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An Update on the Northern Gateway Litigation

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Cases Commented On: *Forest Ethics Advocacy Association v Northern Gateway Pipelines Inc*, 2015 FCA 26; *Gitxaala Nation v Northern Gateway Pipelines Inc*, 2015 FCA 27; *Gitxaala Nation v Northern Gateway Pipelines Inc*, 2015 FCA 73

This post provides an update on the various challenges that have been mounted to Enbridge's Northern Gateway Project (NGP). ABlawg has been following this project for some time. Earlier posts include a post on the relationship between the National Energy Board (NEB) and the Governor in Council, a post on BC's conditions for oil pipelines as well as a series of posts by Shaun Fluker here, here and here particularly on *Species at Risk Act* (SC 2000, c.29) issues with respect to the report of the Joint Review Panel (JRP) and the Governor in Council's decision, and Martin Olszynski's post on the JRP Report. In addition, I offered an earlier account of the Federal Court proceedings in August 2014 which was published in Energy Regulation Quarterly.

As readers will recall, the JRP issued its Report in December 2013 recommending approval of the NGP subject to satisfaction of some 209 conditions. The Governor in Council ultimately accepted the JRP's recommendation in June 2014. Various judicial review and appeal applications have been launched with respect to both the JRP Report and the decision of the Governor in Council. All of these applications have been consolidated (see 2014 FCA 182 and apparently a supplementary order of December 17, 2014 referred to in 2015 FCA 27 at para 1) and a schedule established with a view to a hearing in Fall 2015.

The decisions commented on here therefore all deal with various interlocutory matters. The first two decisions were handed down by Justice Stratas on January 27, 2015. The straightforward issue in *Forest Ethics*, 2015 FCA 26 was whether the National Energy Board should be added as a respondent in one particular application, A-514-14, having already obtained that status in the consolidated applications. The appellants opposed respondent status suggesting that the NEB should be treated as an intervener on the grounds that a tribunal has only limited participation rights on the appeal or judicial review of one of its decisions. Justice Stratas concluded that the Board's submission showed that it was well aware of the limits on its participation, and that since, in a technical sense, the application is an appeal from the Board's decision the NEB should be treated as a respondent.

The second decision handed down in January, 2015 FCA 27, dealt with the extent to which parties might be able to supplement the record with affidavits. The Court anticipated this issue in its consolidation order of December 2014. In that Order the Court took the position that it would

not allow affidavit evidence with respect to constitutional matters that had not already been raised before the Board, since the NEB has the jurisdiction to consider constitutional matters and any effort to raise new questions would inappropriately bypass the Board: see *Forest Ethics v NEB*, 2014 FCA 245, commented on here. In this application for leave to file evidence Justice Stratas noted that most of the affidavits "bear upon the issue whether there was a duty to consult" (at para 8). Justice Stratas permitted the affidavits to be filed but left the ultimate admissibility of these affidavits to be determined by the panel hearing the matter. While he was unclear as to the extent that the affidavits might have been raising new constitutional issues, Justice Stratas was referred to several authorities suggesting that the courts had taken a more relaxed view concerning the admissibility of new evidence in cases concerning Aboriginal peoples: see *Chartrand v The District Manager*, 2013 BCSC 1068, 52 BCLR (5th) 381; *Tsuu T'ina Nation v Alberta (Environment)*, 2008 ABQB 547, 453 AR 114, aff'd 2010 ABCA 137, 482 AR 198; *Enge v Mandeville et al.*, 2013 NWTSC 33, [2013] 8 WWR 562; and *Pimicikamak Band v Manitoba*, 2014 MBQB 143, 308 Man R (2d) 49.

While by no means convinced as to this line of reasoning Justice Stratas acknowledged that this issue had not been considered by the Court of Appeal (at para 10). Similarly, Justice Stratas also left to the hearing panel the question of whether the test for the admissibility of fresh evidence on a statutory appeal under the *National Energy Board Act*, RSC 1985 c N- 7 (*NEBA*) was governed by *Palmer v The Queen*, [1980] 1 SCR 759 or by an administrative law standard (at paras 11-13).

In the third decision, 2015 FCA 73, Justice Stratas was called upon to rule on two contested applications to intervene, one from Amnesty International in support of the appellants and a second from the Canadian Association of Petroleum Producers (CAPP) in support of the respondents. Justice Stratas considered both applications in light of the Federal Court of Appeal's decision in *Canada (Attorney General) v Pictou Landing First Nation*, 2014 FCA 21, 456 NR 365, which set out this test:

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?

Amnesty proposed to focus on international law issues as part of its intervention. Justice Stratas granted Amnesty's application on terms. In doing so he took the view that the intervention "casts things too broadly" insofar as it suggests "that international law is very much at large on all issues in many different ways" (at para 11). In his view, international law might be relevant to the matter at hand in one of two ways. First, if there are multiple possible interpretations of a legislative provision the court should prefer an interpretation that would not put Canada in breach of its international obligations. Second, international law might also be relevant with respect to the exercise of a discretionary power – although in that context it would likely be necessary to show that the failure of the statutory decision maker to follow the guidance of international law would be unreasonable (at para 18):

> 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.

While I think that these are simply two situations in which international law might be relevant to the application of domestic law rather than an exhaustive statement of the relevance of international law, they do serve as a reminder to counsel that it is not enough to adduce a body of international law but that it is also necessary to show how that body of law might make a difference in terms of outcome.

Justice Stratas was especially cautious with respect to the connection between the duty to consult and accommodate and international law. Here Justice Stratas observed (at para 19) that:

> 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.

But even with this restriction, there should be considerable opportunity to argue that international law might inform such matters as: the content of the duty to consult, the significance of the right to culture, the respect that should be accorded to indigenous conceptions of property, and the question of what might constitute an unjustifiable infringement of an aboriginal right or title or a treaty right: see my post on the Supreme Court's *Grassy Narrows* decision here.

Justice Stratas summarized his instructions to counsel (at para 36) as follows:

> 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.

Justice Stratas also invited counsel for the respondent to consider whether it might need to apply to extend the approved length of its memorandum of fact and law once it had had the opportunity to review the intervenor's arguments (at para 30). Justice Stratas had rejected an earlier application from Enbridge to file a more extensive memorandum: 2014 FCA 182 at para 26.

In some respects, the application from CAPP to intervene seemed to present more difficulty than that posed by Amnesty's application. After all, as Justice Stratas himself acknowledged (at para 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.

What were the clinching factors here that justified allowing CAPP to intervene (again on terms)? Justice Stratas referred to three considerations. First, the Court acknowledged that the decision to approve the project had involved public interest considerations (or public convenience and necessity in the argot of *NEBA*) and that (at para 34) "The Association is well-placed to speak to the issue of public interest. It represents a broad segment of the public affected by the decision below."

While the first part of this proposition is clearly uncontroversial, the suggestion that CAPP is broadly representative of the public affected by the decision hardly seems intuitive.

The second relevant consideration seems to have been "equality of arms" (i.e. the need for "overall fairness in the litigation process" – see paras 23 and 36, referencing 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)). And finally Justice Stratas noted that CAPP had been significantly involved in the mater under review.

But Justice Stratas also had advice and instructions for counsel to CAPP (at para 39):

> [CAPP] 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.

And now we must wait for the Fall of 2015.