Coastal First Nations v British Columbia (Environment), 2016 BCSC 804, Supreme Court of British Columbia (J Koenigsberg)

May 06, 2016

On May 6, 2016, the Honourable Madam Justice Koenigsberg issued the reasons for judgment regarding costs in the matter between Coastal First Nations — Great Bear Initiative Society and Gitga'at First Nation (collectively, the "Petitioners") and the Respondents, the Minister of Environment for the Province of British Columbia, the Executive Director of the British Columbia Environmental Assessment Office, the Minister of Natural Gas Development, the Minister Responsible for Housing and Deputy Premier (together, the "Province") and Northern Gateway Pipelines Limited Partnership, by its general Partner Northern Gateway Pipelines Inc. ("Northern Gateway").

As reported in our BLG Aboriginal Law Newsletter, Madam Justice Koenigsberg had found that the Province's agreement to remove the need for an environmental assessment certificate, issued pursuant to the *Environmental Assessment Act*, SBC 2002, c. 43 (the "EAA") was invalid. In the matter of costs, the Petitioners brought an application for public interest special costs on a full indemnity basis. The respondents opposed the application.

The test for public interest special costs was set out in *Carter v Canada (Attorney General),* 2015 SCC 5 and is as follows:

1. The party seeking interim costs genuinely cannot afford to pay for litigation and no other realistic option exists. They must not have any personal, proprietary or pecuniary interest in the litigation that would justify the proceeding on economic grounds.
2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interest of justice for the opportunity to pursue to case to be forfeited just because the litigant lacks the financial means.
3. The issues raised transcend the individual interests of the particular litigation, are of public importance, and have not been resolved in previous cases.

Further, the issues raised must be truly exception and have significant and widespread societal impact.

In short: Does the case involve matters of public interest that are truly exceptional and of significant and widespread societal impact? Is the matter one of personal, proprietary or pecuniary interest to the litigants? Would the litigants have been able to effectively pursue the litigation with private funding?

Madam Justice Koenigsberg found that the case met all three requirements.

The respondents argued for a narrow interpretation of the issues but Madam Justice Koenigsberg did not accept that the issues surrounding the pipeline as a whole could be disentangled from the discreet legal issue the respondents favoured. As a result, the trial was categorized as exceptional, including all three issues raised at trial: the constitutional question relating to the Province's jurisdiction with regard to the Northern Gateway Project, the property interpretation of the *EAA* and the sufficiency of the duty to consult with Gitga'at First Nation.

The Respondents argued that Gitga'at First Nation had particular Aboriginal rights at stake in the trial, which were individual interests and as such should be a bar to public interest special costs. Generally public interest special costs are not appropriate for litigants who have personal, proprietary or pecuniary interest in the litigation. However, Madam Justice Koenigsberg found that the crown's duty to consult with Gitga'at First Nation did not classify the Petitioners as a private litigant with private interests.

The issues decided in this case arise in a social economic context of widespread concern in Canada as a whole... the Petitioners do not deny that the Gitg'at has its particular Aboriginal rights at stake in relation to the [Northern Gateway] project, but they submit that this is no bar to obtaining public interest special costs, and I agree… I find the issues raised here transcend the individual interests of the particular litigant, and affect the people of BC, both Aboriginal and non-Aboriginal and in some instances the implications of the findings have the potential to reach beyond the borders of BC. (paras. 23 – 24)

Madam Justice Koenigsberg was also satisfied that the Petitioners had each either no capacity or limited capacity to finance the litigation.

In addition to considering the three part test, Madam Justice Koenigsberg also considered Northern Gateway's submission that it should be exempted from any special costs award as its conduct was not at issue. While its conduct was not at issue in the case, it had taken an active role in the litigation nonetheless. Accordingly, Madam Justice Koenigsberg relied on the exception in *Gagne* whereby "in some circumstances, a private litigant might be vulnerable to a special costs award if it inserts itself at the forefront of the litigation." Due to Northern Gateway's involvement in the litigation and its insistence on the inclusion of certain constitutional questions, its arguments for exemption were denied.

Both the Province and Northern Gateway are jointly and severally liable for public interest special costs, capped at $230,000, which was the amount of legal fees agreed to between the petitioners and legal counsel prior to the litigation taking place.

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By

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