits in these consolidated matters over and above the defined record. In applications for judicial review and

administrative law statutory appeals, there are limitations on such filings. These limitations are discussed below.

[5] Paragraph 8 of the Order dated December 17, 2014 addressed this. It provided for a leave mechanism for the filing of affidavits. This proactive step has allowed for the proceedings to move in a timely and orderly way. Otherwise, parties would have filed affidavits as part of the record, several parties would have brought motions at different times to strike multiple parties' affidavits from the record, and the Court and the parties would have been tangled in motion records going every which way.

[6] Several parties have asked for leave to file affidavits. The parties have responded and replied to each other. The parties are to be commended for the orderly way in which this process has proceeded. The Court has reviewed the material. These are the Court's reasons on the issue whether leave to file affidavits should be granted.

[7] The Order of December 17, 2014 reminded the parties of the applicable law. I set the relevant portions of it out here (along with one small addition):

> AND WHEREAS this Court reminds the parties that:
>
> - the record in applications for judicial review and appeals from administrative boards normally consists of the materials that were before the administrative boards (*Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 and cases cited therein); fresh evidence (*e.g.* affidavits supplying new evidence) is not normally admissible;
>
> - since the National Energy Board has the jurisdiction to decide constitutional matters before it, new constitutional arguments on appeal or judicial review from that Board are foreclosed; again, to the extent that constitutional issues were raised before the Board, the evidence on those

> issues will appear in the record developed by the Board and additional affidavits on appeal are not admissible (*Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 245 at paras. 40-58; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257) [for new, non-constitutional issues, see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 22-29];
>
> …
>
> - in appropriate circumstances, a motions judge can adjudicate the admissibility of these materials in advance of the hearing: *Collins v. Canada*, 2014 FCA 240.

[8] Many parties on both sides of these consolidated matters have sought leave to file affidavits. For the most part, they bear upon the issue whether there was a duty to consult and, if necessary, accommodate Aboriginal peoples and whether that duty has been fulfilled.

[9] I have been given insufficient information or submissions concerning the extent to which these issues were live before the administrative decision-makers below, a key consideration bearing upon whether the objections in *Association of Universities and Colleges of Canada*, *Forest Ethics*, *Okwuobi* and *Alberta Teachers*, all *supra* lie. For example, while I know that the Joint Review Panel considered issues that are covered in some of the affidavits sought to be filed, I have an insufficient understanding of the mandate and jurisdiction of that body. Without a full understanding of that, I am unable to rule on whether these affidavits should be barred.

[10] As well, the Attorney General of Canada and some others have drawn to the Court's attention certain authorities that are said to support a relaxed approach concerning the admissibility of fresh evidence in cases involving the Crown's duty to consult with Aboriginal

peoples: see, *e.g.*, *Chartrand v. The District Manager*, 2013 BCSC 1068, 52 B.C.L.R. (5th) 381; *Tsuu T'ina Nation v. Alberta (Environment)*, 2008 ABQB 547, 453 A.R. 114, aff'd 2010 ABCA 137, 482 A.R. 198; *Enge v. Mandeville et al.*, 2013 NWTSC 33, [2013] 8 W.W.R. 562; and *Pimicikamak Band v. Manitoba*, 2014 MBQB 143, 308 Man. R. (2d) 49. From reading these cases, it is not clear to me why an administrative tribunal with the power to consider issues relating to the duty to consult should be bypassed just because the issue concerns the duty to consult. But this is best explored in argument on these consolidated matters. Further, to my knowledge, this issue has never been considered by this Court and must be regarded as an open question.

[11] Some parties seem to suggest that the test for fresh evidence in appeals from courts, as discussed in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 106 D.L.R. (3d) 212, has some bearing on the admissibility of fresh evidence in the case of statutory appeals from administrative decision-makers. I would have thought that after *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, it was settled that statutory appeals from decisions of administrative bodies are to be regarded as being the equivalent of applications for judicial review of decisions of administrative bodies. And applications for judicial review of decisions of administrative bodies are fundamentally different from appeals from courts: *Association of Universities and Colleges of Canada*, *supra*. On this basis, *Association of Universities and Colleges of Canada*, *Forest Ethics*, *Okwuobi* and *Alberta Teachers* would appear to be relevant, not *Palmer*. However, this Court does not appear to have settled this precise point.

[12] While I have the power to adjudicate the admissibility of these materials in advance of the hearing, the considerations, above, impel me not to rule on the matter now: see *Collins*, *supra*. The matter is not sufficiently clear cut or obvious. There is a quality of novelty and uncertainty in some of the submissions. I also have the sense that I do not as yet have all information and submissions necessary to decide the matter.

[13] Therefore, I leave the issue of admissibility to the panel hearing these consolidated matters. If the parties wish, they may address the issue of admissibility in their memoranda of fact and law in these consolidated matters.

[14] Therefore, the affidavits described in the Order that I shall release simultaneously with these reasons shall be served and transmitted in accordance with paragraph 9(b) of the December 17, 2014 Order, as amended by paragraph 3 of this Court's January 6, 2015 Order. I shall permit responding affidavits to be served and transmitted in accordance with paragraph 9(b) of the December 17, 2014 Order within five days exclusive of "holidays" under the *Federal Courts Rules*, SOR/98-106. Certain other consequential measures will appear in the Order. The time for completion of cross-examinations is unchanged.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-56-14, A-59-14, A-63-14, A-64-14, A-67-14, A-437-14, A-439-14, A-440-14, A-442-14, A-443-14, A-445-14, A-446-14, A-447-14, A-448-14, A-514-14, A-517-14, A-520-14, A-522-14
STYLE OF CAUSE:	GITXAALA NATION et al. v. Her Majesty the Queen et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	JANUARY 29, 2015

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