Federal Court of Appeal  Cour d'appel fédérale

Date: 20150316

Dockets: A-437-14 (lead file), A-56-14, A-59-14, A-63-14, A-64-14; A-67-14, 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 73

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

and

**THE ATTORNEY GENERAL OF BRITISH COLUMBIA,
AMNESTY INTERNATIONAL and
THE CANADIAN ASSOCIATION OF
PETROLEUM PRODUCERS**

Interveners

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 16, 2015.

REASONS FOR ORDER BY: STRATAS J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20150316

Dockets: A-437-14 (lead file), A-56-14, A-59-14, A-63-14, A-64-14; A-67-14, 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

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Interveners

REASONS FOR ORDER

STRATAS J.A.

[1] These consolidated matters are applications and appeals from decisions of the Governor in Council, the National Energy Board and a Joint Review Panel concerning the Northern Gateway Pipeline Project.

[2] Recently, the Attorney General of British Columbia, reacting to a notice of constitutional question, has asked to intervene and file a memorandum of fact and law on the constitutional question at the same time the respondents file their memoranda. It may intervene as of right: *Federal Courts Act*, R.S.C. 1985, c. F-7, subsection 57(4). An order to this effect shall be made.

[3] Before the Court are two motions under Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 for leave to intervene in these consolidated matters, one by Amnesty International and another by the Canadian Association of Petroleum Producers. For the reasons that follow, I grant both leave to intervene on terms.

A. The test for granting leave to intervene

[4] For the purposes of these motions, I shall apply the test in *Canada (Attorney General) v. Pictou Landing First Nation*, 2014 FCA 21, 456 N.R. 365. This test updates and modifies the former test in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 F.C. 74 at paragraph 12 (T.D.), aff'd [1990] 1 F.C. 90 (C.A.).

[5] The test in *Pictou, supra* at paragraph 11 is as follows:

> I. Has the proposed intervener complied with the specific procedural requirements in Rule 109(2)? Is the evidence offered in support detailed and well-particularized? If the answer to either of these questions is no, the Court cannot adequately assess the remaining considerations and so it must deny intervener status. If the answer to both of these questions is yes, the Court can adequately assess the remaining considerations and assess whether, on balance, intervener status should be granted.
>
> II. Does the proposed intervener have a genuine interest in the matter before the Court such that the Court can be assured that the proposed intervener has the necessary knowledge, skills and resources and will dedicate them to the matter before the Court?
>
> III. In participating in this appeal in the way it proposes, will the proposed intervener advance different and valuable insights and perspectives that will actually further the Court's determination of the matter?
>
> IV. Is it in the interests of justice that intervention be permitted? For example, has the matter assumed such a public, important and complex dimension that the Court needs to be exposed to perspectives beyond those offered by the particular parties before the Court? Has the proposed intervener been involved in earlier proceedings in the matter?
>
> V. Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive

> determination of every proceeding on its merits"? Are there terms that should be attached to the intervention that would advance the imperatives in Rule 3?

[6] Certain of these factors support the granting of leave to intervene. Both proposed interveners have complied with Rule 109(2), offering evidence to the Court that is detailed and well-particularized.

[7] Both proposed interveners have a genuine interest in the matter and the Court is confident that they will bring knowledge, skills and resources to the matter before the Court.

[8] Finally, granting leave to each to intervene is consistent with the objectives of Rule 3. Both proposed interveners applied for leave in accordance with the schedule set by this Court for these consolidated matters, a schedule that was made to implement the objectives of Rule 3.

[9] In both motions, the controversy concerns factors III and IV in the test, namely the extent to which each proposed intervener will bring different and valuable insights that will further the Court's determination and whether it is in the interests of justice that intervention be permitted. Each of the proposed interveners has strengths and weaknesses on these factors.

B. Amnesty International

[10] On a motion for leave to intervene, the Court must consider whether the proposed intervener will offer insights and perspectives that "will actually further the Court's determination of the matter": *Pictou*, *supra* at paragraph 11 (factor III).

[11] Amnesty International offers an international law perspective to the issues before us. It suggests that there are a number of international instruments and other materials that affect the issues. A reading of its memorandum suggests that international law is very much at large on all issues in many different ways in this consolidated matter. In my view, this casts things far too broadly.

[12] In some cases, we are treated to lengthy submissions of international law that have little or no relevance to the domestic law issues we must determine. Often counsel advancing those submissions assume that law at the international level – often expressing fundamental concepts and "above" the law of particular nation-states – always applies when we interpret and apply domestic law. As a matter of law, that is simply not true.

[13] International law potentially affects the issues in these consolidated matters in only limited ways. If Amnesty International's intervention actually is to further this Court's determination of these consolidated matters, it must be directed at those limited ways.

[14] The issues before us are defined by the notices of application and notices of appeal filed in the consolidated matters. From these, I conclude that the issues before us include the following: the reasonableness or correctness of decisions made by the Governor in Council, the National Energy Board and the Joint Review Panel acting under legislative powers of decision, whether any duties to consult with Aboriginal peoples remain unfulfilled, and whether the decisions should be set aside because of procedural errors.

[15] In the case of the reasonableness or correctness of the decisions made, the meaning of the legislative provision authorizing or regulating each decision usually forms an important part of the analysis. As I shall explain, international law can enter the analysis where the meaning of the legislative provision is unclear.

[16] Domestic law, not international law, forms the law of the land, unless the domestic law expressly incorporates international law by reference: *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193 at paragraph 137; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141 at pages 172-73, 81 D.L.R. (3d) 609; and see sections 91 and 92 of the *Constitution Act, 1867*, which give Parliament and the legislatures the "exclusive" power to make laws. If a legislative provision is clear and unambiguous, international law cannot be used to change its meaning: *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281 at paragraph 35; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269 at paragraph 50.

[17] However, if there are multiple possible interpretations of a legislative provision, we should avoid interpretations that would put Canada in breach of its international obligations: *Ordon Estate*, *supra* at paragraph 137. This canon of construction is based on a presumption that our domestic law conforms to international law: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paragraph 53. For example, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at paragraphs 69-71, the Supreme Court considered the statutory words "humanitarian and compassionate" to be ambiguous and so it used international law to resolve the ambiguity. As a practical matter, this canon of construction is

seldom applied because most legislative provisions do not suffer from ambiguity and, thus, "must be followed even if they are contrary to international law": *Daniels v. White*, [1968] S.C.R. 517 at page 541, 2 D.L.R. (3d) 1. Overall, then, international law can play a role in the interpretation of legislative provisions – indeed, sometimes an important one – but it is a well-defined, limited role.

[18] In an administrative law case such as this, international law can enter into the analysis in another limited way. For the purposes of this discussion, I shall assume we are dealing with an unambiguous legislative provision that does not expressly incorporate international law by reference. Under such a provision, despite its clarity, an administrative decision-maker might be able to exercise its discretion in more than one way. And it may be that one particular exercise of discretion is more consistent with international law standards than others. When the administrative decision-maker refrains from exercising its discretion in the way that is more consistent with international law standards and instead exercises its discretion in another way, a party can challenge the reasonableness of that exercise of discretion, invoking the decision-maker's failure to follow international law standards. But given the status of international law where domestic law is unambiguous, this is simply an argument that the decision-maker failed to follow a non-binding policy consideration. That failure may or may not render the decision unreasonable. Much will depend on the importance of the international law standard in the context of the particular case and the breadth of the margin of appreciation or range of acceptability and defensibility the decision-maker enjoys in interpreting and applying the legislative provision authorizing its decision: see, *e.g.*, *Canada (Minister of Transport,*

Infrastructure and Communities) v. Jagjit Singh Farwaha, 2014 FCA 56 at paragraphs 88-105 for the general approach.

[19] In the case of the duty to consult, decisions of the Supreme Court are binding on us and have defined the duty with some particularity. We are not free to modify the Supreme Court's law on the basis of international law submissions made to us. International law, at best, might be of limited assistance in interpreting and applying the law set out by Supreme Court.

[20] I accept that some standards in international law can bear upon procedural fairness. However, for the most part, procedural fairness has been well-defined in cases such as *Baker*, *supra*. On this motion, Amnesty International has not persuaded me that international law will affect the Court's determination on procedural issues in any concrete way.

[21] As for the overall interests of justice (factor IV in *Pictou*), I am concerned that there are already a large number of applicants/appellants before the Court – they outnumber the respondents greatly – and they are quite capable of invoking international law as they please, though perhaps not with the expertise of Amnesty International. Amnesty International is indeed uniquely placed to make useful submissions on these issues.

[22] In assessing this motion for intervention, I must consider the overall fairness of the intervention. The respondents Northern Gateway Pipelines Inc. and Northern Gateway Pipelines Limited Partnership note the number of parties arrayed against them in these consolidated matters. They are concerned that they will already have much to respond to, especially if the

applicants/appellants in their memoranda divvy up issues among themselves to avoid duplication. More specifically, they are concerned that the respondents are faced with page limits for their memoranda and may have to use some of their scarce pages responding to Amnesty International.

[23] These concerns are well-founded. An aspect of overall fairness in the litigation process is the "equality of arms": Lord Woolf, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London, U.K.: Lord Chancellor's Department, 1995). To the extent possible, no one side should be so numerous or dominant that its voices drown out the other side and prevent it from expressing itself adequately.

[24] In oral argument in this Court, we recognize "equality of arms" by affording equal time in oral argument to each side before us, no matter how many might be on one side. As far as memoranda are concerned, the best way to ensure "equality of arms" is by allowing greatly outnumbered parties, when requested, to file lengthier memoranda, but only if necessary.

[25] It is a close call, but overall I exercise my discretion to allow Amnesty International leave to intervene on terms, primarily because of its expertise in international law issues and the potential that international law issues may be relevant, albeit in limited ways.

[26] Amnesty International may file a memorandum of fact and law of no more than 15 pages on or before the deadline set for applicants/appellants to file their memoranda. It may also make

oral submissions in the hearing of the consolidated matters. The panel will decide upon the length of those submissions.

[27] Amnesty International's written and oral submissions shall be limited to issues of international law, but only insofar as they are relevant and necessary to any of the issues in the consolidated matter. It must explain, in legal terms, how and why the particular international law submission is relevant and necessary to the determination of a specific issue, with specific reference to the law set out above or other law bearing on the point. For example, it will have to identify a legislative provision that is ambiguous or that authorizes more than one exercise of discretion and then identify the international law that it says is relevant to the issue.

[28] For clarity, while I am sceptical as to the relevance of international law in areas settled by the Supreme Court, such as the content of the duty to consult and procedural fairness, Amnesty International may speak to those issues as long as it complies with the terms in the preceding paragraph.

[29] The panel hearing these consolidated matters may disregard any international law submissions that do not comply with these conditions or are otherwise irrelevant.

[30] Also as a term of granting Amnesty International leave to intervene, I shall invite the respondents, if they consider it necessary, to move by way of informal letter for an extension of the length of their memoranda within three days of receiving the memoranda of the applicants/appellants and Amnesty International.

C. Canadian Association of Petroleum Producers

[31] On the earlier direction of Justice Sharlow, the Association presented with its motion materials a draft intervener's memorandum. In response, a number of applicants/appellants oppose the Association's intervention, expressing a number of concerns. I share many of those concerns.

[32] The Association appears to be doing nothing more than advancing submissions that the respondents can themselves advance. The submissions do not reflect any particular perspective of the Association, a group of entities whose economic interests are affected by the Northern Gateway Pipeline Project.

[33] Nevertheless, there are some considerations that favour granting the Association leave to intervene.

[34] The Project was approved in part on the basis that it is in the public interest. The legality and reasonableness of the approval is under attack. The Association is well-placed to speak to the issue of the public interest. It represents a broad segment of the public affected by the decisions below.

[35] In *Pictou*, *supra* at paragraph 11, one important consideration is whether the Court is dealing with matters that have "assumed…a public, important and complex dimension" such that the Court needs to be exposed to perspectives beyond those offered by the particular parties

before the Court. In some cases, merely from the standpoint of the appearance of fairness, let alone the concrete assistance that might be offered, a particular intervention might be justified. While such cases are rare, in my view this is one such case.

[36] At present, on one side are aboriginal groups, environmental groups, a union, and now, in the case of Amnesty International, a leading international organization. At present, on the other side are governmental entities, the proponents of the Project, and no one else. What is missing are those, other than the proponents, whose interests may be affected if the Project's approval is overturned. The Association helps to fill that gap.

[37] In my view, this matter is different from *Forest Ethics Advocacy Association v. National Energy Board*, 2014 FCA 88. There, this Court refused to grant leave to intervene to a single refiner downstream of a pipeline. Here we have an association representing a complete industrial sector. Further, the issue in this Court in *Forest Ethics Advocacy Association* – a review of the National Energy Board's decision to deny a single individual a right to participate – did not have the sort of "public, important and complex dimension" we have here. *Forest Ethics Advocacy Association* also did not have the sort of imbalance we have here, namely an array of voices on one side and relatively few on the other side.

[38] I also note that the Association was significantly involved in the matter under review, adducing evidence and questioning witnesses below. Although not at all determinative, this does support the fairness of allowing it to intervene.

[39] Again, it is a close call, but I shall grant leave to the Association to intervene. In its memorandum of fact and law of no more than fifteen pages, it shall make representations on the public interest considerations that come to bear on this Court's assessment of the correctness or reasonableness of the decisions under review. If reasonableness review is relevant, submissions may be made on the size or nature of the range of acceptability or defensibility or the margin of appreciation that should apply to the decisions under review and whether the decisions under review are within those ranges or margins. To be clear, the draft memorandum it has presented to this Court does not comply with the requirements set out in this paragraph and will have to be amended.

[40] The Association shall file its memorandum by the time set for the respondents to file their memoranda. Its submissions shall not duplicate those of the respondents.

[41] The Association shall also be entitled to make oral submissions at the hearing of these consolidated matters. The panel will decide upon the length of those submissions.

[42] Both interveners shall take the evidentiary record as they find it. Neither intervener shall be liable for costs or entitled to costs.

D. Disposition

[43] An order shall be issued in accordance with these reasons.

"David Stratas"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-437-14 (LEAD FILE), A-56-14, A-59-14, A-63-14, A-64-14, A-67-14, 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:	MARCH 16, 2015

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