Federal Court

Cour fédérale

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June 15, 2015

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Dear Counsel:

Re: T-2292-14 ***Doig River First Nation et al v AGC et al***

Enclosed you will find the following document:

- Order and Reasons

of The Honourable Mr. Justice Manson rendered on June 15, 2015.

Yours truly,

Julia Orchard
Registry Officer
Case Management

Encl(s).

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Federal Court | Cour fédérale

Date: 20150615

Docket: T-2292-14

Citation: 2015 FC 754

Vancouver, British Columbia, June 15, 2015

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

DOIG RIVER FIRST NATION,
PROPHET RIVER FIRST NATION,
WEST MOBERLY FIRST NATIONS
AND MCLEOD LAKE INDIAN BAND

Applicants

and

ATTORNEY GENERAL OF CANADA,
MINISTER OF THE ENVIRONMENT,
MINISTER OF FISHERIES AND OCEANS,
MINISTER OF TRANSPORT AND
BRITISH COLUMBIA HYDRO
AND POWER AUTHORITY

Respondents

ORDER AND REASONS

UPON MOTION in writing dated March 2, 2015 on behalf of the Proposed Intervener,

Amnesty International (AI), pursuant to Rules 109 and 369 of the *Federal Courts Rules* for an order that:

a. AI is granted leave to intervene in this application for judicial review pursuant to Rule 109 of the *Federal Courts Rules* to provide submissions on the application of international human rights law and principles to the issues raised in this application;
b. AI is entitled to receive all materials filed in this application;
c. AI may serve a memorandum of fact and law;
d. AI shall accept the record as adduced by the parties and shall not seek to file any additional evidence;
e. AI shall be allowed to present oral argument at the hearing of the application, with the time for oral argument by counsel to AI determined by the judge hearing the application;
f. AI shall seek no costs in respect of the application and shall have no costs ordered against it; and
g. the style of cause shall be changed to add Amnesty International as an intervener, and hereafter all documents shall be filed under the amended style of cause;

AND UPON reading the amended motion record filed on behalf of AI, the motion records filed on behalf of the Applicants and the Respondent, British Columbia Hydro and Power Authority (BC Hydro), and AI's written representations in reply;

AND UPON reading correspondence dated May 25, 2015 from counsel for the Respondents, The Attorney General of Canada, Minister of the Environment, Minister of Fisheries and Oceans, and Minister of Transport (the Crown Respondents);

AND UPON determining that leave to intervene should be granted on terms, for the following reasons.

I. Background

[1] AI has applied pursuant to Rule 109 of the *Federal Courts Rules*, S.O.R./98-106 for leave to intervene in this proceeding.

[2] The Applicants in the underlying judicial review application are four of eight First Nations in British Columbia that are signatories, or adherents, to Treaty 8.

[3] The proposed dam, Site C Clean Energy project [the Project], will be the third dam and hydroelectric generating station on the Peace River in northeast British Columbia.

[4] The planning and evaluation of the Project began in 2004; consultation with Aboriginal communities began in 2007.

[5] A cooperative environmental assessment was conducted for the Project between 2011 and 2014. It entailed a review that invited public participation in determining the procedures and scope of the assessment as well as the adverse effects of the project. It also included the establishment of a joint review panel [the Panel] under the Canadian Environmental Assessment Act [CEAA] and the British Columbia Environmental Assessment Act [BCEAA].

[6] On October 14, 2014, three important statements were issued. First, the Governor in Council issued Order in Council PC 2014-1105 which found that the adverse environmental effects of the Project are justified in the circumstances. Second, the Minister of the

Environment issued a Decision Statement to BC Hydro establishing conditions to comply with in order to proceed with the Project, pursuant to s. 54(1) of the CEAA (this was reissued on November 25, 2014 to correct an error regarding the date of establishment of the conditions). Third, the BC Minister of Environment and Minister of Forests, Lands and Natural Resource Operations issued an Environmental Assessment Certificate for the Project pursuant to s. 17(3) of the BCEAA.

[7] On November 5, 2014, the Applicants commenced this proceeding, arguing that the Governor in Council was required to justify the Project's approval with regard to the test set out in *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*] to justify infringements of section 35(1) of the *Constitution Act, 1982*.

[8] Prophet River First Nation, West Moberly First Nation, and the McLeod Lake Indian Band, also commenced a judicial review application in the BC Supreme Court challenging the decision to issue an Environmental Assessment Certificate for the Project on similar grounds to those raised here. That matter was heard between April 23 and May 6 of 2015, and the decision is currently reserved. AI also applied to intervene in that proceeding, but their application was dismissed.

[9] The Applicant, AI, is independent of any government, political persuasion, and religion. It was founded in 1961 to work towards preventing violations of internationally recognized rights. They "conduct research and take action to prevent and end grave abuses of all human rights".

[10] The government of Canada has endorsed, but not ratified, the United Nations Declaration on the Rights of Indigenous Peoples [the UN Declaration].

II. Issue

[11] The sole issue for the Court is whether AI should be granted leave to intervene in this proceeding.

[12] The Applicants consent to the relief requested. The Crown Respondents take no position on whether leave to intervene should be granted. However, they submit that, in the event leave is granted, AI should not be allowed to argue the merits of the proceeding or align its argument to support any party with respect to the specific outcome of the proceeding. BC Hydro opposes the motion on the grounds that AI is seeking to expand the scope of the proceeding to make submissions regarding international law, which would be of no assistance in deciding the issues raised in the Notice of Application.

[13] The Applicant AI argues that the present proceeding raises:

> …issues of public interest concerning the content of the Crown's obligations to ensure proper protection of Indigenous rights within its decision-making regarding major resource development projects that will have serious negative impacts on Indigenous peoples' access to their traditional lands and the resources necessary to sustain their traditional culture and livelihoods.

[14] They consider themselves in a position to provide a unique international human rights law perspective on the issues arising on judicial review, to assist the Court in interpreting the content of the Governor in Council's statutory powers and obligations under

the CEAA where a development project risking significant adverse effects to indigenous peoples' rights that cannot be mitigated is at issue.

[15] AI submits that the perspective they add does not introduce new issues not previously raised in the Notice of Application, nor does it seek to transform the existing issues raised by the Applicants. What they intend to address is the emergence of arguments related directly to issues raised in the Notice.

[16] Specifically, they intend to provide a different perspective on the interpretation of domestic statutory law and the application of domestic constitutional principles. This perspective has been recognized as valid, and as not raising new issues in the jurisprudence of the Federal Court of Appeal (*Canadian Taxpayers Federation v Benoit*, 2001 FCA 71, at 12, and 18; *Gitxaala Nation v Canada*, 2015 FCA 73, at 15, 17-18).

[17] AI proposes to assist the Court through submissions on how international human rights law informs the following four points:

i. the need for the Crown to recognize and respect Indigenous peoples' rights relating to their land and culture in the context of decisions about resource development that will have significant adverse effects on the exercise of these rights;
ii. the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown;
iii. the interpretation of the Governor in Council's statutory powers and obligations under CEAA in cases in which serious adverse effects to Indigenous peoples' rights are anticipated;
iv. the procedure and substance of judicial oversight of executive decisions regarding whether a proposed limitation of Indigenous rights can be justified.

[18] The Respondents submit that if AI is granted leave to intervene in this matter they would provide no assistance to the Court. In fact, AI seeks to expand the scope of the proceeding to make submissions regarding international law where it has been established that its application is of no assistance. The Notice of Application makes no reference to International Law principles, and any potential value would be minimal.

III. The Test for Granting Leave to Intervene

[19] For the purpose of this motion, I shall apply the test set out by Mr. Justice David Stratas of the Federal Court of Appeal in *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21 (CanLII), 456 NR 365 [*Pictou]*. This test updates and modifies the former test in *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), [1990] 1 FC 74 at paragraph 12 (TD), aff'd [1990] 1 FC 90 (CA).

[20] 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?

IV. Analysis

A. *Compliance with Rule 109(2)*

[21] Having regard to the factors considered by Justice David Stratas in *Picton Landing*, I find that AI has complied with Rule 109(2) in making this application to the Court.

B. *Genuine interest, and unique perspective and expertise*

[22] AI asserts that its arguments raise important questions of public law, relating to the content of the Crown's obligations to ensure proper protection of Indigenous rights within its decision-making process established under the CEAA. If important questions of public law are raised, then a genuine interest is established, if they have demonstrated a commitment to the issues raised and possess special knowledge and expertise (*Globalive Wireless Management Corp v Public Mobile Inc et al*, 2011 FCA 119, at 5(c)). AI submits that they satisfy this standard as has been recognized by the Court.

[23] With respect to the Project specifically, AI has issued a number of public statements concerning the need to protect Indigenous land and culture in the Peace River Valley, both before and after federal approval was given. They also made a recent submission to the United Nations Committee on Economic, Social and Cultural Rights raising these concerns.

[24] In addition, AI's decision not to participate in the environmental assessment process of the Project is not relevant to determining whether they should be granted intervener status since the issues that arise on this application for judicial review only existed after the assessment was completed and the Governor in Council rendered the impugned decision.

[25] AI submits that none of the parties in the proceeding will address the issues raised from an international, non-governmental, non-Indigenous human rights perspective; nor do they have the expertise, knowledge and experience AI has.

[26] International law has been repeatedly recognized as a "relevant and persuasive" source in interpreting rights enshrined in the *Constitution Act, 1982 (Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, at 57), as well as domestic legislation (*R v Hape*, 2007 SCC 26, at 53, 55). Further, Canadian laws are presumed to conform with international law, so any interpretation of domestic legislation that results in a violation of Canada's international human rights obligations should be rejected.

[27] It is AI's opinion that the term "justified in the circumstances" as included in section 52(4) of the CEAA can be interpreted in multiple ways, and international human rights law ought to inform the interpretation of the Governor in Council's decision-making powers and obligations (*R v Hape*, 2007 SCC 26, at 53); they further should inform the Court's selection of the applicable standard of review to apply.

[28] The Respondent BC Hydro asserts that AI's stated expertise will not be of assistance to the Court. International law, specifically the UN Declaration, has been determined inapplicable in such a situation. In *Hupacasath First Nation v Canada (Foreign Affairs)*, 2013 FC 900 the Chief Justice acknowledged at paragraph 51 that Aboriginal Affairs and Northern Development Canada [AANDC] views it as ""an aspirational document" and as "a non-legally binding document that does not reflect customary international law nor change Canadian laws"".

[29] Moreover, BC Hydro states that the Supreme Court settled that the justification of an infringement of Aboriginal or treaty rights, and the judicial oversight of executive decisions regarding the justification of a proposed infringement should involve the application of the framework set out in *Sparrow*. This has been repeatedly confirmed in the context of justification of an infringement (*R v Badger*, [1996] 1 SCR 771; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388).

[30] I agree with AI that their unique and experienced perspective on the international law aspects of the issues before the court in this proceeding could be helpful. I am cognizant, though, of the Respondent BC Hydro's concerns over fairness in adding a new perspective, and new arguments to address in the limited time allotted to hear this matter, as well as limited space afforded them for their written arguments.

[31] In dealing with the factors carefully considered by Justice David Stratas in *Pictou Landing*, AI has complied with the specific requirements set out in Rule 109(2) of the *Federal Courts Rules*. They have further amply demonstrated a genuine interest in the matter

before the Court and the issues it raises. In addition, they have equally demonstrated they have the knowledge, skills and resources required, to address specific issues before the Court and are willing to dedicate them to this matter.

[32] AI's perspective is also not represented by any of the parties before the Court. The perspective of an unaffiliated, international organization, with the experience and expertise of AI, is not reflected by the parties. While I understand that their participation could add some limited procedural complexity, I find that their perspective does have the potential to further the Court in the determination of this matter. Terms of this order will reflect limits on the form and content of the intervention allowed.

[33] Undeniably, the Project's far reaching temporal, geographical, and cultural impacts highlight the public, important, and complex dimension of the matter before the Court. I find that an international perspective can provide insight not provided by the parties.

C. *Interests of justice and just, expedient and least expensive determination*

[34] AI submits that it is in the interest of justice to allow them to intervene in the present proceeding. Their proposed submissions will assist the Court to clarify the domestic legal standards applicable to decision-making in the context of resource development. Further, AI promotes respect for human rights generally, and not just for Indigenous peoples, which is recognized as a broader social imperative.

[35] AI also submits that it intends to be mindful of its submissions, as well as those of other parties, so as not to duplicate arguments or materials before the Court. They intend to abide by any schedule set by this Court for delivery of materials and oral argument. Further, they will seek no costs, and ask that no costs be awarded against it.

[36] AI states that it proposes to rely on more than simply the UN Declaration in their arguments, and draw on a number of international instruments which have been ratified by Canada. This alone distinguishes the cases relied upon by BC Hydro, since in those cases reliance on the UN Declaration was not fully developed, and no other instruments were referenced to support a party's position.

[37] The Respondent counters that AI elected not to take advantage of multiple opportunities to participate in the Project's lengthy environmental assessment. Involvement in earlier proceedings is a relevant factor in deciding whether or not to grant leave to intervene (*Pictou Landing*, at 11), and given the expansion of scope that AI seeks, it would not be in the interests of justice to grant their application.

[38] Despite concerns raised by the Respondent in this matter, and indeed raised in other cases where intervener status has been denied, I believe that with appropriate restrictions on AI's submissions related to matters solely in dispute, the potential for any unfairness can be mitigated. Terms of my order will reflect limits on the extent, form and content of the intervention. Narrowly defining AI's role, giving them limited opportunity to make written and oral arguments, and allowing the Respondent the opportunity to respond with extra written arguments, if they find it ultimately necessary, will ensure that the hearing

runs smoothly, in a fair manner, and based on the original timeline proposed for the proceeding.

[39] I would further state that I agree with the Applicant's that their lack of involvement at the environmental assessment stage is irrelevant to their application for intervener status in the matter at hand since the issues raised here did not present themselves until after the Governor in Council had made a decision on the Project based on the completed environmental assessment. If the judicial review were to deal with the environmental assessment itself their lack of participation might well be a relevant factor to consider.

[40] Points (i), (iii) and (iv) set out in paragraph 18 above need not be addressed by AI, as the Court has sufficient representations by the parties and well established case law on these points, without the need for any further input from AI.

THIS COURT ORDERS that:

1. AI's application to intervene is allowed on the following terms:

   (a) Submissions are limited to the sole issue of the appropriate standard of justification that ought to be applied when limitations on Indigenous rights are contemplated by the Crown, to be filed and served by June 22, 2015;

   (b) Written submissions by AI will be limited to ten (10) pages;

   (c) Oral submissions will be limited to forty five (45) minutes;

   (d) The Respondents shall have until June 30, 2015 to file and serve any reply, limited to five (5) pages.

2. No costs.

"Michael D. Manson"
Judge