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TMX Litigation Takes an Unusual Turn at the Federal Court of Appeal

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Case Commented On: *Ignace v Canada (Attorney General)*, 2019 FCA 239 (CanLII)

Last week, the Federal Court of Appeal (FCA) issued another ruling in the TMX saga dealing with the consolidated challenges to the Trans Mountain pipeline expansion (TMX) project. This decision comes just three weeks after *Raincoast Conservation Foundation v Canada* (Attorney General), 2019 FCA 224 (Can LII) (*Raincoast*), where the FCA granted leave to six parties to commence judicial reviews challenging the Governor in Council's decision to re-approve the Trans Mountain Expansion (TMX) project. In this most recent decision, Justice David Stratas concluded that two of those six parties, Tsleil Waututh Nation (TWN) and Squamish Nation (Squamish), had filed applications that went beyond the narrow parameters set out in the September 4th court order granting leave. Accordingly, the Court issued an order allowing both parties to file amended notices of application that comply with the restrictions in the initial order. In this post, we briefly summarize this latest and fairly unusual development and conclude with a brief comment on what might have led counsel to push the boundaries in this matter.

Context

On September 4, 2019, the FCA granted leave to six of twelve parties wishing to challenge the Governor in Council's (i.e. federal Cabinet's) re-approval of TMX. Writing as the sole judge in the matter, Justice Stratas limited the challenges to three discrete issues, primarily focused on the adequacy of the Government of Canada's further consultation with Indigenous communities between August 30, 2018 and June 18, 2019 (this was the period between the FCA decision quashing the Governor-in-Council's initial approval and its subsequent re-approval following additional studies and consultation). In an unusual step, the FCA provided relatively detailed reasons with the order, all of which we discuss in our earlier post.

Following the court's expressed desire for a "highly expedited schedule" for the judicial review (Raincoast at para 76), the six parties filed their applications within one week of the FCA decision. As noted by Trans Mountain and the Attorney General of Canada (AG), the TWN application for judicial review raised issues that went beyond the restrictions in the order granting leave. By the AG's account, there were seven issues that exceeded the order's parameters; by Trans Mountain's account it was more than sixty (at para 3). Squamish followed TWN's lead but did so later, and so the respondents' and court's attention was primarily focused on TWN. The FCA Registry referred the TWN notice of application for review pursuant to Rule 74 of the Federal Courts Rules, SOR/98-106, under which a document in the Court file that violates an order can be removed from the file (at para 4).

Panels, Appeals and Allegations of Bias

Before dealing with the alleged violations, Justice Stratas first had to deal with TWN's contention that a panel of judges should be assigned to decide the matter and that Justice Stratas should not be on that panel on the grounds that he was effectively sitting on appeal from his own order and that he had prejudged the matter, which is to say that he was biased.

As to the first issue, Justice Stratas observed that the Chief Justice had the exclusive power to assign judges (at para 8) as well as the exclusive power to decide whether a single judge or a panel of judges should hear a matter (subject to some exceptions not applicable here). Furthermore, in this case section 55(2)(c) of the *National Energy Board Act*, RSC 1985, c N-7 expressly contemplated that matters be dealt with by a single judge (at para 26). He also rejected TWN's argument that the FCA's plenary or inherent powers permit the FCA to hear an appeal of the September 4th order, indicating that such powers of the court "do not extend to the creation of appeal rights" (at para 20) and that appeal rights are "not created out of thin air" (at para 24). Rather, he explained, such rights must be authorized by legislation, which they were not in this case (at para 21). In this context, the court order is final (at para 26) and the only recourse for a party is to seek leave to appeal to the Supreme Court of Canada, which Justice Stratas invited the applicants to do (at para 37, see also para 20). Justice Stratas went on to explain that under s 55 of the *National Energy Board Act*, Parliament intended the FCA to carry out a "once-and-for-all 'gatekeeping' function when it determines leave motions, to ensure that only fairly arguable issues are litigated" (at para 30). While the Court has some authority to vary, reconsider or set aside an order under exceptional circumstances (for example, for fraud) under Rules 397- 399, there is no general authority to reconsider an order on the basis of an alleged "miscarriage of justice," otherwise "a party could file a notice of appeal against any adverse decision at any time in any circumstance whatsoever: all it has to do is pick up a megaphone and shout 'miscarriage of justice'" (at para 25).

As to the allegations of bias, Justice Stratas summarily rejected TWN's submissions that he had prejudged his review and that he was biased (at para 13). Neither was he sitting on appeal on his own judgment since his task under Rule 74 "is to decide whether the notice of application for judicial review violates the restrictions in the Order. In that task, I must take the Order and the restrictions in it as they are and as valid" (at para 11).

(Non) Compliance with the Order Granting Leave

Having dealt with those preliminary matters, Justice Stratas characterized TWN's application as an attempt to reassert arguments already raised – and dismissed – in its original leave application, which he considered a violation of the order granting leave and an abuse of process (at para 35). Justice Stratas pointed to two examples:

> [36] Tsleil-Waututh Nation argues that deficiencies in the environmental assessment process before the National Energy Board should be addressed by an immediate judicial review, not left to a later, general judicial review of the Governor in Council's decision at the end of the entire process. This Court has considered and rejected this argument multiple times because this particular legislative regime is not

> designed to permit a series of piece-meal judicial reviews. This renders cases under different legislative regimes irrelevant. Multiple times, the Supreme Court has dismissed leave to appeal from these rulings. See *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 119-127, leave to appeal to SCC refused, 37201 (9 February 2017); *Tsleil-Waututh Nation, above* at paras. 173-203, leave to appeal to SCC refused, 38379 (2 May 2019); *Raincoast Conservation*, above. These authorities also clearly and repeatedly reject the proposition—one that Tsleil-Waututh Nation wishes to advance once again in its notice of application for judicial review—that flaws in the National Energy Board's environmental assessment process and resulting report, including failures to follow statutory requirements, automatically invalidate the Governor in Council's decision. There are many other examples.
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> [37] Tsleil-Waututh Nation advances other arguments against the order granting leave: it "usurp[s] the proper role of the [environmental assessment] panel", "eviscerate[s]" many "fundamental tenets of administrative law," "pays no heed" to those tenets, "permits the [Governor in Council] to ignore the law" and "insulate[s]" the Governor in Council and the National Energy Board "from judicial scrutiny into the lawfulness of their actions". An appeal from the order granting leave does not lie to this Court and so these arguments are not maintainable in this Court. Tsleil-Waututh Nation is free to advance them in an application for leave to appeal to the Supreme Court.

We offer a few observations about these arguments at the end of this post. For his part, Justice Stratas concluded that nothing TWN raised in its submissions could support variation of the court's initial order granting leave, and that, in any event, such relief was not available under the rules applicable in this case (at para 39).

Remedy and Disposition

In terms of remedy, the AG submitted that the Court should order that the application be removed from the court file under Rule 74 with leave to refile. Trans Mountain agreed with removal but submitted that TWN should not be given an opportunity to refile. Justice Stratas adopted the former position and crafted a pragmatic result by relying on the Court's remedial discretion. He noted that removing the application under Rule 74 would only mean that TWN could file another corrected application for judicial review (at para 44). He also noted that barring TWN from challenging the Governor in Council decision (i.e. following Trans Mountains' submission that TWN not be permitted to refile) would be "excessive", notwithstanding what in Justice Stratas' view was a "deliberate, defiant violation" of the court order that represented "an attack on the rule of law" that could in some circumstances constitute contempt of court (at para 45).

Instead, Justice Stratas relied on Rule 55, which allows the court to vary a rule in "special circumstances". He found that special circumstances were present in this case, pointing to the other five applications for judicial review, the expedited process detailed in a September 20th procedural and scheduling order, and the public interest in having the matter determined quickly

(at para 47). Regarding the latter, he stated: "In these circumstances, the public interest is paramount. One way or the other, the parties in the consolidated proceedings—to say nothing of a good chunk of the population of Canada—await this Court's ultimate verdict. A verdict is urgently needed" (at para 48). He then detailed a "complicated, potentially time-consuming chain of events" that would likely unfold if TWN's notice of application were simply removed from the court file (at para 49).

Given these "special circumstances" that provide a basis to vary Rule 74, including the specter of further delay, Justice Stratas provided TWN an opportunity within one day to file an amended notice of application for judicial review that complies with the parameters set by the previous court order (at para 50). Squamish, whose notice of application was observed to be "not as badly out of compliance" as TWN's, but out of compliance nonetheless, was instructed to do the same (at para 52). Justice Stratas reaffirmed the Court's procedural and scheduling order of September 20th (at para 53) and noted that the matter was currently set down for hearing in the week of December 16, 2019. Finally, Justice Stratas awarded costs to the AG in the amount of $2000, payable by TWN (at para 54).

The FCA's Jurisprudence on the Reviewability of NEB Reports

At its core, this most recent development in the TMX saga suggests that counsel for the TWN and Squamish, and perhaps others, are having a hard time accepting the FCA's approach to the judicial review of the NEB's environmental assessment reports. Although it is clear to us at this stage that such concerns can only be raised before the Supreme Court of Canada, we have some sympathy for counsels' difficulty. This is because, with respect, this line of FCA jurisprudence is misconceived. Readers may recall that this novel approach, whereby environmental assessment reports are not directly reviewable, first made its debut in *Gitxaala* in error – an error that the FCA acknowledged in *Tsleil-Waututh*, 2018 FCA 153 (CanLII) (at para 189). Rather than reconsidering its approach, however, the FCA held that the error was not relevant, simultaneously re-iterating the unique nature of the ss 29 – 31 regime of the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 as a "complete code" (at para 186) while also suggesting that the same approach would have been applied to the Northern Gateway Joint Review Panel's (JRP) report in any event (at paras 194 – 196). Confronted with a clear line of jurisprudence holding that JRP reports are directly reviewable, the FCA in *Tsleil-Waututh* suggested that the issue had not previously been raised but rather was assumed (at para 186). Again, with respect, even a cursory examination of that case law makes clear that the issue had been raised and answered in the affirmative: JRP reports are reviewable as preconditions to subsequent government decision-making (see e.g. *Alberta Wilderness Assn. v Canada (Minister of Fisheries and Oceans)*, 1998 CanLII 9122). To borrow the frame adopted in *Gitxaala* (at para 122) and *Tsleil-Waututh* (at para 179), these reports do not merely "assist" the government in decision-making, they "affect legal rights [and] carry legal consequences." Such rights include the government's right to approve a project, while the consequences include the termination, with the completion of a report, of the proponent's, Indigenous peoples', and the public's rights to formally participate in the decision-making process.

There is an established framework for having the FCA overturn its previous decisions (see *Miller v Canada (Attorney General)* (2002), 2002 FCA 370 (CanLII)). Applying that framework to the

question of reviewability of environmental assessment reports and NEB recommendations might have gone some way in making this new approach more palatable to all concerned.

This post may be cited as: David V. Wright, Martin Olszynski, and Nigel Bankes, "TMX Litigation Takes an Unusual Turn at the Federal Court of Appeal" (October 5, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/10/Blog_DW_MO_NB_Ignace.pdf