Federal Court of Appeal  Cour d'appel fédérale

TO : Judicial Administrator

FROM : Noël C.J.

DATE : July 24, 2019

RE : *Raincoast Conservation Foundation et al. v. Canada et al.* (file 19-A-35)
Chief Ron Ignace et al. v. Canada et al. (file 19-A-36)
Squamish Nation v. Canada et al. (file 19-A-37)
Coldwater Indian Band v. Canada et al. (file 19-A-38)
Federation of BC Naturalists v. Canada et al. (file 19-A-39)
Tsleil-Waututh Nation v. Canada et al. (file 19-A-40)
Stz'uminus First Nation v. Canada et al. (file 19-A-41)
Aitchelitz, Skowkale, Shxwhá:y Village et al. v. Canada et al. (file 19-A-42)
City of Vancouver v. Canada et al. (file 19-A-44)
Shxw'ōwhámel First Nation v. Canada et al. (file 19-A-45)
Adkin-Kaya et al. v. Canada et al. (file 19-A-46)
Upper Nicola Band v. Canada (Attorney General) et al. (file 19-A-47)

DIRECTION

On June 18, 2019, the Governor in Council decided to issue Order in Council No. P.C. 2019-820. The Order in Council directs the National Energy Board to issue a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Trans Mountain Pipeline Expansion Project, subject to terms and conditions.

Twelve motions have been brought by First Nations, environmental organizations and other individuals alone or in association with these groups. In their motions, they seek leave to start applications for judicial review challenging the decision of the Governor in Council. These have been brought under section 55 of the *National Energy Board Act*, R.S.C. 1985, c. N-7.

The moving parties have filed their motion records, which include written representations setting out their arguments in favour of challenging the Governor in Council's decision and stopping the Expansion Project from going ahead.

The twelve motions argue that this Court should grant leave to bring applications for judicial review because the applications will raise fairly arguable issues for the Court to decide. The Court's task in dealing with the motions will be to determine whether any, some or all of the issues are "fairly arguable" such that permission to launch a challenge should be granted. As many have

already suggested in their written representations, the test of "fairly arguable" has been set out in cases such as *Lukács v. Swoop Inc.*, 2019 FCA 145 at para. 15 and cases cited therein.

The various motions name some or all of the Attorney General of Canada, Trans Mountain Pipeline ULC, and Trans Mountain Corporation as respondents. The Attorney General is the party that normally is named to defend decisions made by the Government of Canada. Trans Mountain Pipeline ULC and Trans Mountain Corporation are the entities seeking to construct and operate the pipeline expansion works.

On July 22, 2019, the respondents wrote the Court and advised that they are taking no position concerning eleven of the motions for leave to start applications for judicial review against the decision of the Governor in Council (*i.e.*, all except the motion in file 19-A-46). This means that they neither support nor oppose these eleven motions for leave. In other words, they decline to say whether the arguments advanced by the moving parties in these eleven motions have or have not sufficient merit to warrant leave being granted and challenges being brought against the decision of the Governor in Council.

As a result, the Court finds itself in an unusual position. In these eleven motions, this Court has evidence and arguments in favour of granting leave but not against it.

The experience of this Court, and all courts for that matter, is that the best, fully informed, impartial decisions are made when all arguments, for and against, are placed before the Court. Further, in our adversarial system, the Court does not normally come up with arguments on its own. In the current circumstances, the Court has formed the view that it requires evidence, representations or both from parties on both sides.

In situations like this, the *Federal Courts Rules* provide an avenue that this Court can follow.

Under Rule 110(*b*), "[w]here a question of general importance is raised in a proceeding", "the Court may direct the Administrator to bring the proceeding to the attention of…any attorney general of a province who may be interested." For the purposes of the Rule, "proceeding" includes a motion: *Lukács*, above, at paras. 10-11.

Upon receiving this notice, the attorney general of a province may apply for leave to intervene in the proceeding.

In the past, two Attorneys General, the Attorney General of Alberta and the Attorney General of British Columbia, have shown interest in related proceedings in this matter and applied to intervene. Their applications to intervene were granted: see *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 102 (Alberta) and *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 174 (British Columbia). The two took opposite positions before this Court concerning an earlier, somewhat similar decision of the Governor in Council.

The Court considers that the motions raise matters of general importance and public interest sufficient to warrant a direction to the Administrator under Rule 110(*b*) to bring the motions for leave to the attention of the Attorney General of Alberta and the Attorney General of British Columbia. The Court considers that in these circumstances this should be done.

The motions for leave can be brought to the attention of the Attorney General of Alberta and the Attorney General of British Columbia by providing them with a copy of this Direction. I direct that this be done.

Paragraph 55(2)(*c*) of the *National Energy Board Act* provides that the motions for leave to appeal must be determined "without delay and in a summary way". Therefore, I direct that certain other matters be directed and ordered as follows:

- If the Attorneys General intend to move for leave to intervene under Rule 110(*c*), they must file their motion records by August 7, 2019. The motion records must include the memorandum they intend to submit in the leave motions, if leave to intervene is granted.

- An order consolidating the motion files will be made today. This will mean that the Attorneys General need serve only one motion record on all parties (applicants and respondents) in the consolidated proceeding if they decide to move to intervene. If the Attorneys General join the electronic protocol adopted by the parties, they may serve electronically and file an electronic copy with the Court. Service, obviously, must be made on all parties in the consolidated proceeding. A copy of the order consolidating the motion files shall be given to all parties and to these two Attorneys General.

- The replies of the parties moving for leave are due on July 29, 2019 and July 31, 2019. Those deadlines remain in place. The filing deadlines for any responses and replies to motions to intervene brought by the Attorneys General shall be as prescribed by Rule 369.

This Court reserves the right to appoint an *amicus* to offer arguments responding to the motions for leave if it remains in the current situation, *i.e.*, no party prepared to place substantive representations or evidence or both before the Court in response to the motions.

A copy of this Direction is to be sent to all parties in the above files, the Attorney General of Alberta and the Attorney General of British Columbia.

"Marc Noël"

Chief Justice