

Federal Court of Appeal



Cour d'appel fédérale

Date: 20190920

Dockets: A-321-19 (lead file),
A-323-19, A-324-19, A-325-19,
A-326-19, A-327-19

Ottawa, Ontario, September 20, 2019

Present: STRATAS J.A.

BETWEEN:

**CHIEF RON IGNACE and CHIEF ROSANNE CASIMIR, their own
behalf and on behalf of all other members of the STK'EMLUPSEMC
TE SECWEPEMC of the SECWEPEMC NATION, UPPER NICOLA
BAND, COLDWATER INDIAN BAND, SQUAMISH NATION,
TSLEIL-WAUTUTH NATION, AITCHELITZ, SKOWKALE,
SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST
NATION, TZEACHTEN, YAKWEAKWIOOSE**

Applicants

and

**ATTORNEY GENERAL OF CANADA, TRANS MOUNTAIN
PIPELINE ULC and TRANS MOUNTAIN CORPORATION**

Respondents

ORDER

WHEREAS by Order in Council P.C. 2019-0820 dated June 18, 2019, the Governor in
Council decided to approve the Trans Mountain Pipeline expansion project: (2019) C. Gaz. I,
Vol. 153, No. 25;

AND WHEREAS twelve sets of parties, including the applicants, brought motions for leave to start applications for judicial review from this decision;

AND WHEREAS, by Order dated September 4, 2019, this Court ordered that the applicants' leave motions be granted;

AND WHEREAS, in that Order, this Court limited the applications for judicial review to three questions:

1. From August 30, 2018 (the date of the decision in *Tsleil-Waututh Nation*) to June 18, 2019 (the date of the Governor in Council's decision) was the consultation with First Nations and Indigenous peoples adequate in law to address the shortcomings in the earlier consultation process that were summarized at paras. 557-563 of *Tsleil-Waututh Nation*, 2018 FCA 153?
2. Do any defences or bars to the applications apply?
3. If the answers to the questions 1 and 2 are negative, should a remedy be granted and, if so, what remedy and on what terms?

AND WHEREAS the applicants have brought the following applications for judicial review:

- File A-321-19 – *Chief Ron Ignace et al. v. Canada (A.G.) et al.*;
- File A-323-19 – *Upper Nicola Band v. Canada (A.G.) et al.*;
- File A-324-19 – *Coldwater Indian Band et al. v. Canada (A.G.) et al.*;
- File A-325-19 – *Squamish Nation v. Canada (A.G.) et al.*;
- File A-326-19 – *Tsleil-Waututh Nation v. Canada (A.G.) et al.*;
- File A-327-19 – *Aitchelitz et al. v. Canada (A.G.) et al.*;

AND WHEREAS, in its Order of September 4, 2019, this Court required that the applications proceed on an expedited basis; and the Court has noted in its reasons in support of the Order (2019 FCA 224 at para. 74) that there is “a substantial public interest in having [these applications] decided very quickly one way or the other”;

AND WHEREAS this Order is intended to give effect in these proceedings to the principles set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, which provides that

proceedings are to be conducted in a manner that secures the just, most expeditious and least expensive determination of every proceeding on its merits;

AND WHEREAS it is appropriate that this Court issue this Order to implement the foregoing requirements and to ensure that these proceedings are conducted in an orderly, fair and prompt manner;

AND WHEREAS, to this end, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

AND WHEREAS on September 12, 2019 this Court held a hearing by way of teleconference to receive submissions and input concerning this Order and, in particular, the schedule for the procedural steps in these proceedings;

AND WHEREAS it became apparent in the teleconference that there was broad acceptance of:

- a schedule more-or-less as set out in this Order; slight compression of the schedule discussed during the teleconference has been necessary to allow the Court enough time to study and consider the parties' filings before the oral hearing;

- the consolidation of the applications for judicial review;
- as much as possible, the prosecution and defence of these applications using electronic materials and communications;

AND WHEREAS certain considerations lead to the conclusion that the duration of the hearing and the length of the memoranda of fact and law should be shorter than was the case in *Tsleil-Waututh Nation*:

- the scope of these consolidated applications is narrower than the those in *Tsleil-Waututh Nation*;
- the law on the duty to consult and to accommodate has been largely if not completely settled in this Court in *Tsleil-Waututh Nation* (a binding authority in this Court), and so the need to make submissions on uncertain legal points and to refer to many other authorities is significantly reduced;
- shorter, focused submissions that distill the evidentiary detail to its essence are more useful and persuasive than longer, more diffuse submissions that assault the panel with an unmanageable blizzard of detail: see *McKesson Canada Corporation v. Canada*, 2014 FCA 290 at paras. 24-25;

AND WHEREAS the Court provided a preliminary draft of this Order to the parties for submissions and their submissions have been received and considered;

AND WHEREAS, in response to those submissions, certain changes have been made; foremost of these is provision for a common book of authorities, modification of the page length for memoranda of fact and law, amendment to certain deadlines, and adjustment to the format of the electronic records; and the Court has also made certain changes of a relatively cosmetic nature;

THIS COURT ORDERS that:

1. Files A-321-19, A-323-19, A-324-19, A-325-19, A-326-19 and A-327-19 are consolidated.
2. File A-321-19 is the lead matter, this Order shall be filed in file A-321-19, copies of this Order shall be filed in files A-323-19, A-324-19, A-325-19, A-326-19 and A-327-19, and all future filings will be made in file A-321-19 alone.
3. The style of cause in this consolidated matter is as appears in this Order and all further proceedings and documents in these consolidated applications will bear this style of cause.

4. (1) All documents, with the exception of the compendia described in paragraph 13, below, may be served and filed electronically. The email addresses in the electronic service protocol used during the leave motions and filed with this Court shall be used for the purposes of this consolidated application (with the exception of counsel for the Attorney General of Alberta who, at this time, is not part of the consolidated applications); and any amendments to the electronic service protocol may be filed (without proof of service) by email to information@fca-caf.gc.ca, copied to all on the electronic service protocol and otherwise served upon those who are not, forthwith upon the making of the amendment.

(2) Electronic service of a document consists of:

- (a) physical delivery of a USB drive or memory stick, a CD or a similar device containing an electronic copy of the document;
- (b) e-mail delivery of a copy of the document in *.pdf format;
- (c) e-mail delivery of a message containing a link to an URL where an electronic copy of the document may be obtained; or
- (d) the deposit of a document at a location in the “cloud” using a service such as Dropbox, along with notice to all parties that the document has been so deposited.

(3) Electronic filing with this Court shall be performed as set out in paragraph 4(2)(a) of this Order, except that each physical electronic media device shall be filed in triplicate. Upon filing of a document, the Registry shall deposit one copy of it in a folder created in a shared drive that is accessible to members of the Court. Documents filed with the Court in electronic form are part of the Court record and are available to members of the public in accordance with the Court's policies.

(4) Whether for service or for filing, the electronic files must be clearly identified and labelled and organized in a clear and logical way.

(5) Applicants' and respondents' records filed with the Court under paragraphs 12(e) and 12(f) and the Joint Book of Authorities filed with the Court under paragraph 12(g) shall be filed in accordance with paragraph 4(3). The records and the Joint Book of Authorities shall be filed in one or more manageable-sized *.pdf files with clear and logical bookmarks identifying the component documents—the table of contents, the memoranda of fact and law, affidavits and their exhibits, any other documents, and authorities, as the case may be. A party may file its memorandum of fact and law as a separate electronic file rather than as part of its record. Hyperlinked references in the memorandum of fact and law to the record are strongly encouraged.

(6) This paragraph does not apply to any documents covered by a confidentiality order under Rule 152; any confidentiality order will provide for a means by which the confidential documents will appear before the Court.

5. (1) Where a motion brought under the *Federal Courts Rules*:

(a) is on consent or is unopposed, or,

(b) the evidence offered in support of the motion is not controversial,

the motion may be brought by way of an informal letter filed by email to information@fca-caf.gc.ca, copied to all on the electronic service protocol and otherwise served upon those who are not. Responses and replies may be filed in the same way.

(2) In all other circumstances, unless otherwise directed by the Court, a motion under Rule 369 may be brought in electronic form and may be filed using one of the methods in paragraph 4(2) of this Order.

(3) In the case of urgent motions, such as requests for emergency injunctive relief, as soon as the possibility of such a motion arises the potential moving party shall immediately alert the Court by sending an email to information@fca-caf.gc.ca, copied to all on the electronic

service protocol and otherwise served upon those who are not; the parties shall discuss expediting the procedural steps with a view to reaching agreement.

(4) Unless otherwise directed or ordered by the Court, the deadlines for the filing of motion materials shall be those applicable to motions under Rule 369, and all motions shall be heard and determined in writing.

6. The applicants may serve in support of their applications the affidavits they filed in support of their leave motions. The affidavits may be served and may appear in an applicant's record even though they bear the style of cause of the leave motion. The affidavits shall not be modified in any way; rather, additions, deletions or modifications may be made by way of one or more additional affidavits.

7. The Attorney General of Canada shall prepare the electronic copy of the Book of Major Documents under paragraph 12(a) and shall file it in accordance with paragraph 4(3). This Book shall contain a table of contents and up to twenty documents—exclusive of orders, judgments and reasons of this Court—that the Attorney General anticipates the parties will be repeatedly referring to in their affidavits. The Attorney General shall consult with the parties concerning the contents of the Book of Major Documents but need not have the consent of the parties regarding its contents or to file it. The Attorney General may request the Court to vary the maximum number of documents in the book by way of informal letter by email to information@fca-caf.gc.ca, copied to all on the electronic service protocol and otherwise served upon those who

are not. The inclusion of a document into the Book of Major Documents shall not be taken as any admission as to its relevance, meaning or significance. To the extent possible, to avoid needless duplication, the parties should not include documents in the Book of Major Documents in their affidavits and records but may refer to them in the Book of Major Documents.

8. The respondents, Trans Mountain Pipeline ULC and Trans Mountain Corporation, shall prepare the Joint Book of Authorities under paragraph 12(g) and shall file it in accordance with paragraph 4(3). At the time the parties serve their memoranda of fact and law, they shall also serve the respondents, Trans Mountain Pipeline ULC and Trans Mountain Corporation, with an electronic copy of the authorities they reference in their memoranda. Each authority should be a separate electronic file in *.pdf format.

9. Those wishing to intervene shall file their motions under Rule 369 no later than twenty days after the date of this Order and the deadlines set out under the Rules shall apply. In the case of interveners allowed into these consolidated proceedings, the time for them to file memoranda of fact and law and whether they may make oral submissions will be set by later order of the Court. Unless leave of the Court is sought and granted, interveners are restricted to filing a memorandum of fact and law and cannot file evidence.

10. As much as possible, parties with similar interests and similar submissions shall not duplicate submissions, whether oral or written. Rather, they should divide up the submissions

among themselves and adopt and cross-reference submissions made by others in order to avoid duplication.

11. The applicants' memoranda of fact and law shall be no longer than 35 pages each. The memorandum of fact and law of the respondents, Trans Mountain Pipeline ULC and Trans Mountain Corporation, shall be no longer than 60 pages each. The memorandum of fact and law of the respondent, Attorney General of Canada, shall be no longer than 80 pages. For this purpose, parties represented by a single counsel of record shall be considered a single applicant or a single respondent, except for the applicants Coldwater First Nation and Squamish First Nation who, although represented by the same counsel of record, shall be regarded as separate applicants.

12. The following is the schedule for these consolidated proceedings:

- (a) Book of Major Documents – filed by noon PDT September 26, 2019.
- (b) Applicants' affidavits – served by October 4, 2019. The deadline for any of the six sets of applicants may be extended if all respondents consent, provided that the latest possible deadline for the completion of cross-examinations, below, is kept.

- (c) Respondents' affidavits – served by October 25, 2019. The deadline for either of the two sets of respondents may be extended if all applicants consent, provided that the latest possible deadline for the completion of cross-examinations, below, is kept.
- (d) Cross-examinations – completed by November 12, 2019, with the exception of cross-examinations for and by each of the applicants, Squamish Nation and Coldwater Indian Band, which shall be held on November 13-15, 2019. The period for cross-examinations for all parties may be extended on the consent of all to November 15, 2019.
- (e) Applicants' records and memoranda of fact and law – filed by 4:30 pm PST November 20, 2019. Service of an electronic copy of authorities upon the respondents, Trans Mountain Pipeline ULC and Trans Mountain Corporation at the same time.
- (f) Respondents' records and memoranda of fact and law – filed by noon PST December 3, 2019. In the case of the Attorney General of Canada, service of an electronic copy of authorities upon the respondents, Trans Mountain Pipeline ULC and Trans Mountain Corporation at the same time.
- (g) Joint book of authorities – filed by 4 pm PST December 9, 2019.

13. A paper compendium consisting of documents to be referred to in oral argument shall be filed three business days before the first hearing day, with a paper copy to all other parties. In the alternative, instead of a paper copy, an electronic copy of the compendium or a list of references to the documents in the compendium may be provided to a party that so consents. Paper copies of additional documents not appearing in the compendium may be filed with the hearing panel at the hearing at any time but only to respond to submissions made by parties at the hearing. In its discretion, the hearing panel may relax the requirements in this paragraph but parties should not count on this.

14. It is not necessary for the respondents to file notices of appearance.

15. Counsel shall hold December 16-20, 2019 in their schedules for a three-day hearing in Vancouver, British Columbia. A requisition for hearing shall not be filed; the precise dates for the hearing shall be set by further order of the Court.

16. To the extent that this Order differs from the *Federal Courts Rules*, this Order shall prevail.

"David Stratas"

J.A.