

Federal Court of Appeal



Cour d'appel fédérale

Date: 20180830

Dockets: A-78-17 (lead file); A-217-16; A-218-16;  
A-223-16; A-224-16; A-225-16; A-232-16;  
A-68-17; A-74-17; A-75-17;  
A-76-17; A-77-17; A-84-17; A-86-17

Citation: 2018 FCA 155

**CORAM:** DAWSON J.A.  
DE MONTIGNY J.A.  
WOODS J.A.

**BETWEEN:**

**TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF  
BURNABY, THE SQUAMISH NATION (also known as the  
SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIYÁM, CHIEF IAN  
CAMPBELL on his own behalf and on behalf of all members of the  
Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE  
SPAHAN in his capacity as Chief of the Coldwater Band on behalf of  
all members of the Coldwater Band, AITCHELITZ, SKOWKALE,  
SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUALA FIRST NATION,  
TZEACHTEN, YAKWEAKWIOOSE, SKWAH, CHIEF DAVID  
JIMMIE on his own behalf and on behalf of all members of the  
TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON  
IGNACE and CHIEF FRED SEYMOUR on their own behalf and on  
behalf of all other members of the STK'EMLUPSEMC TE  
SECWEPEMC of the SECWEPEMC NATION, RAINCOAST  
CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY**

**Applicants**

**and**

**ATTORNEY GENERAL OF CANADA,  
NATIONAL ENERGY BOARD and  
TRANS MOUNTAIN PIPELINE ULC**

**Respondents**

**and**

**ATTORNEY GENERAL OF ALBERTA and  
ATTORNEY GENERAL OF BRITISH  
COLUMBIA**

**Intervenors**

Heard at Vancouver, British Columbia, on October 3, 5, 2017.

Order delivered at Ottawa, Ontario, on August 30, 2018.

REASONS FOR ORDER BY:

DAWSON J.A.

CONCURRED IN BY:

DE MONTIGNY J.A.  
WOODS J.A.

Federal Court of Appeal



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**BETWEEN:**

**TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY  
OF BURNABY, THE SQUAMISH NATION (also known as the  
SQUAMISH INDIAN BAND), XÀLEK/SEKYÚ SIYÁM, CHIEF  
IAN CAMPBELL on his own behalf and on behalf of all members  
of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF  
LEE SPAHAN in his capacity as Chief of the Coldwater Band on  
behalf of all members of the Coldwater Band, AITCHELITZ,  
SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE,  
SQUIALA FIRST NATION, TZEACHTEN,  
YAKWEAKWIOOSE, SKWAH, CHIEF DAVID JIMMIE on his  
own behalf and on behalf of all members of the  
TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF  
RON IGNACE and CHIEF FRED SEYMOUR on their own  
behalf and on behalf of all other members of the  
STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC  
NATION, RAINCOAST CONSERVATION FOUNDATION and  
LIVING OCEANS SOCIETY**

**Applicants**

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**Respondents**

and

**ATTORNEY GENERAL OF ALBERTA and  
ATTORNEY GENERAL OF BRITISH  
COLUMBIA**

**Intervenors**

**REASONS FOR ORDER**  
**(Confidential Reasons for Order issued August 30, 2018)**

**DAWSON J.A.**

[1] [REDACTED]

[REDACTED]

[REDACTED]

- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

- [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

- 

[REDACTED]

[REDACTED]

[2]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[3]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[4] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[5] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[6] Thereafter, in response to legal proceedings commenced by Upper Nicola and others challenging the decision of the Governor in Council to approve the Proposed Project, Trans Mountain filed a second affidavit sworn by one of its employees, Robert Love. This affidavit included Confidential Information [REDACTED]

[REDACTED]  
[REDACTED] (impugned evidence).

[7] Upper Nicola objected to the filing of the second Love affidavit on the basis that, [REDACTED] the affidavit contained Confidential Information. [REDACTED]

[8] By order dated May 29, 2017, the case management judge in the pending judicial review proceedings ordered that the admissibility of the impugned evidence be determined by the panel hearing the consolidated challenges to the decision of the Governor in Council. By order dated June 8, 2017, the case management judge issued an order protecting the confidentiality of the information pending the decision of the panel.

[9] In response to the objection of Upper Nicola, Trans Mountain concedes that the impugned evidence is confidential. However, it argues that Upper Nicola's confidentiality concerns are fully addressed by the Court's confidentiality order of June 8, 2017, and that the evidence is relevant and admissible.

[10] In my view, Trans Mountain's submission is misplaced.

[11] A breach of confidence is established when the complaining party establishes three elements: first, that the information conveyed was confidential; second, that the information was communicated in confidence; and finally, that the information was misused by the party to whom it was communicated (*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at page 635). In *Slavutych v. Baker et al.*, [1976] 1 S.C.R. 254, the Supreme Court applied the principle of breach of confidence to prohibit the disclosure of a confidential statement by one of the parties to the communication. The Court quoted with approval the statement that “a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication” (reasons of the Supreme Court, page 262).

[12] In the present case, as noted above, Trans Mountain concedes that the information is confidential. This is consistent with the text of the written agreement between the parties. The agreement also establishes that the information was imparted in circumstances where an obligation of confidence existed. I am also satisfied that disclosure of the Confidential Information without the permission of Upper Nicola is detrimental to Upper Nicola. First Nations must be able to engage with pipeline proponents confidentially in accordance with the terms of a confidentiality agreement the parties mutually conclude. As Upper Nicola argues, the “confidentiality of engagement between proponents and First Nations is essential to promoting an open and frank dialogue, including encouraging negotiation of possible solutions to issues within the purview of proponents.”

[13] It follows that I would strike the impugned evidence.



[14] This said, having successfully moved to strike evidence of Trans Mountain’s engagement with it, Upper Nicola will not be permitted to rely upon the absence of the impugned evidence to argue that Trans Mountain’s engagement with it was somehow lacking or fell short of the required standard. This disposition holds the parties to their bargain and is in accord with the equitable principles that ground the concept of breach of confidence—principles based on the general duty to act in good faith.

[15] Upper Nicola and Trans Mountain are requested to serve and file submissions within ten days of the date of these reasons as to what portions of these reasons should be redacted from the public version of these reasons to be released following receipt of the parties’ written submissions. Such submissions should not exceed five pages in length.

“Eleanor R. Dawson”

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J.A.

“I agree.  
Yves de Montigny J.A.”

“I agree.  
Judith Woods J.A.”

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKETS:** A-78-17 (Lead File); A-217-16;  
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A-77-17; A-84-17; A-86-17

**STYLE OF CAUSE:** TSLEIL-WAUTUTH NATION et  
al. v. ATTORNEY GENERAL OF  
CANADA et al.

**PLACE OF HEARING:** VANCOUVER, BRITISH  
COLUMBIA

**DATE OF HEARING:** OCTOBER 3, 5, 2017

**CONFIDENTIAL SUPPLEMENTAL WRITTEN SUBMISSIONS RECEIVED ON  
OCTOBER 6, 2017 AND OCTOBER 10, 2017**

**REASONS FOR ORDER BY:** DAWSON J.A.

**CONCURRED IN BY:** DE MONTIGNY J.A.  
WOODS J.A.

**DATED:** AUGUST 30, 2018

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FOR THE RESPONDENT,  
TRANS MOUNTAIN PIPELINE  
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FOR THE INTERVENER,  
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