Federal Court  Cour fédérale

Date: 20150216

Docket: T-167-15

Citation: 2015 FC 192

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 16, 2015

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT
AND
FRANCE LAMONDE

Moving Parties

and

NATIONAL ENERGY BOARD
AND
THE ATTORNEY GENERAL OF CANADA
AND
ENERGY EAST PIPELINE LTD

Respondents

ORDER

CONSIDERING the motion essentially to obtain from this Court an interlocutory injunction before the commencement of a proceeding ordering the National Energy Board (Board) to extend the deadlines for filing an application to participate or for funding as part of

the review of the application of Energy East Pipeline Ltd (Energy East) to construct a pipeline system until the earlier of the following two dates: the publication of the Commissioner of Official Languages' report on the complaint filed on December 15, 2014, by the Centre québécois du droit de l'environnement (CQDE), or the inclusion of a French version of the essential documents of Energy East's application on the Board's Web site;

AND UPON reading the motion record filed by the moving parties, the record filed in response by the Attorney General of Canada and the outline of submissions filed by Energy East during the hearing;

HAVING HEARD the parties, as well as counsel for the Board and for the Commissioner of Official Languages (Commissioner) during the general sitting of this Court held in Montréal on February 10, 2015;

HAVING GRANTED Energy East's motion to be named as a party to the proceeding, as the moving parties and the respondents did not object;

CONSIDERING the three criteria that must be met to obtain an interlocutory injunction, namely the existence of a serious question, irreparable harm and the balance of convenience;

CONSIDERING the following reasons:

On March 4, 2014, Energy East and TransCanada PipeLines Limited (TransCanada) submitted a description of their Energy East Project (Project) to the Board. On October 30, 2014, Energy East and TransCanada filed an application with the Board under section 52 of the *National Energy Board Act*, RSC 1985, c N-7 (Act), to obtain a certificate of public convenience

and necessity for constructing and operating Energy East Pipeline Ltd's pipeline system, that is, a nearly 4,500-km-long pipeline system between Alberta and New Brunswick. The Project indicates that more than 1,500 km of new pipeline sections will be constructed, more than 700 km of which will be on Quebec territory. The application for authorization also requests the construction of 11 pump stations in Quebec, and the placement of an oil tanker terminal and an oil port on the banks of and in the St. Lawrence River. That application contains more than 30,000 pages in documentation.

The Project is subject to the Board's approval process, established under section 3 of the Act. The Board's responsibilities include regulating the construction and operation of pipelines that extend across provincial boundaries. Section 52 of the Act confers, namely, on the Board the responsibility to evaluate applications from proponents to construct and operate a pipeline system and to submit a report to the Minister of Natural Resources with its recommendations regarding the issuance of a certificate of public convenience and necessity. In accordance with section 54 of the Act, it is the Governor in Council who ultimately decides whether to direct the Board, by order, to issue a certificate of public convenience and necessity in respect of the pipeline and to make the certificate subject to terms and conditions.

Energy East's application was filed with the Board primarily in English. A French version of the 12 volumes of the application, the 8 volumes of the environmental assessment (apart from some technical appendices), as well as all of the chapters on the Quebec portion of the Project is nevertheless available on Energy East's Web site, to which the Board's Web site refers by hyperlink.

On December 22, 2014, the Board issued directives regarding the distribution and dissemination of copies of Energy East's application for public consultation. In particular, the Board ordered Energy East to submit copies of its application to certain places listed in an appendix, to consider the language needs of the local populations thus served and, if need be, to send the parts of the application that had also been produced in French.

On December 15, 2014, the CQDE sent the Board a [TRANSLATION] "request to not proceed with the Energy East and TransCanada PipeLines Limited file until such time as an official French version of that company's Application appears on the Board's site". The Board denied that request on January 6, 2015, and an application for a review of that ruling was denied on February 3, 2015.

On December 15, 2014, the CQDE also filed a complaint with the Commissioner. That complaint is currently under investigation and is apparently being treated as a priority. The Commissioner's report should be available by the end of March 2015.

In a letter dated January 6, 2015, addressed to counsel for Energy East and TransCanada, the Board described the process that it generally follows for approving applications. The letter specifies that the Board must first determine whether the application is sufficiently complete to issue a hearing order. It also states that an application to participate form will be available on the Board's Web site from February 3 to March 3, 2015. Finally, the Board asked Energy East to distribute an application to participate notice to target groups or persons, including the land owners along the Project's route. Third parties who wish to participate in the hearing must fill out the form and submit it to the Board on or before March 3, 2015. People who wish to participate in the hearing may also submit a funding application for money towards their

activities until the submission of evidence by submitting a request to the Board in that regard on or before February 23, 2015.

To be successful and obtain the interlocutory injunction before the commencement of a proceeding that they are seeking, the moving parties must establish, first, that this Court has the jurisdiction to rule on their motion and, second, that the three criteria established by the Supreme Court in *RJR Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, to obtain such an injunction have been met.

I. The jurisdiction of the Federal Court

The moving parties argue that the Federal Court has jurisdiction to hear this motion and suspend the process for filing the funding and participation applications to the Board, by relying essentially on section 76 of the *Official Languages Act*, RSC 1985, c 31 (4th Supp) (OLA), which sets out that the court remedies created by that statute are the responsibility of the Federal Court. Even though judicial review of the Board's rulings falls within the jurisdiction of the Federal Court of Appeal pursuant to paragraph 28(1)(*f*) of the *Federal Courts Act*, RSC 1985, c F-7 (FCA), it is concurrent and non-exclusive jurisdiction that cannot depart from the specific remedy set out in the OLA.

Even though that theory can appear attractive at first blush, it does not stand up to analysis. A close reading of the Act and the FCA shows that Parliament's clear intention was to make the Federal Court of Appeal the only court that has jurisdiction to hear applications for judicial review or appeals against rulings made by the Board. In fact, section 22 of the Act provides that a party that wishes to contest a ruling of the Board must file an appeal to the

Federal Court of Appeal, and obtain leave to appeal from that Court. When the situation does not give rise to such right of appeal, it is through an application for judicial review to the Federal Court of Appeal that a ruling of the Board can be challenged. Indeed, paragraph 28(1)(*f*) of the FCA confers on the Federal Court of Appeal the exclusive original jurisdiction to determine applications for judicial review presented with respect to the Board, subject of course to the privative clause set out in section 23 of the Act. Subsection 28(3) of the FCA also stipulates that, if the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

To the extent that the purpose of the interlocutory injunction motion brought by the moving parties is essentially to challenge the ruling rendered by the Board on January 6, 2015 (and reiterated on February 3), it seems clear to me that this Court is not the appropriate forum and that the procedural vehicle chosen is inappropriate. It goes without saying that it would be wrong to do indirectly what is not permitted directly. The appropriate way for the moving parties to request a stay of the proceedings before the Board was to challenge the Board's ruling dated January 6, 2015, before the Federal Court of Appeal, the only Court that has jurisdiction to entertain an appeal from a ruling of the Board, and to request, by means of a cross-motion, the stay of proceedings before the Board for the duration of the challenge.

The moving parties tried to argue that they could not appeal the Board's ruling because they were not yet a party to the hearing before the Board. That argument does not seem convincing to me. Even if the moving parties have not yet requested and obtained authorization to participate in the hearing before the Board, the fact remains that they are at the heart of the Board's ruling dated January 6, 2015. As such, the moving parties qualify as parties to the

proceeding for which they seek appellate review. In any event, there appears to be no doubt that the moving parties could file an application for judicial review if they had no right of appeal: *Union of Nova Scotia Indians v Maritimes and Northeast Pipeline Management Ltd*, [1999] FCJ No 242 (FCA); *Arthur v Canada (Attorney General)*, [1999] FCJ No 1917 (FCA).

Because this Court has no jurisdiction with respect to the main proceeding, it cannot have jurisdiction to grant interlocutory relief: *Inspiration Television Canada Inc v Canada*, [1992] 3 FC 350; *Dong v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 10 (FC). Even though the Federal Court was given broad discretion with respect to the relief it could grant (FCA, section 44), it would still require jurisdiction regarding the individual or the organization against whom or which the relief is sought. However, this Court has already determined that relief against the Board can only be granted by the Federal Court of Appeal in judicial review: *Sweetgrass First Nation v Canada (Attorney General)*, 2010 FC 535; *Evangelical Fellowship of Canada v Canadian Musical Reproduction Rights Agency*, [1999] FCJ No 1068.

Finally, the moving parties' argument that the Court can grant the orders sought by relying on section 76 of the OLA also does not seem acceptable to me. The objective conditions authorizing the exercise of the remedy set out in section 77 of the OLA have yet to be met. That provision provides that, indeed, a remedy can only be granted after the receipt of the Commissioner's investigation report, or when six months have passed since the complaint was made. In this case, the complaint was made on December 15, 2014, and the Commissioner's report is expected at the end of March 2015. Consequently, the remedy under the OLA is not yet appropriate, and subsection 372(1) of the *Federal Courts Rules*, SOR/98-106 (Rules) sets out

that one cannot obtain a measure to preserve rights, such as an interlocutory or interim injunction before the commencement of a main proceeding.

It is true that subsection 372(1) of the Rules sets out, exceptionally, that a motion may be submitted before the commencement of a proceeding in a case of urgency. It is that exception that the moving parties are trying to avail themselves of, by also undertaking to bring the application for remedy set out in section 77 of the FCA within 10 days of the Commissioner's report, as required by subsection 372(2) of the Rules.

However, I have not been convinced that such urgency exists here. First, as stated above, the moving parties can apply to the Federal Court of Appeal to challenge the Board's ruling dated January 6, 2015, and request, incidentally, that the Board's deadlines be extended. Second, and I will discuss this at length when I address the irreparable harm issue, I have not been convinced that the Court's intervention is urgent and necessary to preserve the moving parties' rights and allow them to argue their legitimate interests and point of view before the Board. In doing so, the Court obviously does not intend to rule on the well-foundedness of the concerns expressed by the moving parties, be it regarding the process followed by the Board or the appropriateness of the Project itself.

Consequently, I am of the opinion that the Federal Court has no jurisdiction to hear the motion. Other recourse before the Federal Court of Appeal is available to the moving parties to challenge the ruling made by the Board on January 6. Even though that finding will be sufficient in itself to dispose of the motion, I will nevertheless address the requirements for obtaining an interlocutory injunction.

II. The application for an interlocutory injunction

Even supposing that the Federal Court has the jurisdiction to hear the moving parties' application, they must establish that their future proceeding under the OLA raises a serious question, that they will suffer irreparable harm in the event that their motion is dismissed, and that the balance of convenience lies in their favour.

Regarding the serious question, the moving parties submit that they are entitled to an official French version of the "essential documents" of Energy East's application to the Board. In their opinion, the translation found on Energy East's Web site and to which the Board's Web site refers does not meet the requirements of the OLA in that it was not formally filed with the Board and was not validated by the Board. The moving parties claim that they are entitled to an official French version of the application before the Board may proceed with its review and conduct a public hearing in accordance with section 35 of the Act.

There is no doubt that Part III of the OLA applies in the context of this dispute. That statute specifies the powers and duties of federal institutions with respect to official languages, and Part III concerns, more specifically, the administration of justice. Section 11 of the Act sets out that the Board is a court of record, and in that regard it is clearly a federal court under section 14 of the OLA. However, that provision stipulates that "English and French are the official languages of the federal courts", and that "either of those languages may be used by any person in, or in any pleading in or process issuing from, any federal court".

That provision is entirely consistent with section 133 of the *Constitution Act, 1867*, and sections 16 to 22 of the *Constitution Act, 1982*, which address language rights in the judicial system in Canada. Those provisions guarantee what is referred to as "optional unilingualism" at

the option of the speaker: *MacDonald v City of Montréal*, [1986] 1 SCR 460, at page 496. Put differently, it is the right to use either official language in any court or in any pleading in or process issuing from any such court that is guaranteed, and not the right that the official language used will be understood by the person to whom the pleading or process is addressed: *Société des Acadiens v Association of Parents*, [1986] 1 SCR 549, pages 574-575.

Consequently, Energy East has the right to use either official language in a proceeding under section 52 of the Act, as do the moving parties. In addition, there is no Part III provision that requires the courts to translate the documents submitted in the records of that court into the other official language. Moreover, the Attorney General of Canada is required to use the official language chosen by the other party in any pleadings in the proceedings before the federal courts (OLA, section 18). Like this Court specified in *Lavigne v Canada (Human Resources Development)*, [1995] FCJ No 737 at paragraph 12, that obligation does not apply to the evidence:

> I am also unable to identify any legal basis for the contention that the Crown or a federal institution has an obligation to provide a party with a translation of the affidavits sworn to by its witnesses, when it is written in the official language other than that chosen by the other party. Such an obligation, insofar as it is said to arise under either the Constitution, the Charter, or the *Official Languages Act*, would have to result from a constitutionally enshrined guarantee, or from the wording of the Act. As noted earlier, the constitutional guarantee pertaining to the use of either official languages in court proceedings are those of the writers or issuers of written pleadings and not those of the readers thereof. There is therefore no constitutional right entitling a party to read affidavit evidence in the official language which he or she has chosen, and hence no corresponding obligation on the part of the governmental party to provide a translation.

In short, the moving parties' position seems to me to be without merit in law, and it is unsupported by Part III of the OLA, the case law flowing therefrom and constitutional statutes that those provisions intend to apply. In the absence of a clear legislative provision to that effect, there cannot be an obligation as onerous as that of requiring that all administrative tribunals and all courts subject to the OLA have all of the records submitted to them translated. In the alternative, the moving parties maintained that they could also avail themselves of section 12 of the OLA, which sets out that "[a]ll instruments directed to or intended for the notice of the public, purporting to be made or issued by or under the authority of a federal institution, shall be made or issued in both official languages". However, that provision clearly does not apply in this case because the application filed by Energy East did not originate from the Board.

The moving parties raised this Court's decision in *Picard v Canada (Commissioner of Patents)*, 2010 FC 86; that decision, however, does not support their claim. In that case, the applicant maintained that he was entitled to a French version of a patent application filed with the Commissioner of Patents of Canada. While acknowledging that a patent is "directed to or intended for the notice of the public", Justice Tremblay-Lamer nevertheless rejected the application of section 12 of the OLA on the ground that patents do not originate from a federal institution, but from an inventor. The Court also explicitly stated that the Patent Office has no obligation to translate applications submitted to it (at paragraphs 48-49):

> For one thing, in that situation, an applicant for a patent would, if they wished to retain control of the application, have to understand and approve the translation done of the patent. That is in direct contradiction with the objective of the *Official Languages Act*, which is to implement the constitutional guarantee of everyone's right to communicate with federal institutions in either official language, at their option.

> For another, if the inventor is required to approve the translation of their application without understanding it, the objective of the patent system, to give inventors control over their applications and place full responsibility for the resulting patent on them, would be compromised. In addition, where there was a discrepancy between the two versions of the patent, an interpretation of the patent based on the objectives of the inventor, as advocated by the Supreme Court in *Free World*, *supra*, would become impossible, unless it were recognized that the "original" version of the patent, the one in the language of the inventor's application, took precedence over the translation. The effect of such recognition would be to cancel out any benefit for linguistic equality resulting from the fact that both versions of a bilingual instrument are equally authoritative, under section 13 of the *Official Languages Act*.

Those reasons are equally valid, it seems to me, in the context of an application for the construction of a pipeline system to the Board. As a result, section 12 of the OLA also does not apply here. The same is true for Part IV of the OLA, also raised by the moving parties. That part concerns communications with and services to the public. It is clear that the Board is an organization that exercises quasi-judicial functions and is not an institution that provides services. The moving parties also failed to substantiate their arguments on this point and were unable to provide any precedent in support of their claims.

Of course, the language rights guaranteed by the OLA do not exhaust the rights that can be claimed by the moving parties in the context of a judicial or quasi-judicial proceeding. Whenever the rights of a party may be affected at the conclusion of such proceeding, the principles of procedural fairness must be respected. Those principles must not be confused with language rights, the basis and scope of which are very different. In the event that the moving parties could prove that their right to be heard by the Board and to participate fully in the hearing that will eventually take place would be compromised in some way, namely because the documents submitted by Energy East were not officially submitted in both languages or

translated by the Board, they could address the Federal Court of Appeal through an application for judicial review or an appeal. For now, such evidence has not been made. The moving parties have not succeeded in demonstrating that they do not understand the issues related to the application filed with the Board by Energy East; in fact, this motion tends to establish the contrary. Moreover, as noted by the Board in its ruling on January 6, Energy East made available sufficient French information to allow any concerned individual to decide on whether or not to participate in the hearing. I note in that respect that the moving parties did not specify which of the "essential" documents were incomprehensible to them, or how the translation provided by Energy East was insufficient to enable them to make an informed decision regarding their participation.

In light of the foregoing, I am therefore of the opinion that this motion does not raise a serious question. Because the requirements for obtaining an interlocutory injunction are cumulative, the failure to meet this first condition is fatal and automatically results in the dismissal of the motion.

In any event, the moving parties have not demonstrated that there is an urgency to act or that they would suffer irreparable harm in the event that the interlocutory injunction is not granted. It is true that individuals who wish to file an application for funding or to participate must do so respectively by February 23 and March 3, 2015. However, it has not been demonstrated how the absence of an official translation of the Project filed by Energy East prevents the moving parties from submitting the required forms to show their desire to be heard or to obtain funding. The forms in question were not submitted to the Court, but there is every indication that the information sought is relatively summary. Section 28 of the *National Energy*

Board Rules of Practice and Procedure, 1995, SOR/95-208, sets out that any interested person may apply to intervene by establishing, in particular, his or her interest and the issues that he or she intends to address at the hearing. It seems obvious to me that someone who owns land through which the pipeline would pass and who was sent a land acquisition notice has the required interest to intervene before the Board. In fact, no evidence was made regarding the information Ms. Lamonde lacks to decide whether she wishes to intervene before the Board. Furthermore, she does not have the mandate required to represent others who could be affected by the Project and therefore cannot be their spokesperson. Regarding the CQDE, there is no evidence in the record that its directors, managers, counsel or employees have been unable to examine the documentation that has been submitted up to this point or that the absence of an official translation prevents them from establishing their interest in the context of a potential application to intervene. The moving parties have therefore not discharged their burden of demonstrating that they would suffer irreparable harm if their motion were dismissed, especially since the Board has not yet determined that the Energy East application is complete and since the hearing order has not yet been issued.

In the circumstances, the balance of convenience clearly favours proceeding with the Board's process. Issuing the order sought by the moving parties would result in preventing the Board from proceeding with or at least significantly delaying the process set out in the Act that is to take place before authorizing the construction of a pipeline. In the absence of clear evidence that a party's rights to participate in the review process set out by Parliament have been compromised, public interest requires that the process be allowed to proceed without interruption. In the event that the moving parties or any other interested parties could

demonstrate that continuing with the process is not consistent with the Act or violates their rights, it will always be open to them to re-apply to courts of competent jurisdiction for relief.

Even if this Court had jurisdiction to hear this motion, I find that the moving parties have not established that they meet the requirements for the issuance of an interlocutory injunction.

The Court also cannot allow the alternate conclusions sought by the moving parties. There is no provision in the FCA or the Rules that allows for converting a motion into an application for judicial review or into an application for leave to appeal, much less before the Federal Court of Appeal. Regarding the motion to issue an interlocutory injunction to allow the moving parties to commence an application for judicial review to the Federal Court of Appeal, it also cannot be granted given the absence of this Court's jurisdiction with respect to the main proceeding.

THE COURT ORDERS that the moving parties' motion is dismissed, without costs.

"Yves de Montigny"
Judge

Certified true translation
Janine Anderson, Translator